INDEPENDENT CONSUMER & COMPETITION COMMISSION

DRAFT DETERMINATION

Application for Authorisation

By

Hoskins Oil Palm Growers Association Incorporated

to Collectively Negotiate

with

New Britain Palm Oil Limited and Hargy Oil Palms Limited

Application Dated : 13 September 2012
Registration Date : 13 September 2012
Public Register Number : A2012/14
Date of Release : 
1. **THE APPLICATION**

1.0.1. Hoskins Oil Palm Growers Association ("HOPGA") made this application (the "second application" or "this application") on 13 September 2012 in accordance with Section 70(1) of the Independent Consumer and Competition Commission Act 2002 (the "ICCC Act"), for authorisation, to enter into joint negotiation with New Britain Palm Oil Limited ("NBPOL") and Hargy Oil Palms Limited ("HOPL" or "Hargy") for oil palm fresh fruit bunch ("FFB") prices and other terms and conditions.

1.0.2. This follows HOPGA’s earlier application (the "first application") made under Subsections (2), (5) and (6) of Section 70 of the ICCC Act, to which the Commission’s determination A2011/12\(^1\) relates.

1.0.3. This is the Commission’s draft determination pursuant to Section 78 of the ICCC Act on this application.

1.0.4. There has been much discussion and assessment of information in relation to the first application, where the facts, circumstances, submissions and contentions, are either identical or so similar as to make no material difference except for the basis of application - the first application being to jointly negotiate (i.e. to give effect to the relevant contract arrangement or understanding) for prices and other terms and conditions of supply of fresh fruit bunches with the processors and to enter into and give effect to an exclusionary provision, while this application is to enter into the relevant contract or arrangement or arrive at an understanding for negotiation of prices and terms and conditions of supply of fresh fruit bunches with the processors. Hence there will not be much discussion of the detail here and this document should be read in conjunction with determination A2011/12, the reasoning in, and assessment of competition effects and public benefit of which is determined to form part of this draft determination.

1.0.5. For ease of reference, a copy of determination A2011/12 is attached to this draft determination.

2. **THE PARTIES**

2.0.1. The parties identified in the first application are the same as in this application and draft determination.

3. **PUBLIC CONSULTATION**

3.0.1. The Commission, after registering the application, initiated public consultation in relation to this application. Public notices were published in print media and letters were sent to selected interested parties whom the Commission considered would have an interest in the application seeking submissions and comments. Included in the list were the two processors ("NBPOL" and "HOPL"), the Oil Palm Industry Corporation ("OPIC"), the World Bank and a number of other organisations including the Department of Agriculture and Livestock, the West New Britain Provincial Administration and other provincial administrations, and the National Research Institute.

\(^1\) This is the Commission’s Authorization Determination in relation to HOPGA’s first application.

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\*Draft Determination A2012/14 HOPGA Authorization Application\*
3.0.2. The Commission also consulted HOPGA for further submissions, and in response it was advised to use the information provided in the first application.

3.0.3. Most interested parties, from whom the Commission sought comments and submissions, verbally advised that they had no further comments to make; and that the submissions made in the first application be used in the assessment and determination of this application. Where relevant and appropriate, the Commission is using submissions made by them on the first application.

3.1. Summary of submissions before release of draft determination

3.1.1. The Commission received submissions from HOPL and NBPOL only and they are summarised below.

Hargy Oil Palms Limited (HOPL)

3.1.2. HOPL’s letter dated 29 October 2012, expressed surprise that this application was not mentioned at the conference relating to the first application in Kimbe, West New Britain Province.

3.1.3. It also mentioned that in its view the current price arrangement is not anti-competitive but pro-competitive therefore the authorisation application under Section 70(1) of the ICCC Act was irrelevant.

3.1.4. Further they viewed that this application should be rejected or at least deferred until such time as the review of FFB Price Formula (which the Commission understood as a ‘Revenue Cost Profile Study’), is completed.

3.1.5. Hargy sent a further letter dated 2 September 2013 stating its view that the (final) determination for the first application appeared to be in error because that application was made under Section 70(1) of the ICCC Act, but the determination provided for authorisation under Section 70(2).

3.1.6. It also raised issues in relation to the FFB Price Formula, stating that the Commission should not take any action in regards to determination A2011/12 until such time as the FFB Price Formula (“formula”) is fully completed.

3.1.7. Hargy also queried why it was named as a party to the arrangements.

3.1.8. The Commission has since responded to these issues raised, pointing out that the first application was submitted under Section 70(2) and Sections 70(5) and (6); and this application was submitted under Section 70(1). As to Hargy not being a party to the arrangements the subject of the first application and this application, in a letter to Hargy dated 17 September 2013, the Commission pointed to the inclusion of Hargy in the application by the applicant, and the various opportunities Hargy had to correct the Commission’s determination which included Hargy as a party, because, "...the Commission is not expert in all industries and depends on the players in the industry to provide accurate information for the purposes of its functions, where necessary and appropriate. That is the purpose of the consultation process, which includes the invitation of submissions on the draft determination and at conference". 
3.1.9. The Commission also pointed to the reference in the “Review of the Oil Palm Fresh Fruit Bunch Pricing Formula, FINAL REPORT...November 2001” pp.10, Table 2, Note(a), which stated that, “...A small number of Hoskins farmers occasionally sell FFB to the HOPL mill.”

3.1.10. The Commission said that Hargy is not bound to negotiate with HOPGA members and discussed Hargy’s statement in its letter that it purchases FFB from the Bialla Oil Palm Growers’ Association as follows:

“In so far as those purchasing arrangements involve joint pricing contracts, arrangements or understandings between Hargy, on the one hand, and the Bialla growers collectively on the other, without authorisation by the Commission, you may wish to consider your position under the law and take your own legal advice. Relevantly, in the context of such pricing arrangements, the Commission said, in the determination:

“By way of information, Section 50 of the ICCC Act, read together with Section 53, makes it clear, in effect, that any party to an agreement which provides for the fixing, controlling or maintaining of the price for supply or acquisition of goods or services (including any discount, allowance, rebate or credit) by any competing parties without authorization may contravene that Act. The Court and not the Commission would decide if the conduct contravenes the ICCC Act.

“Section 50 not only applies to contracts, but also to arrangements or understandings”.

3.1.11. In relation to the request by HOPL that the Commission delays its determination until the review of the formula is completed, the key point is that the application does not relate to the formula or the process for its review, but to the entering into negotiations by the parties. While the formula is likely to have relevance to the negotiations, there is no reason why negotiations cannot commence from the date the authorisation, if granted, takes effect. The Commission’s processes for dealing with the application are neither circumscribed by the formula review process nor its outcome. Furthermore, there is no obvious reason why the formula review process should dictate the timing of the determination or the commencement of the authorisation, if granted.

3.1.12. A copy of that letter has been placed on the public register.

New Britain Palm Oil (NBPOL)

3.1.13. NBPOL’s letter to the Commission dated 13 August 2013, also expressed confusion over which of the two applications the (final) determination dated 2 August 2013 referred to.

3.1.14. The Commission responded to this letter, again clarifying the specific sections of the ICCC Act the respective applications were submitted under.

4. COMMISSION’S ASSESSMENT

4.0.1. Please refer to the detailed discussion of interested parties’ submissions on the first application and the Commission’s assessment of the competition, public benefit and public detriment issues in determination A2011/12. All the competition, public benefit and public
- the authorization was granted on the basis of information that was false or misleading in a material particular, or
- there was a material change in circumstances since the authorization was granted, or
- a condition upon which the authorization had been granted had not been complied with.

5.0.9. Should any of the conditions listed above not be complied with, the Commission may revoke or amend the authorization.

5.0.10. If growers are going to effectively participate in negotiations there is clearly a need for some basic training in accounting concepts and the industry is encouraged to provide this.

5.0.11. This authorization will come into force and cease concurrently with determination A2011/12.

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DR BILLY MANOKA, PhD
Commissioner and Chief Executive Officer

DR ERIC OMURU, PhD
Associate Commissioner (Resident)

MR. DAVID DAWSON
Associate Commissioner (Non-Resident)

Dated the 29th day of October 2013