

# **PNG PORTS REGULATORY CONTRACT**

FOR REGULATORY PERIOD

from

1 February 2010

to

31 December 2014

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## Parties

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1. **PNG PORTS CORPORATION LTD** (company number 1-46339) ("**PNG Ports**").
2. **The Independent Consumer and Competition Commission**, a body corporate established under the *Independent Consumer and Competition Commission Act 2002* (the "**Commission**").

## Recitals

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- A PNG Ports has been declared by the Minister to be a regulated entity under section 32 of the *Independent Consumer and Competition Commission Act 2002* (the **ICCC Act**)
- B The Supply of Essential Port Services and Stevedoring Access the subject of this Contract have been declared by the Minister to be regulated services under section 32 of the *ICCC Act*.
- C PNG Ports is licensed under the *Harbours Act Chapter 240* ( the **Harbours Act**) to provide port facilities for loading and unloading vessels at declared ports and to provide berths and berth reservation services for vessels at declared ports.
- D This Contract is a Regulatory Contract that is binding on PNG Ports and the Commission pursuant to the provisions of the *ICCC Act* and the *Harbours Act*.
- E This Contract regulates the prices that PNG Ports may charge for the Supply of Essential Port Services and Stevedoring Access.

**It is agreed** as follows.

## 1. General

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### 1.1 Definitions

**Actual Cumulative Expenditure** means:

- (a) all actual capital expenditure in relation to Port Assets undertaken by PNG Ports in the period from 1 January 2010 to the date of the Capital Expenditure Progress Report (both dates inclusive), including capital works in progress; and

- (b) all capital expenditure in relation to Port Assets which, as at the date of the Capital Expenditure Progress Report, PNG Ports has contracted unconditionally to undertake,

in each case including capital expenditure on assets to enable the safe, efficient and effective provision of Essential Port Services (such as secure fencing at a Declared Port and computer systems) but excluding any associated overheads.

**Approved FM Pass Through Amount** has the meaning given to it in clause 5.1(e)(ii).

**Approved Harbours Licence Pass Through Amount** has the meaning given to it in clause 5.3(c)(ii).

**Approved Port Closure** means the closure of a Declared Port which is approved or deemed to be approved by the Regulator under clause 8.1.

**Approved Tax Pass Through Amount** has the meaning given to it in clause 5.2(c)(ii).

**Berthing Service** means:

- (a) a port service consisting of providing berths for Vessels at a Declared Port; and  
(b) all services supplied in connection with the supply of such port services.

**Berth Reservation Service** means:

- (a) a port service consisting of providing berth reservations for Vessels at a Declared Port; and  
(b) all services supplied in connection with the supply of such port services.

**Business Day** means a day other than a Saturday or a Sunday or a day that is a public holiday in Port Moresby.

**Capital Expenditure Progress Report** means a report submitted to the Regulator in accordance with clause 4.1(a).

**Capital Expenditure Ratio** has the meaning given in clause 4.1(d).

**Capital Expenditure Review** (or Mid-term review of Capital Expenditure Program) has the meaning given in clause 4.1.

**Commencement Date** means 1<sup>st</sup> February 2010.

**Compliance Notice** means a notice given to PNG Ports by the Regulator under clause 6.1(g).

**Contestable Services** means a service other than an Essential Port Service that is provided using or that is otherwise related to Essential Port Services and includes stevedoring, pilotage and storage services.

**Contract** means this PNG Ports Regulatory Contract.

**Customer** means a person to whom Essential Port Services are supplied by PNG Ports or a person who is seeking to have Essential Port Services supplied by PNG Ports.

**Declared Port** means a port declared under Section 2 of the *Harbours Act*.

**Default Notice** means a notice given to PNG Ports by the Regulator under clause 6.2(b).

**Essential Port Services** means Berth Reservation Services, Berthing Services and Wharfage Services.

**First Regulatory Year** means the period from the 1 February 2010 to 31 December 2010 (both dates inclusive).

**FM Pass Through Amount** has the meaning given to it in clause 5.1(a).

**Force Majeure Event** means:

- (a) a cyclone, storm, flood, volcanic eruption, drought that continues for more than two years, earthquake, bushfire, tidal wave or landslide; or
- (b) an act of public enemy, war (declared or undeclared), sabotage, blockade, revolution, riot, insurrection, civil commotion or any violent or threatening actions,

which results or is likely to result in an increase in the costs incurred by PNG Ports in supplying an Essential Port Service or in complying with the provisions of any legislation, or of any codes or guidelines made or published by the Regulator under the *ICCC Act*, which must be complied with in relation to the supply of Essential Port Services.

**Force Majeure Event Claim** means a claim given to the Regulator by PNG Ports under clause 5.1(b)(ii).

**Force Majeure Event Notice** means a notice given to the Regulator by PNG Ports under clause 5.1(b)(i).

**Harbours Licence Fees** means any licence fees payable by PNG Ports under the *Harbours Act* where the relevant licences are required to enable PNG Ports to provide Essential Port Services.

**Harbours Licence Pass Through Amount** has the meaning given to it in clause 5.3(a).

**Mid-term review of Capital Expenditure Program** (or Capital Expenditure Review ) has the meaning given in clause 4.1.

**Minimum Service Standards** means the service levels or standards specified in Schedule 4.

**Minister** means the Minister responsible for the *Independent Consumer and Competition Commission Act 2002*

**Negative Tax Change Event** means a Tax Change Event which results in PNG Ports incurring materially lower costs than it would have incurred but for that event in supplying an Essential Port Service.

**Negative Tax Pass Through Amount** has the meaning given to it in clause 5.2(e).

**Permitted FM Pass Through Amount**, at any time in respect of a Force Majeure Event, means the increased costs that PNG Ports has actually incurred as at that time (as calculated by PNG Ports under clause 5.1(a) or by the Regulator under clause 5.1(e), as appropriate):

- (a) in supplying an Essential Port Service; and

- (b) in complying with the provisions of any legislation, or of any codes or guidelines made or published by the Regulator under the *ICCC Act*, which must be complied with in relation to the supply of Essential Port Services,

as a result of the occurrence of that Force Majeure Event.

**Permitted Harbours Licence Pass Through Amount**, in respect of a Regulatory Year, means the amount (PHL<sub>t</sub>) calculated as follows:

$$PHL_t = LF_t - K200,000 \times \left( \frac{PNG\ CPI_{t-1}}{PNG\ CPI_{2009}} \right)$$

where:

LF<sub>t</sub> is the aggregate of the Harbours Licence Fees paid by PNG Ports which are referable to that Regulatory Year;

PNG CPI<sub>t-1</sub> is the Adjusted PNG CPI for the 12 month period ending 30 June in Regulatory Year<sub>t-1</sub> and is calculated in accordance with Part 4 of Schedule 2;

PNG CPI<sub>2009</sub> is the Adjusted PNG CPI for the 12 month period ending 30 June 2009 and is calculated in accordance with Part 4 of Schedule 2.

**Permitted Tax Pass Through Amount**, in respect of a Tax Change Event, means the increase in costs that PNG Ports has incurred and is likely to incur over the term of this Contract (as calculated by PNG Ports under clause 5.2(a) or by the Regulator under clause 5.2(c), as appropriate) in supplying an Essential Port Service as a result of the occurrence of the Tax Change Event.

**PNG Ports** means PNG Ports Corporation Ltd (company number 1-46339) or any person that subsequently carries on substantially the same business, using substantially the same assets, as the business carried on and assets used by PNG Ports Corporation Ltd as at the Commencement Date.

**Port Assets** means:

- (a) all assets owned or leased by PNG Ports located in Papua New Guinea which are used or are intended by PNG Ports to be used in connection with the provision of Essential Port Services by PNG Ports; and
- (b) all assets which PNG Ports has contractually undertaken to acquire in Papua New Guinea and which are intended by PNG Ports to be used in connection with the provision of Essential Port Services by PNG Ports.

**Positive Tax Change Event** means a Tax Change Event which results in PNG Ports incurring materially higher costs than it would have incurred but for that event in supplying an Essential Port Service.

**Positive Tax Pass Through Amount** has the meaning given to it in clause 5.2(a).

**Quarter** means a period of three months from 1 January to 31 March (both dates inclusive), 1 April to 30 June (both dates inclusive), 1 July to 30 September (both dates inclusive) or 1 October to 31 December (both dates inclusive).

**Regulator** means the Independent Consumer and Competition Commission established under the *Independent Consumer and Competition Commission Act 2002*.

**Regulatory Principles** means the principles set out in Schedule 5.

**Regulatory Year** means the First Regulatory Year or, if not the first regulatory year, a period of 12 months commencing on 1 January of a year during the term of this Contract.

**Related Corporation** has the meaning given in section 2(3) of the *Corporations Act 1997*.

**Relevant Interest** has the meaning given to it in the *Securities Act 1997* (PNG).

**Relevant Interest Holder in PNG Ports** means a person who has a Relevant Interest in not less than 20% of the shares in PNG Ports that confer a right to vote at any meeting of members of PNG Ports.

**Relevant Tax** means any Tax payable by PNG Ports other than:

- (a) income tax or any tax on fringe benefits or capital gains;
- (b) any tax on payroll;
- (c) land tax or any other tax on the ownership or occupancy of premises;
- (d) customs and import duties;
- (e) municipal rates, taxes and other charges imposed by the National Capital District Commission established under the *National Capital District Commission Act 2001*, any Provincial or Local-level Governments or any other local authorities;
- (f) stamp duty, withholding tax or similar taxes and duties;
- (g) penalties, fines, interest, charges, fees or other amounts for late payments relating to any Tax; or
- (h) any Tax that replaces any of the Taxes referred to in paragraph (a) to (f),

(except where any such Tax referred to in (a) to (h) above is applied only to PNG Ports or is applied to PNG Ports in a discriminatory way).

**Remedial Notice** means a notice given to PNG Ports by the regulator under clause 6.2(a).

**Reporting requirements** means the completion of the templates set out in schedule 6 and linked back to submitted audited accounts or management accounting information.

**Reporting Timeframe** means 30 June of each year.

**Required Harbours Licence Pass Through Amount** has the meaning given to it in clause 5.3(f).

**Required Tax Pass Through Amount**, in respect of a Tax Change Event, means the costs that PNG Ports has saved and is likely to save over the term of this Contract (as determined by the Regulator under clause 5.2(e)) in supplying an Essential Port Service as a result of the occurrence of the Tax Change Event.

**Service Standards Report** means a report given to the Regulator by PNG Ports under clause 6.1(b).

**Stevedoring Access** means the right of stevedores to enter upon the port and associated facilities operated by a licensee for the purposes of loading and unloading ships and other

vessels, but does not include the right to move cargo between ships and other vessels and stacking areas, or to store, sort, stack or deliver cargo within the transit sheds and open stacking areas within the boundaries of a declared port.

**Subsequent Regulatory Year** means any Regulatory Year after the First Regulatory Year.

**Subsidiary** has the meaning given in the *Corporations Act 1997*.

**Tax** means any tax, levy, impost, deduction, charge, rate, duty or withholding which is levied or imposed by the National Government, a Provincial or Local-level Government or any agency, department, instrumentality or other authority of the National Government or of a Provincial or Local-level Government.

**Tax Change Event** means:

- (a) a change in (or change in application or official interpretation of) a Relevant Tax or the way in which a Relevant Tax is calculated;
- (b) the removal of a Relevant Tax; or
- (c) the imposition of a Relevant Tax,

which results in PNG Ports incurring materially higher or lower costs than it would have incurred but for that event in supplying an Essential Port Service.

**Total Forecast Capital Expenditure** means the sum of the Yearly Forecast Capital Expenditures in respect of Regulatory Years 2010 to 2014 (both inclusive).

**Uncontrollable Cumulative Expenditure** has the meaning given to it in clause 4.1(a)(ii).

**Vessel** means a ship, boat or other vessel used for any purpose on the sea or in navigation.

**Wharfage Services** means:

- (a) a port service consisting of providing port facilities for loading or unloading Vessels at a Declared Port; and
- (b) all services supplied in connection with the supply of such port services,

but does not include the provision of such services to pleasure craft less than 10 metres in length, vessels of primitive build or warships.

## 1.2 Principles of interpretation

- (a) Unless the contrary intention appears, the following principles of interpretation apply to this Contract:
  - (i) words denoting persons include corporations, unincorporated associations, firms, governments and governmental agencies;
  - (ii) a reference to a person includes a person's agents, successors and permitted assigns, persons who have control over any assets of a person and receivers, managers, trustees, administrators and liquidators and similar persons appointed over:
    - (A) a person; or
    - (B) any assets of a person;

- (iii) headings are only included for convenience and do not affect the interpretation of this Contract;
  - (iv) a reference to a clause or Schedule is to a clause of, or Schedule to, this Contract;
  - (v) a reference to an agreement, document or regulatory instrument (including this Contract) is a reference to that agreement, document or regulatory instrument as varied, notated or replaced from time to time (whether or not the parties thereto remain the same);
  - (vi) a reference to legislation is a reference to legislation in force in Papua New Guinea; and
  - (vii) a reference to legislation or to a provision of legislation includes a modification or re-enactment of it, a legislative provision substituted for it and a regulation or statutory instrument issued under it.
- (b) All calculations made under or for the purposes of this Contract must be rounded to four significant digits.
  - (c) When a calculation is required under this Contract:
    - (i) Regulatory Year “t”, Subsequent Regulatory Year “t” or calendar year “t” is the Regulatory Year, Subsequent Regulatory Year or calendar year (as the case may be) in respect of which the calculation is being made;
    - (ii) Regulatory Year “t-1”, Subsequent Regulatory Year “t-1” or calendar year “t-1” is the Regulatory Year, Subsequent Regulatory Year or calendar year (as the case may be) immediately preceding Regulatory Year “t”, Subsequent Regulatory Year “t” or calendar year “t”; and
    - (iii) Regulatory Year “t-2”, Subsequent Regulatory Year “t-2” or calendar year “t-2” is the Regulatory Year, Subsequent Regulatory Year or calendar year (as the case may be) immediately preceding Regulatory Year “t-1”, Subsequent Regulatory Year “t-1” or calendar year “t-1”.

### **1.3 Revoking or altering decisions**

- (a) If the Regulator has made a decision under this Contract and later concludes that the decision was made on the basis of information provided to the Regulator that was false or misleading in a material particular, then, subject to clause 1.3(b), the Regulator may revoke the decision and make a new decision in substitution for the revoked decision.
- (b) Before the Regulator revokes and substitutes a decision pursuant to clause 1.3(a), the Regulator must first:
  - (i) notify PNG Ports of the proposed revocation and of the proposed new decision (including the proposed date of effect of the revocation and new decision), and allow PNG Ports a reasonable opportunity to make submissions to the Regulator regarding the proposed revocation and the proposed new decision (including submissions as to whether the original

decision was based on information that was false or misleading in a material particular); and

- (ii) take into account any matters contained in a submission made by PNG Ports pursuant to paragraph (i).
- (c) A new decision made under clause 1.3(a) applies from:
  - (i) if notice of the new decision is required to be published under clause 1.4(a)(ii) – the later of the date on which that notice is so published and any date specified by the Regulator in that notice as the date from which the new decision is to apply; and
  - (ii) if notice of the new decision is not required to be published under clause 1.4(a)(ii) - the later of the date the new decision is made and any date specified by the Regulator in making that new decision as the date from which the new decision is to apply.
- (d) A new decision made under clause 1.3(a) must only differ from the revoked decision to the extent necessary to correct for:
  - (i) the false or misleading information on which the revoked decision was based; and
  - (ii) the application of the revoked decision during the period in respect of which that decision was in effect.

#### **1.4 Notices**

- (a) The Regulator must ensure that a notice of each decision made by the Regulator under this Contract (other than a decision made pursuant to clause 1.5) is:
  - (i) sent to the Ministers responsible for the *Harbours Act* and the *Independent Consumer and Competition Commission Act 2002*;
  - (ii) published in the National Gazette and a newspaper circulating nationally; and
  - (iii) sent to PNG Ports.
- (b) The Regulator must ensure that a copy of each decision made by the Regulator under this Contract, together with a copy of its reasons for that decision, is:
  - (i) sent to the Ministers responsible for the *Harbours Act* and the *Independent Consumer and Competition Commission Act 2002*;
  - (ii) sent to PNG Ports; and
  - (iii) made available for inspection and purchase by members of the public.

#### **1.5 Modification of time periods**

The Regulator may, by written notice to PNG Ports, extend:

- (a) the time by which a thing required to be done by PNG Ports must be done; or
- (b) the period within which a thing required to be done by PNG Ports must be done,

as requested in writing by PNG Ports.

## 1.6 Term

The term of this Contract commences on 1st February 2010 and ends on 31 December 2014 (both dates inclusive).

## 2. Tariffs

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### 2.1 Maximum tariffs for First Regulatory Year: Supply of Essential Port Services

- (a) The maximum amount that PNG Ports may charge for the supply of an Essential Port Service during the First Regulatory Year is the applicable tariff set out in Schedule 1, plus the amount of any Goods and Services Tax (GST) payable by PNG Ports in relation to that supply.
- (b) In so far as the supply of an Essential Port Service during the First Regulatory Year is concerned, PNG Ports must not charge a Customer more for the supply of such Essential Port Service that is set out in Schedule 1 than the amount of that tariff as set out in Schedule 1, plus the amount of any Goods and Services tax payable by PNG Ports in relation to that supply.
- (c) PNG Ports must not charge a tariff for the supply of an Essential Port Service during the First Regulatory Year that is not set out in Schedule 1, and the tariffs set out in Schedule 1 cannot be varied for the First Regulatory Year (save that PNG Ports may allow any Customer a discount to such a tariff).
- (d) Nothing in this clause 2.1 affects the operation of clauses 5 and 9.

### 2.2 Maximum Tariffs for Subsequent Regulatory Years: Supply of Essential Port Services

- (a) PNG Ports may, in accordance with this clause 2.2 and clause 3, change the tariffs it charges for the supply of an Essential Port Service during a Subsequent Regulatory Year to any Customer. For the avoidance of doubt, except as provided in clauses 2.2(c), 4, 5, 6 or 7, PNG Ports may not change an existing tariff, cease to offer an existing tariff or introduce a new tariff for such supply of an Essential Port Service otherwise than in accordance with the procedure set out in clause 3.
- (b) The tariffs for the supply of Essential Port Services that are set out in a statement for a Subsequent Regulatory Year  $t$  that is given by PNG Ports to the Regulator pursuant to clause 3.1(a) must be such that:
  - (i) if there were no Approved Port Closures during the previous Regulatory Year  $t - 1$ :

$$AR_t^j \leq ESPC_t^j$$

where

$AR_t^j$  is the change in forecast average revenue for that Subsequent Regulatory Year as a result of the new tariffs specified in the statement for the Declared Port or group of Declared Ports  $j$

(as defined in Schedule 1), for Subsequent Regulatory Year t, calculated in accordance with Part 1 of Schedule 2; and

ESPC<sup>j</sup><sub>t</sub> is the Essential Services Price Control for the Declared Port or group of Declared Ports j (as defined in Schedule 1), for that Subsequent Regulatory Year t, calculated in accordance with Part 2 of Schedule 2; or

- (ii) if there was one or more Approved Port Closure during the previous Regulatory Year t – 1:

$$AR(APC)^j_t \leq ESPC^j_t$$

where

AR(APC)<sup>j</sup><sub>t</sub> is the change in forecast average revenue for the Declared Port or group of Declared Ports j (as defined in Schedule 1), for that Subsequent Regulatory Year t as a result of the new tariffs specified in the statement for Subsequent Regulatory Year t, adjusted to allow for one or more Approved Port Closure, calculated in accordance with Part 3 of Schedule 2; and

ESPC<sup>j</sup><sub>t</sub> is the Essential Services Price Control for the Declared Port or group of Declared Ports j (as defined in Schedule 1), for that Subsequent Regulatory Year t, calculated in accordance with Part 2 of Schedule 2.

- (c) In so far as the supply of an Essential Port Service during a Subsequent Regulatory Year t is concerned, and subject to clauses 3, 4, 5, 6 and 7, PNG Ports must not charge a Customer more for a tariff for the supply of an Essential Port Service i for the Declared Port or group of Declared Ports j (as defined in Schedule 1), during Subsequent Regulatory Year t than an amount (MP<sup>ij</sup><sub>t</sub>) calculated as follows (expressed in Kina and rounded to two decimal places):

$$MP^{ij}_t \leq AP^{ij}_{t-1} * RC^j_t$$

where:

AP<sup>ij</sup><sub>t-1</sub> is the amount of that tariff (if any) for the supply of an Essential Port Service i that was approved, deemed to be approved or set by the Regulator (as the case may be) pursuant to clause 3.1 for the Regulatory Year immediately preceding the relevant Subsequent Regulatory Year for the Declared Port or group of Declared Ports j (as defined in Schedule 1). Where the Regulatory Year immediately preceding the relevant Subsequent Regulatory Year is the First Regulatory Year, AP<sup>ij</sup><sub>t-1</sub> is the amount of the tariff (if any) that is set out in Schedule 1 (as varied, if at all, in accordance with this Contract);

RC<sup>j</sup><sub>t</sub> means the Rebalancing Control for the Declared Port or group of Declared Ports j (as defined in Schedule 1), for Subsequent Regulatory Year t, calculated in accordance with Schedule 3.

MP<sup>ij</sup><sub>t</sub> must be the same amount for each Declared Port or group of Declared Ports j such that the maximum price that may be charged for the

supply of an Essential Port Service is a single rate applicable to all Declared Ports in group j.

- (d) The tariffs for the supply of Essential Port Services that are set out in the statement for the Declared Port or group of Declared Ports j (as defined in Schedule 1), for that Subsequent Regulatory Year t that is given by PNG Ports to the Regulator pursuant to clause 3.1(a) must be consistent with the requirements of clause 2.2(c).

### **2.3 Discrimination**

The tariffs PNG Ports charges for the supply of an Essential Port Service (including any discounts allowed in respect of those tariffs), must not discriminate unreasonably between Customers who are in substantially the same circumstances. The Declared Ports which are grouped together and which are determined to be in substantially the same circumstances for the regulatory period commencing 1 February 2010, are provided in Schedule 1. If the Regulator, after consulting with PNG Ports, notifies PNG Ports that any tariffs (including any discounts allowed in respect of those tariffs) which PNG Ports is charging for the supply of an Essential Port Service do unreasonably discriminate between such Customers, then PNG Ports must immediately change those tariffs or amounts (including any discounts allowed in respect of those tariffs or amounts) so as to remove that discrimination and must advise the Regulator of those changed tariffs or amounts.

### **2.4 Leisure craft, vessels of primitive build and warships**

PNG Ports must provide port facilities for loading or unloading leisure craft of less than 10 metres in length, vessels of primitive build and warships, at each Declared Port if and to the extent to which such facilities existed as at the date of this Contract and all services supplied in connection with the supply of such services at each Declared Port, free of charge.

## **3. Altering Tariffs**

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### **3.1 Annual variation**

- (a) PNG Ports must, for each Subsequent Regulatory Year, give the Regulator a statement in accordance with clause 3.1(b) that:
  - (i) sets out PNG Ports proposed tariffs for the supply of Essential Port Services for the Declared Port or group of Declared Ports j (as defined in Schedule 1), for that Subsequent Regulatory Year; and
  - (ii) demonstrates compliance of those proposed tariffs with the relevant requirements set out in clause 2.2 and Schedules 2 and 3.
- (b) A statement referred to in clause 3.1(a) must be given to the Regulator by the second Friday in September of the Regulatory Year immediately preceding the relevant Subsequent Regulatory Year.

- (c) The Regulator must not approve a statement given by PNG Ports under clause 3.1(a) if the statement does not demonstrate compliance of the proposed tariffs with the relevant requirements set out in clause 2.2 and Schedules 2 and 3.
- (d) The Regulator must approve a statement given by PNG Ports under clause 3.1(a) if the statement demonstrates compliance of the proposed tariffs with the relevant requirements set out in clause 2.2 and Schedules 2 and 3.
- (e) If the Regulator does not notify PNG Ports of the Regulator's decision regarding a statement given by PNG Ports under clause 3.1(a) by the first Monday in October of the Regulatory Year immediately preceding the relevant Subsequent Regulatory Year, the Regulator is deemed to have approved the statement with effect from that day.
- (f) Clause 3.1 (e) does not apply when tariffs for regulatory year 2013 are being assessed and determined by the regulator.
- (g) When determining tariffs for regulatory year 2013, the regulator must notify PNG Ports by the second Friday of December 2012 of PNG Ports tariffs for 2013.
- (h) The tariffs in any statement given by PNG Ports under clause 3.1(a), being a statement which is approved or deemed to have been approved by the Regulator, apply from the later of:
  - (i) the date on which the Regulator approves or is deemed to have approved the statement; and
  - (ii) the start of the Subsequent Regulatory Year in respect of which the tariffs are to apply.
- (i) If PNG Ports does not provide a statement to the Regulator as required by and in accordance with clause 3.1(a), or such a statement is so provided but (by the first Monday in October of the Regulatory Year immediately preceding the relevant Subsequent Regulatory Year) the Regulator notifies PNG Ports of the Regulator's decision not to approve that statement, then the Regulator may reset the relevant tariffs for the Declared Port or group of Declared Ports j (as defined in Schedule 1), for the relevant Subsequent Regulatory Year in a manner in which the Regulator could have approved the tariffs if they were included in a statement given by PNG Ports under clause 3.1(a). The Regulator must notify PNG Ports in writing of the tariffs so set by the Regulator. The tariffs set by the Regulator apply from the later of:
  - (i) the date on which the Regulator notifies PNG Ports of the tariffs; and
  - (ii) the start of the Subsequent Regulatory Year in respect of which the tariffs are to apply.

### **3.2 Maximum tariffs**

In so far as the supply of an Essential Port Service during a Subsequent Regulatory Year is concerned, and subject to clauses 4, 5 and 8, PNG Ports must not charge a Customer more than the applicable tariff that is approved, deemed to be approved or set by the Regulator (as the case may be) pursuant to clause 3.1 for that Subsequent Regulatory

Year, plus the amount of any Goods and Services Tax payable by PNG Ports in relation to that supply.

## 4. On-going Regulation

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### 4.1 Mid-term review of Capital Expenditure Program

- (a) PNG Ports must, in accordance with clause 4.1(b), submit a Capital Expenditure Progress Report for the calendar years 2010 to 2014 (inclusive)<sup>1</sup> that sets out:
  - (i) The Actual Annual Capital Expenditure each year and the Actual Cumulative Expenditure by the end of each year;
  - (ii) The implied capital expenditure generated from the PNG Ports revenue model for the first three years of the regulatory period, holding the following constant:
    - (1) The operating expenditure as per schedule 6 plus the final costs of the review of the Regulatory Contract charged and approved by the Commission, from its reset review in late 2009;
    - (2) The pre-tax real WACC at 17.09 per cent per annum; and
    - (3) The starting value of the Regulatory Asset Base at K255 million;
  - (iii) The demand to be used in the PNG Ports revenue model is to be a combination of the actual demand over the first 2.5 years of the Regulatory Contract and an updated forecast over the subsequent 2.5 years of the Regulatory Contract;
  - (iv) The implied capital expenditure will be used to express the actual capital expenditure program as a percentage where 100% means that the implied is equal to the actual cumulative expenditure. The implied capital expenditure will be considered the denominator and the actual capital expenditure considered the numerator in the determination of the Capital Expenditure Ratio; and
  - (v) Schedule 2 establishes the various thresholds for a review of the price path should the capital expenditure ratio be less than 75%.
- (b) The Capital Expenditure Progress Report referred to in clause 4.1(a) must be given to the Regulator not earlier than 31 July 2012 and not later than 31 August 2012, and must be certified by a registered company auditor (as defined in section 2 of the *Accountants Act 1996*) as being not false or misleading.
- (c) The Regulator or PNG Ports may, within 10 days after the Capital Expenditure Progress Report referred to in clause 4.1(a) is submitted to the Regulator, give

<sup>1</sup> Note that the data for capital expenditure will be actual for the period to 30 June 2012, and forecast for the remainder of the period, where the forecast numbers used are as agreed by the Regulator.

written notice to the other of them that it requires the appointment of an international consultant for the purposes of this clause 4.1. As soon as reasonably practicable after the giving of any such notice and after consulting with PNG Ports, the Regulator must appoint an appropriately qualified independent international consultant to report to the Regulator and PNG Ports, by 30 September 2012, as to the amount of the Actual Cumulative Expenditure.

- (d) After considering the Capital Expenditure Progress Report submitted by PNG Ports pursuant to clause 4.1(a), any report provided in accordance with clause 4.1(c) by an international consultant (if any) appointed pursuant to that clause, and any further information obtained by the Regulator pursuant to clause 4.1(e) or otherwise provided by PNG Ports, the Regulator must, not earlier than 1st October 2012 and not later than 31 October 2012, notify PNG Ports of its determinations as to the amount of the Actual Cumulative Expenditure and the Regulator's determination of the Capital Expenditure Ratio and the subsequent capital efficiency factor outlined in Schedule 2 Part 2 .
- (e) PNG Ports must, at its expense, provide the Regulator and any international consultant appointed pursuant to clause 4.1(c) with such access to PNG Ports' records, employees and contractors as the Regulator or the international consultant requires for the purposes of this clause 4.1.
- (f) The reasonable costs of any international consultant appointed pursuant to clause 4.1(c) must be borne by PNG Ports.

#### **4.2 Subsequent Regulatory Contract**

- (a) **PNG Ports** may, in accordance with clause 4.2(b), submit to the Regulator a draft **PNG Ports** Regulatory Contract which **PNG Ports** considers should bind it for a period of five years commencing with effect from (and including) **1 January 2015** and any written submission as to its form and content that **PNG Ports** considers appropriate.
- (b) The draft **PNG Ports** Regulatory Contract and any submissions, as referred to in clause 4.2(a), must be given to the Regulator by **31 January 2014**.
- (c) After considering:
  - (i) the draft **PNG Ports** Regulatory Contract and any submissions made by **PNG Ports** under clause 4.2(a);
  - (ii) any submissions made by any other person in relation to the form or content of the **PNG Ports** Regulatory Contract which should bind **PNG Ports** following the expiry of this Contract; and
  - (iii) the particular circumstances of the Essential Port Services supply industry in Papua New Guinea,

the Regulator must publish a draft **PNG Ports** Regulatory Contract that is proposed to bind **PNG Ports** for a period of five years commencing with effect from (and including) **1 January 2015**. For the avoidance of doubt, where PNG Ports does not submit a draft Regulatory Contract under clause 4.2(a) by the date

provided in clause 4.2(b), the Regulator may commence a public consultation process to determine a new Regulatory Contract for the Subsequent Regulatory Period following due process as required by this clause 4.2.

- (d) In preparing the draft **PNG Ports** Contract referred to in clause 4.2(c), the Regulator must also take into account:
  - (i) the legitimate business interests of **PNG Ports**;
  - (ii) the legitimate interests of suppliers to, and customers of, **PNG Ports**;
  - (iii) the nature and uses of the services the prices of which would be regulated under the draft **PNG Ports** Regulatory Contract;
  - (iv) the costs of supplying the services the prices of which would be regulated under the draft **PNG Ports** Regulatory Contract;
  - (v) the costs of complying with relevant health, safety, environmental, social and other legislation and regulatory requirements applying to the Essential Port Services supply industry in Papua New Guinea;
  - (vi) the return on assets required to sustain past and future investment in the Essential Port Services supply industry in Papua New Guinea;
  - (vii) any relevant international benchmarks for prices, costs and return on assets in comparable industries, taking into account the particular circumstances of Papua New Guinea;
  - (viii) the financial implications of the draft **PNG Ports** Regulatory Contract (if it were to come into force) for **PNG Ports** and the Essential Port Services supply industry in Papua New Guinea;
  - (ix) any other factors specified in or under relevant legislation; and
  - (x) any other factors the Regulator considers relevant.
- (e) In addition, the draft **PNG Ports** Regulatory Contract referred to in clause 4.2(c):
  - (i) must not be inconsistent with, and must be prepared in accordance with, the Regulatory Principles; and
  - (ii) must comply with the requirements of the Independent Consumer and Competition Commission Act 2002.
- (f) The Regulator must publish the draft **PNG Ports** Regulatory Contract referred to in clause 4.2(c) by **30th June 2014**.
- (g) **PNG Ports** may, in accordance with clause 4.2(h), make such written submissions to the Regulator as it thinks appropriate in relation to the form and content of the draft PNG Ports Regulatory Contract published by the Regulator and referred to in clause 4.2(c).
- (h) The submissions referred to in clause 4.2(g) must be given to the Regulator by **31 July 2014**.
- (i) After considering:
  - (i) any submissions made by PNG Ports under clause 4.2(g); and

- (ii) any submissions made by any other person in relation to the form or content of the draft PNG Ports Regulatory Contract referred to in clause 4.2(c),

the Regulator must publish a final draft of the PNG Ports Regulatory Contract referred to in clause 4.2(c) by not later than **30 November 2014**.

- (j) In preparing the final draft of the PNG Ports Regulatory Contract referred to in clause 4.2(i), the Regulator must also take into account the matters referred to in clause 4.2(d).
- (k) In addition, the final draft of the PNG Ports Regulatory Contract referred to in clause 4.2(i):
  - (i) must not be inconsistent with, and must be prepared in accordance with, the Regulatory Principles;
  - (ii) must comply with the requirements of the Independent Consumer and Competition Commission Act 2002; and
  - (iii) must be for a period of five years commencing with effect from (and including) **1 January 2015**.
- (l) The Regulator may issue statements of regulatory intent which elaborate on how the Regulator will exercise its powers under this clause 4.2.

#### **4.3 Mid-term review of competition in the market**

- (a) PNG Ports may submit to the Regulator a written statement which makes an assessment of the need for and extent of regulation of the provision of ports infrastructure services in PNG.
- (b) This submission must be given to the Regulator by 30 April 2012.
- (c) After considering:
  - (i) The submission made by PNG Ports;
  - (ii) Any submissions made by any other person in relation to the review; and
  - (iii) The Regulator's objectives set out in Section 5 of the ICCA Act;

the Regulator must publish a draft report that presents the Regulator's findings on:

- (i) Whether ports have substantial market power in the provision of ports infrastructure services, and if so at which port(s) and in connection with the provision of which services substantial power exists; and
  - (ii) The need for and extent of continued regulation of the provision of ports infrastructure services in PNG on a port-by-port basis (in particular, the need for and extent of declaration of ports services under the ICCA Act).
- (d) The Regulator must publish the draft report referred to in clause 4.3(c) by 30 June 2012.
  - (e) In preparing its draft report, the Regulator must take into account (but is not necessarily be limited to consideration of):

- (i) The key characteristics of the market, including the existence of providers of ports infrastructure services other than PNG Ports and the ability of consumers to substitute ports infrastructure services;
  - (ii) The time frames within which ports can be substituted for one another;
  - (iii) The commercial constraints that may affect the potential for market power;
  - (iv) The benefits and costs of the need for and extent of continued regulation of the provision of ports infrastructure in PNG;
  - (v) Whether its findings on the above factors differ between declared ports and between different sub-markets;
  - (vi) Any other factors the Regulator considers to be relevant.
- (f) Submissions to the draft report must be given to the Regulator by 31 July 2012.
- (g) After considering any submissions made by PNG Ports or any other person in relation to the Regulator's draft report the Regulator must publish a final report that presents the Regulator's findings on:
- (i) Whether PNG Ports has substantial market power in the provision of ports infrastructure services, and if so at which port and in connection with the provision of which services substantial power exists; and
  - (ii) The need for and extent of continued regulation of the provision of ports infrastructure services in PNG (in particular, the need for and extent of declaration of ports services under the ICCA Act).
- (h) The report referred to in clause 4.3(f) must be published by 31 August 2012.

#### **4.4 Discriminatory Competition**

- (a) PNG Ports and the Regulator must consult in the event that any third party commences the provision of Essential Port Services where the third party receives any financial assistance or guarantee from the Independent State of Papua New Guinea or an agency thereof which is on terms more favourable than those which would be available to PNG Ports in equivalent circumstances as a consequence of the provision of concessional finance, guarantee or political risk insurance terms, concessional tax treatment or exemption from any tax or regulatory requirement (***Discriminatory Competition***). In this event, PNG Ports may make submissions to the Regulator about the financial effect of the Discriminatory Competition upon revenue and capital expenditure requirements of PNG Ports.
- (b) The Regulator or PNG Ports may, within 5 days after the submissions referred to in clause 4.4(a) are submitted to the Regulator, give written notice to the other of them that it requires the appointment of an international consultant for the purpose of this clause 4.4. As soon as reasonably practicable after the giving of any such notice and after consulting with PNG Ports, the Regulator must appoint an appropriately qualified independent international consultant to report to the Regulator and PNG Ports, within 30 days after the appointment, as to the financial

effect of the Discriminatory Competition upon revenue and capital expenditure requirements of PNG Ports.

- (c) After considering the submissions by PNG Ports pursuant to clause 4.4(a), any report provided in accordance with clause 4.4(b) by an international consultant (if any) appointed pursuant to that clause, and any further information obtained by the Regulator or otherwise provided by PNG Ports, the Regulator must, not later than 60 days after first receiving submissions from PNG Ports, or, if applicable, the report of the international consultant, whichever is the later, notify PNG Ports of its determinations as to the following matters:
  - (i) any adjustment to tariffs PNG Ports is permitted to charge for the supply of Essential Port Services; or
  - (ii) any deviations to the Capital Expenditure Program, necessary to place PNG Ports in the same position as if the Discriminatory Competition had not occurred and the permitted tariffs and amounts specified in Schedule 1 will be amended in accordance with any such determination with effect from the date specified by the Regulator in its determination.
- (d) PNG Ports must, at its expense, provide the Regulator and any international consultant appointed pursuant to clause 4.4(b) with such access to PNG Ports records, employees and contractors as the Regulator or the international consultant requires for the purposes of this clause 4.4.
- (e) The reasonable costs of any international consultant appointed pursuant to clause 4.4(b) must be borne by PNG Ports.

#### **4.5 Minimum capital expenditure**

PNG Ports must ensure that actual capital expenditure and the implied capital expenditure programs, as outlined in the section 4.1, are undertaken such that the Adjusted Cumulative Expenditure for the calendar years 2010 to 2012 results in a Capital Expenditure Ratio of at least 25%. In the event that the Capital Expenditure Ratio is less than 25%, the Regulator's remedies will include, but not be limited to, the right to determine a Capital Efficiency Factor (as defined in Part 2 of Schedule 2) which the Regulator considers appropriate.

## **5. Regulated Pass Through**

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### **5.1 Force Majeure Event Pass Through**

#### Application by PNG Ports

- (a) If a Force Majeure Event occurs, PNG Ports may seek the Regulator's approval to charge Customers, in addition to the maximum amounts that PNG Ports is otherwise permitted to charge for the supply of Essential Port Services pursuant to clauses 2 and 3, an amount (***FM Pass Through Amount***) that is not greater than the Permitted FM Pass Through Amount (as calculated by PNG Ports) in respect of that Force Majeure Event as at the date of the Force Majeure Event Claim (if any)

given to the Regulator pursuant to clause 5.1(d) in respect of that Force Majeure Event.

- (b) To seek the Regulator's approval to pass through an FM Pass Through Amount under clause 5.1(a), PNG Ports must give the Regulator:
  - (i) a Force Majeure Event Notice pursuant to clause 5.1(c) within 3 months of the Force Majeure Event occurring; and
  - (ii) a Force Majeure Event Claim pursuant to clause 5.1(d) within 12 months of the Force Majeure Event occurring.
- (c) A Force Majeure Event Notice must specify:
  - (i) details of the Force Majeure Event concerned; and
  - (ii) the date the Force Majeure Event occurred.
- (d) A Force Majeure Event Claim must specify:
  - (i) details of the Force Majeure Event concerned;
  - (ii) the date the Force Majeure Event occurred;
  - (iii) the increase in costs that PNG Ports has actually incurred as at the date of the Force Majeure Event Claim:
    - (A) in supplying Essential Port Services; and
    - (B) in complying with the provisions of any legislation, or of any codes or guidelines made or published by the Regulator under the *Independent Consumer and Competition Commission Act 2002*, which must be complied with in relation to the supply of Essential Port Services,

as a result of the occurrence of the Force Majeure Event;

  - (iv) the extent (if any) to which PNG Ports has the benefit of any insurance against the consequences of the Force Majeure Event;
  - (v) the FM Pass Through Amount PNG Ports proposes in relation to the Force Majeure Event;
  - (vi) the basis on which PNG Ports proposes to apply the FM Pass Through Amount to Customers; and
  - (vii) the date from, and period over, which PNG Ports proposes to apply the FM Pass Through Amount to Customers,

and must be accompanied by evidence of the increase in costs referred to in paragraph (iii).

#### Approval by Regulator

- (e) If the Regulator receives a Force Majeure Event Claim under clause 5.1(d) in relation to a Force Majeure Event, the Regulator must decide whether the Force Majeure Event occurred and, if the Regulator decides the Force Majeure Event occurred, the Regulator must decide:

- (i) the Permitted FM Pass Through Amount in respect of the Force Majeure Event;
- (ii) the basis on which the FM Pass Through Amount proposed by PNG Ports in relation to the Force Majeure Event or the Permitted FM Pass Through Amount in respect of the Force Majeure Event as determined by the Regulator (whichever is the lesser) (the **Approved FM Pass Through Amount**) may be applied to Customers; and
- (iii) the date from, and period over, which the Approved FM Pass Through Amount in respect of the Force Majeure Event may be applied to Customers,

and notify PNG Ports in writing of the Regulator's decision and the reasons for the Regulator's decision.

- (f) If the Regulator does not give a notice to PNG Ports under clause 5.1(e) within 20 Business Days of receiving:
  - (i) a Force Majeure Event Claim from PNG Ports under clause 5.1(d); and
  - (ii) such evidence of the increase in costs referred to in clause 5.1(d)(iii) as is required by the Regulator,

then, on the 21<sup>st</sup> Business Day after receiving that Force Majeure Event Claim and that evidence, the Regulator is deemed to have notified PNG Ports of its decision that:

- (iii) the FM Pass Through Amount proposed by PNG Ports in relation to the relevant Force Majeure Event in the Force Majeure Event Claim be the Approved FM Pass Through Amount in respect of that Force Majeure Event; and
- (iv) the basis on, date from and period over which that Approved FM Pass Through Amount may be applied to Customers are as specified in the Force Majeure Event Claim.

Relevant Factors

- (g) In making a decision under clause 5.1(e), the Regulator must take into account:
  - (i) the matters and proposals set out in the Force Majeure Event Claim;
  - (ii) the extent to which it would have been reasonable for PNG Ports to have procured insurance against the consequences of the Force Majeure Event; and
  - (iii) any amount recoverable by PNG Ports under insurances against the consequences of the Force Majeure Event and of which PNG Ports has the benefit,

and, subject to the requirement that PNG Ports is not to be compensated for losses against which it would have been reasonable for PNG Ports to have been insured, or for losses to the extent they are able to be compensated for by claiming under insurances of which PNG Ports has the benefit, the Regulator must seek to ensure

that PNG Ports is fully (but not over) compensated for the increase in costs referred to in clause 5.1(d)(iii) to the extent that it was reasonable for PNG Ports to incur those costs, taking into account:

- (iv) the relative amounts of Essential Port Services supplied by PNG Ports to each Customer or class of Customer;
- (v) the time cost of money for the period over which the Approved FM Pass Through Amount is to be applied;
- (vi) the basis on and period over which the Approved FM Pass Through Amount is to be applied;
- (vii) any previous application of this clause 5.1 which has resulted in PNG Ports recovering an amount either more or less than the amount required to fully (but not over) compensate it in respect of a previous Force Majeure Event in accordance with this clause 5.1; and
- (viii) any other factors the Regulator considers relevant.

#### Application of Approved FM Pass Through Amount

- (h) PNG Ports may, after:
  - (i) receipt or deemed receipt of a notice under clause 5.1(e) or (f) allowing PNG Ports to pass through an Approved FM Pass Through Amount; and
  - (ii) publishing a notice in a daily newspaper circulating nationally that sets out:
    - (A) the Approved FM Pass Through Amount which the Regulator has approved or is deemed to have approved;
    - (B) the circumstances giving rise to the Approved FM Pass Through Amount; and
    - (C) the basis on, date from and period over which PNG Ports will apply the Approved FM Pass Through Amount to Customers,

apply the Approved FM Pass Through Amount on the basis, from the date and over the period specified or deemed to be specified in the notice from the Regulator.

- (i) The effect of an Approved FM Pass Through Amount must be:
  - (i) shown on the bill of each affected Customer; or
  - (ii) otherwise notified to such Customers in a manner approved by the Regulator.

#### Relevance of Approved FM Pass Through Amount

- (j) An Approved FM Pass Through Amount applied by PNG Ports under this clause 5.1 is not to be taken into account in the application of clauses 2 and 3.

## 5.2 Tax Pass Through

### Application by PNG Ports

- (a) If a Positive Tax Change Event occurs, PNG Ports may seek the Regulator's approval to charge Customers, in addition to the maximum amounts that PNG Ports is otherwise permitted to charge Customers for the supply of Essential Port Services pursuant to clauses 2 and 3, an amount (**Positive Tax Pass Through Amount**) that is not greater than the Permitted Tax Pass Through Amount (as calculated by PNG Ports) in respect of that Tax Change Event.
- (b) To seek the Regulator's approval to pass through a Positive Tax Pass Through Amount under clause 5.2(a), PNG Ports must give the Regulator a statement within 6 months of the Tax Change Event occurring, specifying:
- (i) details of the Tax Change Event concerned;
  - (ii) the date the Tax Change Event took effect;
  - (iii) the increase in costs that PNG Ports has incurred and is likely to incur over the term of this Contract in supplying Essential Port Services as a result of the occurrence of the Tax Change Event;
  - (iv) the Positive Tax Pass Through Amount PNG Ports proposes in relation to the Tax Change Event;
  - (v) the basis on which PNG Ports proposes to apply the Positive Tax Pass Through Amount to Customers; and
  - (vi) the date from, and period over, which PNG Ports proposes to apply the Positive Tax Pass Through Amount to Customers,
- and accompanied by evidence of the actual and likely increase in costs referred to in paragraph (iii).
- (c) If the Regulator receives a statement under clause 5.2(b) in relation to a Positive Tax Change Event, the Regulator must decide whether that Tax Change Event occurred and, if the Regulator decides the Tax Change Event occurred, the Regulator must decide:
- (i) the Permitted Tax Pass Through Amount in respect of that Tax Change Event;
  - (ii) the basis on which the Positive Tax Pass Through Amount proposed by PNG Ports in relation to that Tax Change Event or the Permitted Tax Pass Through Amount in respect of that Tax Change Event as determined by the Regulator (whichever is the lesser) (the **Approved Tax Pass Through Amount**) may be applied to Customers; and
  - (iii) the date from, and period over, which the Approved Tax Pass Through Amount in respect of that Tax Change Event may be applied to Customers,
- and notify PNG Ports in writing of the Regulator's decision and the reasons for the Regulator's decision.

- (d) If the Regulator does not give a notice to PNG Ports under clause 5.2(c) within 20 Business Days of receiving:
- (i) a statement from PNG Ports under clause 5.2(b); and
  - (ii) such evidence of the actual and likely increase in costs referred to in clause 5.2(b)(iii) as is required by the Regulator,
- then, on the 21<sup>st</sup> Business Day after receiving PNG Ports' statement and that evidence, the Regulator is deemed to have notified PNG Ports of its decision that:
- (iii) the Positive Tax Pass Through Amount proposed by PNG Ports in relation to the relevant Tax Change Event in PNG Ports' statement be the Approved Tax Pass Through Amount in respect of that Tax Change Event; and
  - (iv) the basis on, date from and period over which that Approved Tax Pass Through Amount may be applied to Customers are as specified in PNG Ports' statement.

#### Required Tax Pass Through

- (e) If a Negative Tax Change Event occurs, the Regulator may require PNG Ports to pass through to Customers an aggregate amount (**Negative Tax Pass Through Amount**) that is not greater than the Required Tax Pass Through Amount (as determined by the Regulator) in respect of that Tax Change Event. In such a case, the Regulator must decide:
- (i) the Negative Tax Pass Through Amount in respect of that Tax Change Event;
  - (ii) the basis on which that Negative Tax Pass Through Amount must be applied to Customers; and
  - (iii) the date from, and period over, which the Negative Tax Pass Through Amount in respect of that Tax Change Event must be applied to Customers,
- and notify PNG Ports in writing of the Regulator's decision and the reasons for the Regulator's decision.
- (f) PNG Ports must provide the Regulator with such information as the Regulator requires for the purpose of making a decision under clause 5.2(e) within the time specified by the Regulator.

#### Relevant Factors

- (g) In making a decision under clause 5.2(c) or 5.2(e), the Regulator must (in the case of a decision under clause 5.2(c)) take into account the matters and proposals set out in PNG Ports' statement and:
- (i) in the case of a decision under clause 5.2(c) - the Regulator must ensure that PNG Ports is fully (but not over) compensated for the actual and likely increase in costs referred to in clause 5.2(b)(iii); and

- (ii) in the case of a decision under clause 5.2(e) – the Regulator must ensure that the aggregate amount that PNG Ports is required to pass through to Customers is an amount that is equivalent to (but not more than) the costs that PNG Ports has saved and is likely to save over the term of this Contract in supplying Essential Port Services as a result of the occurrence of the Negative Tax Change Event,

taking into account:

- (iii) the relative amounts of Essential Port Services supplied by PNG Ports to each Customer or class of Customer;
- (iv) the time cost of money for the period over which the Approved Tax Pass Through Amount or the Negative Tax Pass Through Amount (as the case may be) is to be applied;
- (v) the basis on and period over which the Approved Tax Pass Through Amount or the Negative Tax Pass Through Amount (as the case may be) is to be applied;
- (vi) any previous application of this clause 5.2 which has resulted in an Approved Tax Pass Through Amount or a Negative Tax Pass Through Amount in respect of a previous Tax Change Event being more or less than the amount which it should have been for the purposes of this clause 5.2;
- (vii) any change in the way or rate at which another Tax is calculated, or the removal or imposition of another Tax, which, in the Regulator's opinion, is complementary to the Tax Change Event concerned;
- (viii) the effect of any other previous Tax Change Event that has occurred since the later of the Commencement Date and the last decision made under this clause 5.2 in relation to a Tax Change Event; and
- (ix) any other factors the Regulator considers relevant.

Application of Approved Tax Pass Through Amount or Negative Tax Pass Through Amount

- (h) PNG Ports may, after:
  - (i) receipt or deemed receipt of a notice under clause 5.2(c) or (d) allowing PNG Ports to pass through an Approved Tax Pass Through Amount; and
  - (ii) publishing a notice in a daily newspaper circulating nationally that sets out:
    - (A) the Approved Tax Pass Through Amount which the Regulator has approved or is deemed to have approved;
    - (B) the circumstances giving rise to the Approved Tax Pass Through Amount; and
    - (C) the basis on, date from and period over which PNG Ports will apply the Approved Tax Pass Through Amount to Customers,

apply the Approved Tax Pass Through Amount on the basis, from the date and over the period specified or deemed to be specified in the notice from the Regulator.

- (i) PNG Ports must, after receipt of a notice under clause 5.2(e) requiring PNG Ports to pass through a Negative Tax Pass Through Amount to Customers, apply the Negative Tax Pass Through Amount on the basis, from the date and over the period specified in the notice from the Regulator.
- (j) The effect of an Approved Tax Pass Through Amount or a Negative Tax Pass Through Amount must be:
  - (i) shown on the bill of each affected Customer; or
  - (ii) otherwise notified to such Customers in a manner approved by the Regulator.

### 5.3 Harbours Licence Pass Through

- (a) Subject to clause 5.3(b), PNG Ports may at any time propose to the Regulator that it charge Customers an amount (***Harbours Licence Pass Through Amount***) that is not greater than the Permitted Harbours Licence Pass Through Amount in respect of a Regulatory Year (the ***Relevant Regulatory Year***) (to the extent that amount is positive).
- (b) In order to seek the Regulator's agreement to pass through a Harbours Licence Pass Through Amount referred to in clause 5.3(a), PNG Ports must give the Regulator a statement, by 31 January of the Regulatory Year immediately following the Relevant Regulatory Year, specifying:
  - (i) the Harbours Licence Pass Through Amount proposed by PNG Ports;
  - (ii) the amount of the Harbours Licence Fees referable to the Relevant Regulatory Year which have been paid by PNG Ports;
  - (iii) the basis on which PNG Ports proposes to apply the Harbours Licence Pass Through Amount to Customers; and
  - (iv) the date from, and period over, which PNG Ports proposes to apply the Harbours Licence Pass Through Amount to Customers,and must be accompanied by evidence of the payments referred to in paragraph (ii).
- (c) If the Regulator receives a statement under clause 5.3(b), the Regulator must decide:
  - (i) the Permitted Harbours Licence Pass Through Amount in respect of the Relevant Regulatory Year;
  - (ii) the basis on which the Harbours Licence Pass Through Amount proposed by PNG Ports or the Permitted Harbours Licence Pass Through Amount as determined by the Regulator (whichever is the lesser) (the ***Approved Harbours Licence Pass Through Amount***) may be applied to Customers; and

- (iii) the date from, and period over, which the Approved Harbours Licence Pass Through Amount may be applied to Customers,

and notify PNG Ports in writing of the Regulator's decision and the reasons for the Regulator's decision.

- (d) If the Regulator does not give a notice to PNG Ports under clause 5.3(c) within 20 Business Days of receiving:
  - (i) a statement from PNG Ports under clause 5.3(b); and
  - (ii) such evidence of the payments referred to in clause 5.3(b)(ii) as is required by the Regulator,

then, on the 21<sup>st</sup> Business Day after receiving PNG Ports' statement and that evidence, the Regulator is deemed to have notified PNG Ports of its decision that:

- (iii) the Harbours Licence Pass Through Amount proposed by PNG Ports in PNG Ports' statement be the Approved Harbours Licence Pass Through Amount; and
- (iv) the basis on, date from and period over which that Approved Harbours Licence Pass Through Amount may be applied to Customers are as specified in PNG Ports' statement.

- (e) The Regulator may require PNG Ports to pass through to Customers or otherwise apply for the benefit of Customers or potential Customers an amount that is equal to the Permitted Harbours Licence Pass Through Amount in respect of any Regulatory Year (to the extent that amount is negative).

- (f) If the Regulator requires PNG Ports to pass through to Customers or otherwise apply for the benefit of Customers or potential Customers, a Permitted Harbours Licence Pass Through Amount as referred to in clause 5.3(e), the Regulator must decide:

- (i) that amount (such amount being referred to as the **Required Harbours Licence Pass Through Amount**);
- (ii) the basis on which that Required Harbours Licence Pass Through Amount must be passed through to Customers or applied for the benefit of Customers or potential Customers; and
- (iii) the date from, and period over, which that Required Harbours Licence Pass Through Amount must be passed through to Customers or how and when the Required Harbours Licence Pass Through Amount must be applied for the benefit of Customers or potential Customers,

and notify PNG Ports in writing of the Regulator's decision and the reasons for the Regulator's decision.

- (g) PNG Ports agrees to provide the Regulator with such information as the Regulator may request for the purpose of making a decision under clause 5.3(f) within the time specified by the Regulator.

- (h) PNG Ports may, after:
  - (i) receipt or deemed receipt of a notice under clause 5.3(c) or (d) allowing PNG Ports to pass through an Approved Harbours Licence Pass Through Amount; and
  - (ii) publishing a notice in a daily newspaper circulating nationally that sets out:
    - (A) the Approved Harbours Licence Pass Through Amount which the Regulator has approved or is deemed to have approved;
    - (B) the circumstances giving rise to the Approved Harbours Licence Pass Through Amount; and
    - (C) the basis on, date from and period over which PNG Ports will apply the Approved Harbours Licence Pass Through Amount to Customers,

apply the Approved Harbours Licence Pass Through Amount on the basis, from the date and over the period specified or deemed to be specified in the notice from the Regulator.
- (i) PNG Ports agrees that, after receipt of a notice under clause 5.3(f) requiring PNG Ports to pass through a Required Harbours Licence Pass Through Amount to Customers or to apply a Required Harbours Licence Pass Through Amount for the benefit of Customers or potential Customers, it will do so on the basis, from the date and over the period specified in the notice from the Regulator.
- (j) The effect of an Approved Harbours Licence Pass Through Amount or a Required Harbours Licence Pass Through Amount must be:
  - (i) shown on the bill of each affected Customer; or
  - (ii) notified by public advertisement in a national newspaper; or
  - (iii) otherwise notified to such Customers in a manner agreed by PNG Ports and the Regulator.

## **6. Service Standards**

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### **6.1 Minimum Service Standards**

- (a) PNG Ports must ensure that the Minimum Service Standards specified in Schedule 4 are satisfied in respect of each Declared Port at all times.
- (b) PNG Ports must submit to the Regulator no later than 1 March each year a Service Standards Report that demonstrates PNG Ports' compliance with clause 6.1(a) and contains evidence of that compliance. The Service Standards Report must be in such form (if any) as is required by the Regulator.
- (c) The Regulator may at any time audit PNG Ports' compliance with clause 6.1(a). Without limiting the steps which the Regulator may take when conducting such an audit, the Regulator may:

- (i) require PNG Ports to provide information relevant to its compliance with clause 6.1(a); and
  - (ii) inspect any assets, premises, property or records of PNG Ports relevant to its compliance with clause 6.1(a).
- (d) The Regulator must notify PNG Ports within 10 Business Days of commencing an audit under clause 6.1(c).
- (e) The Regulator or PNG Ports may at any time give written notice to the other of them that it requires the appointment of an independent international consultant for the purposes of this clause 6.1. As soon as reasonably practicable after the giving of any such notice and after consulting with PNG Ports, the Regulator must appoint an appropriately qualified independent international consultant to report to the Regulator and PNG Ports, within three months, as to:
  - (i) whether PNG Ports is in compliance with clause 6.1(a); and
  - (ii) if PNG Ports is not in compliance with clause 6.1(a), the relevant Minimum Service Standards that have not been complied with and the nature and extent of the non-compliance.
- (f) The Regulator must not exercise its power under clauses 6.1(c) or (e) more than once per calendar year.
- (g) After considering:
  - (i) any Service Standards Report submitted by PNG Ports to the Regulator in accordance with clause 6.1(b).
  - (ii) any report provided in accordance with clause 6.1(d) by an international consultant (if any) appointed pursuant to that clause; and
  - (iii) any further information obtained by the Regulator pursuant to clauses 6.1(c) or (h) or otherwise,

the Regulator must determine whether or not PNG Ports is in compliance with clause 6.1(a) and must give PNG Ports a Compliance Notice informing PNG Ports of that determination as soon as practicable after making its determination. If the Regulator has determined that PNG Ports is not in compliance with clause 6.1(a), the Regulator must specify in its Compliance Notice the relevant Minimum Service Standards that have not been complied with and must provide details of the non-compliance, including the Declared Port at which the Minimum Service Standards have not been satisfied.
- (h) PNG Ports must, at its expense, provide the Regulator and any international consultant appointed pursuant to clause 6.1(e) with such access to PNG Ports' assets, premises, property, records, employees and contractors as the Regulator or the international consultant requires for the purposes of this clause 6.1.
- (i) The reasonable costs of any international consultant appointed pursuant to clause 6.1(d) must be borne by PNG Ports.

## 6.2 Minimum Standards Price Discount

- (a) If the Regulator gives PNG Ports a Compliance Notice in accordance with clause 6.1 stating that PNG Ports is not in compliance with clause 6.1(a), the Regulator may within five Business Days of giving that notice give PNG Ports a Remedial Notice requiring PNG Ports to remedy the non-compliance with clause 6.1(a) within a reasonable period specified by the Regulator in the notice.
- (b) If PNG Ports fails to:
  - (i) remedy its non-compliance with clause 6.1(a) within the period specified in a Remedial Notice; and
  - (ii) provide the Regulator with evidence to the satisfaction of the Regulator demonstrating PNG Ports' compliance with clause 6.1(a), within the period specified in a Remedial Notice,

the Regulator may give PNG Ports a Default Notice. A Default Notice must specify the relevant Minimum Service Standards that have not been complied with and must provide details of the non-compliance, including the Declared Port at which the Minimum Service Standards have not been satisfied. A separate Default Notice must be issued for each Declared Port.

- (c) From the day immediately following the day on which PNG Ports receives a Default Notice in accordance with clause 6.2(b) until the day on which the Regulator notifies PNG Ports in writing that the Regulator is satisfied that PNG Ports is in compliance with clause 6.1(a), the maximum amount that PNG Ports may charge for the supply of an Essential Port Service at the Declared Port specified in that Notice of Default is an amount equal to 80% of the  $MP^{ij}_t$  determined in accordance with clause 2.2(c) and approved, deemed to be approved or set by the Regulator (as the case may be) pursuant to clause 3.1 for the Declared Port or group of Declared Ports  $j$  (as defined in Schedule 1), for each Regulatory Year during which the Default Notice remains on foot. PNG Ports may at any time after service of a Default Notice notify the Regulator that it considers that it is in compliance with clause 6.1(a). Within 10 Business Days of receiving such a notice the Regulator must notify PNG Ports in writing whether or not the Regulator is satisfied that PNG Ports is in compliance with clause 6.1(a).
- (d) For the avoidance of doubt:
  - (i) a reduction in a maximum amount that may be charged by PNG Ports for the supply of an Essential Port Service during Regulatory Year  $t$  as a result of clause 6.2(c) is not to be taken into account in any calculation made under clause 2.2(b) or (c), whether during that Regulatory Year  $t$  or during any subsequent Regulatory Year. In particular, the reduction in maximum amount that may be charged is not to be taken into account in any calculation or determination of  $AP^{ij}_{t-1}$  (as defined in clause 2.2(c)),  $p^{ij}_t$ , or  $p^{ij}_{t-1}$  (as defined in Schedule 2); and
  - (ii) if a Default Notice is given in Regulatory Year  $t$  and the Regulator has not notified PNG Ports that the Regulator is satisfied that PNG Ports is in

compliance with clause 6.1(a) by the commencement of Regulatory Year  $t + 1$  or any subsequent Regulatory Year, then from the commencement of that Regulatory Year  $t + 1$  (and each subsequent Regulatory Year) the maximum amount that PNG Ports may charge for the supply of an Essential Port Service  $i$  at the Declared Port specified in that Notice of Default becomes an amount equal to 80% of the new  $MP^{ij}_t$  calculated for the Declared Port or group of Declared Ports  $j$  (as defined in Schedule 1), for Regulatory Year  $t + 1$  (or the subsequent Regulatory Year, as the case may be) in accordance with clause 2.2(c) and approved, deemed to be approved or set by the Regulator (as the case may be) pursuant to clause 3.1.

## **7. Competition Policy**

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### **7.1 Ring Fencing**

- (a) If the Regulator considers it necessary or desirable to do so in order to promote competition in a market for Contestable Services, it may serve a notice on PNG Ports specifying steps PNG Ports must take in order to separate its Essential Port Services business from a Contestable Services business or businesses operated by PNG Ports or Relevant Interest Holder in PNG Ports. PNG Ports must comply with any such notice within 20 Business Days of service of the notice or within such longer period as the Regulator may allow.
- (b) PNG Ports must prepare an annual reconciliation between the revenues and costs delivered from its Contestable services and its regulated services. Within this requirement PNG Ports must provide an annual statement to the Commission in the form outlined in schedule 6
- (c) For the 2011 prices to be approved the Regulator will need to be provided with a Strategic Capital Plan. The Regulator requires PNG Ports to prepare and publish a detailed strategic capital plan by 30 November 2010. The Strategic Capital Plan will have, but is not limited to having, due regard for:
  - (i) The scalability of projects;
  - (ii) The potential that individual projects will be stranded by alternative decisions taken by management;
  - (iii) The financial benefits associated with each project, including a cost/benefit analysis;
  - (iv) The underlying investment need;
  - (v) The prioritization of capital expenditure;
  - (vi) The improvements to underlying services which will be delivered by the capital expenditure;
  - (vii) The potential involvement of additional parties through either funding or delivery of required services;

- (viii) The timeframe required to scope, tender and deliver the services required; and
- (ix) The risk factors involved with the capital expenditure as well as an identification and assessment of the probability of the risk factors associated with not undertaking the capital expenditure.

Should the Strategic Capital Plan not be provided to an acceptable standard, by 30 November 2010 the Commission will deem that PNG Ports is in breach of the contract and will therefore not allow the 2011 price to change by more than CPI. That is the X factor for the 2011 year will be zero per cent (0%).

- (d) Without limiting what may be required by the Regulator under paragraph 7.1(a) the Regulator may require:
  - (i) that PNG Ports not provide Contestable Services (although a Relevant Interest Holder in PNG Ports or a Subsidiary of PNG Ports would be free to do so);
  - (ii) require that any contract, arrangement or understanding between PNG Ports and a Relevant Interest Holder in PNG Ports or a Subsidiary of PNG Ports providing Contestable Services in relation to the provision of Essential Port Services by PNG Ports to the shareholder of PNG Ports not be entered into unless first approved by the Regulator; and/or
  - (iii) that confidential information provided by a user of Essential Port Services to PNG Ports not be provided to employees, contractors or advisers of PNG Ports or a Relevant Interest Holder in PNG Ports or a Subsidiary of PNG Ports involved in the provision of Contestable Services.

## **7.2 Stevedoring Access**

PNG Ports agrees to charge for Stevedoring Access on a fair and reasonable basis and, in the event of a dispute in respect of the amount of a charge for Stevedoring Access, PNG Ports agrees to charge such amount for Stevedoring Access as the Regulator determines to be fair and reasonable.

## **7.3 Non discrimination**

PNG Ports must not in connection with the supply of an Essential Port Service or Stevedoring Access discriminate unreasonably between Customers who are in substantially the same circumstances, and in particular with reference to the Declared Port or group of Declared Ports j (as defined in Schedule 1).

# **8. Obligation to Supply Essential Port Services**

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## **8.1 Approved Port Closures**

- (a) Subject to clause 8.1(h), PNG Ports must provide Essential Port Services to each person who seeks the provision of those services at a Declared Port.

- (b) PNG Ports may apply to the Regulator at any time for authorisation to close one or more Declared Harbours. Each application must be in respect of one Declared Port only. The application must:
  - (i) be in such form (if any) as is required by the Regulator; and
  - (ii) be supported by an explanation of why the closure of that port is sought by PNG Ports; and
  - (iii) set out in sufficient detail the reasons why PNG Ports considers that the closure of that port satisfies the criteria for closure specified in clause 8.1(c); and
  - (iv) contain sufficient information, data, or other material to enable the Regulator to determine whether the application satisfies the criteria for closure specified in clause 8.1(c).
- (c) The Regulator may approve a closure of a Declared Port only if the Regulator is satisfied that:
  - (i) alternate port facilities are available to serve existing users' needs in the particular location; or
  - (ii) for any other reason, the Declared Port is no longer required by users.
- (d) The Regulator:
  - (i) must consult with the relevant government department or authority responsible for ports and harbours; and
  - (ii) may require PNG Ports to provide such further information, explanations or other material as the Regulator requires; and
  - (iii) may inspect any assets, premises, property, accounts, records or other information or material of PNG Ports,

in order to determine whether to, or whether it is authorised to, approve a closure of a Declared Port.
- (e) The Regulator or PNG Ports may, within 20 Business Days of an application to close a Declared Port submitted by PNG Ports to the Regulator under clause 8.1(b), give written notice to the other of them that it requires the appointment of an independent international consultant for the purposes of this clause 8.1. As soon as reasonably practicable after the giving of any such notice and after consulting with PNG Ports, the Regulator must appoint an appropriately qualified independent international consultant to report to the Regulator and PNG Ports whether PNG Ports' application satisfies the criteria for closure specified in clause 8.1(c).
- (f) After considering:
  - (i) any information, explanations or other material provided by PNG Ports under clause 8.1(b) or 8.1(d)(ii);
  - (ii) any information, data or other material obtained by the Regulator under clause 8.1(d)(i) or (iii);

- (iii) any report provided in accordance with clause 8.1(e) by an international consultant (if any) appointed pursuant to that clause; and
  - (iv) the criteria for closure specified in clause 8.1(c),
- the Regulator must determine whether or not to approve a closure of a Declared Port sought by PNG Ports.
- (g) The Regulator must give PNG Ports notice of its determination to approve or not approve the closure of a Declared Port under clause 8.1(f) within three months. If the Regulator does not so notify PNG Ports within that period, it is deemed to have approved the closure of the Declared Port.
  - (h) If the Regulator notifies PNG Ports that it has approved the closure of a Declared Port, or if the Regulator is deemed to have approved the closure of the Declared Port under clause 8.1(g), PNG Ports is not obliged to supply Essential Port Services to any person, and is not subject to Minimum Service Standards, in respect of that closed port from the last day of the Regulatory Year in which that approval was provided.
  - (i) An approval or deemed approval by the Regulator of the closure of a Declared Port is automatically revoked if, at any time after that approval, PNG Ports provides any person with an Essential Port Service in respect of that closed port.
  - (j) PNG Ports must, at its expense, provide the Regulator and any international consultant appointed pursuant to clause 8.1(e) with such access to PNG Ports' assets, premises, property, accounts, records, other information or material, employees and contractors as the Regulator or the international consultant requires for the purposes of this clause 8.1.
  - (k) The reasonable costs of any international consultant appointed pursuant to clause 8.1(e) must be borne by PNG Ports.

## **9. Amendment of Regulatory Contract**

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### **9.1 Agreed Amendments**

- (a) Subject to clause 9.1(b), this Contract may be varied from time to time by written agreement between the Regulator and PNG Ports but any such variation must not be inconsistent with the Regulatory Principles or the requirements of the *Independent Consumer and Competition Commission Act 2002*.
- (b) No variation may be made to this Contract unless:
  - (i) at least 40 Business Days prior to any such variation taking effect:
    - (A) the Regulator has published a notice describing the proposed variation in both the National Gazette and a daily newspaper circulating nationally and inviting the making of submissions in relation to the proposed variation not less than 20 Business Days after the date of publication of that notice;

- (B) the Regulator has provided a notice to the Minister responsible for the *Harbours Act* describing the proposed variation; and
  - (C) the Regulator has made available, for inspection or purchase by the public, copies of the precise form of the proposed variation; and
- (ii) the Regulator has considered such submissions in relation to the proposed variation as it receives under clause 9.1(b)(i).

**9.2 Amendments made by virtue of the operation of the Independent Consumer and Competition Commission Act 2002**

If, with the consent of PNG Ports, any service comprising Essential Port Services or Stevedoring Access ceases to be a regulated service (as that term is defined in the *Independent Consumer and Competition Commission Act 2002*), this Contract will be varied, in accordance with the operation of section 33(4) of the *Independent Consumer and Competition Commission Act 2002*, by deleting any reference in this Contract to such of those services as have ceased to be regulated services.

**10. Termination of Regulatory Contract**

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**10.1 Agreed termination**

This Contract may be terminated at any time by written agreement between the Regulator and PNG Ports.

**10.2 Termination by virtue of the operation of the Independent Consumer and Competition Commission Act 2002**

This Contract will terminate automatically if PNG Ports ceases to be a regulated entity (as that term is defined in the *Independent Consumer and Competition Commission Act 2002*).

## SCHEDULE 1 - MAXIMUM TARIFFS FOR FIRST REGULATORY YEAR

### A. Maximum tariffs for Wharfage Services

The maximum amount that PNG Ports may charge for the supply of a Wharfage Service during the First Regulatory Year is outlined in the following two tables, representing two groups of Declared Ports j.

#### Ports of Moresby, Lae, Kimbe, Vanimo and Samarai (Declared Ports j = 1)

Cargo	Unit	Overseas cargo (rate per unit)		Coastal cargo (rate per unit)	
		Inward K	Outward K	Inward K	Outward K
Horse, cattle, dogs, sheep, goats, pigs	Each animal	2.66	3.34	4.01	2.66
Oils (in bulk), Petroleum (in bulk)	Tonne of 1,000 litres	5.34	5.34	2.66	2.66
Palm Oil	Tonne of 1,000 litres	-	4.60	2.66	2.66
Boats, Iron Tanks (Empty)	Metre length	20.02	20.02	5.34	5.34
Copra, cocoa, coffee, bagged agriculture produce	Tonne/Weight	13.35	8.01	2.66	2.66
Goods not enumerated above	Tonne Weight or cubic metre whichever is greater	13.35	8.28	4.01	4.01
Container (FCL/LCL/MT)	per Twenty Foot Equivalent Units (TEU)	49.34	49.34	24.67	24.67
	Per Forty Foot Equivalent Units (FEU)	98.68	98.68	49.34	49.34
	Per 10/9m3	24.67	24.67	12.34	12.34
	Per 4m3/DBox	16.45	16.45	8.22	8.22
Cement	Tonne/Weight	13.04	8.28	4.01	4.01
Sand	Tonne/Weight	13.35	8.28	4.01	4.01
Soil	Tonne/Weight	13.35	8.28	4.01	4.01
<b>Containers Off/On</b>			<b>Rate Per Unit/Activity</b>		
Overseas (40ft)			191.22		
Overseas (20ft)			95.61		
Overseas Others (9m,10m,"D" Box)			47.81		
Coastal (40ft)			191.22		
Coastal (20ft)			95.61		
Coastal Others (9m,10m,"D" Box)			47.78		
Overseas General Break Bulk (Off/On)			39.25		
Coastal General Break Bulk (Off/On)			14.70		

PNG Ports may choose to apply lower tariff if this is deemed to be appropriate by management and consistent with the developmental goals of a port.

**Ports of Madang, Rabaul, Alotau, Oro Bay, Kavieng, Daru, Buka, Kieta, Aitape, Lorengau and Wewak (Declared Ports j = 2)**

Cargo	Unit	Overseas cargo (rate per unit)		Coastal cargo (rate per unit)	
		Inward K	Outward K	Inward K	Outward K
Horse, cattle, dogs, sheep, goats, pigs	Each animal	2.89	3.62	4.34	2.89
Oils (in bulk), Petroleum (in bulk)	Tonne of 1,000 litres	5.79	5.79	2.89	2.89
Palm Oil	Tonne of 1,000 litres	-	4.99	2.89	2.89
Boats, Iron Tanks (Empty)	Metre length	21.69	21.69	5.79	5.79
Copra, cocoa, coffee, bagged agriculture produce	Tonne/Weight	14.46	8.67	2.89	2.89
Goods not enumerated above	Tonne Weight or cubic metre whichever is greater	14.46	8.97	4.34	4.34
Container - Full Container Load (FCL) and Less than Container Load (LCL) and Empty (MT)	Per Twenty Foot Equivalent Units (TEU)	53.46	53.46	26.73	26.73
	Per Forty Foot Equivalent Units (FEU)	106.92	106.92	53.46	53.46
	Per 10/9m3	26.73	26.73	13.37	13.37
	Per 4m3/DBox	17.82	17.82	8.91	8.91
Cement	Tonne/Weight	14.13	8.97	4.34	4.34
Sand	Tonne/Weight	14.46	8.97	4.34	4.34
Soil	Tonne/Weight	14.46	8.97	4.34	4.34
<b>Containers Off/On</b>		<b>Rate Per Unit/Activity</b>			
Overseas (40ft)		208.61			
Overseas (20ft)		104.30			
Overseas Others (9m,10m,"D" Box)		52.15			
Coastal (40ft)		208.61			
Coastal (20ft)		104.3			
Coastal Others (9m,10m,"D" Box)		52.13			
Overseas General Break Bulk (Off/On)		42.79			
Coastal General Break Bulk (Off/On)		16.03			

PNG Ports may choose to apply lower tariff if this is deemed to be appropriate by management and consistent with the developmental goals of a port.

where:

Tonne means one cubic metre;

Weight means 1,000 kilograms or, in the case of bulk oil, oils or petroleum, 1,000 litres;

If the Unit is specified to be "Tonne/Weight", the applicable tariff is the greater of the tariff calculated on the basis of the number of Tonnes of the cargo loaded or unloaded (as the case may be) and the Weight of the cargo loaded or unloaded (as the case may be).

"Overseas Cargo - Inward" means cargo to be unloaded from a vessel, which cargo was loaded onto the vessel at any place outside of Papua New Guinea.

"Overseas Cargo – Outward" means cargo to be loaded onto a vessel, which cargo is intended at the time of loading to be unloaded outside of Papua New Guinea.

"Coastal Cargo – Inward" means cargo to be unloaded from a vessel, which cargo was loaded onto the vessel at any place within Papua New Guinea.

"Coastal Cargo – Inward" means cargo to be unloaded from a vessel, which cargo is intended at the time of loading to be unloaded at any place within Papua New Guinea.

#### **PASSENGER FEES**

Adult – K4.64 per passenger

Children – K2.32 per passenger

#### **TRANSHIPMENTS**

The tariffs for transhipments (inward and outward charged separately) will be charged at, for overseas – 50%, and for coastal – 100%, of the respective approved wharfage tariffs in accordance with Schedule 1, Part A of this Contract, and payable at the port of transhipment.

### **B. Maximum tariffs for Berth Reservation Services**

The maximum amount that may be charged for the supply of a Berth Reservation Service during the First Regulatory Year in respect of a particular vessel is the tariff set out in the following tables.

#### **Ports of Moresby, Lae, Kimbe, Vanimo and Samarai (Declared Ports j = 1)**

Type of vessel	Berth reservation Schedule of rates
Overseas vessels – cargo and passenger vessels at the ports of Port Moresby and Lae	K 527.65 per occasion
Overseas vessels – cargo and passenger vessels - at remaining ports	K 263.82 per occasion
Overseas tankers – large	K 799.23 per occasion
Overseas tankers – small	K 400.91 per occasion
Overseas vessel of any type or at any port- each alteration to arrival time	K 134.50 per occasion
Coastal vessels – POM and Lae	K 265.12 per occasion
Coastal vessels – at remaining ports	K 134.50 per occasion
Coastal vessels – any, port each alteration to arrival time	K 53.02 per occasion

PNG Ports may choose to apply lower tariff if this is deemed to be appropriate by management and consistent with the developmental goals of a port.

**Ports of Madang, Rabaul, Alotau, Oro Bay, Kavieng, Daru, Buka, Kieta, Aitape, Lorengau and Wewak (Declared Ports j = 2)**

Type of vessel	Berth reservation Schedule of rates
Overseas vessels – cargo and passenger vessels at the ports of Rabaul and Madang	K 571.70 per occasion
Overseas vessels – cargo and passenger vessels - at remaining ports	K 285.85 per occasion
Overseas tankers – large	K 865.95 per occasion
Overseas tankers – small	K 434.38 per occasion
Overseas vessel of any type or at any port- each alteration to arrival time	K 145.73 per occasion
Coastal vessels – Rabaul, and Madang	K 287.25 per occasion
Coastal vessels – at other ports	K 145.73 per occasion
Coastal vessels – any, port each alteration to arrival time	K 57.45 per occasion

PNG Ports may choose to apply lower tariff if this is deemed to be appropriate by management and consistent with the developmental goals of a port.

**C. Maximum tariffs for Berthing Services**

The maximum amount that may be charged for the supply of a Berthing Service during the First Regulatory Year in respect of a particular vessel is the tariff set out in the following tables.

**Ports of Port Moresby, Lae, Kimbe, Vanimo and Samarai (Declared Ports j = 1)**

Type of vessel	Berthage Schedule of rates
Overseas vessels (including cargo, passenger and tankers)	K 1.69/ metre LOA / hour alongside PNGH wharf
Coastal vessels – under 20 metres (or part thereof)	K 0.22/ metre LOA / hour alongside PNGH wharf
Coastal vessels – 20 metres <LOA< 49 metres	K 0.32/ metre LOA / hour alongside PNGH wharf
Coastal vessels – 49<LOA	K 0.32/ metre LOA / hour alongside PNGH wharf
Workboats (quarterly fee)	K77.59 alongside PNGH wharf
Tugs	K11.89 per tug/day

**Ports of Madang, Rabaul, Alotau, Oro Bay, Kavieng, Daru, Buka, Kieta, Aitape, Lorengau Wewak (Declared Ports j = 2)**

Type of vessel	Berthage Schedule of rates
Overseas vessels (including cargo, passenger and tankers)	K 1.84/ metre LOA / hour alongside PNGH wharf
Coastal vessels – under 20 metres (or part thereof)	K 0.24/ metre LOA / hour alongside PNGH wharf
Coastal vessels – 20 metres <LOA< 49 metres	K 0.35/ metre LOA / hour alongside PNGH wharf
Coastal vessels – 49<LOA	K 0.35/ metre LOA / hour alongside PNGH wharf
Workboats (quarterly fee)	K84.07 alongside PNGH wharf
Tugs	K12.88 per tug/day

where:

PNGH wharf means a wharf in a Declared Port owned, operated or controlled by PNG Ports.

A coastal vessel carrying cargo loaded at any place outside of Papua New Guinea will be charged for Berthing Services at the rate applicable for overseas vessels until such overseas cargo is completely unloaded at which time it will revert to being a coastal vessel.

## SCHEDULE 2 – TARIFF FORMULAE

### Part 1. Average Revenue Change (No Port Closures)

The change in forecast average revenue for Subsequent Regulatory Year t ( $AR_t$ ) is calculated as follows:

$$AR_t = \frac{\sum_{i=1}^n p^i_t * q^i_{t-1}}{\sum_{i=1}^n p^i_{t-1} * q^i_{t-1}}$$

where

there are n tariffs;

$p^i_t$  is the rate for tariff i proposed to apply in Regulatory Year t in a statement given under clause 3.1;

$p^i_{t-1}$  is the rate for tariff i that applied in Regulatory Year t-1; and

$q^i_{t-1}$  is the actual chargeable quantity in relation to tariff i that was supplied by PNG Harbours in the 12 months between 30 June of Regulatory Year t-1 and 30 June of Regulatory Year t-2.

### Part 2. Essential Services Price Control

The Essential Services Price Control for a Declared Port j for Regulatory Year t ( $ESPC^j_t$ ) is calculated as follows:

$$ESPC^j_t = \frac{PNGCPI_{t-1}}{PNGCPI_{t-2}} + X^j_t - CEF_t$$

where:

$PNGCPI_{t-1}$  is the Adjusted PNGCPI for the 12 month period ending 30 June in Regulatory Year t-1 and is calculated in accordance with Part 3 of this Schedule 2; and

$PNGCPI_{t-2}$  is the Adjusted PNGCPI for the 12 month period ending 30 June in Regulatory Year t-2 and is calculated in accordance with Part 3 of this Schedule 2.

$X^j_t$  is the Price Control Factor for a Declared Port or group of Declared Ports j for Regulatory Year t and equals the values set out in the following table:

	Ports of Port Moresby, Lae, Kimbe, Vanimo and Samarai (Declared Ports j = 1)	Ports of Madang, Rabaul, Alotau, Oro Bay, Kavieng, Daru, Buka, Kieta, Aitape, Lorengau, Wewak (Declared Ports j = 2)
X factor in each Regulatory Year	0.10	0.20

### Part 3. Average Revenue Change (Approved Port Closures)

The change in forecast average revenue for Subsequent Regulatory Year t [AR(APC)<sub>t</sub>], adjusted to allow for one or more Approved Port Closure, is calculated as follows:

$$AR(APC)_t = \frac{\sum_{i=1}^n p^i_t * \{ q^i_{t-1} - cpq^i_{t-1} \}}{\sum_{i=1}^n \{ p^i_{t-1} * q^i_{t-1} \} - \{ doc + ahoc \}}$$

where

there are n tariffs;

$p^i_t$  is the rate for tariff i proposed to apply in Regulatory Year t in a statement given under clause 3.1;

$p^i_{t-1}$  is the rate for tariff i that applied in Regulatory Year t-1;

$q^i_{t-1}$  is the actual chargeable quantity in relation to tariff i that was supplied by PNG Harbours in the 12 months between 30 June of Regulatory Year t-1 and 30 June of Regulatory Year t-2;

$cpq^i_{t-1}$  is the actual chargeable quantity in relation to tariff i that was supplied by PNG Harbours in respect of ports closed on the last day of Regulatory Year t-1, which quantity was supplied during the 12 months between 30 June of Regulatory Year t-1 and 30 June of Regulatory Year t-2;

doc is the total amount of direct operating and maintenance costs (expressed in Kina) incurred by PNG Harbours during the 12 months between 30 June of Regulatory Year t-2 and 30 June of Regulatory Year t-3 in respect of ports closed during Regulatory Year t-1; and

ahoc is the total amount [per annum] of avoidable head office costs incurred by PNG Harbours [during the 12 months between 30 June of Regulatory Year t-2 and 30 June of Regulatory Year t-3] in respect of ports closed during Regulatory Year t-1 and likely not to be incurred by PNG Harbours in Regulatory Year t as a result of the port closures.

## Part 4. Capital Efficiency Factor (CEF<sub>t</sub>)

The Capital Efficiency Factor for Regulatory Year t where Regulatory Year t is 2013 or a subsequent Regulatory Year (CEF<sub>t</sub>) has the value set out in the following table corresponding to the value of the Capital Expenditure Ratio (CER<sub>t</sub>) determined by the Regulator under clause 4.1:

CER <sub>t</sub>	CEF <sub>t</sub>				
	2010	2011	2012	2013	2014
Less than 25%	0%	0%	0%	See section 4.5	See section 4.5
25% to 50%	0%	0%	0%	Up to 10 per cent <sup>^</sup>	Up to 10 per cent <sup>^</sup>
50% to 75%	0%	0%	0%	Up to 5 per cent <sup>^</sup>	Up to 5 per cent <sup>^</sup>
Greater than 75%	0%	0%	0%	0 per cent	0 per cent

<sup>^</sup>Unless due cause can be identified as to the reason why capital expenditure was under spent.

The CEF<sub>t</sub> for Regulatory Year t determined by the Regulator under clause 4.1, is the same for both groups of Declared Ports (ie: j = 1 or 2).

## Part 5. Changes in calculation of CPI

PNGCPI<sub>t-1</sub> is calculated as follows:

The adjusted PNG CPI for the 12 month period ending on 30 June in Regulatory Year t-1 is calculated as follows:

$$\text{PNGCPI}_{t-1} = \{ \text{PNGCPI}_{(q3, t-2)} + \text{PNGCPI}_{(q4, t-2)} + \text{PNGCPI}_{(q1, t-1)} + \text{PNGCPI}_{(q2, t-1)} \} / 4$$

where:

PNGCPI for a Quarter (q) is the All Groups Weighted Average CPI for Urban Areas excluding Drinks, Tobacco and Betel Nut, published by the National Statistics Office;

PNGCPI<sub>(q3, t-2)</sub> is the PNGCPI for the Quarter ending on 30 September in Regulatory Year t-2 or calendar year t-2.

PNGCPI<sub>(q4, t-2)</sub> is the PNGCPI for the Quarter ending on 31 December in Regulatory Year t-2 or calendar year t-2;

PNGCPI<sub>(q1, t-1)</sub> is the PNGCPI for the Quarter ending on 31 March in Regulatory Year t-1 or calendar year t-1; and

PNGCPI<sub>(q2, t-1)</sub> is the PNGCPI for the Quarter ending on 30 June in Regulatory Year t-1 or calendar year t-1;

PNGCPI<sub>t-2</sub> is calculated as follows

The adjusted PNG CPI for the 12 month period ending on 30 June in Regulatory Year t-2 is calculated as follows:

$$\text{PNGCPI}_{t-2} = \{ \text{PNGCPI}_{(q3, t-3)} + \text{PNGCPI}_{(q4, t-3)} + \text{PNGCPI}_{(q1, t-2)} + \text{PNGCPI}_{(q2, t-2)} \} / 4$$

Where:

PNGCPI<sub>(q3, t-3)</sub> is the PNGCPI for the Quarter ending on 30 September in Regulatory Year t-3 or calendar year t-3;

PNGCPI<sub>(q4, t-3)</sub> is the PNGCPI for the Quarter ending on 31 December in Regulatory Year t-3 or calendar year t-3 ;

PNGCPI<sub>(q1, t-2)</sub> is the PNGCPI for the Quarter ending on 31 March in Regulatory Year t-2 or calendar year t-2; and

PNGCPI<sub>(q2, t-2)</sub> is the PNGCPI for the Quarter ending on 30 June in Regulatory Year t-2 or calendar year t-2.

If a source of data described in this Contract is no longer published, or if any other change occurs in relation to such data which would cause the continued use of the source to result in inaccurate comparisons between data calculated using the source prior to the change and data calculated using the source after the change, then the Regulator may by notice to PNG Ports substitute an alternative source of such data to apply from a date determined by the Regulator in the notice.

If the CPI for the period ending on 30 June in Regulatory Year t-1 is not available when the calculation of PNGCPI<sub>(q2, t-1)</sub> needs to be made, the calculation in Part C above shall be made using instead the most recent eight quarterly CPI figures then publicly available.

### **SCHEDULE 3 - REBALANCING CONTROL**

The Rebalancing Control for Regulatory Year t ( $RC_t$ ) is calculated as follows:

$$RC_t^j = ESPC_t^j + 0.015$$

where:

$ESPC_t^j$  means the Essential Services Price Control for the Declared Port or group of Declared Ports j (as defined in Schedule 1) for Regulatory Year t as determined in accordance with Part 2 of Schedule 2.

## **SCHEDULE 4 - MINIMUM SERVICE STANDARDS**

1. Wharves must be maintained:
  - in a condition which is suitable for safely berthing a vessel with a minimum size of Length 57m, Beam 9.8m, Draft 3.3m;
  - in such condition to enable the safe carriage of a fully loaded standard “20 foot” container, placed onto a standard tractor-drawn 4 wheel container-trailer.
2. A suitable hardstand area must be maintained at each wharf or end of causeway to allow for the manoeuvre of a tractor and container-trailer. As a minimum, the hardstand must be reasonably smooth and level gravel, free draining, and have area allocated for the storage of at least 10 containers, stacked single height.
3. Roads and pavements within a wharf must be maintained in a well graded condition, free of large potholes or failed areas, freely draining and such that container trucks can load, unload and turn without undue hindrance.
4. The minimum security requirement will be a robust 1.8m high chain wire fence maintained around each wharf area, with lockable access gates 4.2m wide. The fence must not have holes or gaps which would allow an unauthorised person to enter.
5. A suitably equipped office must be maintained and must be manned at least during normal office hours, with functioning radio facilities available for communication from, to and with vessels wishing to obtain Essential Port Services or requiring any other service.
6. Town water must be available to reprovision vessels.
7. Full telecommunications service must be supplied to the port office.
8. Power (3ph 415 v) must be available, supported by a functioning back-up generator of suitable capacity, if primary power supply is PNG Power reticulated supply.

## **SCHEDULE 5 - REGULATORY PRINCIPLES**

1. There must be an examination of:
  - (a) the value of capital stock at the end of the term of this Contract, which must be the depreciated value of the actual prudent capital expenditures undertaken during the term of this Contract. The depreciation method to be applied to this capital amount must be the current cost accounting approach applying a depreciated optimised replacement cost (the DORC methodology). The actual capital expenditure made during the term of this Contract must be reviewed to ensure that it was prudent and should be included in the asset base going forward. No amount may be included in the value of capital stock with respect to capital items in existence as at the Commencement Date of the first Regulatory Contract<sup>2</sup>, being 1 January 2005;
  - (b) the appropriate rate of return to apply in setting the new price path; and
  - (c) the level of future capital expenditure and operating expenditure to maintain service levels, including any efficiency factor to be applied to operating expenditure.
2. PNG Ports must be regulated under an incentive regulation approach.
3. A building block approach must be adopted, consisting of the following components:
  - (a) initial capital stock;
  - (b) return on capital (WACC);
  - (c) new capital expenditure;
  - (d) return of capital - economic depreciation; and
  - (e) operating expenses.
4. Consideration must be given to establishing a glide path adjustment with a sharing of efficiency gains between PNG Ports and consumers of Essential Port Services.
5. Consideration must be given to the number of ports, stand alone costs of each port and subsidies existing between ports.

<sup>2</sup> All capital existing as at the Commencement Date of the first Regulatory Contract has been treated as sunk and valued at zero for the purposes of this Subsequent Regulatory Contract.

## SCHEDULE 6 - REPORTING FRAMEWORK

Reporting Template

### Regulated ports

Port name	Total	Change from previous year	Comments
Revenue*	A		
Operating costs (direct)*	B		
Operating costs (indirect)*	C		
Total operating costs	$D = B + C$		
Surplus/Deficit for the port	$E = A - D$		
Depreciation (as per building block model)	F		
Return on capital	$G = E - F$		
Implied RAB (only where G is >0)	$H = G * \text{WACC}$		
Actual Capex	I		
Actual RAB	$J = \text{Building block Model} + I - F$		
Demand			
Vessel Calls			
Cargo Throughput			
Containers			

The value of the pre-tax real WACC is determined to be equal to 17.09 per cent per annum.

The building block model is set equal to the current RAB and updated for the actual CAPEX in each completed year of this current Regulatory Contract. Reports will be completed and delivered to the Commission by 30 June in each year. \* denotes that information must tie back to either, audited financial statements – where available, or monthly management reports to the Board of Directors – where audited financial statements are not available.

**PNG Ports regulated business**

<b>Sum of ports</b>	<b>Total</b>	<b>Change from previous year</b>	<b>Comments</b>
Revenue*	A		
Operating costs (direct)*	B		
Operating costs (indirect)*	C		
Total operating costs	D = B + C		
Surplus/Deficit across ports	E = A - D		
Depreciation (as per building block model)	F		
Return on capital	G = E - F		
Implied RAB (only where G is >0)	H = G * WACC		
Actual Capex	I		
Actual RAB	J = Building block Model + I - F		
Demand			
Vessel Calls			
Cargo Throughput			
Containers			

The value of the pre-tax real WACC is determined to be equal to 17.09 per cent per annum.

The building block model is set equal to the current RAB and updated for the actual CAPEX in each completed year of this current Regulatory Contract. Reports will be completed and delivered to the Commission by 30 June in each year. \* denotes that information must tie back to either, audited financial statements – where available, or monthly management reports to the Board of Directors – where audited financial statements are not available.

**Ringfenced information**

<b>Total Business Revenue</b>	<b>Revenue</b>	<b>Change from previous year</b>	<b>Comments</b>
Berthage/ Reservations	A		
Wharfage	B		
Regulated services	$C=A+B$		
Contestable services	D		
Motukea	E		
Non Regulated services	$F= D+E$		
Government Grants^	G		
Other Revenue	H		All other revenue to be explained, eg: customer contribution for capital expenditure, aid grant.
Total Revenue*	$I=C+F+G+H$		

<b>Total Business Costs</b>	<b>Costs</b>	<b>Change from previous year</b>	<b>Comments</b>
Regulated services (direct)	A		
Regulated services (indirect)	B		
Total regulated	$C=A+B$		
Contestable services (direct)	D		
Contestable services (indirect)	E		
Total contestable services	$F= D+E$		
Motukea (direct)	G		
Motukea (indirect)	H		
Total Motukea	$I= G+H$		
Other Costs	J		All other costs to be explained, eg:

			interest on loans to support capital expenditure.
Total costs*	$K = I + J + F + C$		

Total Business Payments	Dividends or Capital Return #	Change from previous year	Comments
Funded by regulated services	A		
Funded by Contestable services	B		
Funded by Motukea	C		
Total Dividend*	$D = A + B + C$		

\* denotes that information must tie back to either, audited financial statements – where available, or monthly management reports to the Board of Directors – where audited financial statements are not available. ^ assumes that any cross subsidy is funded directly from government grants (until such time that a CSO policy is agreed this value would equate to zero). # separately report dividends from capital returns.

For the avoidance of doubt Audited Statements can include statements which have been prepared and reviewed by an auditor but not signed off by the Auditor General of PNG.

**SCHEDULE 7 – PARAMETERS TO BE USED IN THE PNG PORTS REGULATORY PRICING MODEL TO DETERMINE THE CAPITAL EFFICIENCY FACTOR**

**Operating costs**

As per the calculation of the implied capital expenditure program from the PNG Ports regulation pricing model the following operating costs are to be included in the model.

<b>Kina</b>	<b>2010</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>	<b>2014</b>
Operating Expenditure	78,967,778	88,601,847	99,411,272	111,539,447	125,147,260

**WACC**

The final pre-tax real WACC used in the determination of the price path for 2010 through to 2014 is equal to 17.09% per annum.

**2010 Starting Regulatory Asset base**

The opening asset base at 1 January 2010 is K255 million.

**Depreciation**

<b>Kina</b>	<b>2010</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>	<b>2014</b>
Depreciation	16,398,974	21,919,730	23,631,415	24,312,173	24,569,995

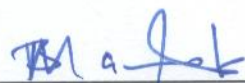
**Demand**

Actual demand for the first 2.5 years is to be used in the regulatory modelling and an updated forecast for the next 2.5 years, as determined by the Regulator at the mid-term Capital Expenditure Review.

**Capital Expenditure program**

The capital expenditure program will be derived from the PNG Ports regulatory pricing model. Note that the CEF will be primarily assessed from the actual outcomes of the first two and a half years of capital expenditure only. However, the Regulator will have due regard to the forward forecasts of expenditure for the remaining two and a half years of this Regulatory Contract in assessing the CEF value set at the mid-term Capital Expenditure Review, which will be applicable for the last two years of the Regulatory Contract.

Executed by the Independent Consumer  
and Competition Commission

A handwritten signature in blue ink, appearing to read 'B Manoka', written over a horizontal line.

Associate Prof. Billy Manoka (PhD)  
Commissioner & CEO