Mr. Elastus Geroro  
Acting Chief Executive Office  
*Independent Consumer & Competition Commission*  
1st Floor  
Garden City  
Angau Drive  
Boroko

Dear Mr. Geroro

**Reply to ICCC Draft Regulatory Contract & Issues Paper 2014**

Please find attached the *Association of Licensed Stevedoring Contractors* reply to the ICCC Draft Regulatory Contract & Issues Paper.

Yours faithfully,

[Signature]

Neil Papenfus  
Acting Chair
ICCC Issues Paper

PNG Ports Draft Regulatory Contract

The Association of Licensed Stevedoring Contractors (the Association) would like to thank the ICCC for the opportunity to comment on the Issues paper on PNG Ports Draft Regulatory Contract.

Although the Association recognizes the merit of some of the measures proposed by ICCC in the interest of fair pricing and transparency, we have strong concerns that in some areas the ICCC recommendations move beyond monitoring issues into matters of management performance and governance that should fall under the remit of the Board of Directors of Ports.

According to your website, the ICCC is responsible for regulating the tariffs and service standards of PNG Ports Corporation Ltd (PNG Ports). However, in the issues paper there are determinations that point to a much more direct involvement in operational and commercial issues that should be responsibility of the Board of Directors and/or IPBC. We support the role of the regulator in setting an adequate framework to motivate competition and fair pricing but ICCC’s lack of industry expertise is leading to recommendations that not only are misaligned with international practices but also do not promote operational efficiencies or effectiveness.

We have further comments to the Issues paper, as listed below:

**Issue 1 Definition of Contestable & Essential Port Services**

The ALSC strongly opposes the addition of all contestable services to the list of regulatory services.

Regulatory services are defined in Minister’s declaration of July 2002 (section 32(4)), and should not be varied unless due process is followed. We recommend that the Commission reverts back to the ministerial definitions.

Essential port services are defined in section 1 of the Harbours Act in reference to those port services consisting of:

a) providing port facilities for loading and unloading vessels at a declared port; and

b) providing berths and berth reservation services for vessels at a declared port.

It follows that as a ‘regulated entity’, PNG Ports has certain functions and powers relating to those essential port services, for example should stevedoring services be considered a regulated service, it is implying that there is no competition in country (hence the requirement of becoming regulated services) and could open the door in the future for PNG Ports to be the exclusive provider of these services (as it would be within their mandate to provide all of the new regulated services). This will definitely not promote competition in the waterfront and would have a disastrous impact for all members of the Association.
The proposal by the ICCC to include certain goods and services as contestable and/or regulated services has been done without proper consultation with the industry or any commercial or practical justification as to why they should be included in the draft determination.

**Issue 5 Demand forecast for the next regulatory period**

The assumptions both made by Ports and Deloitte’s are considered to be overestimated. According to our forecast information for 2015 (that was discussed with the shipping lines) there is no expectation of increases of volumes of cargo in any of the regulated PNG Ports due to no major new projects in 2015/2016 and weak prospects for commodity prices that dictate the exports of PNG. There are other factors like the variation of the Kina exchange rate that can have a significant impact on the volumes of cargo.

Although it is understood the analysis of the macroeconomic conditions, this is a general correlation that does not include a pragmatic discussion with the industry. The assumptions made in the document (POM 7.8% overseas 3.1% coastal, Lae 7.6% overseas 1.6% coastal, Other 4.8% overseas 1.8% coastal) are much higher than the increases of the last two years and our expectations for 2015. Please consult with Ports for actual volumes and please consider no increase in throughput in 2015 (vs 2014).

**Issue 12 Total Revenue Requirement**

The principles of Maximum Allowable Revenue (MAR) are considered to be a pragmatic approach. The proposed model allows a mechanism to recover revenue if MAR is exceeded in a certain year but it does not have any mechanism for Ports to recover revenue if MAR ceiling is not achieved.

If throughput is lower than forecasted, PNG Ports is allowed to change prices within 30 days notice that will mean that none of the current port users will be able to assess and estimate the cost of their operations. With expected fluctuation of prices, shipping lines would not be able to plan for PNG Ports associated costs and would impair their ability to quote for freight (often contracted months in advance) and charges for wharfage and handling. Prices within ports ideally should change yearly and in a worst case scenario no more than twice in one year.

With the assumption of a very optimistic (and unrealistic) forecast for 2015 (as per issue 5), the change of the model to MAR/single till approach will create chaos in the waterfront that will have a significant impact on customers. For a shipping line, costs specifically associated to a particular port/country lines will be passed directly to customers in their freight rates, so uncertainty will be felt mainly by the end customer, i.e. the people of Papua New Guinea.

**Issues 14 ICCC proposed to reform the wharfage charge to a rental based charge.**

Noting ICCC comment on page 42 “We note that PNG Ports is atypical to many other ports, in that it faces no competition from other ports in its proximity or from road or rail. It therefore enjoys a natural monopoly given its location and the geography of PNG. On this basis, regulation of its pricing is more imperative than say a port in Australia that competes with other ports in Australia as well as other modes of transport.”

Association of Licensed Stevedoring Contractors
This is an inaccurate statement. PNG Ports has competition both in Port Moresby (AES, Motukea, Steamships and Bismarck wharves) and in Lae (Asiawe, South Sea Lines, Bismarck). In 2013, the total volume of cargo in ALL PNG Ports facilities was 1/5 of the total volume of cargo in Port of Brisbane.

The model proposed by PNG Ports to convert charges to unit box rates would improve efficiencies. The current system using revenue ton as a basis for wharfage on containers is unwieldy and cumbersome. Chronic under-declaration not only has led to losses of revenue for both PNGPCL and Customs but also presents a very serious safety risk due to under declaration of actual container weights. A simple box rate is efficient and in keeping with best practices. It allows for shipping companies to quote more accurately and is speedier. Note though that per revenue ton rates are still used as the basis for breakbulk freight charges.

Shipping companies have confirmed that in Pacific Ports, including New Zealand and Australia, wharfage is charged either on a TEU or Revenue Ton basis. The rental-based method proposed by ICC will not promote efficiencies and would be impractical to execute.

**Issue 15 Pricing structure**

We do not accept the ICC conclusion that stevedores have no incentive to increase efficiencies.

All stevedore and handling revenue is set at a unit or revenue ton rate. However labour, the highest cost of stevedoring is measured in “time”. In other words, the longer it takes to stevedore a vessel, the more it costs the stevedore company. It is not in the stevedore’s interest to be inefficient. Significant gains have been made in terms of productivity and this has been a high priority for the lines, PNGPCL and the stevedoring companies. It is disappointing that the ICC does not acknowledge this.

The cost of stevedoring in PNG is relatively small in the total cost of shipping but the speed with which vessels are loaded and unloaded in PNG ports can have a major impact on the cost of the voyage. Vessels work to very tight time schedules. A delay in any one port can have a cascading effect throughout the voyage as it could mean that a berth is no longer available when the ship arrives in the next port. The shipping companies therefore have a strong incentive to maximise efficiency through minimising the cost of moving cargo through the logistics chain and to incentivise stevedoring and handling companies to minimise vessel times spent in Port.

A vessel’s performance is heavily dependent on the planning (done by the shipping company), type of vessel (pontoon or hydraulic hatches, McGregor cranes or Swinging Derricks, etc.), age of vessel, type of cargo, etc. It is not simply a question of the stevedore’s performance that determines efficiency.

The ICC proposal is neither workable, manageable nor viable and it will not improve efficiencies nor motivate any future improvements. The ICC states that the maximum time allowed for a stevedore to “occupy” the wharf is one week. What happens if a Port has consecutive vessels for more than a week? Under this rule, stevedoring and handling would just stop. Then what is the mechanism to restart and how long would stevedoring companies have to wait? How long would shipping lines have to wait for loading or discharging their vessels?
**Issue 18 Dispute Resolution**

The Association does not agree with the dispute resolution framework for the following reasons:

a) the Association considers that the ICCC does not have the power under the Independent Consumer and Competition Act (the ICC Act), including section 35, or the Harbours Act to introduce such a dispute resolution clause;

b) such a clause may well infringe upon those contractual obligations (including terms regarding dispute resolution) that exist in an agreement between an operator and its customer. If a container or goods are released in the event of a dispute in contravention of those terms that exist in an agreement between an operator and its customer, then this is likely to prejudice the rights of the operator to claim all relevant charges against its customer. The introduction of such a draft dispute resolution clause will most certainly lead to an abuse of the system by customers in circumstances where they demand the release of their containers with the knowledge that have not paid all relevant charges for the release of their container; and

c) a dispute resolution clause cannot purport to override the common law right of an operator to withhold a container on the basis that it holds a lien over a container where the customer has not paid for a particular service.

**Issue 19 Introduction of Key Performance Indicators**

The ALSC welcomes the introduction of KPIs in the regulatory contract that formalises current practise: stevedoring companies have KPIs established with Ports on several items including Productivity and HS&E. However, while an important tool to measure performance KPI’s need to be understood within their context. Performance may be attained at the cost of safety and we note that Health and Safety is not mentioned in this document. It is worth noting that safety standards are a priority in PNG Ports current requirements and a primary priority for the stevedoring and shipping companies.

It is also crucial that these KPIs are practical: A Port needs to be able to prioritise vessels and/cargo as the need arises, e.g., fuel ships, passenger vessels, naval vessels etc. will typically get first call to berth. Bulky breakbulk vessels that take time, e.g., wheat or bulk bag cement, will usually wait for a liner vessel to be discharged first. This is standard worldwide.

Finally, we must disagree with the attempt by ICCC to link KPIs to management remuneration and benefits. These matters should be dealt with by PNG Ports Board of Directors, not the ICCC.

**Issue 31 Confidentiality**

The Association is concerned that confidential information, including commercially sensitive information will be released to the ICCC, which in turn may release that information to the public. Operators in the stevedoring and handling business often operate their businesses at a marginal rate and the disclosure
of commercially sensitive information to the public or a competitor may severely prejudice an operator’s business, including the ability to continue operations.

The Association is also concerned that there appear to be no protective measures discussed in the preamble to issue 30 as to what undertakings would be given by the ICCC regarding the proposed collation of that information and safeguards to ensure that confidential information is not unlawfully published or disclosed to the public or a competitor. The preamble also does not discuss principles for which information could be sought or how objections may be made regarding the disclosure of certain commercially sensitive information. In response to past submissions papers, it is the Association’s opinion that the ICCC has disclosed certain confidential information to the public without the permission of the relevant operator. The Association objects to the proposal that PNG Ports disclose certain information as such information may well contain commercially sensitive information that may harm an operator’s business, if that information is disclosed to a competitor.

PNG Ports is also not authorised under the Harbours Act to disclose such information and may expose PNG Ports to court proceedings by an operator that considers that the disclosure of such information is unlawful.

It is also apparent that issue 31 gives discretion not to disclose information which it considers is confidential but the exercise of this discretion risks disclosure of commercially sensitive issues unless effective justification is provided.

**Issue 32 Enforcement of contractual obligations**

Sections 127 and 128 of the ICC Act provide certain powers to the ICCC to obtain information relevant to its functions and powers under the ICC Act and so the Association considers new clause 15 in the Regulatory Contract is unnecessary. Likewise, if PNG Ports considers that the ICCC has exceeded its powers under the ICC Act, it may seek certain orders in the National Court against the ICCC. In other words, new clause 15 appears to simply state that the ICCC and PNG Ports may take certain action against each other party, in circumstances where those rights are already prescribed in the ICC Act.
8 August 2014

Dr Billy Manoka
Commissioner
Independent Consumer and Competition Commission
Garden City, Boroko, NCD

Dear Commissioner,

RE: PNGCCI COMMENTS/SUBMISSION ON PNG PORTS ISSUES PAPER AND DRAFT REGULATORY CONTRACT

I attach our submission/comments from the PNG Chamber of Commerce and Industry in response to the Issues Paper and Draft Regulatory Contract on PNG Ports Corporation Ltd (PNG Ports), released by the ICCC to the public for comments.

We believe the new proposed regulatory model proposed by the Commission is heavy handed and will work against businesses especially, importers and exporters and consequently the economy through unpredictable behavioural patterns of PNG Ports as a result of the new proposed model.

The Chamber understands that the Commission currently does not have a full quorum in terms of its membership as required under the ICCC Act. With no quorum at present, and not for the last few months, it would appear that the Commission does not have a quorum for meetings and cannot decide things by resolution. Sections 35 and 36 of the ICCC Act require the Commission to make decisions and issue regulatory contracts etc which it would appear that at present it cannot do, till either the full time Commissioner returns, or a new Associate Commissioner (Non-Resident) is appointed. Therefore, the Chamber queries whether the current regulatory reset process is unlawful, because the Commission is not able to legally issue draft Regulatory Contracts, Reports, etc. We have recently been advised that the Commissioner has resumed work however, note that ICCC Appointments Committee has yet to appoint a new non-resident Associate Commissioner who is required to make up the quorum. We seek clarification on this matter.

We look forward to responses to issues and concerns raised in our submission.

Yours sincerely,

[Signature]

John Leahy
President
PNG CHAMBER OF COMMERCE AND INDUSTRY (PNGCCI) SUBMISSION TO INDEPENDENT CONSUMER AND COMPETITION COMMISSION- PNG PORTS ISSUES PAPER AND DRAFT REGULATORY CONTRACT

This Submission is presented on behalf of the of PNG Chamber of Commerce and Industry (PNGCCI) and its members including its affiliated Provincial Chambers throughout the nation, in response to the Issues Paper and Draft Regulatory Contract on PNG Ports Corporation Limited issued by the Independent Consumer and Competition Commission (ICCC).

INTRODUCTORY COMMENTS
Despite the public policy and economic regulatory reforms introduced in 2002 (of which the establishment of the ICCC by way of the ICC Act 2002 was part), the politicising of SOEs and the IPBC, and frequent directions by Ministers to SOEs to undertake projects outside of their Business Plans has hindered their performance resulting in much criticism of SOEs by the general public and businesses. PNG Ports however, is one of the few SOEs that has been performing reasonably well despite these political challenges and apart from a few bad decisions by previous management. We note that PNG Ports continues to subsidise unprofitable ports as part of meeting its community service obligations as required by the Government although there is no formal government policy on CSOs or the funding of CSOs. The Commission should note that challenges of making a profit, paying dividends to shareholder and meeting the expectations of Government to fund CSOs will continue to be a challenge for SOEs, and in particular for PNG Ports.

We note that the Commission is adopting a hardline regulatory approach against regulated entities. In its recent Draft Report on the Stevedoring Industry, despite a strong representation by the industry to maintain the current regulatory model, the Commission is moving from a monitoring type regulation to price control type regulation. This is similar to the old regulatory regime before the reforms in 2002. The inability of the Prices Controller at that time to manage the large number of price determinations under the old Prices Regulation legislation resulted in the collapse of the heavy handed form of regulation operating at the time. The reform process undertaken in 2002 which resulted in the enacting of the ICCC legalisation was intended to avoid this type of problem in the future. Ultimately the cost to the economy of such heavy handed regulation needs to be carefully considered against the potential benefits. It was the opinion of the Government of the day, that the replacement for the Prices Controller should have the ability to adopt light handed regulation as a means of balancing the benefits and costs of regulatory intervention.

The industry believes the Commission did not take this need for a balance between costs and benefits in its decision on the stevedoring industry, and thus failed to justify a move towards a price control model for this sector. Similarly, on the basis of the Issues Paper that has been released on PNG Ports, the industry believes that the Commission is adopting a similar heavy handed approach towards Ports PNG which could have a negative unintended impact on the PNG economy.
The new proposed Ports regulatory regime (MAR and single till) –which effectively moves from a 5 year incentive based regulatory model to a year on year revenue model - could see Ports being encouraged to adopt perverse behaviour in terms of their pricing of services, ultimately to the detriment not only of exporters and importers, but also to the general consumer. This potential for unintended consequences from the proposed new regulatory arrangements in part reflects poor drafting of the proposed Regulatory Contract, and limited consideration in the Issues Paper of the arguments for and against the path that the Commission proposes to take. Unfortunately, this does not do the Commission any credit, and must be addressed carefully before any final decision is made. Further discussion on this point follows below.

The Chamber also believes that the Commission could be stepping beyond its role into functions that fall within IPBC and Board of PNG Ports, who are responsible for governance and operational issues of Ports. Examples of this problem are reflected in the highly intrusive approach to decisions to be taken by PNG Ports re its ongoing annual capex program, its decisions on opex options, and the loose wording around the proposed annual price setting arrangement which could, under one interpretation, mean that PNG Ports would need to justify each year's opex against the annual cap set by the Commission.

The Commission appears to have moved away from the incentive form of regulation that has been embodied in the Regulatory Contracts and regulatory arrangements that have applied in the last decade. It is not clear on what basis and factual evidenced the Commission has taken this approach as the Issues Paper is devoid of argument on this matter. However, there is a real danger that in being overly prescriptive and interventionist, the Commission has effectively moved towards a year on year rate of return form of regulation. This would be a backward step, particularly as it provides no incentive for PNG Ports to improve its performance with consequential benefits for the PNG economy.

The Chamber believes the new regulatory regime proposed by ICCC would potentially require changes to the ICCC Legislation - the proposed MAR and Single Till proposals would require amendments to ICCC Act or at least proper consideration of the requirements of the current Regulatory Contract which in part specify that the Regulatory Contract commencing 1 January 2015 should be premised on an incentive based regulatory model. The Issues Paper is silent on this issue. However, this matter needs to be considered and explored in any Final Report prepared by the Commission.

Any changes to ICCC Act would be a policy function of Department of Treasury and one that would require an adequate timeframe for extensive consultation with all stakeholders. The current timeframe is too short to give our member Chambers around the nation to provide their views.

Specific issues of concern are highlighted below.

USE OF REVENUE CAP MODEL

The Commission is proposing to use Maximum Allowable Revenue (MAR) approach to price determination. The Commission intends to set the MAR at a level that it thinks would recover the full, building block determined revenue requirements of Ports. Consequently, this would then allow PNG Ports to set their prices such that if at the end of the year the revenue collected by Ports exceeds the MAR for that year, then Ports would need to give a discount on prices in the following year to return the revenue collected over the two years to the MAR set by the Commission for those two years; this process would continue for the third year and following.

The Commission appears to be trying to avoid the need to allocate costs between the regulated services provided by Ports and the unregulated services provided by Ports which would be required if a price or revenue cap was set for the regulated services alone. The Commission in the past has indicated that it would like to regulate the unregulated services and the proposed opex and capex allocation methodology proposed by the Commission effectively intrudes into this area.

In setting a MAR in accordance with description laid out in its Issues Paper, the Commission is proposing that PNG Ports repay (through lower prices in a subsequent year) any over recovery of the MAR allowed, but then not allowing Ports to recover any under recovery of the MAR in those years where they may not have fully reached the revenue cap.

The use of a revenue cap (rather than a prices cap) while possibly a legitimate approach to regulation may not be consistent with ICCC Act and could be a subject of a legal challenge.
The issue here would relate to the question as to whether the form of regulation proposed in the current version of the Draft Regulatory Contract meets the requirements of the legalisation which, although it refers to revenue cap arrangements, still requires the Commission to set a price.

On the basis of the draft Regulatory Contract which forms part of the Issues Paper. it would appear that the prices that the Commission is proposing is zero for each specified service. This places the onus on PNG Ports to determine a price in the 30 days from the end of November when the Final Report is due to be released and 1 January 2015 when the new arrangements are intended to come into effect. However, given the complexity of the proposed arrangements as set out (rather confusingly) in the Issues Paper and Draft Regulatory Contract, members of the Chamber are concerned that this could result numerous changes being made in PNG Port’s charges over the initial months of the year as PNG Ports struggles to deal with the data and analysis issues needed to determine ongoing prices for the year that will meet the MAR cap requirements.

However, legal issues aside, the approach proposed by the Commission fails to apply an appropriate balance of safeguards and risk allocation for Ports. And as a consequence creates incentives for perverse behaviour by Ports which would not be in the best interest to the business community and of the national economy.

For example, by excluding the possibility of PNG Ports recovering under-collection of its designated MAR in any year, PNG Ports would have an incentive to raise prices more than once during the year for the year in question such that it would ensure that it at least recovered the full revenue allowance for the year. As an example, PNG Ports could find that because volume of trade is down on expectation, it could seek to raise it prices in the last quarter of a year to recover any likely under recovery against the MAR if it appeared this was likely to occur.

It would appear from the wording of the draft Regulatory Contract that the Commission is proposing to give PNG Ports the ability to make these price/multiple adjustment decisions during a year provided the MAR is not exceeded. Clearly, this would result in some very unstable pricing arrangements which would be faced by importers and exporters alike, and would not give them any certainty regarding their costs, thereby hindering efficient trading activity into and out of PNG.

Another example, which goes to the question of the inclusion of unregulated services (such as pilotage and storage) in the calculation of the capped MAR (the single till approach which is based on a revenue based allocation of opex and capex), would be the incentive that this would provide for Ports to cross subsidise its unregulated activities by reducing revenue outcomes for unregulated services as a means of increasing the proportion of total revenue requirements that would be collected under the MAR for regulated services. This could in effect act as a way of discouraging or even blocking competition in the unregulated services area, which by definition is the competitive part of the market where other service providers can readily operate (pilotage and storage).

The failure of the Commission to adequately address the issue of differentiating between the regulated and unregulated services under its proposed single till and MAR approach, would act against the principles of promotion of competition contained in the ICCC Act. Competing service providers, particularly in the storage area, will be concerned about the implications of the MAR cap approach that is proposed by the Commission as it will effectively disadvantage these businesses.

It appears the Commission has not fully addressed the different cost drivers behind each of the regulated and unregulated service areas, the competitive environment that applies to the services themselves, and the ability of PNG Ports to shift its revenue recovery arrangements between these activities given the perverse incentive that is provided by a single till MAR/revenue cap.

If indeed the Commission believes that its proposed arrangements are more efficient than a price cap applied to regulated services as is currently used, then it should provide a full explanation and justification of its position in the Issues Paper. Currently, this justification is not clearly enunciated in the Issues Paper. In addition, there appears to be confusion in the mechanism by which the Commission’s proposed MAR arrangements are to work as set out in the Regulatory Contract. These matters need to be resolved.

A more correct and desirable approach to regulation for this industry involves adoption of appropriate cost allocation rules, the determination of the revenue requirements for the regulated services part of PNG Ports’ business, and then by either using a price cap or revenue cap for those services only, applying a regulatory regime that allows for an appropriate sharing
of risk and that is neutral in terms of the impact that will occur across other unregulated services and other businesses that compete for unregulated services in the market. The Maximum Allowable Revenue cap, without setting maximum prices under that cap, which is what the ICCC is proposing, is not only undesirable as a means of regulating the industry but arguably is also not in accordance with ICCC Act, which requires ICCC to regulate prices through the Regulatory Contract (section 35(4)).

SINGLE TILL
The ICCC should define clearly what are “regulated services” and “not regulated services” for the benefit of the business community.
The proposed single till approach to regulation may be easier for ICCC to manage (because it does not have to address the issue of cost allocation between particular services), but is it in accordance with the ICCC Act? Is the Commission contemplating amending the Act? This is not stated clearly in the Issues Paper.

It is our understanding that Regulatory Contract applies only to regulated services, and cannot regulate other services (contestable services). Regulatory services are defined in Minister’s declaration of July 2002, and cannot be varied (section 32(4)). It would appear that the ICCC is trying to regulate all services which it thinks ought to be regulated, and is thereby ignoring the definition of “regulated Services”. In particular it wants to regulate storage services, which are not within the definition of regulated services.
The potential impact of the proposed operation of the single till approach is that it draws into the regulatory arrangements those services which are by definition, unregulated. The Chamber questions as to whether the Commission has the legal power to make such a change in the interpretation and application of the current regulatory regime and legislation.

SEEKING CLARIFICATION FROM THE COMMISSION
The legality of a number of proposed changes that the Commission wishes to make raises issues that are of major concern to the business community. The business community relies upon the rule of law, particularly commercial law, as this provides the basis upon which contracts, trade and commercial agreements can occur with confidence. To create an environment in which it might be conceived that the rule of law does not apply, will automatically place constraints upon efficient business practices and trade between parties, such that the economy as a whole will suffer.
The role and responsibilities of the Commission as provided under the ICCC Act together with associated legislation, is of such importance within the PNG economy that there must be no doubt that the Commission is acting in accordance with the law, and that its decisions can be relied upon as being lawful.

There are a number of unclear legal matters that arise from the current wording of the Issues Paper, and in particular the draft Regulatory Contract that need to be resolved. Thus, the Chamber would request that as part of its preparation of its Final Report, the Commission review and clarify its position on the following legal issues:

- Maximum Allowable Revenue cap, without setting maximum prices under that cap, which is what the ICCC is proposing, is not only undesirable as a means of regulating the industry but may not be in accordance with ICCC Act, which requires ICCC to regulate prices through the Regulatory Contract (section 35(4)).
- Single till approach to regulation may be easier for ICCC to manage, because it doesn’t have to worry about cost allocation among particular services, but is not in accordance with the Act. The Regulatory Contract applies only to regulated services, and cannot regulate other services (contestable services). Regulatory services are defined in the Minister’s declaration of 11 July 2002, and cannot be varied (section 32(4)). It would appear that the ICCC is trying to regulate all services which it thinks ought to be regulated, and is thereby ignoring the definition of “regulated Services”. In particular it wants to regulate storage services, which are not within the definition of regulated services. In fact, a single till approach necessarily tries to bundle all services as “regulated services”, which would not appear to be in accordance with the law.
- The Issues Paper says that PNG Ports has a legislative monopoly (which ICCC does not define). This does not appear to be in accord with the relevant legislation, namely the Harbours Act, or the ICCC Act, nor the licence issued to PNG Ports. It is the Chamber’s understanding
that anyone can provide essential port services, and in some places they do, in competition with, or instead of PNG Ports (eg, Curtain Brothers Dockyard in Port Moresby and PNGSDP project in Western Province). Lack of precision in this definition raises some concern for the Chamber, especially should the ICCC believe that it can regulate the prices of these competing service providers on the basis of its interpretation of the law. This makes it all the more important that services which are not legally defined as "regulated services" are not by implication from the current wording of the Issues Paper and Regulatory Contract, to be treated as regulated by the ICCC.

- ICCC wants to set up a tribunal with power to impose penalties up to K10,000 to resolve disputes. The Chamber believes that this is not permitted by law, and would seek to oust the jurisdiction of the courts, which is illegal. If there is a problem with disputes between Ports and its customers, you could have an optional mediation process run by, for example, a mediator nominated by PNGCCI, though each party would still have the opportunity to take the matter to court if the mediation did not produce an agreed result. That would be lawful.

SUMMARY

The proposed regulatory framework for Ports PNG will potentially adversely affect businesses especially those directly involved in importing and exporting. This is particularly evident as a consequence of the proposed use of a year-on-year MAR approach to determining PNG Ports' charges. The proposed mechanism for the operation of this MAR approach (which it must be said is not particularly well thought through or presented in the Issues Paper and draft Regulatory Contract) is unpredictable, potentially encouraging perverse behaviour by PNG Ports. In particular, the lack of symmetry in the treatment of under and over recovery of MAR on a year on year basis encourages PNG Ports to set prices that will more than meet MAR requirements, thereby adding a price surcharge to the cost of services that importers and exporters need to pay on a year by year basis. The use of an over recovery catch up on a year on year basis will not necessarily resolve this issue as PNG Ports will always have the incentive to charge at a rate that will ensure that they at least recover the full allowable MAR.

The focus on a year on year review of opex and capex performance will also remove the incentive nature of the regulatory arrangements. This would appear to be contrary to the regulatory principles that have been included in the regulatory regime used in PNG to this time. Ultimately, this will act to discourage productivity improvements by PNG Ports to the detriment of the economy as a whole. This approach is sub optimal, and if the Commission wishes to adopt this approach, then it should be prepared to argue the case more fully in the Issues Paper and to address the concerns that the Chamber has. The Chamber recommends that the current regulatory regime should continue while a comprehensive review is undertaken with wider terms of reference to include CSO and Dividend policies and extensive consultations with government and businesses throughout the nation.

Finally, the Chamber recommends that a full review of all aspects of the proposed regulatory arrangements, changes to the Regulatory Contract and proposed price determination model, be subject to detailed legal assessment to determine whether or not all legal requirements have been met, and the final decisions are legally sound. In particular, the Commission awaits clarification as to the legitimacy in law of the current Draft Issues Paper and Regulatory Contract given that it would appear that a quorum as required under the ICCC Act has not been inexistence to make a resolution approving the release of the current documents.