Determination and Reasons

Authorisation Application
For Proposed Acquisition of Portion of Curtain Bros Motukea Port

Registration Date: 18 August 2014
Decision Date: 17 September 2014
Public Register No.: A2014/17
EXECUTIVE SUMMARY

1. The Independent Public Business Corporation ("IPBC") applied to the Independent Consumer and Competition Commission ("Commission" or "ICCC") for clearance and authorization to acquire a portion of Motukea port within the port of Port Moresby from Curtain Brothers (PNG) Limited ("Curtain Bros"). The applications were checked for correctness and were registered on 18th August 2014; and the relevant processes began thereafter. This determination relates to the authorization application. The clearance decision was issued on 09th September 2014. Further details of that are discussed in the body of this determination.

2. IPBC informed the Commission that the parties to the acquisition are Papua New Guinea Ports Corporation Limited ("PNGPCL"), IPBC and the Independent State of Papua New Guinea, and the seller Curtain Bros. The proposed acquisition will facilitate the Government of PNG's decision for the relocation of some of the port facilities of Port Moresby port currently operated by PNGPCL.

3. The Commission understands the intention of the Government is to have a private operator operating the proposed Motukea port. However, the Commission was not informed who that private operator is, or would be.

4. Authorization is a statutory process under the Independent Consumer and Competition Commission Act 2002 (ICCC Act). It allows a business to seek exemption from legal action under the ICCC Act where that business proposes to acquire assets or shares of another business. The Commission may grant authorization for IPBC to proceed with the transaction if it is broadly satisfied that the benefits that result from the acquisition will result, or will be likely to result, in a net benefit to the community. In so doing the Commission will consider:

   a. whether the benefits that result, or will be likely to result, will flow directly or indirectly from the proposed acquisition,
   
   b. whether such benefits will provide a benefit to the community generally, and
   
   c. if so, do such benefits outweigh, or will they be likely to outweigh, any detriments to the community that may result from the proposed acquisition.

5. Authorization, if granted by the Commission, protects IPBC and the other parties from action for breach of the ICCC Act. Such action may be taken by the Commission or third parties.

6. The Commission may grant authorization only in relation to a proposed acquisition. If an acquisition has been completed before an authorization decision, then any authorization granted will not provide protection against legal proceedings.
7. The ICCC Act provides that in considering an application for authorization the Commission must have particular regard to any efficiencies that may result from an acquisition. It also provides that the onus is on the applicant to satisfy the Commission that there is net benefit to the community flowing from an acquisition.

8. Authorization is a public and transparent process and all relevant material (subject to confidentiality) has been placed on a public register. That register is included in the Commission’s website and a hard copy is available at the Commission’s Port Moresby Office for perusal. A copy of the authorization application is on the public register together with the applicant’s supporting submission and the submissions of other parties.

9. In considering an application such as this, the Commission consults widely. The purpose of this is to hear what others have to say as to the benefits/detriments that result from the proposed acquisition and also to test in the community the submissions of the applicant and the concerns of the Commission.

10. Following registration of this application the Commission identified a list of interested parties and forwarded the application and supporting submission to those parties for comment. The Commission also identified a number of key parties, and as well as inviting them to lodge a written submission, those parties were interviewed by Commission staff. Copies of all submissions received are on the public register.

11. In this case the Government also lodged a submission. That submission emphasised the importance of an efficient port system in the development of the national economy and its view that this proposed acquisition would contribute towards that.

12. That submission, coming as it does from the Government commenting on matters of national interest has been given careful attention by the Commission.

13. In its consideration of the application on its merits the Commission has identified the following benefits to the community as resulting (or likely to result) from the proposed acquisition -

- compressed time frame for establishment of the new port,
- reduction in landside traffic issues created in Port Moresby by the diversion of heavy traffic away from the central business area of Port Moresby,
- likely alleviation of capacity constraints and enabling of future port growth thereby bringing about increased efficiencies in the handling of cargoes at the port of Port Moresby, and
- provision for redevelopment of valuable downtown land in Port Moresby.
14. Whilst the applicant stated that PNGPCL will be the landlord, the details of the proposed operations of the proposed port and the identity of the operator(s) is/are uncertain. The Commission considers that a number of detriments may result. They include:

- the number of potential competitors is likely to be reduced,
- there are likely to be higher barriers to entry and expansion,
- there is potential for increased prices and profit margins,
- the potential entry of a new vigorous competitor is likely to be foreclosed or, at the least, reduced,
- there may be adverse consequences for landowners and local settlers,
- potential for increased land transport costs,
- concerns about access issues, and
- the likelihood of significant costs in upgrading roads and other infrastructure and the likely impact on port costs of such costs.

15. When the operations of the parties are clarified and known it may be that some of these detriments would no longer be relevant or would need to be given less weight. However, in the meantime the Commission must consider what is before it.

16. On balance, the Commission considers that there are considerable benefits to the community that may result from the acquisition but there is also the potential for considerable detriment. The Act provides that the Commission may impose conditions as a part of an authorization determination. The application for authorization does not, without conditions, pass the public benefit test and it would be necessary to refuse it in the absence of conditions.

17. The Commission therefore proposes to impose conditions in the case of this application. The effect of those conditions will be to ensure that the benefits, will outweigh detriments of the acquisition.

18. The Commission therefore proposes to grant authorization for the proposed acquisition only subject to appropriate conditions.

INTRODUCTION

1. The Independent Public Business Corporation ("IPBC") applied for clearance and authorization to acquire a portion of Motukea port from Curtain Bros. IPBC informed the Commission that the parties to the acquisition are Papua New Guinea Ports Corporation Limited ("PNGPCL"), IPBC and the Independent State of Papua New Guinea, and the seller Curtain Bros. The applications were checked for correctness and were registered on 18th August 2014 and the relevant processes began thereafter.
2. The proposed acquisition will facilitate the Government of PNG’s decision for the relocation of some of the port facilities of Port Moresby wharf currently operated by PNGPCL.

3. The clearance application lodged by IPBC has been considered by the Commission. It issued its decision on 09th September 2014. Clearance can only be granted if the Commission is satisfied by the applicant that the proposed acquisition will not result or be likely to result in a substantially lessening of competition in the relevant market. The Commission was not satisfied and refused to grant clearance. A copy of that decision is on the public register. Various aspects of that decision are referred to in this determination.

4. Authorization may only be granted if, essentially, the proposed acquisition results in a net benefit to the public. The test is discussed in more detail later.

5. The Commission understands that the intention of government is to have a private operator operating the proposed Motukea port. However, the Commission was not informed and does not know who that private operator is, or would be.

6. Authorization is a statutory process under the ICCC Act. It allows a business to seek exemption from legal action under the ICCC Act where that business proposes to acquire assets or shares of another business. The Commission may grant authorization for IPBC to proceed with the transaction if it is broadly satisfied that the benefits that result from the acquisition will result, or will be likely to result, in a net benefit to the community. In so doing the Commission will consider:

   a. whether the benefits that result, or will be likely to result, will flow directly or indirectly from the acquisition,
   
   b. whether such benefits will provide a benefit to the community generally, and
   
   c. if so, do such benefits outweigh, or will they be likely to outweigh, any detriments to the community that may result from the acquisition.

7. Authorization, if granted by the Commission, protects IPBC and the other parties from action for breach of the ICCC Act. Such action may be taken by the Commission or third parties.

8. The Commission may only grant authorization in relation to a proposed acquisition. If an acquisition has been completed then a determination will not provide protection.

9. The ICCC Act provides that in considering an application for authorization the Commission must have particular regard to any efficiencies that may result from an acquisition. It also provides that the onus is on the applicant to satisfy the Commission that there is net benefit to the community flowing from an acquisition.
10. Authorization is a public and transparent process and all relevant material (subject to confidentiality) has been placed on a public register. That register is included in the Commission's website and a hard copy is available at the Commission's Port Moresby Office for perusal. A copy of the authorization application is on the public register together with the applicant's supporting submission and the submissions of other parties.

11. In considering an application such as this, the Commission consults widely. The purpose of this is to hear what others have to say as to the benefits/detriments that result from the proposed acquisition and also to test in the community the submissions of the applicant.

12. Following registration of this application the Commission identified a list of interested parties and forwarded the application and supporting submission to those parties for comment. The Commission also identified a number of key parties and, as well as inviting them to lodge a written submission, those parties were interviewed by Commission staff. Copies of all submissions received are on the public register (subject to confidentiality). To view full submissions, please visit the ICC Commission website: www.iccc.gov.pg.

THE PARTIES

The Independent Public Business Corporation (“IPBC”)

13. The IPBC is a 100% State-owned statutory corporation that holds assets and investments on behalf of the Government of PNG. The state owned enterprises including PNGPCL report their business activities to IPBC. IPBC is an independent entity as stated in the Independent Public Business Corporation Act 2002 (IPBC Act).

Papua New Guinea Ports Corporation Limited (“PNGPCL”)

14. PNGPCL is the successor company to PNG Harbours Board. It is a registered company under the Companies Act 1997. It operates all the declared ports in PNG. PNGPCL is also vested with a delegated authority by the Department of Transport to provide harbour management and maritime compliance responsibilities at all land/water interfaces (wharves and jetties) declared and non-declared ports and harbours throughout the country. It is a State Owned Entity (SOE) whom the IPBC has ownership over through Government shares that it holds in PNGPCL.

Curtain Brothers PNG Limited (“Curtain Bros”)

15. Curtain Bros is a conglomerate and has wharf and port related interest in Motukea port outside Port Moresby. This application related to the proposed purchase of a portion of the Motukea port for relocation of the Port Moresby wharf operated by PNGPCL.
THE FUNCTION OF THE ICCC

16. The Commission is an independent statutory authority. It is required to consider applications lodged and apply the tests set out in the ICCC Act to those applications. The Commission is not subject to direction by the Government. However, the government may lodge submissions in respect of an application as can any party with an interest in an application.

17. Section 82 (3) of the ICCC Act, a part of which is quoted below, provides that the Commission shall -

(a) if it is satisfied that the acquisition will not have, and will not be likely to have, the effect of substantially lessening competition in a market, by notice in writing to the person by or on whose behalf the notice was given, give a clearance for the acquisition; (the Commission has, as mentioned above, issued a clearance decision in which it decided that the proposed acquisition is likely to substantially lessen competition in the relevant markets) or

(b) if it is satisfied that the acquisition will result, or will be likely to result, in such a benefit to the public that it should be permitted, by notice in writing to the person by or on whose behalf the notice was given, grant an authorisation for the acquisition; or

(c) if it is not satisfied as to the matters referred to in Paragraphs (a) or (b), by notice in writing to the person by or on whose behalf the notice was given, decline to give a clearance or grant an authorisation.

18. It is the applicant’s obligation to provide necessary information to satisfy the Commission of the above tests. Essentially the Commission has to assess the benefits and detriments to the community likely to result from the proposed acquisition, and weigh the two. If it is not satisfied that the benefit outweighs the detriment it must refuse authorization. However, it may impose conditions on an application and by so doing change the balance. That balance can be changed by either imposing conditions that raise the public benefits or lower the detriments or a combination of both.

19. In determining what amounts to ‘public benefit’, the Commission regards anything of value to the community generally or any contribution to the aims pursued by society including the achievement of the economic goals of efficiency and progress as a public benefit. Public detriments are the converse of public benefit and may include:

- a reduction in the number of effective competitors;
- increased restrictions on entry;
- constraints on competitiveness by market participants, affecting their ability to innovate effectively and conduct their affairs efficiently, competitively and independently.
LIKELY FUTURE WITH AND WITHOUT THE PROPOSED ACQUISITION

20. To assess the proposed acquisition for the purposes of the test, the Commission considers it useful to compare the likely future ‘with’ the proposed acquisition and separately, ‘without’ the proposed acquisition.

21. Put simply, this means that the Commission must be satisfied that the applicant’s claimed benefits result directly or indirectly from the subject matter of the application. If the claimed benefits were to arise irrespective of this proposed acquisition, then the Commission could not consider for the purpose of the authorization test that such a benefit is a result of the proposed acquisition.

22. The applicant has not provided any submissions on likely future with and without the proposed acquisition.

SUBMISSIONS RECEIVED

Applicant’s public benefit claims

23. The applicant submitted that the proposed acquisition will result in “…significant public benefits that outweigh the small reduction in competition that could occur in the short run.” In support of this claim, IPBC's public benefit claims are summarised below.

1. Alleviate capacity constraints

24. The applicant stated that the demand for port services is expected to grow strongly over coming decades, and Port Moresby is expected to experience average growth rates of around 6.1% a year to 2030. It submitted that at these growth rates port volumes will roughly double by 2025 and its current operational capacity is expected to exceed in 2015.

25. IPBC argued that a constrained port would have significant negative effects such as either queuing or higher prices for shipping lines, for the PNG economy. The applicant stated that this generates costs which are passed on to freight users and, eventually, consumers which will negatively affect the standard of living of PNG residents while higher costs of exports will reduce the competitiveness of PNG’s producers.

26. The applicant submitted that moving the port to Motukea will allow capacity constraints to be reduced. It indicated that port operational modelling has been undertaken for the site in Motukea and the study has confirmed that Motukea port will be able to meet the future increase in demand for port services.
27. IPBC also submitted that relocation to Motukea will allow for landside capacity constraints to be alleviated and the relative abundance of land at the site will allow for the entry of new providers of ancillary services, such as storage, as well as for the construction of efficient distribution facilities. It gave example of two of the largest land transport providers who have already established cargo storage yards in the vicinity of Motukea.

28. IPBC further submitted that the site at Motukea also meets other likely future capacity requirements such as forecast dimensions of ships. It added that this will be achieved through the port modification, introduction of large ships into the port, the utilization of ship to shore cranes, improved turnaround times and ultimately establishing a regional hub in Port Moresby which will result in employment creation.

2. Reduce landside traffic issues created in Port Moresby by the port

29. In respect of this public benefit claim, the applicant submitted that due to the location of Port Moresby port, it has been causing the landside traffic issues around the Port Moresby Central Business District (CBD). It estimated that the port freight volumes are expected to increase significantly and it will add more to the current traffic problems. It submitted that more precisely, heavy vehicle movements near the CBD create two main costs as follows:

1) **Congestion costs** where heavy vehicles contribute to road congestion which creates costs for other road users; and

2) **Other Externality costs** such as noise, pollution and danger created by heavy vehicle movements. Noise affects local businesses and communities, pollution affects the environment and accidents generate costs in terms of medical care and loss of life.

3. Allow for the redevelopment of valuable downtown land in Port Moresby

30. As noted above, the applicant stated that the port is located very close to the CBD on some of the highest value land in Port Moresby, and relocating the port to Motukea would free up this land and allow it to be redeveloped given the upcoming Pacific Games in 2015 and the Asia Pacific Economic Corporation (APEC) Meeting in 2018. It supported that depending on the precise use of the land, redevelopment could result in some combination of:

1. Increased commercial floor space;
2. Increased residential properties; or
3. Increased recreational facilities.

31. The applicant stated that the economic benefits created by this potential development are complex and will depend on the precise nature of the development. In giving an example, it stated that increased commercial floor space will work to lower the costs of leasing for businesses which in turn will create benefits by reducing the costs of production and making PNG firms located in Port Moresby more efficient.
32. In respect of the reduction in competition on port efficiencies, the applicant states that in industries where there are significant economies of scale, such as port services, there is a countervailing force to the effect of reduced competition on efficiency: the effect of scale on efficiency. It stated that fewer competitors mean a larger scale for remaining firms and, in the presence of economies of scale, lower costs. The applicant further supported with independent research done into port competition and efficiency in overseas ports that productivity costs of reduced competition would be offset by economies of scale benefits by around the mid-2020. It stated that beyond this date, the scale benefits of port expansion enabled by the proposed acquisition may actually result in net economic benefits.

33. The applicant further stated that the port development will demand the improvement of essential services such as power, water and sanitation to the area and benefits will flow through to the landowners within this area in terms of employment and economic activities.

34. Besides the above public benefits claims, the applicant also put forward that the greatest public benefit that will emanate from this proposed acquisition as far as the alternative uses of the land currently occupied by PNGPCL is the GoPNG’s intent to develop infrastructure and facilities in this particular area in preparation for PNG’s hosting of the APEC 2018 meeting in PNG. It submitted that this development and the spin off economic and social benefits that will emanate from it will be substantial not only for this particular area of Port Moresby and greater Port Moresby but also for PNG’s standing as a country in successfully hosting such an international event of such magnitude as the APEC 2018 meeting.

**Avenel Engineering Systems ("AES")**

35. AES was originally established as New Britain Electric by Senior Director, Dominic Avenell in 1956, and began its operations in 1997. It provides a wide range of construction and project services across civil and construction works including plant hire, earth moving, haulage. AES constructed and operates Raavu Industrial Park, a small private wharf specialized in receiving LNG cargo and occasionally coastal vessels.

36. In a staff interview with AES representatives, it was noted that the proposed acquisition, in their view, would benefit them as the relocation of the current port to Motukea would bring the main shipping port in Port Moresby closer to AES and as such it would increase traffic at that end and would increase the chances of ships pulling into the AES port due to increased demand.

37. AES submitted that in the short-run (after the acquisition and relocation), rates of services would rise and the profit margins gained by PNGPCL would depend on the number of shipping vessels that pulled into the new Motukea port.
Carpenters Shipping Agency (“CSA”)

38. CSA is wholly owned by its parent company MBf Holdings Bhd, a publically listed Malaysian conglomerate. CSA currently operates two deep sea vessels and offer shipping services in PNG for both international and domestic cargos.

39. The Commission staff met with representatives of CSA. They confirmed that the PNGPCL’s port had reached maximum capacity and the port needs to be relocated in order for it to expand for greater shipping volumes and services. However, they said that the current road infrastructure leading to Motukea port cannot cater for increase in the traffic of large container trucks and this may result in road traffic congestion. They also said that land transport costs would be higher to due to the longer distance from Motukea to various locations in Port Moresby. Overall, CSA considered that the proposed acquisition is good, however it needs to be planned and executed properly.

Bismark Maritime Ltd (“Bismark”)

40. Bismark is a coastal shipping operator and owns a port in Fairfax Harbour for its own purposes and occasionally other coastal shipping vessels from other companies.

41. Bismark is of the view that Port Moresby port does not currently need relocation. It further stated that the proposed acquisition would bring a number of problems such as traffic congestion on roads leading to Motukea, increased transport costs due to distance of transporting containers to and from Motukea, adding to the final cost of goods and services to the consumer. Bismark is also concerned that staff currently working at the port would need adequate public transport to the new location.

42. Bismark said that in terms of competition it would be only fair if all other ports at Fairfax relocate to Motukea on the same terms in order to compete fairly. There should not be preferential treatment given to certain shipping companies or port service providers when the port is relocated as it would lessen competition.

43. The main barriers to entry were licensing and registration as well as landowner issues which companies would have to deal with when establishing a port or providing stevedoring services. Landowners are a powerful force in PNG and can stop major development projects if not properly addressed.

44. Bismark thought that the large costs of acquiring Motukea Island would have to be paid for some time in the future. PNGPCL would have to increase prices and rates of services to recuperate costs to acquire the port. Shipping companies and users of ports services would then pass them on to the end consumer.
45. Overall, Bismark submitted that it is not directly opposed to the relocation of the port to Motukea if all stakeholders (ship owners, shipping agents, stevedoring companies, transport companies, etc.) are given equal opportunities, as any favouritism or concessions that would give the recipient an unfair competitive advantage.

**Inchcape Shipping Services (“ISS”)**

46. ISS is a shipping agent with shipping lines operating in PNG. It is of the view that the proposed acquisition for the purposes of relocation of the Port Moresby port is a good idea as the city is currently growing and the traffic congestion problem would be solved.

47. ISS is also concerned that current PNGPCL harbour charges increase at around 12% per annum and they are sure that with the acquisition and relocation, the rates would continue to increase.

**Department of Public Enterprises (“DPE”)**

48. DPE submitted that the proposed acquisition will not have the effect of substantially lessening competition and would generate healthy competition benefits and consequently would benefit the overall economy.

49. The DPE is of the view that if the ICCC approves this acquisition, the acquisition would increase PNGPCL’s ability to provide sufficient port facilities at the upstream markets and it would trigger efficiency benefits to the entire supply chain within and around the port area. It further stated that this would cause a chain reaction in competitive pressure within the downstream markets like stevedoring and handling, trucking operations, storage spaces within nearby lands. It stated that these competition outcomes in downstream markets would be able to generate significant benefits for which the ICCC Act is aimed at promoting and protecting.

**The Nenehi Laurina Landowner Group**

50. Members of the above landownership group from Tanatana Village made known to the ICCC in a meeting and a subsequent letter that they had an interest in this acquisition. They said that while they did not oppose the acquisition they wanted to be recognised as a party in this acquisition. Their main concern was that they were being left out of this acquisition and Curtain Bros was claiming portions of the land which they claim to have joint ownership of with Curtain Bros.

51. They also have claimed that the file that shows their title ownership has been tampered with and so it does not have their name.
EVALUATION OF APPLICATION

Public benefits

52. In considering the application the Commission will first consider the benefits. As required by the ICCC Act the Commission will give particular consideration to efficiencies that result (or may result) from the proposed acquisition. However, there are also other benefits that also will need to be considered. Following that it will consider detriments that may flow from the proposed acquisition and finally it will weigh the benefits and detriments and if the benefits outweigh the detriments it will grant authorization.

53. A number of submissions have been received raising a range of issues. In respect of some important issues there are conflicting views. The Commission has given consideration to all those issues to the extent relevant in consideration of this application. However, some of the issues raised are outside of the functions of the Commission and this determination will only consider benefits or detriments that arise either directly or indirectly from the proposal to acquire a portion of Motukea port.

54. The Commission thanks all those who have lodged written submissions and who have provided oral submissions. It is important for the Commission to consult widely in a matter such as this and it appreciates information and the time and effort of interested parties.

55. IPBC makes the following submissions -

Compressed time frame for development of the port

1.1. IPBC submits that development of new port facilities would normally take a considerable time because of licensing and registration issues and where landowner issues arise this may cause even further delays. In this regard the Commission notes that the issue of relocation of port facilities has been under consideration by Government for in excess of fifteen years.

1.2. IPBC says the portion being purchased already has facilities and although they will need to be upgraded and expanded there will still be a considerable saving in establishment time. Also it says landowner issues have already been addressed.

1.3. While the submission received on behalf of landowners throws some doubt on the latter point the Commission accepts that it is likely that the time frame for establishment will be significantly shortened. This will have implications for other claimed benefits discussed below as achievement of those claimed benefits will to a large extent be linked to the expeditious establishment of the new port facilities on the portion to be acquired.
Alleviation of capacity constraints

1.4. There was general consensus that the port usage has grown substantially recently, that the growth will continue and that the existing port will reach capacity shortly (although there is not complete agreement on the time frame). IPBC argued that a constrained port would have significant negative effects such as either queuing or higher prices for shipping lines, for the PNG economy. It also argued that capacity constraints will be reduced as a consequence of the proposed acquisition.

1.5. The Commission considers that as it is now, the Port Moresby port is not as efficient as it should be. As a result, there is port congestion. Also traffic is sometimes diverted to Motukea port. In this regard the Commission understands that this was one of the major factors that caused about 90% of the PNG LNG cargoes to be processed at the Motukea port.

1.6. Relocation of the port to Motukea will allow at least some of the factors mentioned above to be alleviated and this would reduce the anticipated capacity inefficiencies of ports services. These inefficiencies result in higher costs to port users which are ultimately passed on to consumers by way of higher prices of goods. The Commission accepts therefore that, as submitted by DPE, a move to Motukea is likely to have the potential to avoid capacity inefficiency and these will, if achieved, have flow on benefits in and around the port and to the broader community.

Reduction landside traffic issues created in Port Moresby by the port

1.7. Again there is general support for the submission that the current port causes traffic issues and that those issues are likely to increase. IPBC submits that there are congestion costs and other external costs such as noise, pollution and danger created by heavy traffic movements.

1.8. The Commission accepts that there are significant detriments resulting from the movement of heavy vehicles to and from the port and that these detriments will increase in the future and it is the interest of those directly and indirectly affected for these issues to be addressed.

Redevelopment of valuable downtown land in Port Moresby

1.9. IPBC submitted that relocating the port to Motukea would free up this land and allow it to be redeveloped. It added that the economic benefits created by this potential development are complex and will depend on the precise nature of the development.

1.10. The Commission accepts that these consequences will follow the relocation and there is resulting public benefit.
**Improvement of infrastructure, employment and economic activities**

1.11. These are submitted by IPBC as further benefits flowing from the proposed acquisition.

1.12. The Commission accepts that these benefits are likely to result as a consequence of the proposed acquisition.

**Commission conclusion on claimed public benefits**

56. While the Commission accepts that there are benefits in relocation of the port it needs to be satisfied that those benefits are linked either directly or indirectly to the proposed acquisition. In other words, would those benefits arise even if this acquisition did not proceed.

57. In the Commissions view commercial pressures would eventually result in a movement away from the present location. However, the crucial issue is that it may take some considerable time and even after the decision was made, regulatory and landowner issues may lengthen that period. That would not be in the public interest.

58. The Commission is therefore of the view that the proposed acquisition would shorten the time frame for relocation and the consequential benefits discussed above would follow.

**Public detriments**

59. As mentioned above the Commission will now consider detriments that may result from the acquisition.

60. An important detriment that needs to be considered is whether the proposed acquisition will or will be likely to lessen competition. In deciding that the Commission must firstly decide which areas of competition (or markets) are likely to affected by the proposed acquisition. This was considered in the Commission’s clearance decision referred to earlier. In that decision it said that any lessening of competition is likely to manifest in relevant markets identified below:

1. the market for the supply of all wharf facilities;
2. the market for the supply and acquisition of essential services (wharfage, berths and berth reservation spaces); and
3. the market for the supply and acquisition of contestable services (storage, stevedoring and pilotage).
61. In relation to those areas of competition the Commission is of the view that:

- the number of potential competitors is likely to be reduced,
- there are likely to be higher barriers to entry and expansion,
- there is potential for increased prices and profit margins, and
- the potential entry of a new vigorous competitor is reduced.

62. The Commission notes that a number of those who made submissions also had concerns about some of these.

63. The Commission also notes the arguments of IPBC in relation to reduction in competition. It does not accept that the claimed consequences will necessarily follow in relation to this proposed acquisition.

64. Considerations of detriments are not necessarily limited to competition detriments. Interested parties raised a number of other detriments too. They include -

- increased traffic congestion and access issues at Motukea,
- increased cost of transport due to increased distances to parts of Port Moresby, and
- the need for improved public transport for staff.

65. There would also be a need to upgrade roads and other infrastructure in the area of the new port. This would be substantial and Government would need to divert funds from other programs for this. Such infrastructure upgrades and increased traffic may impact adversely on landowners and others who live nearby as well in terms of pollution and accidents.

**Commission conclusion on likely detriments**

66. IPBC has not provided in any detail on who will be the operators of the new port and that makes it difficult to give appropriate weighting to the benefits identified. However, the Commission considers that there are likely to be substantial detriments. Foremost amongst them is that a viable competitor is taken out by the acquisition, thereby, in the absence of condition, removing competitive constraints presently impacting upon PNGPCL and increasing its market power.

**WEIGHING OF BENEFITS AND DETRIMENTS**

67. In its consideration of the applicant’s public benefit claims and taking into consideration submissions and comments from interested parties, the Commission has identified the following benefits to the community as resulting (or likely to result) from the acquisition -
• compressed time frame for establishment of the new port,
• likely alleviation of capacity constraints and enabling of future port growth thereby bringing about increased efficiencies in the handling of cargoes at the port of Port Moresby,
• reduction in landside traffic issues created in Port Moresby by the diversion of heavy traffic away from the central business area of Port Moresby, and
• provision for redevelopment of valuable downtown land in Port Moresby.

68. Bearing in mind that IPBC has not provided any detail of the proposed operation of the port the Commission has identified the following detriments that may result –

• the number of potential competitors is likely to be reduced,
• there are likely to be higher barriers to entry and expansion,
• there is potential for increased prices and profit margins,
• the potential entry of a new vigorous competitor is likely to be reduced,
• there will increased road traffic congestion and access issues at the new port,
• there will be a need for substantial expenditure on new infrastructure to address access issues,
• potential increased land transport costs, and
• a range of social costs to landowners and others.

69. The Commission acknowledges, however, that the extent of these detriments and the weight it has given them may have been different depending on the operational structure of the new port.

70. On balance, the Commission considers that there are considerable benefits to the community that may result from the acquisition but there is also the potential for considerable detriment. It is likely that the operators of the new port will not or will not be adequately constrained by competitors and on that basis concern that the potential for improved efficiencies will not be realised and passed on.

71. In these circumstances the Commission is not prepared to grant authorization to allow the acquisition to proceed except on conditions. Those conditions will need to address the concerns identified above.

CONDITIONS OF AUTHORISATION

72. The decision of the Commission is that the application for authorisation, as expressed by the applicant, can only be granted with conditions, as otherwise the Commission would have been unable to conclude that the benefits outweigh the detriments. The conditions are as follows:
1. PNGPCL may continue to provide port services at Port Moresby port until and up to the date that Motukea port becomes a fully-fledged port and fully operational.

2. PNGPCL shall not have any regulatory or licensing oversight over Motukea or over the providers of any port services in or related to the port unless approved by the Commission, in writing, upon such conditions as the commission may require.

3. When fully fledged PNGPCL shall not, without written consent of ICCC upon such conditions as it may require, own or operate the Motukea port or any business providing port or port related services at, to or from Motukea port except, to the extent, if any, approved by the Commission in writing and subject to such conditions as it may require, as partly owning landlord.

4. PNGPCL shall not itself select, or participate in the selection of, the operator for Motukea port or of any service provider servicing the port or its customers, except in relation to security or essential utilities and then only to the extent if any approved in writing by the Commission upon such conditions as it may require.

5. PNGPCL shall not be the fully owned or, except with the written approval of the Commission and upon such conditions as it may require shall not be a part owner or, landlord of Motukea port. Some other government entity or established entity shall be the landlord of Motukea port.

6. All port operators (including Motukea port operator and PNGPCL) shall not, at any port, discriminate between any customers of the port on price or service.

7. All port operators (including Motukea port operator and PNGPCL) shall publish the charges which it makes and shall adhere to those published charges without any discounts or allowances.

8. All port operators (including Motukea port operator and PNGPCL) shall deal with incoming ships strictly on a first come first served basis except in the case of emergency, in which case it shall issue a press statement within 24 hours identifying the preference given and the reason. Should any port operator (including Motukea port operator and PNGPCL) give preference to any ship out of order, it shall pay to the ship owners of all ships which should have had priority the sum of K15,000 per ship or such lesser sum as shall be agreed with the ICCC.
9. All port operators (including Motukea port operator and PNGPCL) shall, include as terms in every contract of engagement terms, imposing upon all suppliers of services in or in relation to port services, the obligation not to discriminate in favour of their own integrated businesses or against the business of its competitors in such terms as shall be satisfactory to the Commission and include in such contracts terms enabling a process of complaint to the Commission and determination by it of any disputes and terms ensuring that the Commission determination is considered final and to be abided by all parties.

10. The operator selected to operate Motukea port shall not, unless otherwise agreed in writing by the Commission, upon such conditions as it may require, be or be related to any firm which has, in the opinion of the Commission, market power in any market relating to shipping, ports or related services. In the event that a proposed operator is an operator with market power in shipping, port or related services, an application to the Commission would need to be made for approval, upon such conditions as the Commission may require including requirements relating to benchmarks to be achieved by the operator during the contract period and conditions effectively ensuring that anticompetitive behaviour or practices were not possible.

11. There shall be a regulatory contract applicable to the operator of Motukea port, where due consideration will be given to international benchmarks among other regulatory principles in determining prices and all port charges.

12. Licensing functions for Port Moresby port stevedoring services shall be transferred to the Commission within 12 months and for the rest of the country within 24 months.

13. There shall be no extra charges levied by a port operator where delay has been occasioned by no fault of the port customer. Any port charges may be protested to the Commission, which shall act as a ports disputes arbitrator and shall have the power to review any charges and levies and reverse or reduce them. The Commission shall have the power to order either party to pay the costs of any such review.

14. Regulated Asset Base (RAB) values for setting port charges shall not include any assets which have or should have been fully depreciated or the acquisition of which was costless to the operator. Any assets included shall be included at depreciated cost.
DETERMINATION

73. Subject to all the conditions above being satisfied, the Commission is satisfied that the proposed acquisition will result, or will be likely to result, in such a benefit to the public. The Commission hereby grants authorization subject to those conditions.

74. In giving this authorization, the Commission makes the following notes;

1.1. the parties complete the transaction within 12 months from the date of authorization;

1.2. a signed copy of the sale and purchase agreement is produced to the Commission immediately after the transaction is completed; and

1.3. prior to completion, all conditions must have been satisfied. They are conditions precedent, not conditions subsequent.

1.4. If the above conditions have not been satisfied before completion of the acquisition, this authorization will not apply and the acquisition will be open to be challenged under the ICCC Act.

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DR BILLY MANOKA, PhD
Commissioner/CEO

DR ERIC OMURU, PhD
Associate Commissioner (Resident)

DATED this 17th day of September 2014
On 17 September 2014, the Commission delivered its determination and reasons ("the Determination") in the above matter granting conditional authorisation.

Since delivery of the Determination, the Commission has received additional submissions from the Independent Public Business Corporation ("IPBC"). These submissions, as was also the case with the original application and its earlier submissions, were made by IPBC as chair of and on behalf of a Project Steering Committee consisting of the Office of the Chief Secretary, Department of National Planning and Monitoring, Department of Environment and Conservation, PNG Ports Corporation Limited ("PNGPCL"), Department of Transport, Department of Lands and Physical Planning,

IPBC raised the following issues, on behalf of the members of the Project Steering Committee:

1. The National Executive Council, in approving the acquisition, contemplated that PNGPCL would act as the landlord owner of the asset.
2. PNGPCL has existing long term contractual agreements with Exxon Mobil to provide pilotage and other services related to LNG shipping.
3. The inability of PNGPCL to participate in selection of the port operator may cause lack of industry knowledge. IPBC sought removal of the restriction in clause 72.4 of the Determination upon PNGPCL participating in the selection of the port operator.

The Commission has given careful consideration to the supplementary submissions on behalf of members of the Project Steering Committee. The Commission recognises the proposed acquisition is of national significance.

The Commission has reached the conclusions outlined below for the reasons set out.

The National Executive Council, in approving the acquisition, contemplated that PNGPCL would act as the landlord owner of the asset.

The Commission is aware of the terms of NEC Decision 214/2014. It is aware that the decision contemplates that PNGPCL, together with IPBC, be a participant in the proposed acquisition, but this is stated in the NEC Decision as subject to "achieving all necessary statutory approvals". The Commission has afforded, and will continue to afford, great respect to the national significance of the project, to the support of government for the project and to the terms of NEC Decision 214/2014.

There are very significant competition issues in the acquisition of the Motukea port by PNGPCL and it was in order to address those issues that the conditions expressed in the Determination were formulated. The Commission accepts, as a result of the supplementary submissions, that the government’s intention that PNGPCL should acquire Motukea as landlord only is viewed by government as of cardinal importance to the proposed acquisition. The task then is to consider
whether any modification of the conditions would permit that outcome while ensuring that the presence of PNGPCL as landlord did not cause, facilitate or permit anti-competitive outcomes.

After careful consideration, the Commission considers that conditions 72(3) and 72(5) could be amended as follows:

72(3) PNGPCL shall not operate, or have any involvement in the operation of, the Motukea port or any business providing port or port related services at, to, from or in connection with Motukea port except to the extent, if any, approved by the Commission in writing and subject to such conditions as the Commission may require. This clause does not preclude PNGPCL acting solely as landlord entering into such long term leasing agreements as the Commission shall approve and upon such terms, conditions and charges (including rental) as the Commission shall approve, the intention being that PNGPCL should act only as a passive landlord upon terms, conditions and at rentals which do not adversely affect competition and potential competition.

72(5) would be deleted.

**PNGPCL has existing long term contractual agreements with Exxon Mobil to provide pilotage and other services related to LNG shipping.**

As proposed amended clause 72.3 contains an exemption for conduct of PNGPCL “to the extent, if any, approved by the Commission in writing and subject to such conditions as the Commission may require”, it would be open to PNGPCL to apply to the Commission for consent to continue to perform the contracts to which the IPBC submission refers. Without the benefit of a proper study of the facts and the competition issues, it is not possible to predict the conclusion which the Commission would reach.

The inability of PNGPCL to participate in selection of the port operator may cause lack of industry knowledge. IPBC sought removal of restriction in clause 72.4 of the Determination upon PNGPCL participating in the selection of the port operator.

Clause 72(4) would not prevent PNGPCL from making submissions to the selecting authority in relation to potential applicants to become the port operator, although it would prevent PNGPCL from being a participant in the selection decision. There would be significant competition issues were PNGPCL to participate in the decision making process. In the absence of specifically enabling legislation, it is not easy to see how this could be achieved consistently with the existing requirements of the ICCC Act.

**Conclusion**

For the above reasons, the Commission varies the Determination made on 17 September 2014 as follows:

Clause 72(3) is deleted and replaced by the following:

72(3) PNGPCL shall not operate, or have any involvement in the operation of, the Motukea port or any business providing port or port related services at, to, from or in connection with Motukea port except to the extent, if any, approved by the Commission in writing and subject to such conditions as the Commission may require. This clause does not preclude PNGPCL acting solely as landlord entering into such long term leasing agreements as the Commission shall approve and upon such terms, conditions and charges (including rental) as the Commission shall approve, the intention being that PNGPCL
should act only as passive landlord upon terms, conditions and at rentals which do not adversely affect competition and potential competition.

Clause 72(5) is deleted.

Clause 74, 1.3 is deleted.

Clause 74, 1.4 is deleted and replaced by the following:

74. 1.4 If any of the above conditions shall have been breached, the acquisition will be open to be challenged under the ICCC Act.

Dr Billy Manoka, PhD
Commissioner

Dr Eric Omuru, PhD
Associate Commissioner (Resident)

Dated 25 September 2014