Application for Authorisation

By

Hoskins Oil Palm Growers Association Incorporated

to Enter Into Collective Negotiations

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 : 6/2/13
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 (“NBPO”) 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 relates.

1.0.3. This is the Commission’s 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 or boycott supplying FFB, 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 FFBs 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 determination.

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

1.0.6 Also attached is a copy of the World Bank and Klynveld Peat Marwick Goerdeler “KPMG” Work Plan for the FFB Formula Price Review.

2. The Parties

2.0.1. The parties identified in the first application are the same as in this application and 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 (“NBPO” 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

---

1 This is the Commission’s Authorization Determination in relation to HOPGA’s first application.
West New Britain Provincial Administration and other provincial administrations, and the National Research Institute.

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.

4. Summary of submissions before release of Draft Determination

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

4.1. Hargy Oil Palms Limited

4.1.1. 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.

4.1.2. 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 ICC Act was irrelevant.

4.1.3. Further they submitted 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.

4.1.4. 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 ICC Act, but the determination provided for authorisation under Section 70(2).

4.1.5. 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.

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

4.1.7. 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, which are 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”.

4.1.8. 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.”

4.1.9. 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”.

In relation to the request by HOPL that the Commission delay 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 not circumscribed either by the formula review process or 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.

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

4.2. New Britain Palm Oil (NBPOL)

4.2.1. 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.

4.2.2. The Commission responded to this letter, again clarifying the specific sections of the ICCC Act the respective applications were submitted under.
5. **Summary of submissions after release of Draft Determination**

5.0.1 The Commission received a submission from the Department of Trade Commerce and Industry and two responses from the Department of Prime Minister & National Executive Council (“PM & NEC”) and HOPGA. Both responses did not object to the draft determination. HOPGA only expressed its interest to participate in a conference should the Commission decide to call one.

5.1 **Department of Trade, Commerce and Industry (“DTCI”)**

5.1.1. DTCI, while noting that the oil palm growers have taken the step to promote oil palm cultivation in the country to meet edible oil scarcity and for import substitution, it believes the situation will not improve unless farmers get a remunerative price for their FFB. DTCI believes that the Commission’s role in determining the prices and other terms and conditions is crucial in this industry because the present price fixing formula for FFB may be unscientific and wholly in favour of the processors rather than the farmers. Therefore, unless farmers get remunerative prices for FFBs, the objective of the farmer’s application will not be achieved.

5.1.3. DTCI submitted that it does not have information on the present pricing units but it assumes that the present price-fixing formula for FFB was based on the statistics of oil extraction rates and value realization provided by some processing units, not on research by concerned parties, resulting in flaws in the pricing formula. DTCI considers that the Commission address the application of the HOPGA in consultation with NBPOL and HOPL to enter into any genuine negotiations and to announce some incentives to oil palm farmers, and, should a review commence, it should be done within the laws as it might have legal implications.

5.1.4. DTCI mentioned that since FFB is highly perishable and need to be processed within 24 hrs of harvest, any special circumstances regarding cultivation, gestation, harvesting and processing, should be in the best interest of farmers and processors.

5.1.5. They believe the decision by HOPGA to negotiate a fixed price formula will ensure that all party’s interests are understood and the parties are genuine in their negotiations and there are no further threats to the sector by any party.

5.1.6. DTCI emphasised the need for a level playing field in favour of all parties while determining the price.

6. **Commission’s assessment**

6.0.1. 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 detriment assessments in determination A2011/12 are applicable here and adopted by the Commission in this determination on this application.
7. **Determination**

7.0.1. On 13 September 2012, HOPGA lodged this (second) application for authorization pursuant to Section 70 (1) of the *ICCC Act*.

7.0.2. The application was made for authorization to enter into an agreement, arrangement or understanding that substantially lessens competition, *(Section 50).*

7.0.3. HOPGA seeks authorization to enter into a contract, arrangement or understanding to collectively negotiate terms and conditions (including price) for the sale of FFB with the two processors, NBPO and HOP.

7.0.4. For the Commission to grant authorization, it has to be satisfied that in all the circumstances the conduct the subject of the application would or would be likely to result in a benefit to the public that would outweigh the lessening in competition that would result or be likely to result from it.

7.0.5. Since the second application involves the same substantive matters and considerations as the first application and only differs in relation to the sections of the *ICCC Act* that the respective applications were made under, the Commission’s reasons and assessments discussed in the determination on the first application is determined to apply to this determination.

7.0.6. Taking into consideration the submissions on this application and for the reasons outlined in determination A2011/12, the Commission is satisfied that this application satisfies the tests outlined in Section 77 (6) (a) of the *ICCC Act* and grants authorization subject to the following conditions:

- **Condition 1.** Grower participation in the collective arrangements is voluntary.
- **Condition 2.** HOPGA will ensure that its members know and understand that no threats, intimidation or violence of any kind can be directed against any member of HOPGA who chooses not to be involved in any collective negotiations.
- **Condition 3.** Bargaining takes place with individual processors.
- **Condition 4.** HOPGA is prepared to provide benchmark information to growers.
- **Condition 5.** Genuine negotiations are conducted.
- **Condition 6.** Benchmarks and milestones be established by HOPGA with the processors in consultation with the ICCC that essentially requires the parties to reach agreement within 18 months of the granting of authorization.

7.0.7. Should the parties not comply with **Condition 5** or **Condition 6** the Commission will review the operation of the Authorization and seek to have FFB made a declared good for the purposes of the *PRA*.

7.0.8. HOPGA should also note that there is provision within the *ICCC Act* that allows the Commission to revoke or amend an authorization if the Commission is satisfied that:
7. **Determination**

7.0.1. On 13 September 2012, HOPGA lodged this (second) application for authorization pursuant to Section 70 (1) of the *ICCC Act*.

7.0.2. The application was made for authorization to enter into an agreement, arrangement or understanding that substantially lessens competition, (Section 50).

7.0.3. HOPGA seeks authorization to enter into a contract, arrangement or understanding to collectively negotiate terms and conditions (including price) for the sale of FFB with the two processors, NB POL and HOPL.

7.0.4. For the Commission to grant authorization, it has to be satisfied that in all the circumstances the conduct the subject of the application would or would be likely to result in a benefit to the public that would outweigh the lessening in competition that would result or be likely to result from it.

7.0.5. Since the second application involves the same substantive matters and considerations as the first application and only differs in relation to the sections of the *ICCC Act* that the respective applications were made under, the Commission’s reasons and assessments discussed in the determination on the first application is determined to apply to this determination.

7.0.6. Taking into consideration the submissions on this application and for the reasons outlined in determination A2011/12, the Commission is satisfied that this application satisfies the tests outlined in Section 77 (6) (a) of the *ICCC Act* and grants authorization subject to the following conditions:

**Condition 1.** Grower participation in the collective arrangements is voluntary.

**Condition 2.** HOPGA will ensure that its members know and understand that no threats, intimidation or violence of any kind can be directed against any member of HOPGA who chooses not to be involved in any collective negotiations.

**Condition 3.** Bargaining takes place with individual processors.

**Condition 4.** HOPGA is prepared to provide benchmark information to growers.

**Condition 5.** Genuine negotiations are conducted.

**Condition 6.** Benchmarks and milestones be established by HOPGA with the processors in consultation with the ICCC that essentially requires the parties to reach agreement within 18 months of the granting of authorization.

7.0.7. Should the parties not comply with **Condition 5** or **Condition 6** the Commission will review the operation of the Authorization and seek to have FFB made a declared good for the purposes of the PRA.

7.0.8. HOPGA should also note that there is provision within the *ICCC Act* that allows the Commission to revoke or amend an authorization if the Commission is satisfied that:

<table>
<thead>
<tr>
<th>Agreement Details</th>
<th>Agreement Details</th>
<th>Agreement Details</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Chairman's casting vote</strong></td>
<td><strong>Chairman's casting vote</strong></td>
<td><strong>Chairman's casting vote</strong></td>
</tr>
<tr>
<td><strong>(Cross out whichever is not applicable)</strong></td>
<td><strong>(Cross out whichever is not applicable)</strong></td>
<td><strong>(Cross out whichever is not applicable)</strong></td>
</tr>
</tbody>
</table>

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 7th day of December 2013
Application for Authorisation

By

Hoskins Oil Palm Growers Association Incorporated

to Collectively Negotiate

with

New Britain Palm Oil Limited and Hargy Oil Palms Limited

Dr. Billy Manoka, PhD
Commissioner &
Chief Executive Officer

Mr. David Dawson
Associate Commissioner
(Non- Resident)

Dr. Eric Omuru
Associate Commissioner
(Resident)

Date of Determination: Application Dated : 4 October 2011
Public Register Number : A2011/12
Table of Contents

1. Executive Summary .................................................................................................................. 4
2. Role and powers of Commission in relation to arrangements that would or may lessen
   competition ............................................................................................................................... 7
3. Introduction ............................................................................................................................... 11
4. The Parties ................................................................................................................................ 12
   4.1. HOPGA ................................................................................................................................ 12
   4.2. NBPOL ................................................................................................................................. 12
   4.3. HOPL .................................................................................................................................. 13
5. Background .............................................................................................................................. 14
6. Oil Palm Industry Structure in West New Britain ...................................................................... 15
7. Submissions received on the application prior to the issue of the draft Determination .......... 16
   7.2. OPIC ................................................................................................................................... 16
   7.3. HOPGA .............................................................................................................................. 17
   7.4. NBPOL and HOPL ............................................................................................................. 17
8. Draft Determination .................................................................................................................. 19
9. Statutory Conference ............................................................................................................... 20
   9.1. Attendees at the conference ............................................................................................... 20
   9.2. Submissions received at the conference ............................................................................. 20
10. Submissions received subsequent to the issue of the Draft Determination .......................... 22
   10.1. HOPGA ............................................................................................................................ 22
   10.2. Bialla Oil Palm Growers Association ............................................................................. 23
   10.3. Popondetta Oil Palm Growers Association .................................................................... 23
   10.4. OPIC .................................................................................................................................. 23
   10.5. NBPOL ............................................................................................................................. 23
   10.6. Submissions from Government agencies ....................................................................... 24
   10.7. West New Britain Provincial Government ..................................................................... 25
   10.9. Department of Agriculture and Livestock ..................................................................... 26
11. The proposed pricing review .................................................................................................... 27
12. Questions of law and other questions raised by NBPOL ...................................................... 28
13. ICCC’s Evaluation .................................................................................................................. 30
   13.0. The Commission’s Approach ............................................................................................ 30
   13.1. Relevant areas of Competition - ‘Markets’ ..................................................................... 30
   13.2. The FFB market .............................................................................................................. 31
   13.3. Crude palm oil and palm kernel market ......................................................................... 31
   13.4. Consideration of the counterfactual .............................................................................. 31
   13.5. Assessment of Effect on Competition ............................................................................ 31
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>13.6. Public Benefit</td>
<td>33</td>
</tr>
<tr>
<td>13.7. Inequality in Bargaining Power</td>
<td>34</td>
</tr>
<tr>
<td>13.8. Information Asymmetry</td>
<td>34</td>
</tr>
<tr>
<td>13.9. Savings in Transaction and Administrative costs</td>
<td>34</td>
</tr>
<tr>
<td>13.10. Reduction in tensions in the industry</td>
<td>35</td>
</tr>
<tr>
<td>13.11. Potential for Industry Benchmarking</td>
<td>35</td>
</tr>
<tr>
<td>13.12. Efficiencies</td>
<td>35</td>
</tr>
<tr>
<td>13.13. Assessment of Public Benefit</td>
<td>35</td>
</tr>
<tr>
<td>13.15. Assessment of Efficiencies</td>
<td>37</td>
</tr>
<tr>
<td>13.16. Assessment of Balance of Public Detriment and Public Benefit</td>
<td>37</td>
</tr>
<tr>
<td>13.17. Conditions of Authorization</td>
<td>37</td>
</tr>
<tr>
<td>14. Determination</td>
<td>39</td>
</tr>
<tr>
<td>List of Abbreviations</td>
<td>41</td>
</tr>
</tbody>
</table>
1. Executive Summary

1.0.1. This summary provides a broad outline of this determination. To fully appreciate the context, reasons and conditions of this determination, the determination should be read in full.

1.0.2. This is the Determination on the application for authorization made by Hoskins Oil Palm Growers Association Incorporated (HOPGA or the applicant), on 4 October 2011, in respect of a proposal to jointly negotiate the oil palm fresh fruit bunch (FFB) prices and other terms and conditions with New Britain Palm Oil Limited (NBPOL) and Hargy Oil Palms Limited (HOPL). The application was made under Section 70 of the Independent Consumer and Competition Commission Act 2002 (ICCC Act) for authorisation of the following:

- an agreement, arrangement or understanding that substantially lessens competition (Section 70 (2)); and
- an exclusionary provision (Sections 70 (5) and (6)).

1.0.3. The onus is on the applicant to satisfy the Independent Consumer and Competition Commission (the Commission or ICCC) that:

- there is a net benefit to the community from the conduct, the subject of the application (and not just the parties to the application).
- the benefits and detriments flow directly or indirectly from the conduct for which authorization is sought and
- such benefits outweigh any anti-competitive detriments.

1.0.4. The Commission notes that there appears to be a widespread misunderstanding of the role and powers of the Commission in relation to its consideration of arrangements that would or may affect competition. To assist parties in their understanding of this, the Commission addresses these issues in section 2 of this determination.

1.0.5. In relation to this application, the Commission wrote to an extensive list of parties it identified as having an interest in the application calling for submissions on the application. It also wrote to the applicant - HOPGA. Further oral and written submissions were received from HOPGA. Apart from the applicant, submissions were also received from the Oil Palm Industry Corporation (OPIC), Centre for Environmental Law and Community Rights, the World Bank, NBPOL and HOPL, Department of Agriculture and Livestock (DAL), National Research Institute (NRI) and West New Britain Provincial Administration (WNBPA).

1.0.6. A draft determination was issued on 12 September 2012 and a conference on the draft determination was held on 5 October 2012. A large number of issues were raised at the conference and there were a number of further submissions lodged. All submissions to the extent they are relevant to the Commission’s consideration of the application have been considered in this determination.

1.0.7. HOPGA submits the following benefits in support of the application:

- inequality in bargaining power – if growers were able to come together to negotiate terms and conditions with processors it would enhance their bargaining power and there would be a greater likelihood of a more equitable outcome;
- information asymmetry – authorization would allow growers to have access to more information and they would likely develop the expertise to interpret that information.
• savings in transaction and administrative costs - it is more efficient for processors and growers to negotiate jointly than to negotiate individually and

• reduction in tensions in the industry – there would be a greater likelihood of increased harmony in the industry if processors entered into genuine negotiations with growers.

1.0.8. The Commission gives public benefit the widest possible meaning. It regards it as anything of value to the community. Generally any contribution to the aims pursued by society including the achievement of the economic goals of efficiency and progress.

1.0.9. The Commission is satisfied that the following public benefits listed below are likely to be achieved as a consequence of the proposed conduct and that the benefits will flow through to the broader community:

• greater equality in bargaining power.

• potential for reduction in information asymmetry.

• potential for reduction in tensions in the industry and

• provided industry information is aggregated and distributed to members, there is potential for industry benchmarking and increased efficiency.

1.0.10. A public detriment is the converse of a public benefit. Collective arrangements as proposed by HOPGA have the potential to reduce competition between growers but the extent of this detriment and its impact will depend on the industry circumstances. Circumstances relevant to this consideration include the following:

• if those involved in the collective arrangements only amount to a small proportion of participants in the industry then the potential detriment is likely to be less.

• if growers’ participation in collective negotiations is voluntary then the detriment would be low as there may be an ongoing level of competition.

• if the size of the collective bargaining group is small then the extent of the detriment is likely to be reduced.

• if boycott activity is potentially involved this heightens the potential detriment. However, if the size of the bargaining group is reduced this limits the potential detriment.

• if higher fees are negotiated, there is a likelihood that higher fees will be passed on to consumers.

• if primary producers sell directly to the public the producers would have market power if they were to collectively decide prices.

1.0.11. On the competition side, the improved balance in negotiating power between small, fragmented growers and a monopsony mill is pro-competitive as it reduces the likelihood of prices being driven below the levels that would prevail in a competitive market due to sunk costs of growers and their inability to easily leave the market. That also enhances public benefit by improving allocative efficiency and dynamic efficiency throughout the economy by ensuring that growers’ resources are used in their highest value activities.

1.0.12. Section 46 of the ICCC Act requires the Commission, in making a determination whether or not or the extent to which the conduct will result or will be likely to result in a benefit to the public, to have regard to any efficiencies that it considers will result or will be likely to result from that conduct. The Commission considers that the direct and primary negotiation by growers’
representatives with the millers on supply terms and conditions will enhance efficiency by making both sides more responsive to each other and reducing mis-communication. Such face-to-face communications is likely to create long-term trust and put the supply arrangements on a firm footing, thus creating certainty and enhancing allocative efficiency.

1.0.13. Hence, as competition is the presumed objective of the ICCC Act as a public benefit, the arrangements can be regarded as being generally pro-competitive and little further need be put into the balance to outweigh any detriment from the arrangements. The potential anti-competitive detriment, however, needs to be examined. The potential for lessening of competition lies in the possibility that growers may engage in compulsory boycotts to secure the prices they seek. That is dealt with by a condition prohibiting such compulsory boycotts.

1.0.14. Public benefits as listed above result from this application and are likely to be substantial. Applying the criteria discussed above to the detriments to this application, the detriments may potentially be substantial, only if boycotts are compulsorily imposed on growers by their negotiating group. However, the balance would change in favour of authorization if:

- the growers (whether they be members of HOPGA or not) were prepared to allow participation in the collective negotiations and participation in any boycott is voluntary.
- HOPGA makes it clear to its members that if there are any threats, intimidation or violence to members who do not wish to participate in the collective negotiations (or any resulting boycott) then the protection of the authorization may be removed.
- the bargaining is to take place on a region by region basis.
- HOPGA is prepared to provide benchmark information to growers.

1.0.15. In addition to the conditions mentioned above the Commission imposes a number of other conditions of authorization. They are:

- Authorization is granted for a limited period of time. That is, five years, so as to allow the authorization to be reviewed in the light of circumstances prevailing at the time of its expiry.
- The Commission will closely monitor the operation of the authorization to ensure that genuine negotiations are being conducted. Should the Commission form the view that genuine negotiations are not taking place, it would review the operation of the authorization and seek to have oil palm fruit made a declared good for the purposes of the Prices Regulation Act (PRA)
- The Commission will set a number of benchmarks that the parties should meet. These will relate to the timing and progress of negotiations. The Commission will assist parties to agree on a process, milestone, timeframes and factors to be taken into account during the negotiations. While the detail must be agreed between HOPGA and the processors in consultation with the Commission, essentially, they will require the parties to reach agreement within eighteen months of the granting of authorization. Should the parties be unable to reach agreement the Commission would review the operation of the authorization and may seek to have FFB made a declared good for the purposes of the PRA.

1.0.16. Authorization is granted subject to the above mentioned conditions. It will come into force six months from the date hereof or the finalisation of the pricing review currently being facilitated by OPIC whichever is the sooner.
2. Role and powers of Commission in relation to arrangements that would or may lessen competition

2.0.1. The Commission is established under the *ICCC Act*. It is an independent statutory authority that has administrative responsibility for the *ICCC Act*.

2.0.2. Arrangements that would or may lessen competition are covered by the *ICCC Act*. Broadly that Act provides the Commission with the power:

- to take enforcement action in the Courts if it forms the view that arrangements would or may substantially lessen competition or if they are likely to be in contravention of the *per se* provisions of the *ICCC Act* - *per se* provisions relate to arrangements between parties to fix, control or maintain prices or boycotts or the engaging in resale price maintenance - these are outlined briefly below or

- to authorize some such arrangements, provided those engaging in the arrangements can demonstrate to the Commission that there is net benefit to the community from those arrangements - this amounts to an exemption from certain provisions of the *ICCC Act* on public benefit grounds. A brochure is available from the Commission that sets out the authorization process or

- to give clearance in the case of business acquisitions provided the acquirer satisfies the Commission that the acquisitions will not have or will not be likely to have the effect of substantially lessening competition in a market.

2.0.3. The competition provisions of the *ICCC Act* cover the following:

- arrangements that substantially lessen competition in the market.
- price fixing between competitors.
- suppliers setting the minimum price resellers can charge (resale price maintenance) for the products they sell.
- certain instances of misuse of market power.
- business acquisitions that substantially lessen competition in the market.

2.0.4. If the Commission forms the view that an arrangement under consideration is likely to be caught by the *ICCC Act* and it falls within the Commission's priorities (and it is not likely to be specifically authorized by some other piece of legislation) it can take enforcement action by instituting proceedings in the National Court. That is, it has to prove its case before the Court. The Commission comes before the Court like any other litigant.

2.0.5. If parties are engaging in conduct that would or may contravene the competition provisions (except misuse of market power) and they consider that there is net benefit to the community from the conduct they may apply to the Commission for authorization of the arrangement.

2.0.6. In relation to acquisitions there is also provision to allow parties to seek a ruling from the Commission that the acquisition does not substantially lessen competition in the market. This is called clearance and is only available for business acquisitions.

2.0.7. Parties are encouraged to approach the Commission if they are engaging in conduct that may be caught by the *ICCC Act* and/or if they are considering applying to the Commission for authorization or clearance.

2.0.8. The Commission takes the view that if an application for authorization is received by the Commission and that application is a valid application as required by Section 76 then it is obliged to consider the application in the terms required by the *ICCC Act*. 
2.0.9. The authorization test varies slightly depending on what the application covers but essentially the requirement the applicant must satisfy is that the arrangement:

- results in a benefit to the community that outweighs any detriment to the community

More specifically the Commission must be satisfied that:

- there is a net benefit to the community from the conduct, the subject of the application (and not just to the parties to the application).
- the benefits and detriments flow directly or indirectly from the arrangement for which authorization is sought and
- such benefits outweigh any anti-competitive detriments or other detriments.

2.0.11. Authorization is a public and transparent process. That means the application and all material supplied by the applicant goes on a public register and any person can peruse that material. Currently the public register is only available in hard form but shortly it will be available in electronic form. (Although there is provision for granting confidentiality claims for material supplied in submissions, confidentiality would not be granted to the subject matter of the application but would be granted for commercially sensitive material such as sales, cost of production, revenue data, etc.)

2.0.12. The Commission also seeks the views of others who may have an interest in the application. Their submissions are placed in the public register also. Again confidentiality can be granted for material.

2.0.13. As is required by the ICCC Act, the Commission makes its decision on its assessment of the public benefits/detriments from submissions of the applicant and interested parties and on no other basis. If the Commission were to take into account matters other than benefits or detriments arising from the conduct, the subject of the application, its decision could be challenged at law and in making its decision the Commission must take into account all public benefits or public detriments that relate to the application. It is, however, not required to give equal weighting to all such benefits/detriments.

2.0.14. The Commission is required to consider an application in the terms set out in the ICCC Act. In applying the relevant test, the Commission must grant authorization broadly if it is satisfied that the benefits to the public outweigh the detriments. If there is little or no detriment to the community resulting to the public from the subject matter of the arrangement then there only needs to be a small benefit to outweigh it. If the benefit does not outweigh the detriment then the Commission must refuse to grant authorization.

2.0.15. The Commission has the power to grant authorization subject to conditions. For instance, if it is not satisfied that the conduct for which authorization is sought is sufficient to outweigh the detriment then it may impose conditions which may enhance the public benefit or reduce the detriment. Market circumstances change and as a consequence it is common for the Commission to grant authorization for a limited time (except in relation to acquisitions).

2.0.16. If a condition is not complied with by the applicant the authorization may be revoked or amended.

2.0.17. What is a public benefit? The Commission takes a wide view as to what is included in public benefit. Essentially it considers it to be anything of value to the community. That can include:

- arrangements that improve efficiency.
- arrangements that enhance the health and safety of the community
- arrangements that result in development of the economy
- arrangements that expand exports or employment
- arrangements that assist business to adjust to transition to competition.
2.0.18. Detriment is the converse of public benefit. Examples of public detriments are:

- constraints on competiveness by market participants affecting their ability to innovate effectively and conduct their affairs efficiently, competitively and independently.
- raising of barriers to entry.
- reduction in the number of effective competitors.

2.0.19. Further examples of public benefit (and detriment) are contained in the Commission's authorization brochure - some of them are also discussed in this determination.

2.0.20. There appears to be a view in the marketplace that the Commission's role, in respect of authorization applications, is broader than the *ICCC Act* provides. However the Commission is bound by the law and cannot exceed its authority. Some issues in this regard are discussed below.

2.0.21. Can the Commission impose conditions on a party that is not part of an arrangement that is the subject of an authorization application? No, the Commission cannot impose conditions on third parties. Where an arrangement in some way relates to a third party, the Commission can make suggestions or recommendations but there is no power in the *ICCC Act* to require third parties to comply.

2.0.22. In considering an application for authorization, is the Commission conducting a review of the industry? No, the Commission is complying only with its obligations under the law to consider an application on the merits. In considering an application on its merits the Commission must apply the appropriate public benefit / public detriment weighing test and set out the reasons for its decision. To understand the context in which an arrangement operates, it may include background information such as the structure of the industry and performance indicators that are available from non-controversial publicly available information but such information is for context only and not part of the Commission's evaluation of the public benefits/detriments.

2.0.23. Can the Commission take into account benefits and detriments that do not result directly or indirectly from the arrangement, the subject of the application? No, even if the Commission is aware of perceived detriments occurring in the industry in which the arrangement takes place the Commission cannot consider them as part of the test. In some instances, it may comment on such external factors but the comments are not in relation to the application and amount to no more than recommendations or suggestions.

2.0.24. If the Commission forms the view after it has decided that the test has been satisfied, that the benefit to the community can be enhanced or the detriment lessened, can additional conditions be imposed to secure such enhancement of benefit or lessening of detriment? No, it cannot impose a condition just because it thinks it may be in the interests of the industry or community. Conditions must be linked to the subject matter of the application and then only to change the balance of benefits/detriments.

2.0.25. Does the Commission have to decide if conduct for which authorization is sought is caught by the Act? There are a range of reasons which determine if particular arrangements are caught by the *ICCC Act*. Some arrangements may not substantially lessen competition, some arrangements may not fall within the specific wording of the *ICCC Act* and some may be specifically authorized by other laws. These are questions of law that the Commission does not have the power to decide. They are matters that can only be determined by the Court. If an applicant takes the decision that they do not want to be at risk of breaching the *ICCC Act* (and do not want to risk being subject to the severe penalties that the *ICCC Act* provides) and considers that the arrangement results or would be likely to result in a net benefit to the community they may apply for authorization. Unless the arrangement is clearly not caught by the *ICCC Act* or authorization would not provide protection for the subject arrangement, the Commission is obliged to consider the application on its merits and go through the procedures provided for in the law.
2.0.26. Will the Commission decide if one of two or more different arrangements provides greater public benefit than another? **No,** that is not the function of the Commission nor is it its role to decide which alternative is better. Authorisation allows parties to engage in conduct that would or may contravene the *ICCC Act.* It may be that two or more alternative arrangements may be proposed to address an issue in an industry. In that case can the parties decide to apply for authorization for protection of both? For instance, a submission from Gadens on behalf of the processors in this application advocates an alternative system to that for which authorization is sought. It is not for the Commission to decide if an alternative system is better or delivers greater benefit/less detriment. Provided the parties can demonstrate net public benefit there is no reason why the Commission cannot grant more than one authorization. This is relevant where parties take different views as to how an issue in an industry could be resolved. In this context authorization simply facilitates (and provides protection from contravention of the *ICCC Act*) for discussions of those two arrangements. The Commission would not normally expect this situation to arise and the Commission would not provide a decision as to which is the better arrangement but if the tests were satisfied, it could conceivably grant authorization to both arrangements.

2.0.27. If the conduct has been engaged in the past can the arrangements continue? **Yes,** provided the arrangements do not contravene the *ICCC Act* (or if they do, an applicant can demonstrate through the authorization process, the net public benefit). However, just because the arrangements were operated before the *ICCC Act* came into force and they still operate does not mean that they do not now breach the *ICCC Act*.

2.0.28. If the arrangements are sanctioned by a Government department or agency, does that mean the *ICCC Act* does not apply? **No,** unless the arrangement is specifically authorized by another law. In deciding what is specifically authorized, the Commission takes the view that the specific arrangement has to be clearly and specifically set out in that other law and the arrangement must be fundamental to the objectives of the legislation if it is to be protected from application of the *ICCC Act.* However, ultimately, this is a decision for the Court and not the Commission.
3. **Introduction**

3.0.1. This is the Determination on the application for authorisation made by HOPGA, on 4 October 2011, in respect of a proposal to jointly negotiate the Oil Palm FFB prices and other terms and conditions with NBPOL and HOPL. The application was made under Section 70 of *ICCC Act* for authorisation of:

- an agreement, arrangement or understanding that substantially lessens competition (*Section 70 (2)*); and
- an exclusionary provision (*Sections 70 (5) and (6)*).

3.0.2. The authorisation process under the *ICCC Act* is a transparent process that requires the Commission to give all persons with an interest in the application the opportunity for comment.

3.0.3. Following consideration of all comments received, the Commission issues a Draft Determination. The Draft Determination is issued to the applicant and all interested parties. The applicant and interested parties are invited to hold a Conference with the Commission if they wish to discuss any aspect of the Draft Determination (or if no Conference is requested, the Commission may call a conference). A Draft Determination was issued on 12 September 2012. A Conference was held on 5 October 2012.

3.0.4. Following the Conference and consideration of any issues raised including any further submissions received, the Commission issues a (final) Determination. The Determination is issued to the applicant and all interested parties.

3.0.5. Authorization is not given lightly. The onus is on the applicant to satisfy the relevant provisions in the *ICCC Act*. The Commission must be satisfied that:

- there is a net benefit to the community from the conduct, the subject of the application (and not just the parties to the application),
- the benefits and detriments flow directly or indirectly from the conduct for which authorization is sought, and
- such benefits outweigh any anti-competitive detriments.

3.0.6. The Commission regards anything of value to the community as a public benefit. Should authorization be granted in the terms sought by the applicant (HOPGA), the members of HOPGA will be able to collectively negotiate terms and conditions (including price) for their product with the two processors and if they are unable to negotiate an acceptable price then those members may collectively refuse to supply product to either or both processors.

3.0.7. The Commission has the power to grant authorization subject to conditions. For instance, if it is not satisfied that the conduct for which authorization is sought is sufficient to outweigh the anti-competitive detriment then it may impose conditions which may enhance the public benefit or reduce the detriment.

3.0.8. The Commission has not considered an application of this kind previously. However, agencies with similar laws in other jurisdictions have. The Commission considers that this application will have the potential to set an important precedent for other similar applications where small individual businesses, particularly in primary production, which have little negotiating strength, are required to negotiate prices and other terms and conditions with larger more powerful and bigger organisations, such as processors, marketing organisations or large retailers. As such, the Commission, in this decision sets out principles that it will apply to such situations in the future.
4. **The Parties**

4.1. **HOPGA**

4.1.1. HOPGA is based in West New Britain Province (WNBP) of Papua New Guinea (PNG). It is made up of oil palm growers, specifically, in the areas around Hoskins. HOPGA was incorporated and came into existence on 14 June 1996. According to the Oil Palm Industry Corporation Act, there should be only one recognised registered Growers’ Association (GA) in declared palm oil projects.

4.1.2. According to the information provided (in various submissions) before the Commission, HOPGA which consists of over 7,500 growers is one of the four GAs in PNG. The others are Bialla Oil Palm GA consisting of over 3,100 growers, Popondetta Oil Palm GA with 5,860 members, Milne Bay Oil Palm GA with 795 growers and New Ireland Oil Palm GA with 1,311 members.

4.1.3. HOPGA is the medium through which its members can act together to exercise a degree of bargaining power in negotiations to effectively resolve the issues faced by its members in the oil palm industry. It is the mouthpiece for all growers in consultations with the developer, the Local Planning Committee, OPIC and other relevant government agencies.

4.1.4. HOPGA has the largest number of growers and the growers are automatically members of the HOPGA. Growers’ blocks are around two hectares. Growers normally harvest oil palm fruit on a fortnightly basis. Harvest can take up to three or four days. When the fruit is to be transported to processors' mills, it is stacked on the roadside, weighed and transported to the mill by company transport. In some cases the growers arrange the transport of the fruit themselves and pay the cost themselves. All members of HOPGA sell all their FFB to NBPOL.

4.1.5. Collections of fruit are carried out by the processors according to a set schedule with a truck arriving at the farm gate the same day every two weeks. Payments are made to the growers on a monthly basis.

4.2. **NBPOL**

4.2.1. NBPOL is PNG’s largest oil palm plantation and milling operator. It is also the only refiner of palm oil in PNG. NBPOL is the parent company for oil palm developments in Hoskins (WNBP), Higaturu Oil Palm Limited (Northern Province), Milne Bay Estates (Mine Bay Province), Poliamba (New Ireland Province) and Ramu (Madang Province). The company is a publicly listed Agri-industrial company. According to NBPOL’s 2012 annual report, Kulim Berhard of Malaysia is the leading shareholder with 48.97 per cent followed by the West New Britain Provincial Government which has 8 per cent interest while others, including Pacific Rim Plantations Services Limited, Nambawan Super and NASFUND share the balance in NBPOL. Its shares are listed on the London and Port Moresby Stock Exchanges.

4.2.2. NBPOL acquired Ramu-Agri Industries Ltd, another upcoming palm oil processing company, which was cleared by the Commission under a decision made on 17 June 2008. In 2010, NBPOL acquired some 80 per cent shares in CTP (PNG) Limited and had since acquired the remaining 20 per cent of shares in the company, by then renamed Kula Palm Oil Limited, from the Independent Public Business Corporation (IPBC).

4.2.3. NBPOL operates substantial estates where it grows its own oil palm. NBPOL’s core activity is the cultivation and processing of oil palm into crude palm oil, palm kernel oil, palm kernel expeller and palm kernel meal for sales to both domestic and foreign markets notably, United Kingdom, Europe and Australia. The company has laboratory and seed processing facilities with production and sales of approximately 20 million seeds. Some 35 per cent of NBPOL’s FFB is sourced from smallholder growers.

4.2.4. Approximately 95 per cent of PNG palm oil is sold in Europe. Palm kernel meal is a low value product sold for cattle food and mainly sold in Australia as stock fodder.
4.3. **HOPL**

4.3.1. HOPL was incorporated in 1969 as a joint venture between the PNG Government and Shin Asahigawa Pty Ltd. In 1973, the Government terminated the joint venture agreement with Shin Asahigawa Pty Ltd and invited interested plantation management companies to participate in the joint venture. A Belgian company, (SaSipef NV), a professional international management company with experience in the running of large oil palm projects was successful. It was a 50-50 joint venture project. In 2004, the PNG Government sold all its shares to the Belgian Company which always had full responsibility for the management, operations, processing and international marketing of the company’s products.

4.3.2. HOPL is a smaller milling company compared to NBPOL. NBPOL has six mills including a refinery operating in PNG. It also has operations in Guadalcanal Province of Solomon Islands, while HOPL has only two processing plants in the Bialla region of WNBP and is currently building its third plant. It does not have a refinery.

4.3.3. Since 1973 HOPL developed over 9,500 hectares of oil palm plantations. It has also assisted with the development of over 13,000 smallholder blocks. It produces a substantial proportion, some 53 per cent of its raw material from its own estates.
5. **Background**

5.0.1. The Commission’s involvement in the oil palm industry dates back to 2006. The Commission received a complaint from HOPGA alleging that there were some collusive arrangements between NBPOL and HOPL. In its submission, HOPGA alleged that:

- NBPOL had failed to comply with the Government sanctioned FFB Price Review and adjustments;
- there is interference of Government functions;
- the decisions of the Acting OPIC Chairman are contrary to what OPIC should be doing;
- there is non-compliance with the Master Agreement by NBPOL;
- in WNB two different oil palm companies are paying the growers exactly the same price. HOPGA believed there could be a case of price fixing by the firms involved and
- a market sharing agreement called the ‘Nakanai Agreement’ divided the growing areas between NBPOL and HOPL.

5.0.2. Of these allegations, only the last two allegations were considered by the Commission as relevant for investigation under the Part VI (the competitive market conduct provisions) of the *ICCC Act*.

5.0.3. The last allegation was resolved by the parties abandoning the agreement and the Commission cautioning them against such conduct in the future.

5.0.4. The second last allegation was answered by the parties as being ‘price parallelism’ with HOPL, the smaller player, unilaterally matching prices paid by NBPOL, the larger player, claimed to be more efficient by virtue of its economies of scale. The matching was said to be aimed at promoting harmony.

5.0.5. The oil palm industry is one of the most important agricultural export sectors. Statistics from the Bank of Papua New Guinea show that in the years between 2009 and 2011 the volume of oil palm exported increased in PNG. This is in response to higher international prices and lower production in countries like Malaysia and Indonesia due to natural disaster and unfavourable weather conditions.

5.0.6. Apart from Madang (Ramu) which is an upcoming oil palm project, the five declared and existing oil palm projects in PNG are:

- Hoskins (NBPOL),
- Bialla (HOPL),
- Popondetta (Higaturu),
- Milne Bay (Milne Bay Estates), and
- New Ireland (Poliamba).

5.0.7. Both the projects and the growers’ associations are financially supported by the levies that are deducted from the growers’ pay-out ratio which are administered by the miller.
6. Oil Palm Industry Structure in West New Britain

6.0.1. Oil palm in PNG is established under the Nucleus Estate Smallholder Scheme (NESS) whereby the milling company established commercial estates with milling facilities and also purchase the FFB from the small growers. It consists of five nucleus estates companies and some 19,047 small growers. The nucleus estates are owned by NBPOL, HOPL, Higaturu Oil Palm Limited, Milne Bay Estate and Poliamba Estate. All of the estates except HOPL are subsidiaries of NBPOL. The projects at Hoskins, Bialla and Popondetta are more than 30 years old and the projects at Milne Bay and New Ireland are about 10 years old.

6.0.2. HOPGA growers are located around Hoskins and all members of HOPGA deliver their FFB to NBPOL. There are regular meetings between the key parties in the industry. Each month a meeting is convened by the Local Planning Committee to discuss matters relating to the area and to discuss various submissions. The members of the committee include the General Manager of NBPOL (Chair), OPIC, the Provincial Administrator (or his delegate), the executives of HOPGA, Mama Lus Frut (a women’s organisation) and a number of observers including growers.

6.0.3. Hoskins growers have the highest output of all smallholder projects. In 2009 they produced a total of 422,224 tonnes of FFB from 23,670 ha (17.8 tonnes per ha). That is around 99.79 per cent of the small holders’ harvest.

6.0.4. This application only relates to negotiations for the supply of FFB grown by members of HOPGA. Currently growers are paid according to a pricing formula. However, the last price formula review was conducted in 2001. The Bialla Growers Association in its submission on this application outlined the elements of the pricing formula. It says the major components of the formula include:

- world market price,
- smallholders cost of production labour, farm inputs (fertiliser, tools, equipment, seedlings), transport costs, land rentals, interest on loans, and the various levies paid to OPIC, OPRA, sexava pest and grower association,
- milling company’s cost of milling, storage and forwarding,
- milling extraction rate of crude palm oil and palm kernel, and
- foreign exchange rate.

6.0.5. At that time (2001) the payout ratio was set at 57 per cent (palm product value) for growers and 43 per cent for milling companies. However, growers wish to negotiate directly with the processors. That is the basis of this application.

6.0.6. The Bialla Growers Association described the milling process in the following terms. It says it is quite technical but basically the FFB are cooked in a steam chamber (sterilizer) and then on to the thresher where bunches are separated from the fruitlets. The third stage is where the fruit is pressed and the juice squeezed out and it is finally pumped into storage tanks for export.
7. **Submissions received on the application prior to the issue of the draft Determination**

7.0.1. As part of the authorisation process under the *ICCC Act*, the Commission is required to conduct public consultation to collect views from the applicant and persons having an interest in the application.

7.0.2. Upon receipt of the application, the Commission identified a list of parties who may have an interest in this application. Included in the list were the two processors (NBPOL and HOPL), OPIC, the World Bank and a number of other organisations including the DAL, WNBPA and other Provincial Administrations., Department of Implementation and Rural Development and the NRI. Department of Treasury informed the Commission that the Department will not make any submission on the application.

7.0.3. Letters were sent to interested parties. The letters and attachment set out the process of consideration of applications for authorization by the Commission and asked for submissions on the application. It also attached an extensive list of issues that it asked the parties to address.

7.0.4. The Commission also consulted HOPGA explaining the authorisation process and sought further submissions. HOPGA provided oral and written submissions.

7.0.5. The Commission received submissions from the World Bank, OPIC, Centre for Environmental Law and Community Rights and from Gadens Lawyers - the law firm representing the processors, NBPOL and HOPL. It also received submissions from NBPOL and a joint submission from NBPOL and HOPL. Following the issue of the Draft Determination submissions were received from the Bialla Growers Association, Popondetta Growers Association and the processors. Submissions were also later received from DAL, NRI, WNBPA and the processors.

7.0.6. Submissions are discussed later in this Determination.

7.1. **The World Bank**

7.1.1. The World Bank considered it inappropriate for it to provide any comment on the application.

7.2. **OPIC**

7.2.1. The key points of the submission are set out below:

- the fruit needs to be processed within 24 hours and this effectively limits the distance that the fruit can travel,
- the cost of establishing processing mills is high and this has led to a single firm dominating production in each geographical area,
- the processors need small holder fruit to maximise their profits but they are not dependent on smallholder fruit as they can run their plant on their own estate fruit,
- smallholders need the mills to exist – they are dependent on the processors as their fruit is worthless without the mills,
- OPIC does not believe growers will be able to negotiate a better price than what the formula would deliver because the processors will negotiate from a position of advantage and
- there is concern that if the formula is dispensed after negotiation there will be violence particularly if boycotts are threatened.
7.2.2. In summary, OPIC considers that moving away from the pricing formula will be dangerous, regressive and not to the long term benefit of growers.

7.3. **HOPGA**

7.3.1. HOPGA submitted it could do better for growers if it negotiates directly and with the benefit of an updated pricing formula. There is currently a review of the existing pricing formula being carried out by a World Bank Consultant. This is discussed further below.

7.3.2. Less than 50 per cent of small growers work full time on their plots. If prices are low, the options for the growers are limited and some growers resort to growing alternative crops. But the potential for growing alternative crops is also limited. Some growers try selling off their blocks to other growers or new entrants but that is difficult because returns are low.

7.3.3. The HOPGA growers have supplied the majority of FFB over the years but gradually the processors have expanded their estates. Growers currently provide up to 35 per cent of the raw materials for NBPOL but the growers believe that the processors will eventually be able to meet the full capacity of their mills from their own estates. This would mean that small growers would have to seek other processors for their product. However, for export, the FFB needs to be processed so the only option for the growers would be to set up their own mill. They have already explored this option but were unable to secure funding.

7.3.4. HOPGA submits that its members are disadvantaged by the existing pricing arrangements. HOPGA submits that growers have been underpaid under the current price formula as they have only been paid 11 per cent of the world market price. They submit that for other crops such as cocoa and coffee, growers are paid more than 70 per cent of the world price. HOPGA also submits that NBPO’s calculations of the payout to growers (based on the world price) are not done in a transparent manner. HOPGA further says that the pricing formula needs to be corrected so that growers are fairly compensated. The Commission notes that the existing price formula is to be reviewed by an independent consultant and there is provision for extensive consultation with growers and other stakeholders. Growers will have the opportunity to raise their concerns with the consultants. The proposed pricing review is discussed further below. HOPGA says processors have a ‘take it or leave it attitude’ to growers. But if growers are able to come together and negotiate with the processors it will enhance the bargaining power of growers. They believe this will result in a more equitable outcome.

7.3.5. Growers do not have access to the same information as processors and lack the expertise to interpret available information. Accessing information would assist in the negotiating process and the proposed arrangements would facilitate this. HOPGA also claimed that it would be more efficient to carry out the negotiation process with groups of growers rather than individually.

7.3.6. HOPGA disputes OPIC’s claim that the proposed negotiations will lead to violence. Instead it submits that collective negotiations will be more likely to result in increased harmony in the industry. If genuine negotiations take place then most growers would be happy and that would reduce current tension in the industry.

7.3.7. Further if growers are able to withhold supplies as part of the negotiating process it will enhance their power and this will increase the likelihood of a more equitable outcome, particularly in terms of prices paid to growers.

7.4. **NBPO and HOPL**

7.4.1. Gadens Lawyers lodged a submission on behalf of the processors. That submission centred on the background and merits of the existing price formula and suggested that the Commission authorise that existing pricing formula. However, that is not the subject of the application before the Commission.
7.4.2. NBPOL and HOPL also made further submissions prior to the issue of the Draft Determination. NBPOL submitted that HOPGA’s application is irregular and defective in that information submitted was *prima facie* grievances and complaints. NBPOL emphasised that the grievances and complaints dated back to 2006 when they lodged the complaint to the Commission. NBPOL highlighted the fact that the smallholders remain beneficiaries of the projects and related agreements and also under the *Oil Palm Industry Corporation Act* and the *Palm Oil Industry Stabilization Funds Act* of 1983. NBPOL mentioned that HOPGA or the small holders do not have the mandate to apply for authorization.

7.4.3. Moreover, NBPOL maintained that HOPGA’s application and supporting information submitted to the Commission contains some premises, statements or information that are based on misunderstandings or ignorance of the whole scheme of things and the World Bank/IDA funding arrangements and is materially incorrect or misleading. NBPOL then concluded by proposing that Commission staff visit all the sites to meet with them, the smallholders, OPIC officers and other stakeholders to ascertain firsthand information and current practical situations on provisions for smallholders and the conduct of parties.

7.5. **Centre for Environmental Law and Community Rights (CELCOR)**

7.5.1. The CELCOR is concerned about a number of aspects of oil palm growing that are not disclosed to growers and the surrounding communities. CELCOR is also concerned that oil palm does not deliver significant livelihood benefits. It supports the view that the growers should have more information as to pricing of FFB and that growers need to have a certain degree of independence to perform their mandated tasks.
8. **Draft Determination**

8.0.1. The Commission issued a Draft Determination on this application on 12 September 2012.

8.0.2. In that Draft Determination the Commission said:

> ‘The Commission is satisfied that the following public benefits listed below are likely to be achieved as a consequence of the proposed conduct and that the benefits will flow through to the broader community:

- Greater equality in bargaining power.
- Potential for reduction in information asymmetry.
- Potential for reduction in tensions in industry.
- Provided industry information is aggregated and distributed to members there is potential for industry benchmarking and increased efficiency.’

8.0.3. The Commission went on to say, after discussing the potential detriments that the detriments are also likely to be substantial. However, the balance would change in favour of authorization if:

- The growers were prepared to allow participation in the collective negotiations to be voluntary.
- The bargaining was to take place on a mill by mill basis.
- HOPGA is prepared to provide benchmark information to growers.

In addition to the conditions mentioned above the Commission also proposed to impose a number of other conditions that relate to the circumstances of the proposed authorization. They are:

- Authorization is granted for a limited period of time, that is, five years, so as to allow the authorization to be reviewed in the light of changed circumstances.

- The Commission will closely monitor the operation of the proposed authorization to ensure that genuine negotiations are being conducted. The Commission would expect the processors individually to co-operate and contribute relevant information as part of the negotiating process. Such information could include international price trends and anticipated international demand. Should the Commission form the view that genuine negotiations are not taking place, it would review the operation of the proposed authorization and seek to have oil palm fruit made a declared good for the purposes of the *Prices Regulation Act (PRA).*

- The Commission will set a number of benchmarks that the parties should meet. These will relate to the timing and progress of negotiations. The Commission will assist parties to agree on a process, milestone, timeframes and factors to be taken into account during the negotiations. While the detail must be agreed between HOPGA and the processors in consultation with the Commission, essentially, they will require the parties to reach agreement within four months of the granting of authorization. Should the parties be unable to reach agreement the Commission would review the operation of the proposed authorization and may seek to have FFB made a declared good for the purposes of the *PRA.*
9. **Statutory Conference**

9.0.1. Under Section. 78(6) of the *ICCC Act* the Commission may on request by the applicant or an interested party, or of its own motion, determine to hold a conference in relation to the Draft Determination. The Commission decided in respect of this application that a conference should be held and all parties with an interest in the application were invited to the conference.

9.0.2. The Conference was held in Kimbe, WNBP on 5 October 2012. Some 55 persons attended the Conference. The Conference was presided over by Commissioner, Dr. Billy Manoka.

9.1. **Attendees at the conference**

9.1.1. Those attending the conference included:

- HOPL;
- Governor of WNBP, the Hon. Muthuvel Sasindran;
- representatives of HOPGA;
- representatives of Bialla Oil Palm Growers Association;
- representative of Popondetta Oil Palm Growers Association;
- OPIC;
- NBPOL;
- DAL.

9.2. **Submissions received at the conference**

9.2.1. The Conference ran for more than two and a half hours. A large number of persons took the opportunity to speak. A record of the conference (not verbatim) was made and a copy of that record was placed on the public register. Copies of the conference notes were distributed to interested parties during the week following the Conference.

9.2.2. A large number of points were raised and discussed at the Conference and parties were invited to make further submissions in respect of the application. Not all points raised were strictly relevant to the subject matter of the application, namely, that HOPGA was seeking authorization to collectively negotiate prices and other terms and conditions with the processors and if necessary, to engage in a boycott of products to the processors.

9.2.3. In fact, many submissions were about the pricing formula referred to earlier in this Determination and all parties were reminded that the pricing formula was not the subject of the authorization application. However, it became clear during the course of the Conference that all parties sought a review of the pricing formula and that HOPGA would be using the outcome of the review of the pricing formula in its negotiations with processors.

9.2.4. The major points relevant to the application and the pricing formula that were raised at the conference included:

- The Governor of WNBP, the Hon. Muthuvel Sasindran favoured input of growers to the review of the pricing formula and noted that the interests of the processors should not be ignored.
• HOPGA does not want to negotiate with processors until the current pricing formula is reviewed.

• OPIC said funds are currently available for the current pricing formula to be reviewed.

• There would be a continuing need for the relevant inputs to the pricing formula to be audited on an annual or at least biannual basis to ensure that the formula took into account changes that had taken place to cost and revenue items subsequent to the review of the pricing formula.

• OPIC is prepared to facilitate that pricing review provided there is no legal impediment.

• OPIC emphasised its neutrality in respect of this application.

• The pricing formula review will take at least 12 months to be completed.

• Negotiations would be undertaken with the processors after that review is made available to HOPGA and the processors.

• NBPOL referred to its submissions in relation to the application and briefly mentioned that it had concerns as to questions of law and the fact that the Commission had not issued an Issues Paper before going to a Draft Determination. It acknowledged that there was a lot of public interest in this matter. It was keen to have the review of the price formula conducted.

• HOPL supported a review of the current price formula.

• The processors submitted that the number of persons on the growers’ blocks are increasing so the blocks are now expected to support more people.

• As part of this, it was submitted that some blocks are under producing but overall crop production has increased and payout to growers has increased.
10. Submissions received subsequent to the issue of the Draft Determination

10.0.1. One submission was received prior to the Conference (but after the issue of the Draft Determination), a further oral submission was received from HOPGA immediately after the Conference and further submissions were received from/on behalf of NBPOL after the Conference. In addition, submissions were received from the WNBPA, DAL and NRI. A record of the oral submission of HOPGA was made and a copy of that submission and all others are on the public register. Submissions of each of the parties are summarised below.

10.0.2. Following the Conference the Commission held further discussions with each of the key stakeholders. Those discussions were very helpful to the Commission and it is grateful for the co-operation and considerable effort that each of the parties made.

10.0.3. A letter, dated 16 April 2013, was received from HOPGA enquiring as to the progress of the Commission's consideration of the application. The Commission replied to HOPGA on 7 May. That letter stated that:

‘Following the Conference in September last year the Prime Minster wrote to the Commission to say that he would direct government agencies to provide submissions on this application and he asked the Commission to defer consideration of the application for that purpose. The Commission agreed to the Prime Minister's request.’

10.0.4. It wrote to all relevant agencies, explaining the operation of the law; the matters the Commission must take into account in consideration of this application and informed them that it also proposed to hold a seminar for government agencies to explain in more detail the ICCC processes. The seminar took place in January 2013.

10.0.5. The seminar was not well attended and the Prime Minister asked that the Commission hold another seminar on the subject.

10.0.6. That seminar was held on 15 May 2013 and parties attending were given until 5 June 2013 to lodge further submissions. Submissions were subsequently lodged by DAL and NRI. WNBPA lodged a submission on the day of the seminar. Those submissions are discussed in more detail below.

10.1. HOPGA

10.1.1. HOPGA made the following points:

- it confirmed that it wanted the pricing review to go ahead, even though this would mean that there would be a delay before pricing negotiations could commence;

- growers want to receive a share of the revenue of crude palm oil, palm kernel oil and palm kernel expeller;

- HOPGA wants to have all the growers’ FFB processed by one mill, even though that would mean that some product, which could be processed by a closer mill, would need to be transported further. In these circumstances the growers would meet the additional transport costs;

- HOPGA would wish to be consulted in the development of the terms of reference that would be included in the tender for any new review of the pricing formula and would expect to be given the opportunity to provide input to the consultant engaged to carry out any such pricing review;
in view of HOPGA’s desire to have all its grower FFB processed in one mill it wanted to be able to negotiate with NBPOL [and, presumably, with HPOL separately, although that is not completely clear] rather than on a mill by mill basis;

HOPGA understands and accepts that growers can make their own individual decisions as to whether or not they wish to be part of any collective negotiations or any boycott. HOPGA understood that it or its members could not intimidate or use force of any kind to require individual growers to be part of the collective negotiations or, if a boycott was called by HOPGA, to be a part of that.

10.2. Bialla Oil Palm Growers Association

10.2.1. A comprehensive submission was lodged with the Commission on 21 September 2012.

10.2.2. The submission notes that the Commission’s call for submissions of 6 January 2012 was not received by it until 2 July 2012. It provided information in response to the Commission’s list of questions. It also provided information in respect of the cost of transport. It made some comments in relation to transport costs and output of mills that would need to be taken into account as part of the review process. The submission provides other general information that is included in other parts of this determination.

10.3. Popondetta Oil Palm Growers Association

10.3.1. A detailed submission was lodged with the Commission on 1 October 2012.

10.3.2. The submission provides information in respect of production and living costs for growers, manpower requirements and job specifications, purchase price of FFB by the miller, various options for calculation of the price, possible implications of delayed or failed review of the pricing formula and recommendations.

10.3.3. The submission raises a large number of issues, not all of which is within the scope of the application, nevertheless the comments have been noted and specific issues have been included in other parts of this determination.

10.4. OPIC

10.4.1. A submission was received from OPIC on 25 September 2012.

10.4.2. OPIC says that it provides extension services to growers and is funded by processors and growers and that its governance structure includes both processors and growers. In view of this, it says that it is inappropriate to make any substantive submission on the application or Draft Determination. However, it adds that it is a long term participant in the industry and is happy to serve the Commission by providing information to assist in its deliberations. It makes a number of points of detail that have been addressed by the Commission in this determination.

10.4.3. OPIC has continued to provide valuable assistance to the Commission and has given presentations at both seminars.

10.5. NBPOL

10.5.1. A detailed submission was received on 2 October 2012.

10.5.2. That submission does not address the merits of the application (that is, whether the subject matter of the application (collective bargaining by HOPGA and a possible boycott) results in a net benefit to the public in terms of the tests that the Commission must apply in deciding applications). Instead the submission takes the view that questions of law should have been addressed by the Commission
before it considered the application on its merits. It says the Commission should provide its
decision on these questions of law and give its reasons to all parties.

10.5.3. NBPOL is also concerned that the Commission did not issue an Issues Paper in respect of the
application, that the Commission cannot compel another party to be part of negotiations, that some
of the media comment on the application was inaccurate and that the application was not signed by
a person who had authority to act on the part of the HOPGA growers.

10.5.4. NB POL in its submission of 6 November 2012 stated that they still reserve their position on the
Commission’s jurisdiction in the determination and authorization of HOPGA’s application which
relates to specific subject matters that were already the subject of the past and existing legislation.
They referred also to the questions of law raised in their other submissions.

10.5.5. Bradshaw Lawyers who act for NB POL lodged a submission on 12 February 2013. That
submission says that their client lodged a number of submissions but there had been no reply to
those submissions. Essentially, Bradshaw Lawyers took the view that the Commission must
consider those submissions (that went to questions of law) before the Commission could issue a
determination. The Commission discusses this point further in this determination at Section 12.
Briefly, the Commission’s position is that it is not a Court and does not have the power to
determine those questions. NB POL had been given ample opportunity to lodge submissions on the
merits of the application but its submissions on public benefit/detriment had been minimal. A letter
to that effect was forwarded to Bradshaw Lawyers on 26 February 2013.

10.6. **Submissions from Government agencies**

10.6.1. As mentioned above, the Commission was asked by the Prime Minister to defer consideration of
the application. The Commission responded to the request by the Prime Minister by writing to
Departments and agencies outlining briefly the background to the application and the matters that
the Commission would take into account in considering the application and inviting them to attend
a seminar. The following departments and agencies were invited:

<table>
<thead>
<tr>
<th></th>
<th>Department of Agriculture and Livestock (DAL)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2</td>
<td>Department of Implementation and Rural Development</td>
</tr>
<tr>
<td>3</td>
<td>Department of National Planning and Monitoring</td>
</tr>
<tr>
<td>4</td>
<td>Department of Treasury</td>
</tr>
<tr>
<td>5</td>
<td>East New Britain Provincial Administration</td>
</tr>
<tr>
<td>6</td>
<td>Milne Bay Provincial Administration</td>
</tr>
<tr>
<td>7</td>
<td>National Research Institute (NRI)</td>
</tr>
<tr>
<td>8</td>
<td>New Ireland Provincial Administration</td>
</tr>
<tr>
<td>9</td>
<td>Office of the Minister for National Planning and Monitoring</td>
</tr>
<tr>
<td>10</td>
<td>Office of Governor – East New Britain Province</td>
</tr>
<tr>
<td>11</td>
<td>Office of Governor – Madang Province</td>
</tr>
<tr>
<td>12</td>
<td>Office of Governor – Milne Bay Province</td>
</tr>
<tr>
<td>13</td>
<td>Office of Governor – New Ireland Province</td>
</tr>
<tr>
<td>14</td>
<td>Office of Governor – WNBP</td>
</tr>
<tr>
<td>15</td>
<td>Office of the Minister for Agriculture and Livestock</td>
</tr>
<tr>
<td>16</td>
<td>Office of the Minister for Treasury</td>
</tr>
<tr>
<td>17</td>
<td>Oil Palm Industry Corporation</td>
</tr>
<tr>
<td>18</td>
<td>Palm Oil Council</td>
</tr>
<tr>
<td>19</td>
<td>Rural Industries Council</td>
</tr>
<tr>
<td>20</td>
<td>West New Britain Provincial Administration</td>
</tr>
</tbody>
</table>

10.6.2. Over the course of the two seminars that were conducted, the following Departments and agencies
attended:
10.6.3. After the second seminar, three submissions were received from WNBPA, DAL and NRI. These are summarised below.

10.7. West New Britain Provincial Government

10.7.1. A detailed submission was lodged with the Commission by WNBPA on 15 May 2013. The submission provides comments on the list of questions and issues on which the Commission sought submissions when the application was first received.

10.7.2. The submission provides broad general information in respect of the operation of the industry. Much of this is incorporated in other parts of this Determination.

10.7.3. The submission indicates that growers have made numerous attempts to negotiate with processors but the processors are unwilling to negotiate purportedly because of issues of law.

10.7.4. In relation to benefits/detriments to the community that would flow from authorization of the application the following points are submitted:

- increased income would flow to growers if they are able to collectively negotiate;
- there will be detriment to both growers and processors if growers are able to boycott as part of the negotiating process. The adverse impact of boycotts will flow to more than just the growers participating in the boycott;
- a boycott should be seen as a last resort;
- there will be greater equality in bargaining power;
- the institution of a boycott may not be practical.

10.7.5. The submission also raises other issues, not all of which are within the scope of the application.
10.8. **National Research Institute**

10.8.1. NRI is supportive of the Commission’s Draft Determination and agrees that the proposed conditions must be strictly adhered to and that an appropriate time frame for the determination is five years. In addition, it makes the following submissions:

- allowing growers to negotiate terms of supply will give some market power to smallholders and this will increase the public benefit,
- granting authorization will provide greater bargaining power to growers,
- each of the growers is a competitor competing with each other to sell their produce to the processor.

10.9. **Department of Agriculture and Livestock**

10.9.1. DAL provided a brief background as to its role in facilitating and promoting the development of agriculture in PNG and says that the nucleus estate arrangement is a model and success story for agriculture. It adds that smallholders are an integral part of the industry and it is healthy to see mutual cooperation and benefit sharing arrangements.

10.9.2. DAL does not see competition in the marketing of FFB and says it follows that the growers are not in competition, nor are processors.

10.9.3. It considers the boycotting of supply to processors is detrimental to all parties.
11. The proposed pricing review

11.0.1. The growers have confirmed that they wish a pricing review to proceed and they are prepared to defer negotiations with the processors until it has been delivered.

11.0.2. OPIC will facilitate the review. It prepared the terms of the tender, liaised with the World Bank and the other agencies involved in preparing the tender, selected the expert and will provide assistance to the expert to obtain the required marketplace information and when the expert has completed the review, it will provide it to each of the grower associations, each of the processors and other relevant government agencies. OPIC’s involvement in the review will only be up to the point where it distributes the completed review to all the interested parties.

11.0.3. For reasons associated with funding it was necessary for OPIC to move quickly in the preparation of the Terms of Reference (ToR) for the review. The review is expected to be completed by the end of 2013 or early 2014. It provided a copy of the ToR to the Commission for consideration.

11.0.4. The ToR provides a brief background on the matter. It indicates that the ‘primary objective’ of the FFB Price Formula is that the smallholder should recover his or her full cost of production plus an equitable share of any profit from the sale of the processed fruit.

11.0.5. The ToR calls for an independent consultant to review and audit the existing formula for the last 10 years. The consultant will give an opinion on whether the formula has been correctly and consistently applied in each of the project locations and material errors will be documented including quantification of the effects of errors or omission.

11.0.6. The consultant will also do an audit and report for the year 2012 (for each of the project areas) and report as to whether the formula has been applied consistently and correctly and if not the estimated monetary value of such errors (if material). Transport cost calculations will also be examined and if material errors are found, a report will be prepared.

11.0.7. The consultant will make recommendations on changes to the formula that will improve the operation of the formula, that is, ‘ensuring a transparent and equitable pricing formula is in place and applied by each palm oil milling company at each project location and specifically that the formula fairly estimates the processed value of the smallholder fruit’.

11.0.8. A draft report will be prepared and translated into Tok Pisin and summarised in a graphic presentation package. The consultant will deliver the draft report and give presentations at public forums in the project areas and Port Moresby. Here the stakeholders will have the opportunity to discuss the methodology, rationale and recommendations. Specific advance publicity of the event will be required.

11.0.9. Following consultations, the report will be finalised, including a summary in Tok Pisin and widely distributed to Grower Associations and other stakeholders and written submissions will be invited.

11.0.10. A final report will be prepared having regard to submissions and presented to OPIC.
12. Questions of law and other questions raised by NBPOL

12.0.1. The processors have raised a number of issues in relation to the application. These are discussed briefly below. However, it should be noted at the outset that the Commission is not able to provide legal advice and the ICCC Act does not provide the Commission with the power to decide questions of the law.

12.0.2. The powers and functions of the Commission in relation to the consideration of applications for authorization are contained in the provisions of the ICCC Act. Essentially the Commission takes the view that if an application for authorization is received by the Commission and that application is a valid application, as required by Section 76, then it is obliged to consider the application in the terms required by the ICCC Act. In the Commission’s opinion there was no reason not to accept this application and that therefore there was no reason to reject the application. If it cannot reject the application the Commission must consider it on the merits and in doing so comply with the provisions of the ICCC Act.

12.0.3. The submissions of the processors are directed almost exclusively to arguing that the Commission does not have jurisdiction in this application, that it must consider and make a decision on jurisdictional issues before proceeding any further with the application and that if it considers it has jurisdiction then it should provide its decision and reasons. That is the role of the Courts and there is nothing in the ICCC Act that would require the Commission to do that.

12.0.4. NBPOL claims the pricing formula is specifically authorized by other legislation. That may or may not be the case. That is a question of law. In the absence of this application, should the Commission form the view that parties in the industry are engaging in conduct that amounts to price fixing it would consider legal proceedings against those parties and as a part of that it would consider if the conduct was specifically authorized by some other laws. But it is not necessary to do that here as there is a valid application before the Commission and the Commission is obliged to proceed as provided for in the ICCC Act.

12.0.5. By way of information, the Commission considers that Section 50 of the ICCC Act, read together with Section 53, provides, 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 the ICCC Act. The Court and not the Commission would decide if the conduct contravenes the ICCC Act.

12.0.6. It is noted that the DAL takes the view that the parties are not in competition as do the processors and that the NRI takes the contrary view. Competition can take many forms and not only in respect of prices. The Commission notes the submission at the Conference that some blocks are under producing. That submission was not challenged by HOPGA or the processors. This supports the contention of the NRI. Clearly grower management practices such as the application of fertilizer, the control of weeds and decisions not to fully harvest FFB results in some blocks under producing while others may engage in different practices and this is reflected in higher production from those blocks and in the context of this industry higher revenue. That in the Commission's view supports the view of the NRI.

12.0.7. On the issue whether or not the pricing formula is specifically authorized by other legislation, even if the formula formed part of the application for authorisation, that question would not have had to be decided by the Commission for the purposes of consideration of the application because it would have been a matter for the Court, if any party had wished to have it adjudicated. As it happens, HOPGA has not applied for authorisation of the formula thus making the question of specific authorisation of the formula even more irrelevant.

12.0.8. NBPOL submits that the conduct for which authorization is sought does not amount to a restrictive trade practice. The conduct for which authorization is sought is an agreement to set a price involving growers who we see as being in competition with each other. In the circumstances the Commission considers the intention of parliament was to prevent such conduct unless authorized or
specifically authorized. But these are questions of law for a Court and not the Commission to decide.

12.0.9. NBPOL submits that Section 70 (2) only deals with existing contracts and not new or proposed contracts. The decision on that can only be ultimately made by the courts.

12.0.10. There is concern about the media reporting of the application. The media release put out by the Commission was accurate and it must be noted that the Commission has no control over what was said by the media.

12.0.11. NBPOL reminds the Commission that it does not have the power to compel NBPOL to enter negotiations with HOPGA. The Commission accepts that point as it did in the Draft Determination when it said at paragraph 7.15.2; that it ‘cannot impose conditions on the processors as they are not a party to the application’. This point is also referred to later in this Determination.

12.0.12. There is no requirement as contended by the processors for the Commission to put out an Issues Paper. In fact, the only submissions the Commission received on the merits of the application up to the issue of the Draft Determination were those of the applicant. The submissions of NBPOL were not on the merits of the application but specifically related to questions of law and the existing pricing formula.

12.0.13. NBPOL claimed that the person who signed the application for authorization did not have the authority or capacity to sign the application. If that was the case HOPGA has had ample opportunity to say so. It has not and, in fact, the Chairman of HOPGA spoke at the conference in favour of the application and nominated the person who signed the application as their chief spokesperson.
13. **ICCC’s Evaluation**

### 13.0. The Commission’s Approach

13.0.1. For the Commission to grant authorization in relation to conduct pursuant to Section 70 (2), it has to be satisfied that in all the circumstances the conduct the subject of the application would or would be likely to result in benefits to the public that would outweigh the lessening in competition that would result or would be likely to result from it. To grant authorization in relation to conduct pursuant to Section 70 (5) and (6) the Commission has to be satisfied that the entering or giving effect to an exclusionary provision will in all the circumstances result or be likely to result in such benefit to the public that the exclusionary provision should be allowed to be given effect to.

13.0.2. The applicant has sought authorization for the following conduct:

*for its members to collectively negotiate the terms and conditions (including price) for supply of oil palm fruit to processors; and for its members to engage in a boycott of processors, if necessary, as part of the negotiating process.*

13.0.3. Even though it is not part of the application HOPGA is in favour of the pricing review and is prepared to delay negotiations pending the current review.

13.0.4. The applicant has claimed a number of benefits as resulting from this application. The Commission must consider if there is (or is likely to be) a nexus between the benefits claimed and the detriments that would (or may result) from the conduct. If this nexus is established the Commission must determine whether it results in a benefit to the community and not just a benefit to those who are party to the conduct and finally it must determine if the benefits outweigh the detriments.

13.0.5. The Commission will identify and weigh the benefits/detriments in the context of a ‘future, with and without test’. It will compare the benefits and detriments resulting from the proposed conduct in the future if the authorization is granted with those resulting, if authorization is not granted. How the industry will be likely to operate in the future if authorization is not granted is referred to as the ‘counterfactual’.

13.0.6. The starting point for consideration of this application is to consider the relevant areas of competition i.e. the ‘market(s)’. This gives context to the consideration of both public benefit and detriment. It effectively sets the parameters of consideration of benefit and detriment.

### 13.1. Relevant areas of Competition - ‘Markets’

13.1.1. Section 45 (2) defines a market as:

*A reference in this Part to the term “market” is a reference to a market in the whole of Papua New Guinea for goods or services as well as other goods and services that, as a matter of fact and commercial common sense, are substitutable for them, including imports.*

13.1.2. The Commission in considering the HOPGA application considers that there are essentially two areas of competition:

- the market for the sale by smallholder growers and purchase by purchasers of FFB; and
- the market for the output of the mills (that is, crude palm oil; palm kernel expeller; and palm kernel oil).

13.1.3. While the key area for consideration in this application is in the former market, the outcomes in that market, however, flow through to the latter market.
13.1.4. FFB must be processed within the time frame of twenty four hours; therefore, it limits the geographic area of competition to the respective catchment areas of the processors’ mills in West New Britain.

13.2. The FFB market

13.2.1. The market for FFB involves the members of HOPGA selling to millers on a fortnightly basis. The smallholder has a choice either to sell the FFB at the mill gate price (where the farmer has to transport his or her own FFB to the mill within twenty four hours or at the farm gate price (where the miller collects the fruit from the farmer). The difference between the farm gate price and the mill gate price is the transport cost to the mill.

13.2.2. The price formula has operated since the inception of the first nucleus estate some forty years ago. HOPGA members are dissatisfied with the current practice of determining the price its members receive and propose to negotiate jointly with the processors.

13.3. Crude palm oil and palm kernel market

13.3.1. The two main processors buy the FFB from the small holders and process the FFB into crude palm oil, palm kernel expeller and palm kernel oil. NBPOL is the only miller that has a refinery to further process the crude palm oil and palm kernel oil. More than 95 per cent of the output from the processors is exported.

13.4. Consideration of the counterfactual

13.4.1. The Commission considers in circumstances such as these, where primary producers offer a similar product to a small number of buyers, that the growers have little or no capacity to negotiate variations to the terms and conditions offered by buyers and little capacity to negotiate individual terms and conditions. This position is exacerbated where growers have little capacity to change the products they offer. In this instance, HOPGA says the only alternative, albeit limited, is for growers to abandon harvesting oil palm fruit and grow alternative produce such as cash crops which they already do to supplement the return from palm oil or sell out. Further, in view of the need to process the crop within a very short time frame, growers have a limited opportunity, if any, to sell to an alternative processor, if indeed that were practicable, given the additional distance involved.

13.4.2. Also in this case the processors are large well-resourced enterprises with significant commercial and negotiating expertise and this contrast sharply with growers. There are some 8,000 growers providing approximately 35 per cent of NBPOL’s capacity with the majority of FFB being provided from the processor’s own estates. Individual growers have little expertise or capacity to engage in effective negotiations with processors. Individual growers would have little input to standard terms and conditions and little capacity to vary the terms and conditions.

13.4.3. It would therefore be expected that in the absence of authorization, individual growers would accept the standard terms and conditions imposed by the processors and this would involve the use of the pricing formula that has not been varied for many years and which the growers claim has resulted in a reducing return for growers. Some growers may seek to negotiate individually but in the absence of countervailing power they would be unlikely to be successful. That conclusion is supported by OPIC.

13.5. Assessment of Effect on Competition

13.5.1. The small-holders growers are private entrepreneurs who in the Commission’s view are in competition with each other selling FFB individually to the same mill (this was discussed in section 12 – Questions of Law). They are not employees. In other jurisdictions, similar circumstances prevail in industries such as grape growing for vintners, lorry owner drivers, carting pre-mixed concrete for suppliers etc. The fact that growers receive the same price reflects Government-industry pricing arrangements, which growers now perceive as ineffective. That does not mean
they are not competitors. The mill to which growers sell is effectively a monopsony. The smallholder growers have no option but to sell to the only miller which is located in the project area. The mills also do not appear to compete for the FFB as would occur in a normal market as each project is designed for one miller only. Furthermore, ‘price parallelism’ prevails with one miller ‘watching and matching’ the prices paid by the other. Even if government involvement leads to the same price, that is a prevention or hindering of competition (in the price dimension only) within the meaning of section 45 (3) of the ICCC Act, which provides as follows:

“(3) In this Part, unless the context otherwise requires, a reference to the lessening of competition includes a reference to the hindering or preventing of competition.”

13.5.2. In the context of the above provision, it is Government-industry pricing arrangements which obviate the need for growers and processors to negotiate individually in competition with each other on price as well as on quality of fruit. Price is one dimension of competition and quality is another. In similar grower-processor arrangements, processors can usually reject or pay less for sub-standard fruit. Put simply, if growers are not employees, they must be competitors.

13.5.3. Such pricing arrangements do not remove the option of growers leaving the industry, a key indicator of competition. The only issue is on what terms. The sunk costs may render them captive – a key competition issue in terms of bargaining power between a monopsony buyer and a highly fragmented supply side structure. There is no doubt in the Commission’s view that growers are competitors as between themselves. Processors also compete with each other for FFB in contiguous areas as shown by the ‘Nakanai Agreement’ and, in the broader sense, for access to new growing areas and to supplant each other by takeover.

13.5.4. While it may be argued that competing growers coming to an agreement on prices implies a lessening of competition, that effect is considered minimal when the monopsonist processor is also offered the opportunity of participating in the price negotiations.

13.5.5. HOPGA submitted (see paragraph 7.3.2) that:

- less than 50 per cent of small growers work full time on their plots;
- if prices are low, the options for the growers are limited and some growers resort to growing alternative crops;
- the potential for growing alternative crops is also limited;
- some growers try selling off their blocks to other growers or new entrants but that is difficult because returns are low.

13.5.6. The above shows that the sunk costs for growers are high and consequently, the monopsony market power enjoyed by the millers is extremely high and as a result, the propensity of growers to accept sub-competitive prices due to their ‘captivity’ by sunk costs is correspondingly high.

13.5.7. The imbalance in the market power between the individual growers and the mills to which they supply needs to be redressed in the interests of long-term efficiency or else fluctuations in supply of FFB are likely to result with the possibility of growers leaving the industry. Such exit involves significant exit costs, growers having invested in the development of the plantations over a long period and makes them vulnerable to the monopsony power of the mills to force prices down below the levels that would prevail in a competitive market.

13.5.8. The ‘sunk’ costs of such investment in both plantations and mills are significant and without effective negotiation arrangements will lead to depression of acquisition prices below the efficient costs of production.
13.5.9. The concept of competition implies a sufficiency of effective competition on both supply and acquisition sides so that negotiating power is balanced and neither side is forced to accept prices that do not reflect their efficient costs. Where prices are struck that are higher or lower than competitive costs, the outcome is anti-competitive. If lower, then in the long term, resources will leave the growing side of the market.

13.5.10. The collective negotiation proposal will restore a measure of balance to the negotiating process and reduce the anti-competitive effect of monopsony power, thus in the long term preventing resources leaving the market in the form of growers exiting their farms.

13.5.11. The efficacy of Government arrangements for price regulation has been widely questioned by growers. The Commission understands that reviews of the formula were intended to occur at two yearly intervals but that has not occurred for many years, apparently because of lack of funds to organise selection and engagement of a consultant to conduct such reviews, the cost of which, in turn are understood to be borne by the World Bank. Overall, it is a highly unsatisfactory state of affairs that two-yearly reviews have not been conducted for ten years. That failure has to be addressed and the current World Bank funded review proposes to do that. This proposal that is the subject of this application will partly redress that failure and obviate the need for growers to depend completely on government-industry joint action which has, on the growers’ submissions, proven inefficient, ineffective and unsatisfactory to them.

13.5.12. More efficient and responsive pricing mechanisms improve the balance of negotiating power and produce pro-competitive outcomes. Pro-competitive outcomes mean that there is no anti-competitive effect to put in the balance. Indeed, the ICCC Act is based on the premise that competition itself is a significant public benefit and authorisation is only available if any lessening of competition is outweighed by public benefits. Hence, the pro-competitive effects of more balanced negotiating power is a significant public benefit which is discussed in greater detail under the heading ‘Public Benefit’ below. The only potential area of anti-competitive outcomes is that of possible boycotts and that potential anti-competitive effect is substantially reduced by the condition imposed in the determination that participation in such boycotts is to be voluntary. Hence, the assessment of competition effects results in the conclusion that little, if any, anti-competitive effect is likely and even the possibility of anti-competitive effect arising from potential boycotts is guarded against by the condition imposed in this authorisation that any such boycott is required to be voluntary for individual growers rather than compulsory. The public benefit required to be put into the balance, if any, therefore, is minimal. The following section discusses the public benefit/detriment associated with the arrangements proposed in this application.

13.6. Public Benefit

13.6.1. The ICCC gives public benefit the widest possible meaning. It regards it as anything of value to the community, generally any contribution to the aims pursued by society including the achievement of the economic goals of efficiency and progress (decision of Australian Trade Practices Tribunal in re: Queensland Cooperative Milling Association Ltd, 1976).

13.6.2. While it may be argued that unbridled competition generally produces the most efficient market circumstances, in certain circumstances such as where there is a significant imbalance in bargaining positions, collective negotiation measures on the weaker side of the bargaining arrangement may be required to produce efficient outcomes.

13.6.3. HOPGA submits the following benefits in support of the application:

- inequality in bargaining power - if growers were able to come together to negotiate terms and conditions with processors it would enhance their bargaining power and there would be a greater likelihood of a more equitable outcome.
- information asymmetry - authorization would allow growers to have access to more information and they would be likely to develop the expertise to interpret that information.
• savings in transaction and administrative costs - it is more efficient for processors and growers to negotiate jointly than to negotiate individually.

• reduction in tensions in the industry – there would be a greater likelihood of increased harmony in the industry if processors entered into genuine negotiations with growers.

13.7. Inequality in Bargaining Power

13.7.1. There is currently an imbalance in bargaining power between processors and growers. The fruit must be processed quickly and transport costs are high so there is little opportunity to transport the fruit over long distances. This means that HOPGA growers have no opportunity to switch to HOPL. They have only small plots of land, on average two hectares and limited opportunities to use their land for alternative crops. The fruit must be sold within twenty four hours and growers have no opportunity to sell elsewhere. HOPGA has considered establishing its own processing mill but could not attract funding.

13.7.2. The Commission therefore accepts that growers are largely locked into the mill to which they are contracted. This imbalance is reflected in the position that HOPGA claims is taken by processors. Namely that, processors have a ‘take it or leave it’ attitude to growers. In this regard the Commission also notes the comments of the WNBPA that growers have tried to negotiate with processors in the past but processors have refused on the basis of claimed legal impediments.

13.7.3. The Commission takes the view that authorizing growers to collectively bargain and if necessary, to withhold supplies as part of that process will be likely to enhance their bargaining position and is more likely to bring about a more equitable outcome. That is, the potential for unfair treatment or exploitation of growers is reduced.

13.7.4. Greater bargaining power and consequently the potential for greater input to terms and conditions is likely to lead to greater efficiencies.

13.8. Information Asymmetry

13.8.1. The Commission accepts that most of the relevant industry and market information is held by the processors. However, greater involvement of the growers in the proposed pricing review has the potential to expand grower’s knowledge and understanding of cost and revenue factors of all parties involved in the industry. The collective bargaining process and the proposed review will also enable HOPGA to pool information, develop relevant negotiating expertise and enhanced resources and may allow HOPGA to seek professional assistance. Provided this information is passed on to growers this may result in more efficient market outcomes.

13.9. Savings in Transaction and Administrative costs

13.9.1. The Commission notes the claim by growers that the processors have refused in the past to negotiate and exhibit a ‘take it or leave it’ attitude to growers. The Commission therefore, takes the view that in the absence of authorization, the processors will impose their own terms and conditions. There is not likely to be any individual negotiations with NBPOL. Therefore overall economic efficiency in the industry would be unlikely to be improved over time, for reasons discussed under the heading of ‘Assessment of Effect on Competition’ above.

13.9.2. The Commission considers it is likely that if authorization is granted and there are negotiations higher costs will be imposed on both sides as a result of the need to negotiate, but overall industry efficiency would be likely to be improved from a greater balance in bargaining power as a result of negotiations based on better information, which lead to long-term stability and resources remaining in the industry, representing their highest value use.
13.10. **Reduction of tensions in the industry**

13.10.1. The Commission is aware of OPIC’s and the processor’s concern and that of other parties that collective negotiations may lead to violence in the industry. However, it notes that HOPGA does not accept this as a likely outcome. The Commission notes the claim by HOPGA that there is no history of violence in the industry and instead claims that genuine negotiations with the processors will lead to reduced tension in the industry. The Commission notes that others dispute the claim of a lack of violence in the industry.

13.10.2. It seems to the Commission that collective negotiations have the potential to bring about greater bargaining equity in the industry and reduced potential for exploitation and this will be likely to lead to greater harmony and economic efficiency. However, if the process results in intimidation or violence that is relevant to the continuance of any authorization that the Commission may grant, Parties should note that an authorization can be reviewed in light of such circumstances and where appropriate, revoked or varied.

13.11. **Potential for Industry Benchmarking**

13.11.1. This potential benefit was not argued by growers. However, it seems to the Commission that the proposed review of the pricing formula and collective negotiations will facilitate the pooling of information on costs and revenues by growers. If this information was aggregated and disseminated by HOPGA, it would allow growers to compare their performance with others. The Commission considers appropriate performance measures will be likely to enhance grower efficiency and this would also benefit the broader community.

13.12. **Efficiencies**

13.12.1. Section 46 of the ICCC Act requires the Commission, in making a determination whether or not, or the extent to which, conduct will result, or will be likely to result, in a benefit to the public, to have regard to any efficiencies that it considers will result, or will be likely to result, from that conduct.

13.12.2. The submissions by HOPGA above relating to (a) the redressing of inequality in bargaining power; (b) addressing information asymmetry; (c) savings in transaction and administrative costs; and (d) likelihood of reducing tensions in the industry; are substantial and considerable efficiency considerations.

13.12.3. The Commission considers that the direct and primary negotiation by growers’ representatives with the millers on supply terms and conditions, rather than an attenuated process involving a Government-industry organisation will enhance efficiency by making both sides more responsive to each other and reducing the likelihood of mis-communication. Such face-to-face communication is likely to engender long-term trust and put the supply arrangements on a firm footing, thus creating certainty and enhancing allocative and dynamic efficiency.

13.13. **Assessment of Public Benefit**

13.13.1. The Commission is satisfied that the following benefits are likely to be achieved as a consequence of the proposed conduct and that the benefits will flow through to the broader community:

- greater equality in bargaining power,
- potential for reduction in information asymmetry,
- potential for reduction in tensions in industry, and
- provided industry information is aggregated and distributed to members there is potential for industry benchmarking and increased efficiency.

13.14.1. A public detriment is the converse of a public benefit. Collective arrangements as proposed by HOPGA have the potential to reduce competition between growers but the extent of this detriment and its impact will depend on the industry circumstances. Circumstances relevant to this consideration include the following:

- if those involved in the collective arrangements only amount to a small proportion of participants in the industry in the vicinity of Hoskins then the potential detriment is likely to be less. In this case it seems to the Commission that HOPGA members account for a high proportion of those involved in the industry so the potential detriment of the arrangement is likely to be high.

- if grower’s participation in collective negotiations (and any boycott) is voluntary then the detriment would be low as there would be an ongoing level of competition in the form of non-boycotting growers continuing to supply the mill. However, if growers are required to participate in the negotiations (and any boycott) then the detriment is likely to be high.

- if the size of the collective bargaining group is small then the extent of the detriment is likely to be reduced. The Commission considers limiting the bargaining group (for example, by geographic area or by processor or even by mill (where this can be achieved)) allows negotiations to better take into account the group’s particular characteristics then this significantly reduces the potential detriment. In this case the potential detriment would be reduced if HOPGA were to negotiate with millers on an individual mill by individual mill basis.

- if boycott activity is potentially involved, this heightens the potential detriment. However, if the size of the bargaining group is reduced this limits the potential detriment.

- if there is potential for the detriment associated with a boycott to impact severely on third parties this heightens the impact of the boycott. The Commission notes the comments of WNBPA in this regard.

- if intimidation takes place or violence is threatened or takes place against growers who refuse to participate in collective negotiations or a boycott this would further heighten the detriment of such boycott activity or collective negotiations.

- if higher payments are negotiated, will the higher payments be passed on to consumers? In this case the Commission understands some 95 per cent of the output of the processors is exported and the price of exports is constrained by the international market. Therefore the impact on other local production is limited. As mentioned above, the Commission considers there is an imbalance in bargaining power between HOPGA members and NBPOL and to the extent this reduces prices paid to growers. It has the potential to reduce the overall size of the growing side of the market and consequently, allocative efficiency in the national economy.

- if primary producers sell directly to the public, the producers would have market power if they were to collectively decide prices. However, that is not the situation with this industry as the Commission understands there are no direct sales to the public.

13.14.2. The Commission considers potential detriments flowing from the arrangements are potentially substantial but they could be reduced:

- if grower participation in the collective arrangements (including any boycotts) are voluntary;
• if HOPGA makes the above mentioned point clear to growers and takes specific action to ensure the collective negotiations and any boycotts are voluntary and

• if bargaining takes place on a mill by mill basis. However, the processors point out that mills sometimes are unable to take FFB either because of mechanical difficulties or capacity constraints or other reasons and there is a need to be able to move FFB to other than the closest mill. In these circumstances it may not necessarily be feasible to negotiate on a mill by mill basis but rather on a processor by processor basis.

13.14.3. The Commission notes the concern that processors will not negotiate with growers even with authorization and that the processors may refuse to take the growers’ produce. Should this situation eventuate and the Commission has evidence of collusion between processors, the Commission would view such conduct with great concern and would consider taking action against the processors and any party who has aided or abetted a possible contravention of the law.

13.15. Assessment of Efficiencies

13.15.1. As required by section 46, the Commission has regard to the efficiencies of the proposed arrangements in: (a) the redressing of inequality in bargaining power; (b) addressing information asymmetry; (c) savings in transaction and administrative costs; and (d) likelihood of reducing tensions in the industry and concludes that the efficiencies are substantial and likely to be considerable.

13.16. Assessment of Balance of Public Detriment and Public Benefit

13.16.1. In applying the relevant test the Commission must grant authorization if it is satisfied that the benefits to the public outweigh the detriments. If there is only a small or no detriment then there only needs to be a small benefit to outweigh it. If the detriment outweighs the benefit then the Commission must refuse to grant authorization. However, if by imposing conditions the Commission is able to reduce the detriments or enhance the benefits then it may grant authorization subject to those conditions.

13.16.2. Public benefits as listed above likely to result from this application are likely to be substantial, particularly the pro-competitive aspect of greater balance in bargaining power as discussed under the heading ‘Assessment of Effect on Competition’. As mentioned above the detriments are capable of being substantial, if certain circumstances outlined above prevail. The potential detriment from possible lessening of competition, however, is contingent on possible actions by the parties. If safeguards were built in to avoid or minimise the anti-competitive detriment from such action, then there would be little, if any, detriment to put in the balance. The balance, therefore, would lie strongly in favour of authorization if the growers were prepared to allow participation in the collective negotiations to be voluntary, if the bargaining were to take place on a local processor by processor basis and if HOPGA is prepared to provide benchmark information to growers.

13.17. Conditions of Authorization

13.17.1. The Commission imposes a number of other conditions that relate to the circumstances of the authorization. The Commission grants authorization for a limited period of time so as to allow the authorization to be reviewed in the light of changing circumstances. The Commission considers that authorization for a period of five years would be appropriate for this application.

13.17.2. The Commission cannot impose conditions on the processors as they are not a party to the application, however, the Commission will closely monitor the operation of the authorization to ensure that if negotiations take place they are genuine negotiations. The Commission would expect the processors individually to co-operate and contribute any necessary information as part of the negotiating process although the Commission expects that the proposed pricing review would be the prime source of information. Should the Commission form the view that genuine negotiations
are not taking place, it would review the operation of the authorization and seek to have oil palm fruit made a declared good for the purposes of the PRA.

13.17.3. The Commission also proposes to set a number of benchmarks that the parties should meet if negotiations are to take place. These will relate to the timing and progress of negotiations. The Commission will assist parties to agree on a process, milestone, timeframes and factors to be taken into account during the negotiations and if it is necessary for arbitration on some elements, the Commission would be prepared to facilitate that. While the detail must be agreed between HOPGA and the processors in consultation with the Commission, essentially it will require the parties to reach agreement within a certain time of the granting of authorization. Since HOPGA is now prepared to wait for the pricing review to be undertaken and it is likely that the pricing review will not be completed until late 2013 or early 2014 the Commission will allow 18 months from the date of this Determination to reach agreement. Should the parties be unable to reach agreement the Commission would review the operation of the authorization and may seek to have FFB made a declared good for the purposes of the PRA.

13.17.4. 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 that.
14. **Determination**

14.0.1. On the 4 October 2011, HOPGA lodged an authorization application pursuant to Section 70 of the *ICCC Act*.

14.0.2. The application was made for authorization, for:

- an agreement, arrangement or understanding that substantially lessens competition, *(Section 50)* – application pursuant to *Section 70 (2)*; and
- an exclusionary provision, *(Section 52)* – application pursuant to *Sections 70 (5) and (6).*

14.0.3. HOPGA seeks authorization to collectively negotiate terms and conditions (including price) for the sale of oil palm fruit with the two processors, NBPOL and HOPL. The application also seeks authorization for the possible joint refusal to supply fruit to the processors as part of the negotiating process.

14.0.4. For the Commission to grant authorization in relation to conduct pursuant to Section 70 (2), it has to be satisfied that in all the circumstances the conduct the subject of the application would or would be likely to result in benefit to the public that would outweigh the lessening in competition that would result or be likely to result from it.

14.0.5. To grant authorization in relation to conduct pursuant to Section 70 (5) and (6) the Commission has to be satisfied that the entering or giving effect to an exclusionary provision will in all the circumstances result or be likely to result in such benefit to the public that the exclusionary provision should be allowed to be given effect to.

14.0.6. For the reasons outlined in section 13 and other parts of this determination and subject to the conditions outlined below, the Commission is satisfied that the application satisfies the tests outlined in the paragraphs above and it grants authorization for a period of five years on the following conditions:

**Condition 1.** Grower participation in the collective arrangements (including boycotts) is voluntary.

**Condition 2.** HOPGA will ensure that its members know and understand that no threats, intimidation or violence of any kind can be directed against any member of HOPGA who chooses not to be involved in any collective negotiations or any boycott.

**Condition 3.** Bargaining takes place with individual processors.

**Condition 4.** HOPGA is prepared to provide benchmark information to growers.

**Condition 5.** Genuine negotiations are conducted.

**Condition 6.** Benchmarks and milestones be established by HOPGA with the processors in consultation with the ICCC that essentially requires the parties to reach agreement within 18 months of the granting of authorization.

14.0.7. Should the parties not comply with **Condition 5** or **Condition 6** the Commission will review the operation of the Authorization and seek to have FFB made a declared good for the purposes of the PRA.

14.0.8. HOPGA should also note that there is provision within the *ICCC Act* that allows the Commission to revoke or amend an authorization if the Commission is satisfied that:

- 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.

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

14.0.10. As mentioned in section 13 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.

14.0.11. This authorization will come into force six months from the date hereof or on the date of the issue of the pricing review being facilitated by OPIC whichever comes first.

<table>
<thead>
<tr>
<th>Agreed/Not Agreed/Abstained</th>
<th>Agreed/Not Agreed/Abstained</th>
<th>Agreed/Not Agreed/Abstained</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chairman's casting vote exercised/not exercised</td>
<td>(Cross out whichever is not applicable)</td>
<td>(Cross out whichever is not applicable)</td>
</tr>
</tbody>
</table>

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 02nd day of August 2013
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commission</td>
<td>Independent Consumer and Competition Commission</td>
</tr>
<tr>
<td>DAL</td>
<td>Department of Agriculture and Livestock</td>
</tr>
<tr>
<td>FFB</td>
<td>Oil Palm Fresh Fruit Bunch</td>
</tr>
<tr>
<td>GA</td>
<td>Growers Association</td>
</tr>
<tr>
<td>HOPGA</td>
<td>Hoskins Oil Palm Growers Association Incorporated</td>
</tr>
<tr>
<td>HOPL</td>
<td>Hargy Oil Palms Limited</td>
</tr>
<tr>
<td>ICCC Act</td>
<td>Independent Consumer and Competition Commission Act 2002</td>
</tr>
<tr>
<td>MBP</td>
<td>Milne Bay Province</td>
</tr>
<tr>
<td>MP</td>
<td>Madang Province</td>
</tr>
<tr>
<td>NBPOL</td>
<td>New Britain Palm Oil Limited</td>
</tr>
<tr>
<td>NES</td>
<td>Nucleus Estate Scheme</td>
</tr>
<tr>
<td>NIP</td>
<td>New Ireland Province</td>
</tr>
<tr>
<td>NRI</td>
<td>National Research Institute</td>
</tr>
<tr>
<td>OPIC</td>
<td>Oil Palm Industry Corporation</td>
</tr>
<tr>
<td>OPRA</td>
<td>Oil Palm Research Association</td>
</tr>
<tr>
<td>PNG</td>
<td>Papua New Guinea</td>
</tr>
<tr>
<td>PRA</td>
<td>Prices Regulation Act.</td>
</tr>
<tr>
<td>ToR</td>
<td>Terms of Reference</td>
</tr>
<tr>
<td>WNBPA</td>
<td>West New Britain Provincial Administration.</td>
</tr>
</tbody>
</table>