VARIATION AND AMENDMENT TO DETERMINATION, ADDENDUM AND REASONS

AUTHORISATION APPLICATION

FOR PROPOSED ACQUISITION OF PORTION OF CURTAIN BROS MOTUKEA PORT

On 17 September 2014, the Commission made a Determination and reasons (“the Determination”) in the above matter granting authorisation subject to certain conditions being satisfied. On 25 September 2014 the Commission made an Addendum to the Determination (“the Addendum”).

The Commission has been informed by Independent Public Business Corporation (“IPBC”) that on 22 October 2014, IPBC gave to PNG Ports Corporation Limited (“PNGPCL”) a Notice pursuant to section 461 of the Independent Public Business Corporation of Papua New Guinea Act 2002 (“the IPBC Notice”) setting policies and giving directions concerning the Motukea port. The Commission has received a copy of the IPBC Notice Direction to PNGPCL as served upon PNGPCL.

The Commission is satisfied that the IPBC Notice and the obligations which it imposes upon PNGPCL to comply with its terms have the effect of ensuring that the proposed acquisition of Motukea would, in the circumstances which now exist, result in such a benefit to the public that it should be permitted. The Commission is therefore satisfied that the proposed acquisition should be authorised under s 82 of the Independent Consumer and Competition Commission Act 2002 without the need to impose conditions.

The Commission varies and amends the Determination and Addendum as follows:

Clause 72-74 and their headings, as amended by the Addendum, are deleted.

New clauses and headings are added as follows:

NOTICE BY IPBC TO PNGPCL

72. On 22 October 2014, IPBC gave a Notice to PNGPCL pursuant to section 461 of the Independent Public Business Corporation of Papua New Guinea Act 2002 (“the IPBC Direction”). The Commission has received a copy of the IPBC Notice to PNGPCL as served upon PNGPCL. A copy of the IPBC Notice Direction is attached as Schedule 1.

The Commission is satisfied that the IPBC Notice and the obligations which it imposes upon PNGPCL to comply with its terms have the effect of ensuring that the proposed acquisition of Motukea will result in such a benefit to the public that it should be permitted. The Commission is therefore satisfied that the proposed acquisition should be authorised under s 82 of the Independent Consumer and Competition Commission Act 2002 without the need for conditions.
DETERMINATION

73. The Commission hereby grants authorisation to the proposed acquisition.

Dr Billy Manoka, PhD
Commissioner

Dr Eric Omuru, PhD
Associate Commissioner (Resident)

Dated 22 October 2014

SCHEDULE 1

Copy of the IPBC Direction.
Independent Public Business Corporations of Papua New Guinea Act 2002

SECTION 46I NOTICE

TO : The Chief Executive Officer – PNG Ports Corporation Limited
     : The Chairman & Directors – PNG Ports Corporation Limited (PNGPCL)
FROM : The Independent Public Business Corporation of PNG (IPBC)
SUBJECT : NOTICE UNDER SECTION 46I OF THE INDEPENDENT PUBLIC BUSINESS CORPORATION OF PAPUA NEW GUINEA ACT 2002 ("ACT")

A. PREAMBLE

On 24 July 2014, the National Executive Council (NEC) by Decision No.214/2014 (NEC Decision) provided for the acquisition of Motukea Port from Curtain Bros (PNG) Limited (proposed acquisition) through a Port Sale Agreement, subject to achieving all necessary statutory approvals.

The NEC also approved the execution of a Letter of Intent between PNGPCL, IPBC and Curtain Bros whilst the necessary statutory approvals were being sought to execute the PSA.

In accordance with the NEC Decision, on 10 September 2014 the Letter of Intent was duly executed.

The IPBC also noted that it had been previously informed by the ICCC that any proposal for the Motukea port would require approvals under the ICCC Act, without which the ICCC may take action under the ICCC Act. The IPBC therefore considered that a necessary statutory approval to execute the PSA would require approval from the Independent Consumer and Competition Commission (ICCC). Furthermore, during the approval and clearance of the Letter of Intent, the State Solicitor also requested ICCC clearance for the PSA. Consequently, the IPBC lodged applications with the ICCC for clearance and authorization of the proposed acquisition under sections 81 and 82 of the Independent Consumer and Competition Commission Act 2002 (ICCC Act).

On 9 September 2014, the ICCC announced that it declined to give clearance for the proposed acquisition as it was not satisfied that the proposed acquisition will not have, and will not be likely to have, the effect of substantially lessening competition in markets in PNG. The ICCC then proceeded to consider the IPBC’s application for authorization.

On 17 September 2014, the ICCC granted authorization for the proposed acquisition on the basis that the proposed acquisition would be likely to result in such a benefit to the public that it should be permitted. In making its determination, the ICCC made clear that while it considered that there are considerable benefits to the community that may result from the proposed acquisition there is also the potential for considerable detriment. The ICCC’s determination was expressed in such terms that authorization was only granted where certain
"conditions" as set out in the determination were met. Fourteen such conditions were set out in the ICCC’s determination.

By an addendum dated 25 September 2014 (the Addendum), the ICCC varied its determination to amend one of the conditions and delete another so as to leave 13 conditions stipulated by the ICCC.

PNGPCL has objected to the conditions sought to be imposed by the ICCC. It points to its legal advice that it is beyond the ICCC’s power to express an authorization under section 82 of the ICCC Act as being subject to conditions.

The ICCC rejects that contention and, in any event, observes that in the absence of the conditions, it has refused to grant authorization because it considers the statutory test for authorization is not met if the proposed acquisition proceeds without addressing the requirements of those conditions.

The IPBC has carefully considered the concerns expressed by PNGPCL and the views of the ICCC. It has also convened and participated in detailed discussions between all parties in an effort to reconcile the differing opinions. These discussions have resulted in a willingness on the part of the ICCC to further amend the conditions that it says are needed to deal with the anticompetitive potential of the proposed acquisition. PNGPCL remains staunchly opposed to the ICCC’s views and has declined to execute the PSA while the conditions remain.

Consistent with the NEC Decision, the IPBC seeks to execute the PSA without further delay. Moreover, the IPBC considers that the proposed port industry reform in the Port Moresby region is of substantial national interest and cannot continue to be delayed in the face of the current impasse.

The IPBC considers that the proposed acquisition can only be pursued subject to the statutory requirements of the ICCC Act, including the need to ensure that the proposed acquisition is not susceptible to challenge under section 69 of the ICCC Act. The IPBC respects the ICCC’s views as to the potential anticompetitive detriments from the proposed acquisition if it were permitted to proceed without appropriate regulatory protections.

In those circumstances, and having regard to the legal uncertainty that may surround the granting of an authorization for acquisition of assets of business subject to conditions (while not necessarily accepting that it is beyond the ICCC’s power to do so), the IPBC has decided to give this Notice under section 461 of the Independent Public Business Corporation Act 2002.

This Notice is intended to make clear that the proposed acquisition will be pursued by the IPBC, through PNGPCL, only subject to a specific regulatory framework as established by the policies and directions set out in this Notice. These policies and directions are in respect of matters that concern the activities of PNGPCL as a Majority State Owned Enterprise, with a particular focus on industry reform. They have been formulated having regard to the ICCC’s objectives in identifying the matters previously identified as “conditions” in the ICCC’s determination.

The IPBC intends that by giving this Notice the ICCC will be in a position to vary its determination made on 17 September 2014 (as amended by the addendum dated 25 September
2014) so as to grant authorization for the proposed acquisition as governed by the policies and directions in this Notice. In those circumstances, having regard to the ICCC’s reasons for its determination, the IPBC submits that the authorization can be made without being expressed to be subject to any conditions.

B. POLICIES AND DIRECTION

TAKE NOTICE that the IPBC Board in its Meeting of the 21 October 2014 deliberated on the issue of the proposed acquisition and the concerns raised by the ICCC.

AND TAKE FURTHER NOTICE that as a result of that Board decision, NOTICE IS HEREBY GIVEN to PNGPCL, being a Majority State Owned Enterprise within the meaning of the Independent Public Business Corporation Act 2002 (the Act), setting the policies and giving the directions set out herein.

The IPBC HEREBY SETS POLICIES in connection with matters concerning the activity of PNGPCL relating to the ownership and operation of port facilities in Port Moresby and Motukea, and PNGPCL is HEREBY DIRECTED, in the following way:

1. Pursuant to the NEC Decision No.214/2014 and subject to this Section 461 Notice, PNGPCL shall immediately upon issue of the Legal Clearance from the State Solicitor’s Office execute the Port Sale Agreement with Curtain Bros (PNG) Ltd for the acquisition of Motukea Port.

2. PNGPCL will continue to provide port services at Port Moresby only until the main port operations in Port Moresby are transferred to the Motukea port and Motukea is fully operational.

3. To the extent that PNGPCL continues to have regulatory or licensing oversight over Motukea port or over the providers of any port services in or related to Motukea port, it will exercise these functions in consultation with, and having regard to any recommendations of, the ICCC.

4. PNGPCL may operate and be involved in the operation of, Motukea port and any business providing port or port related services in connection with Motukea port only as approved by the ICCC in writing and subject to such conditions as the ICCC may require. This Direction does not preclude PNGPCL acting solely as landlord and entering into long term leasing agreements with persons as selected in accordance with clause 5 below.

5. IPBC in consultation with PNGPCL will establish a selection panel to select the new operator of the Motukea Port and any service provider serving the port or its customers. PNGPCL may participate as a minority member of the selection panel. The ICCC will also participate as a member of the selection panel.

6. Any regulatory contract (or replacement regulatory contract) issued to PNGPCL and the new operator of the Motukea Port shall include provisions dealing with the following matters, on terms to be established in accordance with the provisions of Part III of the ICCC Act:
(a) the port operator shall not discriminate between customers of the port on price and service;

(b) the port operator shall publish their proposed charges and shall adhere to those published charges without any discounts or allowances;

(c) the basis on which the port operator will deal with incoming ships whether on a first come first served or other basis, including procedures for dealing with complaints;

(d) the requirement that the port operator shall include in every contract of engagement with suppliers of port services terms that these suppliers shall not discriminate in favour of their own integrated businesses or against the business of its competitors; and

(e) consideration will be given to international benchmarks among other regulatory principles in determining prices for regulated services.

Where in this Notice it is stated that the ICCC is to perform a function, it is intended that the ICCC will do so having regard to its primary objectives in section 5 of the ICCC Act.

AND TAKE FURTHER NOTICE that pursuant to Section 46J of the IPBC Act, where PNGPCL by its Board, Management or employees, fails to comply with or ignores or fails to give prompt effect to this Notice, each of the Directors including the Chief Executive Officer shall be deemed to have contravened Part VIA of the IPBC Act and also breached their duties as Directors pursuant to Section 112 of the Companies Act for which IPBC shall be entitled to either commence prosecution under the Companies Act or dismiss the Chief Executive Officer and Directors from Office.

AND TAKE FURTHER NOTICE that this Notice shall take immediate effect on and from the date herein under provided and unless earlier rescinded or revoked shall remain in force for such period as may be determined by IPBC.

DATED this the 22nd day of October 2014.

For and on behalf of the
Independent Public Business Corporation of PNG

[Signature]

Mr. WASANTHA KUMARASIRI, OBE
MANAGING DIRECTOR
Independent Public Business Corporation