

## LEGAL DEVELOPMENT ISSUES

**REVISED MODEL BILL ON COMPETITION****Paper by the Commonwealth Secretariat****EXPLANATORY MEMORANDUM TO THE MODEL BILL ON COMPETITION****INTRODUCTION**

1. At their Meeting in Durban in 1999 Commonwealth Heads of Government (CHOGM) emphasised the importance of a robust competition atmosphere in a global economy. CHOGM requested the Secretariat to explore ways and means to promote consensus on international trade which includes competition law. The main objective of competition policy and law is to preserve and promote competition as a means of ensuring the efficient allocation of resources in an economy. This should result in lower prices and adequate supplies for consumers and, it is hoped, faster growth and a more equitable distribution of income. By lowering barriers to the entry of new firms into an industry, competition policy helps to create an enabling environment for entrepreneurial development, an essential prerequisite for a vibrant economy (OECD and Khemani 1998).
2. As Law Ministers will recall, in response to this request, the Legal and Constitutional Affairs Division (LCAD) of the Secretariat developed a model bill and submitted the same to the Commonwealth Law Ministers Meeting (LMM) in St Vincent and the Grenadines in 2002. After careful consideration, the LMM instructed LCAD to revise the (2002) model bill to take into account the needs of small and vulnerable sectors of the economy that have been systematically disenfranchised from meaningful competition activities.
3. In light of this directive the (2002) model bill was referred for initial redraft, an exercise which was undertaken and finalised in September 2003. The Law Development Section (LDS) of LCAD then distributed copies of the Bill to Law Ministers for their comments. Expert Groups were then convened in each region of the Commonwealth to seek views on the possibility of further amendment to the Bill where necessary.
4. The first of the Expert Group Meetings took place from 10-14 May 2004, in Singapore. The countries represented were India, Malaysia, Maldives, Mauritius, Seychelles, Singapore and Sri Lanka.
5. The LDS conducted its Pacific meeting from 8-12 November, in Apia, Samoa. The countries represented were Cook Islands, Fiji, Kiribati, Papua New Guinea, Samoa, Tonga and Tuvalu.
6. The third of these series of Expert Group Meetings was held in Nassau, the Bahamas from 13-17 December. Representatives at that meeting hailed from the Bahamas, Belize, CARICOM, Jamaica, St Kitts and Nevis, St Lucia and St Vincent and the Grenadines.
7. The fourth regional session was held in Seychelles from 4-8 April, for the African region. With representatives from most of Commonwealth Africa, that meeting brought delegates from Botswana, Cameroon, The Gambia, Ghana, Kenya, Lesotho, Malawi, Mauritius, Namibia, Seychelles, Sierra Leone, South Africa, Swaziland, Uganda and Zambia. The meeting also benefited from the input of the Special Advisory Services Division (SASD) as well as delegates from the Secretariats of the Common Market for Eastern and Southern Africa (COMESA), Economic Community for West African States (ECOWAS) and the UN Conference on Trade and Development (UNCTAD).

8. The redraft of the Model Bill presented to Law Ministers is therefore the culmination of the composite thoughts of these regional experts. In a Final Expert Group Meeting on the Competition Bill, which took place at the Commonwealth Secretariat, Marlborough House, from 25-29 July, the Bill was fine tuned by a blend of experts culled from the series of regional meetings.

9. Submitted as **Annex I** is the rationale from some of the regional experts for a robust Competition Bill, particularly in small developing economies.

10. Submitted as **Annex II** is a chart representing the Investigation and Hearing Procedure contemplated by the Model Bill.

## THE DRAFT MODEL LAW

### THE LONG TITLE

11. The long title sets out the scope of the Bill, namely to promote, maintain and encourage competition, to prohibit anti-competitive activities and unfair practices, to establish a Competition Commission, to promote the interests and welfare of consumers and for matters connected therewith and incidental thereto.

### PART 1 - PRELIMINARY

#### CLAUSE 2 - Interpretation

12. Sub-clause (1) contains the definitions of terms used in the Bill:

“acquire” is defined in wide terms in relation to goods and services and includes in relation to goods a right or interest by way of a purchase, lease, gift, contest, exchange, hire, hire purchase, and in relation to services the acceptance of the rendering of services;

“agreement” means an agreement between enterprises, irrespective of the form in which it is made (would include arrangement or understanding) and whether or not it is intended to be legally enforceable;

“business” includes activities which are all encompassing as it includes all commercial or economic activities relating to goods or services but such activities must be for gain or reward and would therefore exclude charitable organisations;

“consumer” is also defined in wide terms to include a person being an individual or a body corporate or an unincorporated body of persons acquiring goods or services for any purpose;

“control” is defined as the power of a person holding voting or other power in a body corporate enabling him to decide the manner in which the commercial activities of the body corporate is run;

“document” is defined to cater for information recorded in any form;

“enterprise” encompasses an individual, partnership or other body (corporate or unincorporated) which is engaged in business;

“goods” is defined to include all kinds of property except real property, money, securities or choses in action;

“service” is widely defined to embrace all types of services, whether industrial, professional, or otherwise;

“supply” is defined in relation to goods that are supplied by way of sales, exchange, lease, hire and hire-purchase of the goods and in relation to services it covers the provision of services by way of sales, rent or a grant of the services;

Sub-clause (2) provides that the references to the lessening of competition include hindering or preventing competition;

Sub-clause (3) sets out the method of determining the effect on competition in a market, by taking account of all the factors that affect competition in that market, including actual or potential competition from products supplied or likely to be supplied by non-residents or persons who do not carry on business in the particular country;

### **CLAUSE 3 - Objects**

13. This clause states the objects of the law. Clause 3 as drafted initially has been amended to address the concerns of member states. It now provides that in addition to the objectives set out under sub-clauses (a) to (e), small and medium enterprises should be able to compete effectively in a market and that the promotion of competition should not take place at the expense of small and medium enterprises.

### **CLAUSE 4 - Application**

14. This clause provides for the scope of the application of the Act in relation to business activities (any commercial or economic activity relating to goods and services for gain or for reward) and refers to the First Schedule which lists the activities which are excluded from the ambit of the law.

## **PART II –THE COMPETITION COMMISSION**

### **CLAUSE 5 - Establishment of Commission**

15. The Competition Commission is established as a body corporate. The constitution and conduct of business of the Commission are set out in the Second Schedule.

### **CLAUSE 9 - Functions and duties of Commission**

16. The Commission is vested with wide-ranging functions and duties:

- on-going review of business activities in order to identify activities which may adversely affect consumers’ economic interests;
- eliminate and control anti-competitive activities;
- act nationally and internationally in respect of competition consumer protection matters;
- advise the Minister on the operation of the Act and assist the Minister with any matter he may wish to be enlightened on concerning the application of the Act;
- conducting investigations to determine whether any enterprise is engaging in anti-competitive practices or unfair practices, and such other investigations as it may think fit in connection with matters within the scope of the law;
- generally carry out such functions as are required to give effect to the Act.

#### **CLAUSE 10 - Delegation of powers**

17. The Commission is given powers to delegate, if it so decides, any of its powers either to its Executive Director or such other employee as it deems appropriate.

18. The powers of delegation under sub-clause (1) are not applicable in the instances listed under sub-clause (2).

#### **CLAUSE 11 - Appointment of Executive Director and other employees**

19. Under sub-clause (1) the Commission may appoint an Executive Director on such terms and conditions as it may determine save for the duration of the employment specified under sub-clause (2).

20. Sub-clause (3) provides that the Executive Director shall be responsible for the proper administration and management of the affairs of the Commission and sub-clause (4) deals with a situation of where the Executive Director is temporarily absent or temporarily incapacitated in which case the Commission may appoint another person to replace him.

21. Sub-clause (5) makes provision for the Commission to appoint such other employees, consultants and agents as the Commission may consider necessary for the performance of its functions and the discharge of its duties. Moreover it will be possible under sub-clause (6) to appoint any officer in the service of government to any office with the Commission.

### **PART III - FINANCIAL PROVISIONS, ACCOUNTS AND ANNUAL REPORT**

#### **CLAUSES 12 TO 16 - Funds of Commission, Power to levy fees, Loans and Financial penalties, Financial Year and annual estimates, Accounts and audits**

22. Clauses 12 to 16 set out the source of the funding of the Commission, its power to levy fees for any services rendered by it and to raise loans from the government for the performance of its functions and the discharge of its duties. The Commission has a duty to pay all penalties collected under the Act, into the Consolidated Fund. The estimates of the Commission's income and expenditure will have to be approved by the Minister, whose decision shall be final and binding. The accounts of the Commission shall be audited by the Auditor General or such auditor as may be approved by the Auditor General. Clause 16 provides that the auditor or any of its employees shall have free and unhindered access to all the records relating to the financial transactions of the Commission and list down such matters as the auditor shall take into consideration for the purposes of his report. It shall also be an offence for any person, who, without any reasonable excuse, fails or refuses access to the auditor or any person authorised by the auditor, to have access to any accounting or other records in the custody of that person.

#### **CLAUSE 17 - Annual report**

23. Clause 17 provides for the Commission to transmit to the Minister an annual report dealing generally with the activities of the Commission during the preceding financial year and containing information relating to the proceedings and policy of the Commission. The audited accounts of the Commission and the report of the auditor shall be included in the annual report. The Minister shall as soon as practicable cause a copy of the report to be presented to the Parliament.

24. Under sub-clause (4), the Commission is given the power to submit a report to the Minister on any particular matter under investigation which in its opinion requires the special attention of the Minister.

## PART IV - ANTI COMPETITIVE AGREEMENTS AND ABUSE OF DOMINANT POSITION

### CLAUSE 18 - Anti-competitive agreements

25. Sub-clause (1) prohibits and declares void all agreements between enterprises that result or are likely to result in the prevention, restriction or distortion of competition in a market.

26. Sub-clause (2) sets out examples of the types of prohibited agreements containing provisions which:

- directly or indirectly fix purchase or selling prices or determine any other business activity;
- limit or control production, markets, technical development or investment;
- share markets or supply sources;
- constitute bid-rigging;
- apply dissimilar conditions to equivalent transactions with other trading parties, thus placing them at a competitive disadvantage;
- impose extraneous obligations on other parties as a condition for concluding contracts.

27. Sub-clause (3) sets out the types of agreements which are excluded from sub-clauses (1) and (2), namely:

- agreements authorised by the Commission under Part V;
- those which contribute to improvement in production or distribution of products, promotion of technical or economic progress and at the same time, confer a benefit on consumers;
- agreements which only impose the type of restrictions on enterprises that are necessary for attaining the above objectives;
- agreements which do not afford an opportunity for enterprises to eliminate competition in relation to a substantial proportion of the relevant products.

28. Sub-clause (4) enables a court to sever any provision of any agreement or any decision prohibited under sub-clause (1) from the whole agreement or decision.

29. Sub-clause (5) provides for a provision of this Act which is expressly applicable to or related to an agreement to be read as applying with the necessary modification to a decision by an association of enterprises or a concerted practice by enterprises which have as their object or effect the prevention, restriction or distortion of competition.

30. Sub-clause (6) describes the circumstances that would constitute bid-rigging in the form of collusive agreements and provides that bid-rigging shall not apply where the parties to the agreement are inter-connected parties or the person making the call for or requests for bids is made aware of the agreement.

### CLAUSE 19 - Dominant position

31. This clause sets out the circumstances in which an enterprise is regarded as holding a dominant position in a market, by virtue of the fact that the enterprise, by itself or together with one or more enterprises, occupies such a position of economic strength as to enable it to exclude competition, control prices or behave independently of its competitors, potential competitors, customers or suppliers. It should be pointed out that no threshold in respect of the percentage of the market power of an enterprise has been laid down. The Expert Group agreed that it will be up to individual member states to decide on the need to impose a threshold and the method to be adopted for the determination of such threshold.

## **CLAUSE 20 - Identification of relevant market**

32. In order to identify a relevant market, clause 20 sets out the criteria that need to be considered namely, the geographical boundaries within which groups of sellers and buyers of goods or services compete for those goods or services, whether the goods or services are regarded as interchangeable or substitutable by the consumer taking into account the prices and characteristics of those goods and services and the suppliers to which the consumers may turn in the event of an abuse of dominance.

## **CLAUSE 21 - Abuse of dominant position**

33. Sub-clause (1) prohibits conduct which amounts to abuse of dominant position.

34. Sub-clause (2) sets out examples of abuse of a dominant position such as:

- restricting any other person from entering the market;
- preventing or deterring any other person from engaging in competitive conduct in a market;
- eliminating or removing any person from any market;
- imposing unfair purchase or selling prices;
- limiting production of products to the prejudice of consumers;
- imposing extraneous supplementary obligations on parties to agreements as conditions of acceptance of the agreements;
- engaging in exclusive dealing, market restriction or tied selling.

35. Sub-clause (4) defines the terms “exclusive dealing”, “market restriction” and “tied selling”.

36. Sub-clause (5) contains exceptions to sub-clause (2), where:

- the conduct is the subject of an authorisation under Part VI;
- the conduct of the enterprise was exclusively aimed at improving the production or distribution of products or promoting technical or economic progress and consumers received a fair share of the resulting benefits;
- the enterprise enforces or seeks to enforce copyright, patent registered design or trade mark rights;
- the effect of the enterprise’s conduct in the market results from its superior competitive performance.

## **PART V - MERGERS AND ACQUISITIONS**

### **CLAUSES 22 and 23 - Mergers prohibited and Substantial lessening of competition**

37. Clause 22 defines the conditions under which a merger is prohibited and the circumstances which would be construed as constituting a merger. As in the case of abuse of dominance no threshold is provided as it will be left to individual member states to determine whether a merger should be defined by reference to a threshold based on the annual turnover or assets, or a combination of both in relation to specific industries. Sub-clause (3) provides for the manner in which a merger can be achieved.

38. Clause 23 lists the factors that the Commission may take into account for the purpose of determining whether a merger is likely to constitute a substantial lessening of competition.

## **PART VI - AUTHORISATIONS AND EXEMPTIONS**

### **CLAUSE 24 - Grant of authorisation**

39. Sub-clause (1) requires an enterprise to apply to the Commission for permission where it proposes to become a party to an agreement, a conduct or a merger prohibited under sections 18, 21 and 22.

40. Sub-clause (2) lists the factors that the Commission is required to take into account before determining the application. It is noteworthy that many states expressed concern about the impact that an agreement, conduct or merger may have on small and medium enterprises. Under clause 22(2)(b) the Commission has the duty to consider the effect of an authorisation on the ability of small and medium size enterprises to compete effectively.

### **CLAUSE 25 - Effect of authorisation**

41. While an authorisation is in force, the enterprise to which it is granted is not prevented by any provision of the law from giving effect to any agreement or engaging in any conduct or merger to which the authorisation relates.

### **CLAUSE 26 - Revocation of authorisation**

42. Sub-clause (1) empowers the Commission to revoke or amend the authorisation if satisfied that it was granted on false or misleading information or if there is a breach of any term or condition attached thereto.

43. Sub-clause (2) requires the Commission to give notice of an intended revocation to the person concerned and of the person's right to be heard by the Commission on the matter.

### **CLAUSE 27 - Register of authorisations**

44. The Commission is required to keep a register which shall be available to members of the public for inspection at all reasonable times.

### **CLAUSE 28 - Block Exemptions**

45. Under clause 28 the Commission is given the power to exempt any particular category of agreements from the prohibition under clause 18. The exemption should be read as applying to decisions by an association of enterprises and to concerted practices in virtue of clause 18(5). Under clause 45 regulations may provide for the category of agreements that shall be eligible for block exemptions and the factors that may be taken into consideration before granting a block exemption.

## **PART VII - CONSUMER PROTECTION**

### **CLAUSES 29 AND 30 - Unfair practice and Consumer transactions**

46. Clause 29 prohibits an unfair practice and defines in wide terms what constitutes an unfair practice in relation to a consumer transaction. An unfair practice may occur before, during or after a consumer transaction or may consist of a single act or omission. A number of specific unfair practices are provided for in the Third Schedule.

47. Clause 30 defines consumer transaction as being either a direct transaction between an enterprise and a consumer or a transaction on behalf of a consumer entered between an enterprise

and another consumer. In either case the transaction relates to the supply of goods or services as a result of a purchase, lease, gift, contest or other arrangement. The Fourth Schedule lists exceptions to a consumer transaction which are normally dealt with under other enactments. The Commission has also the discretion to exclude such transactions as it may consider appropriate after consultation with the Minister.

## **PART VIII - INVESTIGATION AND HEARING**

### **CLAUSE 31 - Complaints and requests**

48. Clause 31 lays down the procedures in respect of an investigation carried out by the Commission where it has reason to believe that an enterprise is a party to an anti-competitive activity or an unfair practice under Parts IV, V and VII of the Act. The investigation may be triggered following a complaint or a request or at the initiative of the Commission subject to the complaint not being frivolous or vexatious. The Commission may for the purpose of its investigation appoint the Executive Officer or such other employee as it thinks fit as investigating officer.

49. In the conduct of an investigation the Commission has been vested with wide powers for evidence gathering. It may serve a notice in writing to seek any specified document or information from any person or request the person to attend at a specified place and answer questions of the investigating officer. Once the Commission decides that there is prima facie evidence of an alleged infringement of an anti-competitive activity or unfair practice as the case may be, the Commission shall inform the party and give the party the opportunity to make representations in connection with the alleged infringement. The Commission may then proceed to carry out further investigation or hold a hearing. Annex II shows the various stages of an investigation before a decision is reached by the Commission.

### **CLAUSE 32 - Discontinuance of investigation or inquiry**

50. The Commission has discretion to discontinue an investigation or inquiry if it is of the opinion that no further investigation is justified.

### **CLAUSE 33 - Interim measures**

51. The Commission has power under clause 33 to act swiftly to prevent threatened or continuing anti-competitive activities or unfair practices if it has reasonable grounds to believe that serious or irreparable damage is likely to occur to a particular person or category of persons. The Commission may also apply for an interim measure to prevent a person from hindering or impeding an investigation.

### **CLAUSES 34 TO 38 - Examination of witnesses, Immunity and privileges, Witnesses refusing to comply, Procedures for hearing, Power to prohibit disclosure of information, documents and evidence**

52. Clauses 34 to 38 are standard clauses dealing with the conduct of a hearing by the Commission and in particular the examination of witnesses by the Commission.

### **CLAUSE 39 - Power of entry and search**

53. Sub-clauses (1) and (2) deal with the power of entry and search by an investigating officer where the Commission thinks necessary in order to ascertain whether there is contravention of the law. The powers of entry and search are exercised under the authority of a warrant issued by a Magistrate.

54. Sub-clauses (3) to (7):

- set out the conditions for the issue of the warrant by the Magistrate;
- limit the period for retention of documents;
- oblige the investigating officer to produce evidence of his authority and identity on entering premises and to leave a receipt listing documents that are removed;
- oblige the occupier or person in charge of the premises to facilitate the authorised officer in carrying out his duties;
- prescribe a penalty for obstructing or impeding the authorised officer.

## PART IX - ENFORCEMENT

### CLAUSE 40 – Enforcement of decisions of the Commission

55. Under Clause 40 the Commission has a range of enforcement powers aimed at eliminating the harmful effect of anti-competitive activities and unfair practices under Parts IV, V and VII of the Bill. These include:

- a direction in relation to a prohibited agreement under clause 18 for the parties to modify or terminate the agreement;
- a direction in relation to a conduct prohibited under clause 21, for the enterprise to modify or cease the conduct;
- a direction to a merger prohibited under clause 22, for a merger to be dissolved or modified as the Commission may direct;
- a direction in relation to an unfair practice prohibited under clause 29, for an enterprise to cease the unfair practices and where appropriate retribute any money, property or other consideration furnished by the consumer;
- a financial penalty as the Commission deems fit to impose;
- an order for a party to furnish a performance bond or guarantee or other forms of security acceptable to the Commission.

56. The prime concern of the Commission in policing the prohibited activities under Parts IV, V and VII will be the public interest in the protection of the integrity and efficiency of markets. The effective use of the powers of the Commission will assist in achieving the Commission's statutory objectives of deterring anti-competitive activities and unfair practices and requiring those who engage in such activities or practices to remedy the prejudice that they cause to other market participants or the consumer.

57. The Bill provides for a civil regime of fines. It was agreed by the Expert Group to leave it to individual members to decide whether the civil regime should complement an existing criminal regime or replace it.

58. Under Clause 41 of the Bill the Commission may apply to the court to have its direction registered in the manner provided by the Rules of Court in which case the direction shall have the same force and effect as if it was a direction given by the court for enforcement purposes.

59. Under Clause 42, any person who has been prejudiced as a consequence of a prohibited activity or practice shall have the right to enter a civil action against the enterprise responsible for the infringement. However the action can only be lodged after a finding of the Commission or after the final determination of an appeal where the finding is the subject of an appeal.

## **PART X- APPEALS**

60. Clause 43 provides for any person aggrieved by a decision of the Commission to appeal to the Judge in Chambers or to the High Court and lists the powers of the appellate court when determining an appeal.

## **PART XI- MISCELLANEOUS**

### **CLAUSE 45 - Regulations**

61. Under Clause 45 the Minister (or the Commission with the approval of the Minister) may make regulations for carrying out the purposes and provisions of this Act generally and in particular to provide for the procedures to be followed in respect of applications and notices to proceedings of the Commission, the form and manner in which a request for an investigation is to be made and for the fees to be charged by the Commission in respect of anything done or any services rendered by the Commission.

### **CLAUSE 46 - Guidelines**

62. In order to give further guidance and certainty to those affected by the regime set out in the model legislative provisions the Commission is vested with powers to promulgate guidelines that will indicate in broad terms the policy approach to any matter within the jurisdiction of the Act. The Commission may, for instance, publish guidelines in the Gazette to indicate the types of conduct or practice which are likely to fall foul of the law and the types of conduct and practice which are not.

### **CLAUSE 47- Acts of employee or agent**

63. Clause 47 provides for the vicarious liability of an enterprise as a result of the act or omission of its employee or agent arising in the course of the employee's employment with the enterprise or an agent exercising the powers or performing the duties on behalf of the enterprise within the scope of his authority.

### **CLAUSE 48 - Protection from personal liability**

64. This clause protects the Commission, its members, employees or agents and any person whether on secondment or appointed by the Commission to perform its functions or discharge its duties for anything done in good faith in the exercise of any power or purported power under this Act or any other enactment.

### **CLAUSE 49 - Confidentiality**

65. Under clause 49 it shall be the duty of every person listed under sub-clause (3) to preserve secrecy with regards to any matter that has been classified as confidential by the Commission unless the disclosure or communication of such information is necessary for the performance of his function or discharge of his duty or is lawfully required by a court. Any unauthorised disclosure would constitute an offence punishable by a fine and imprisonment.

## COMPETITION LAW (A view from the Pacific)

“...*industrial power should be decentralised so that the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional stability of a few self appointed men.*” Justice Douglas in *US v Columbia Steel* [1948]

### 1.0 INTRODUCTION

In our small Pacific Island economies, market is one of the principal mechanisms by which scarce resources are allocated to fulfil the buyers’ wants and desires. A market which is free of traders’ manipulation, restrictions or other anti-competitive distortions will most effectively and equitably distribute those resources to both the rich and poor in our community. Whilst competition in a market place is supposed to be regulated by the economic forces in this context of efficient and equitable distribution of resources, it is important to ensure that dominant enterprises do not undermine the vulnerable sectors. Economic reality does not foster this due to many other extraneous factors. Consequently, legislative intervention is necessary to foster a competitive market economy. A market must be encouraged to perform efficiently. A comprehensive law must facilitate the functions of those market factors to optimise the performance ensuring greater public benefit and enhancing economic development.

The Commonwealth Model Competition Bill is drafted to optimise public benefit and enhance economic development. It incorporates the participation of a large number of small enterprises in a market, whilst ensuring that a monopolistic trader in so much as rejuvenating economic activity, does not overly influence the price or product thus eliminating competition or attempts to phase out small and medium enterprises.

### 2.0 WHY IS THERE A NEED TO HAVE COMPETITION LAW IN PACIFIC ISLAND COUNTRIES?

One of the most commonly advanced reasons opposing an instructive Competition legislation has been that any such legislation will adversely affect the participation of monopolies in the economic development. The reason is supported by theories such as small consumer base, high administrative costs, lower investment returns for monopolies, etc.

In spite of the above, during the meeting of the Pacific region in Apia, Samoa, in November, 2004 the participants of the *Commonwealth Expert Group Meeting on Draft Model Bill on Competition for the Pacific Region*, were unanimous in their view that Pacific Island countries each need legislation governing competition.

Many developed countries now have some form of competition legislation. This has been undertaken after a considerable research, consultation and thought. There are many vivid reasons for promulgation and implementation of instructive competition legislation.

Some of those reasons are:

#### a) Common Law Insufficient

In the absence of any legislative regime, the only means for prohibiting any restrictive trade or monopolistic practice was left to the Courts. Over a period of time, the Court developed common law principles such as restraint of trade, etc. Generally Pacific Island countries derived and adopted the common law of the United Kingdom. The United States, the United Kingdom, and

our neighbours Australia and New Zealand, experienced that common law has not been effective in eliminating anti-competitive practices. It was further established that lack of or ineffective competition resulted in stagnant economic development. Common law doctrines and remedies failed in that they did not adequately vindicate the public interest, which subsequent competition legislation set out to achieve. Some notable shortcomings encountered were:

- apart from declaring any restrictive agreements illegal under the restraint of trade doctrine, the Court could not provide adequate remedy;
- a third party injured by any such restrictive trade practice was left without a remedy. Any violating agreement is applied with considerable vigour and success between the vendors and purchasers of business and not third parties;
- there was a general judicial reluctance to meddle with controversial and uncertain matters familiar to the parties involved;
- although certain torts attracted some economic relationships, the law of tort provided little comfort for traders adversely affected by restrictive trade practice or monopolistic behaviour.

During the Pacific meeting it was revealed that many countries did not have competition legislation. *A fortiori* the above apprehension of common law applies to those countries. Common law will also have to evolve taking into account recent developments in law and technology.

The smaller Pacific Island countries' judicial systems are largely influenced by their neighbours, Australia and New Zealand. Judges and Justices of Appeal are appointed to serve in superior and appellate courts. Both these countries have a comprehensive competition law. Australia promulgated its legislation in 1974 followed by New Zealand in 1986. Due to the legislative regime, the Judges presiding do not have the requisite common law background. It is likely that the common law which these Judges will develop would be more aligned to the legislative provisions of their countries which have a totally different social, cultural and economic background.

It is most humbly submitted that Pacific Island countries should promulgate and implement competition legislation to avoid it being enmeshed by a mixture of common law and legislation from other countries.

#### **b) Changing Economy**

Traditionally, the Pacific Island countries would not have been concerned with competition due to considerable reliance on a subsistence economy. This has rapidly changed over the last 50 or so years. Declining subsistence economy resulted in greater economic dependence on other countries, particularly Australia and New Zealand. As Pacific Island countries join this global market, as a matter of economic reality, they should concurrently introduce the necessary legislative reforms to ensure they play an active and important role in the market.

#### **c) Competition Enhances Investment**

An effective Competition Law will undoubtedly attract investment both local and foreign. An inclusive competition law will encourage small and medium scale investors as opposed to monopolies that thrive in an unregulated market. Many Pacific Island countries depend on investment for a stable macro-economic environment to succeed in the global economy. A

generic competition legislation that provides for a level playing field for small, medium and large enterprises to compete on an equal footing will provide the impetus for more investments and a conducive trading environment. Investors will not fear being driven out by monopolies or oligopolies by unfair competition.

**d) Innovation and Technology**

The snowball effect of investment, particularly foreign, is likely to bring in innovation and technology, which is largely lacking in our jurisdiction. Competition legislation for the region no doubt will result in the transfer of this technology regionally; an overall gain for the region.

**e) Human Resource Development**

Market competition brings in efficiency, innovation and an increase in economic activity. Increased economic activity results in engagement of more human resources. The residual effect of this increased economic activity will be an advantage for the region in that there will be human resources development and capacity building.

**f) Public Benefit**

A competitive market backed-up by comprehensive competition legislation will bring in direct benefit to the consumers through lower prices and higher output. Further, the competitors would be more efficient, innovative and responsive to consumer needs. Overall this should strengthen individual countries economic competitiveness. If all the countries of the region are able to implement the legislation, the Pacific as a region will enjoy a better position in the global market.

**g) Public Sector Reforms**

A number of Pacific Island countries are currently reforming the public sector. These reforms will eventually result in government-owned services being made corporate, which will include private sector participation in varying degrees. All such services will be subject to open competition as opposed to the current government protection. As many of the government-controlled services are freed up, more competition is likely to be generated.

However, it is to be noted the certain government services will still have to be retained and possibly be excluded from the Competition Law. The draft Bill provides for exemptions.

**h) Assist in Implementation of Regional and International Trade Related Treaties and Instruments.**

The Pacific region itself has many regional and international instruments regulating trade. The ratification of these instruments has opened up sectors of the economy to market competition domestically, regionally and internationally. At least this provides a greater impetus for the promulgation and implementation of competition legislation.

The above is not an exhaustive list of the reasons why Pacific Island countries should consider adopting competition legislation. It is urged that the draft Competition Bill with the explanatory note by the Commonwealth Secretariat be read together.

### 3.0 WHAT DOES THE BILL CONTAIN?

The draft Model Bill regulates both competition and provides a limited degree of consumer protection.

On the competition front, the Bill regulates:

- a) abuse of dominant positions;
- b) restrictive trade agreements;
- c) mergers.

#### a) Abuse of Dominant Positions

Monopolies and large enterprises are a hallmark of many small island states in the Pacific. During the consultation process, it was felt that monopolies would still play a vital role for the economic development of small island states. In light of their importance, the Bill does not from the outset prohibit the existence or practice of monopolies. However, the Bill primarily restricts any abuse of the dominant position that a monopoly enjoys. As long as the monopolies do not distort competition, they will be behaving in accordance with the law. Therefore there is no immediate fear of existing monopolies being driven out from a country or the region. These monopolies have played and will continue to play a crucial role in the development of the small island countries albeit sharing the market with their competitors.

The monopolies will have to adjust and be responsible in allowing other competitors to emerge.

#### b) Restrictive Trade Agreements

Any agreement between enterprises, which is likely to cause any appreciable adverse effect on competition in a market is prohibited. The model competition law prohibits any agreement that has the effect of lessening competition. These are agreements which:

- directly or indirectly fixed prices;
- control production, market, technical development or investment;
- provide for artificial dividing up of markets or sources of supply ;
- affect tenders;
- apply dissimilar conditions to equivalent transactions;
- condition the conclusion of contracts with supplementary obligations.

#### c) Mergers

During the meeting in London, the Group felt it important to include mergers. This was not discussed in the meeting in Apia. However, merger is an integral part of the Law of Competition. Its inclusion became necessary after a thorough discussion.

There are limited enterprises in the Pacific Island countries. Any merger is a real threat to any effective competition in the market place. Accordingly, any merger has to be monitored and approved by a regulatory body. The Bill vests this power to the Competition Commission.

However, it is to be noted that the Bill only prohibits a merger that is likely to adversely affect competition.

#### **4.0 PROMOTION OF COMPETITION IN SMALL AND MEDIUM ENTERPRISES**

One of the key objectives of the Bill is to promote and enhance the ability of small and medium enterprises to compete effectively. At the Apia meeting, the participants felt it important that some small enterprises should be excluded from the Bill.

This has now become part of the Bill. Small and vulnerable sectors are protected under the Bill. This includes affirmative action programmes. The underlying objective of this provision is to regulate competition whilst protecting small and developing enterprises, which is categorically common in the Pacific Region.

There is provision for block exemptions of certain businesses to be gazetted by the Minister. In addition to the exemptions, provision is also made for authorisation of certain business activities by the Competition Commission.

#### **5.0 ESTABLISHMENT OF A COMMISSION**

In order to enforce the Competition Law, a Commission needs to be established. Due to economic and human resources demand, the Bill proposes to establish a Commission which will have part time members. It will also perform dual functions: Investigation and Adjudication.

A precise procedure and structure has been created to ensure that small island countries will be able to establish a Commission with minimum administrative and financial disruption.

An administrative fine (financial penalty) is the penalty for breach of any of the provisions relating to competition.

#### **6.0 CONSUMER PROTECTION**

Whilst provisions relating to consumer protection are not directly relevant to the regulation of competition in a market place, it was felt that this should be incorporated in the Bill. The reason for the incorporation was that in many smaller countries particularly, it may be difficult to legislate on both competition and consumer protection. Acceptance of the Model Competition Law will cater for both these areas of law.

#### **7.0 CONCLUSION**

During the Pacific Regional Meeting, it was revealed that Fiji and Papua New Guinea had comprehensive competitive legislation. Samoa and Cook Islands were in the process of drafting their laws. Generally, all the countries had some competition policies. A common reason for the policies was to enhance economic activity and to provide the consumers with better value for their money.

The draft Model Bill vividly and very comprehensively encapsulates the collective view of the region. The Bill in its current form is laudable for the region. The Commonwealth Secretariat should be commended for its effort. With confidence, it can be said that the Bill with necessary modification is ideal for those countries that do not have any competition legislation. Further, the Bill will also generate discussion amongst countries having competition legislation and this may be an opportune time to review the same.

## COMPETITION LAW (A View from the Caribbean)

1. Competition law is considered to be vital to modern economies, that is, market led, export driven economies. The aim and objective in having a comprehensive law on governing market-based activities is to control or eliminate restrictive practices or abuse dominant positions of market power which limit access to markets or otherwise unduly restrain competitions adversely affecting domestic, international trade or economic development.

2. The Caribbean region is comprised mainly of independent, developing states whose economies rely heavily on trade and local and foreign investment. Recently, important steps have been made toward the establishment of the Caribbean Court of Justice, which will assist in the resolution of trade disputes; and regimes supporting the movement of factors and skilled persons and competition under CARICOM Agreements, all of which will assist with the promotion, enhancement, and furtherance of national, regional, and international trade.

3. Against this background, the Model Competition Bill made for interesting discussion at the Commonwealth Expert Group Meeting in December, 2004, since its main purpose was the furtherance of competition through controlling or restricting activities which limit market access, restrain competition, or otherwise adversely affect domestic or international trade and economic development. This was particularly so since, with the exception of Jamaica, Caribbean states have largely opted for sectoral rather than generic legislation or regulation to deal specifically with competition issues.

4. One of the main concerns of the countries represented was to ensure that the provisions of the Draft Bill harmonised with the provisions relating to competition regime in the Revised Treaty of Chaguaramas and promoted growth and development of the region that was consistent with their unique challenges. It was therefore anticipated that great strides would be taken by Caribbean states in drafting and enacting domestic legislation in accordance with the Draft Bill.

### **(1) Main Principles of the Bill**

5. To further its purpose, the main principles of the Bill are as follows:

- (a) provide for competition and encourage same in small and medium business enterprises;
- (b) control or elimination of all restrictive agreements or arrangements among businesses, including mergers, acquisitions, or cartels which amount to abuse of dominant positions;
- (c) establish an independent competition commission to administer competition law and policy;
- (d) enhance consumer welfare and protection of consumer interests;
- (e) criminalisation of price fixing, conspiracy, bid-rigging, misleading advertising, double ticketing, and other anti-competitive or unfair practices;
- (f) improve transparency.

### **(2) How the main principles of the Bill have been applied in selected states in the Caribbean region**

6. Jamaica is the only Caribbean state, which presently has a generic competition law regime addressing each of the main tenets of the Bill aforementioned. For most other states, i.e. Belize, the Bahamas, St Kitts and Nevis, St Lucia and St Vincent and the Grenadines, issues of competition law and policy are dealt with by sectoral regulation, which has evidently been a popular tool in prioritising the interest of small or local enterprises in certain key sectors whilst taking advantage of market incentives and competitive dynamics.

## *Jamaica*

7. The Jamaican delegation explained that, guided by a clear economic liberalisation policy, generic competition legislation was central to the creation of a competitive environment. Thus the Fair Competition Act (FCA), 1993, the Telecommunications Act, 2000, and the Consumer Protection Act, 2004 were enacted. The FCA was enacted to: (i) provide for competition in markets and to secure economic efficiency in trade and commerce; (ii) promote consumer welfare and protect consumer interest; and (iii) open markets and guard against the undue concentration of economic power. In the telecommunications industry, this issue was dealt with specifically by the Telecommunications Act aforementioned, one of the main objects being the promotion and protection of the interest of the public by promoting fair and open competition in the provision of specified services and telecommunications equipment (section 3, Telecommunications Act).

8. The control or elimination of restrictive agreements or arrangements which amount to abuse of dominant positions is achieved through the restriction of agreements which contain provisions which have as their purpose or effect the substantial lessening of competition (Part III, FCA). These include, for instance, exclusionary provisions that prevent, restrict or limit the supply or acquisition of goods and services; resale price maintenance, exclusive dealing, tied selling or market restriction.

9. To give teeth to these restrictive provisions, the FCA also established a Fair Trading Commission, which has the authority under section 5 to carry out investigations either on its own initiative or at the request of a complainant or a portfolio Minister, or any person adversely affected by abuse of a dominant position of an enterprise. The Commission is garbed with extensive investigative powers, including the power to administer oaths, require an authorised officer to enter and search premises, remove documents which evince any contravention of the Act, and summon and examine witnesses to that end (sections 7 and 10).

10. Consumer welfare and protection is also achieved by the FCA which has as a primary objective the elimination of industry-wide practices that systematically victimise the consumer. These are discussed in some detail at (e) below. The Consumer Protection Act also enhances the protection and promotion of consumer interests in the supply of goods and services as it makes broader provision for redress where the rights of a consumer are infringed.

11. It is therefore an offence under the FCA to engage in competitor collaborative activities, which have the effect of price-fixing, bid-rigging, market division, limiting output, misleading advertising, double-ticketing, or otherwise eliminating competition and/or jeopardising the interest of the consumer. Under the Consumer Protection Act, additional redress is available for breaches of consumer rights, including against misleading and deceptive conduct, false representations and unfair and unsafe practices by providers of goods and services.

12. One of the greatest indices of improved transparency in the competition law regime in Jamaica is the Telecommunications Act. It can be said that while this Act is sector specific, it conforms to the tenor of the FCA and is tailor made to deal with the particular requirements of the telecommunications industry and to revolutionise the telecommunications monopoly system. Under the All Island Electricity Licence, 2001 the generation aspect of electricity production was unbundled making way for competition in the production of electricity. The Office of Utilities Regulation is also mandated to regulate these industries and in the exercise of its functions, to have regard to whether specified services are likely to promote or inhibit competition (section 4).

## *St Vincent and the Grenadines*

13. The competition law regime of St Vincent and the Grenadines does not appear to have taken the sector-specific approach although it's Fair Trade Competition Act (1999), which is very

similar to the Fair Competition Act of Jamaica, has not yet been proclaimed. Thus the main priority seems to be the control of prices and distribution of goods by virtue of the Price and Distribution of Goods Act (1975).

14. Under this Act, the Permanent Secretary of the Ministry responsible for Trade is the Licensing Authority. The Minister responsible for Trade is also empowered to restrain price increases or situations where prices may be affected. The Governor-General would in any case be required to make an order before any action can be taken. Under the Act, the Governor-General may by order prescribe the price of goods, any mark-up or maximum price, and offences and punishments in relation to the contravention of orders made under the Act. At present, Price Control Orders exist, among other things, to regulate the price of goods such as bread, cement and gasoline.

15. The Telecommunications Industry has also been liberalised under the Telecommunications Act, 2001. Under this Act, the Minister responsible must ensure open entry, market liberalisation and competition; fair pricing and the use of cost-based pricing methods; and fair competition practices by telecommunications providers. The Minister has the ultimate decision whether to grant a license to an applicant. The industry is regulated by the National Telecommunication Regulatory Commission, which advises the Minister on the formulation of national policies on telecommunications matters and regulates prices for the provision of telecommunications services.

### *The Bahamas*

16. Competition laws have played a minimal role in the Bahamas because of the limited areas in which competition issues apply. Where competition matters apply, it is largely dealt with by sector-specific legislation, and a policy of safeguarding the interest of the state and its citizens is evident. For instance, the provision of electricity is state owned, and approval of the Minister is required under the Electricity Act (1956) for the installation or operation of any power station with capacity exceeding 250 kilowatts on the island of New Providence. Under the Out Islands Electricity Act (1969), installation or operation of power stations with capacity exceeding 25 kilowatts is prohibited except where the Minister is satisfied that the energy required cannot be produced by the state-owned electrical corporation.

17. The import sector has been largely characterized by exclusive arrangements, the utilities sector i.e. electricity, telephone, water and waste disposal are natural monopolies, and are government owned. Transportation services, particularly marine transportation have been characterised by Government-sanctioned arrangements.

18. The Telecommunications Act (2000) attempts to achieve a compromise by providing specifically for competition while still securing to the state-owned telecommunications company, the rights granted to it in accordance with the state's sector policy. A Public Utilities Commission is in place to regulate the business operations of public utilities and advise the Minister on matters relating to the telecommunications sector.

19. By a National Investment Policy, investment in and ownership of certain businesses is still restricted to Bahamians. These include inter-island cargo services; domestic newspapers and magazine publications; security services; public transportation; and wholesale and retail operations.

### *Belize*

20. In the case of certain sectors of Belize, a clear policy of safeguarding a comfortable domestic market before encouraging competition is discernible. This is most clearly expressed in the agricultural industry, which is a key contributor to employment and export revenue in Belize. This policy is realised through the requirement of a license for the importation of locally produced items.

This license is granted on a discretionary basis, which in effect has enabled local producers to have a comfortable market while allowing the importation of such goods in the event that the demand cannot be met locally. Traces of this policy also appear in the tourism industry, in which certain national ownership requirements are still imposed on operators of tourism-related businesses, and in the services industry where the only foreign workers who automatically enjoy national treatment are senior and technical staff not available on the local labour market.

21. Nonetheless, other properly regulated sectors seem to conform to the tenor of the Draft Model Competition Bill. For instance, the Telecommunications Act (Cap. 229, Laws of Belize) does not restrict the telecommunications industry to monopoly ownership. In fact, there are presently two functional holders of licenses for the provision of telecommunications services. The Public Utilities Commission is also mandated to regulate all activities in this area, and for example, it has broad powers to impose limits on potential profits if it deems it necessary in order to prevent unfair business practices in a competitive market. Also, service providers in this industry cannot compete as majority owners in other utility markets or control more than 25 per cent of any company in those sectors.

22. Further, while the Electricity Act does not explicitly deal with competition, it is noted that no national ownership requirements are imposed. Electricity services are also tightly regulated by the Public Utilities Commission, which is mandated to secure the interest of the consumer. Thus far the Public Utilities Commission has established a tariff and rate setting methodology for the regulation of charges on consumers and the actual services for which fees can be charged. Thus the interest of the consumer is given priority.

#### ***St Kitts and Nevis***

23. Competition law and policy in St Kitts and Nevis is also applied by way of sectoral regulation. Essential public utilities such as electricity and water are state-owned monopolies, so the Government sets the water and electricity rates. Nonetheless, there is healthy competition in the bottled water industry.

24. The Telecommunications Industry has also been liberalised since the granting of licenses to two other telephone companies. It is anticipated that with the added service providers telephone rates would improve and the sector would be better regulated. A National Telecommunications Regulations Commission is in place to regulate this industry.

25. The retail services sector is considered one of the main sectors in the island and exclusive arrangements are quite evident. This sector is still dominated by two conglomerates both of which trade in cars, building materials, furniture, appliances, cement, and many other products. The interesting feature of these conglomerates though is that they largely trade in different product brands of cars, for instance, and are the only importers of products such as cement. In this regard, a virtual monopoly exists. There is some competition between these two companies in the supply of furniture and appliances.

#### ***St Lucia***

26. Competition policy in St. Lucia is on a sectoral basis because the Government has seen the middle ground approach as being more conducive to maintaining quality and developing the necessary economies of scale.

27. The telecommunications market has also been liberalised by virtue of the Telecommunications Act, 2000, which ended a monopoly system and provided instead for open entry, market liberalisation and competition in telecommunications; ensuring wide access to

telecommunications at affordable rates; and fair competition practices. A National Telecommunications Regulatory Commission is also established under the Act for the regulation of prices and monitoring anti-competitive practices within the industry (section 3). This development is buttressed by the Eastern Caribbean Telecommunications Authority Act (2000), which establishes the Telecommunications Authority that is charged with promoting open markets and fair competition in the OECS.

28. Recently, the monopoly of the Banana Growers Association has also been dissolved by the Banana Growers Association (Dissolution) Act, 1998. There is now no prohibition on participation in this industry.

29. We note however that with a view to ensuring quality and efficient production, the monopoly established under the Electricity Act (1994) is retained; and under the Water and Sewerage Act (1999) any other license for the provision of water services are granted subject to the state-owned water company's license.

### **(3) *How the main principles of the Draft Model Bill might be modified***

30. It can be seen that even though there is largely no generic competition legislation, the main principles of the Draft Model Bill are expressed in the treatment of the sectors concerned. The states of the Caribbean region are limited by virtue of geographic size and hence their markets are relatively small. The failure to enact generic competition legislation is largely due to the fear of fully liberalising markets to the detriment of local producers of goods and services. Nonetheless, there are clear benefits to the enactment of generic competition legislation; these include certainty and foreseeability, which is crucial to investors. It is therefore hoped that the treatment of these principles would be modified by them and subsumed under generic competition legislation.

31. With the impact of WTO agreements on the region and the region's current involvement in the process of forming a single market and economy (the Caribbean Single Market and Economy), an increase in cross-border trading regionally and internationally is unavoidable. It is foreseeable that with globalisation and the Caribbean Single Market and Economy the need to enact comprehensive competition legislation is inevitable. Therefore, it is important that the relevant market be adequately defined in competition legislation. The objective of defining the relevant market is to identify the companies that compete with each other within a given product and geographical area and whether the products in question can be substituted so as to determine whether a firm exercises monopolist behaviour.

32. In each Caribbean territory, intellectual property rights are fully protected by legislation and they are fully respected under the Draft Model Bill. It is expected that this will also be maintained in the respective competition legislations.

33. Within the expanded market issues of cartelisation and enterprises engaging in predatory and/or discriminatory behaviour with or without affiliate enterprises and abusing dominant positions will figure more prominently in time. The definitions of dominance in the market, that is, the degree of actual or potential control of the market by an entity and anti-competitive practices and the goods and services covered may also be tailored in order to suit the socio-economic reality of the state concerned. With respect to the determination of dominant positions some states may opt to define dominance on the basis of market percentage market share that an entity must hold in order to be considered to be in a dominant position or monopolistic or to initiate investigations.

34. A state may limit the ambit of anti-competitive practices or may restrict it to horizontal and vertical agreements or arrangements that are intended to be binding. Whether the agreement or arrangement should be in writing would be left to the state to decide depending on its particular

circumstances. However, the general trend is to include oral or informal agreement so as to effectively cure the mischief although this may cause more legal controversy.

35. Further provisions dealing with exclusive dealing and arrangements which involves a manufacturer and restricts either a buyer or retailer from dealing in goods of a competitor, will be of increasing importance.

## THE COMPETITION ACT ARRANGMENT OF SECTIONS

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2. Interpretation
3. Objects of Act
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Part IX – Enforcement

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First Schedule: Excluded Matters

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Third Schedule: Unfair Practices

Fourth Schedule: Excluded Transactions

## MODEL LAW ON COMPETITION

An Act to promote, maintain and encourage competition, to prohibit anti-competitive activities and unfair practices, to establish a Competition Commission, to promote the welfare and interests of consumers in [name of state] and for matters connected therewith and incidental thereto.

WHEREAS the Government of [name of state] recognises that-

the economy must be efficient and competitive in order to promote development; an effective competition regulation environment is necessary for the economy; and the protection of vulnerable sectors through the effective implementation of competition law is consistent with international best practices and is in the national interest

NOW THEREFORE be it enacted by the Parliament of [name of state] as follows-

### PART I - PRELIMINARY

- |                       |    |   |
|-----------------------|----|---|
| <i>Short title</i>    | 1. | This Act may be cited as the Competition Act, [year ]   |
| <i>Interpretation</i> | 2. | (1) In this Act, unless the context otherwise requires- |
- “acquire” in relation to-
- a) goods includes the obtention of a right or interest by way of a purchase, lease, gift, contest, exchange, hire or hire purchase, or other arrangement;
  - b) services, includes the acceptance of the rendering of any service;
- “agreement” means an agreement, between enterprises, which is implemented or intended to be implemented in [name of state] irrespective of the form in which it is made and whether or not legally enforceable;
- “business” means any commercial or economic activity relating to goods or services for gain or reward;
- “Commission” means the Competition Commission established under section 5;
- “concerted practice” means a practice involving direct or indirect contacts between competitors falling short of an actual agreement;
- “consumer” means a person, charitable organization, association, body corporate or an unincorporated body of persons, acquiring goods or services for any purpose;
- “control” in relation to a body corporate, means the power of a person to secure by means of-
- a) the holding of shares or the possession of voting power in relation to that body corporate; or

b) any other power conferred by the constituent documents of the body corporate or other document regulating the manner in which the body corporate is run, so that the commercial activities of the body corporate are conducted in accordance with the wishes of that person or its nominee;

“document” includes information recorded in any form;

“dominant position” is as defined in section 19;

“enterprise” means a person being an individual, association, partnership, a body corporate, or an unincorporated body of persons engaged in business;

“goods” includes all forms of property [other than real property, money, securities or choses in action];

“investigating officer” means an officer appointed as such by the Commission for the purposes of this Act;

“market” means a market in [name of state] or in any part of [name of state];

“minister” means the minister to whom the responsibility for the subject of competition has been assigned;

“person” includes an enterprise;

“price” includes any charge or fee or valuable consideration of any description;

“prohibited activity” means any of the activities prohibited under sections 18,21,22 and 29;

“relevant market” is as defined in section 20;

“service” means a service of any description, whether industrial, professional or otherwise;

“supply” includes, in relation to-

a) goods, the supply by way of sales, exchange, lease, hire or hire-purchase of the goods; and

b) services, the provision by way of sale, rent, or grant of the services.

and “supplier” shall be construed accordingly;

“trade” includes business.

- (2) Every reference in this Act to the lessening of competition shall, unless the context otherwise requires, include references to the hindrance or prevention of competition.

- (3) For the purposes of this Act, the effect on competition in a relevant market shall be determined by reference to all factors that affect, or may potentially affect competition in that market, including the supply or likely supply of goods or services by any enterprise not resident or carrying on business in [name of state].
- Objects of Act**      3.      The objects of this Act are to-
- a) promote, maintain and encourage competition;
  - b) prohibit anti-competitive activities which prevent, restrict or distort competition or constitute an abuse of dominant position in any market;
  - c) enhance economic efficiency in production, trade and commerce;
  - d) promote the welfare and the interests of consumers, and provide consumers with competitive prices and a wide choice of goods or services;
  - e) expand opportunities for domestic enterprises to participate in world markets; and
  - f) promote and thereby enhance the ability of small and medium enterprises to compete effectively in a market.

- Application of Act**      4.      (1) This Act applies to all business activities within, or having an effect within, [ ] except for those matters listed in the First Schedule.

## PART II – THE COMPETITION COMMISSION

- Establishment of Commission**      5.      There is hereby established for the purposes of this Act, a body to be known as the Competition Commission which shall be a body corporate with perpetual succession and shall, as such be capable of-
- a) suing and being sued;
  - b) acquiring, owning, holding and developing or disposing of property, both movable and immovable; and
  - c) doing and suffering such other act or things as bodies corporate may lawfully do and suffer.

- Common seal**      6.      (1) The Commission shall have a common seal and such seal may from time to time be broken, changed, altered or made anew as the Commission thinks fit.
- (2) All deeds and other documents requiring the seal of the Commission shall be sealed with the common seal of the Commission.

		(3)	All courts, judges and persons acting judicially, shall take judicial notice of the common seal of the Commission affixed to a document and shall presume that it was duly affixed.
<b>Independence of Commission</b>	7.		The Commission shall be an independent institution and shall at all times discharge its functions in an impartial manner.
<b>Constitution of Commission</b>	8.	(1)	The Commission shall consist of such number of persons, not being less than ( ) nor more than ( ) as the Minister may appoint.
		(2)	The Second Schedule shall have effect with respect to the Commission, its conduct of business, its members and proceedings.
<b>Functions and duties of Commission</b>	9.	(1)	Subject to the provisions of this Act, the functions and duties of the Commission shall be to- <ul style="list-style-type: none"> <li>a) keep under review, business activities in [name of state] with a view to identifying activities which may prevent, restrict or distort competition and adversely affect the economic interests of consumers;</li> <li>b) eliminate or control activities having adverse effects on competition in [name of state] generally;</li> <li>c) advise the Minister on such matters relating to the operation of this Act as it thinks fit or as may be requested by the Minister;</li> <li>d) act nationally and internationally as the body representative of [name of state] in respect of competition and consumer protection matters;</li> <li>e) conduct investigations to determine whether any enterprise is engaged in anti-competitive activities, unfair practices or for such other reason as it thinks fit; and</li> <li>f) carry out such other functions as are required to give effect to this Act.</li> </ul>
		(2)	In performing its functions and discharging its duties pursuant to subsection (1), the Commission shall have regard to the nature of various markets in [name of state] and the need to ensure that vulnerable sectors of the economy are not unfairly disadvantaged.
		(3)	The Commission may undertake such other functions and duties as the Minister may assign in writing to the Commission and in so doing, the Commission shall be deemed to be fulfilling the purposes of this Act, and the provisions of this Act shall apply to the Commission in respect of such functions and duties.
<b>Delegation of powers</b>	10.	(1)	The Commission may, subject to the conditions or restrictions it thinks fit, delegate the performance of any of the functions, duties and powers assigned to it by this Act or any other enactment to its

Executive Director or such other employee of the Commission as it deems appropriate.

- (2) Notwithstanding subsection (1), the Commission shall not delegate the power to –
- a) levy fees and borrow money;
  - b) discontinue an investigation;
  - c) hold a hearing; and
  - d) issue a direction, or to impose a penalty.

**Appointment of Executive Director and other employees**

11. (1) The Commission shall, subject to the provisions of the section, appoint an Executive Director on such terms and conditions as the Commission may determine.
- (2) The duration of the employment of the Executive Director shall be for an initial period of [ ] years and his employment may be renewed for a further period not exceeding [ ] years.
- (3) The Executive Director shall be responsible to the Commission for the proper administration and management of the affairs of the Commission in accordance with the policy laid down by the Commission.
- (4) Where the Executive Director is temporarily absent from [*name of state*] or temporarily incapacitated by reason of illness or for any other reason, another person may be appointed by the Commission to act in the place of the Executive Director during his absence.
- (5) The Commission may appoint and employ on such terms and conditions as the Commission may determine a secretary and such other employees, consultants and agents as may be necessary for the effective performance of its functions and the discharge of its duties.
- (6) The [*Governor General/President*] may subject to such condition as he may impose, approve the appointment of any officer in the service of the Government to any office with the Commission.

**PART III – FINANCIAL PROVISIONS, ACCOUNTS AND ANNUAL REPORT**

**Funds of Commission**

12. The funds of the Commission shall consist of-
- a) such sums as may be appropriated by Parliament for the purposes of this Act; and
  - b) fees collected pursuant to section 13 and any other moneys which may become payable to or vested in the Commission in respect of any matter incidental to its functions.

- |  |     |  |
|--|-----|--|
| <b>Power to levy fees</b>                  | 13. | (1) The Commission may levy fees for any services rendered by it.<br>(2) Such fees shall be used by the Commission to defray its expenses.   |
| <b>Loans and financial penalties</b>       | 14. | (1) For the performance of its functions or the discharge of its duties under this Act or under any other enactment, the Commission may from time to time raise loans from the Government.<br>(2) All financial penalties collected under this Act shall be paid into the Consolidated Fund.   |
| <b>Financial year and annual estimates</b> | 15. | (1) The financial year of the Commission shall begin on ( ) of each year and end on ( ) of the succeeding year except that the first financial year of the Commission shall begin on the appointed day and end on the ( ) of the succeeding year.<br>(2) The Commission shall in every financial year, prepare or cause to be prepared and shall adopt annual estimates of its income and expenditure for the ensuing year.<br>(3) The Commission may adopt supplementary estimates at any of its meetings.<br>(4) Upon adoption by the Commission, a copy of all annual estimates shall forthwith be sent to the Minister.<br>(5) The Minister may approve or disallow any item in the estimates submitted to him by the Commission, and the Commission shall be bound by the decision of the Minister.   |
| <b>Accounts and audit</b>                  | 16. | (1) The accounts of the Commission shall be audited annually by the [Auditor General] or by any auditor approved by the [Auditor General] for that purpose.<br>(2) The Commission shall, as soon as practicable after the close of the financial year, prepare and submit financial statements in respect of that year to the auditor who shall audit and report on them.<br>(3) The auditor or any person authorised by him shall be entitled at all reasonable times to unhindered access to all accounting and other records relating directly or indirectly to all financial transactions of the Commission.<br>(4) Any person who, without reasonable excuse, refuses or fails to allow the auditor or any person authorised by the auditor access to any accounting or other records in his custody or power shall be guilty of an offence and shall be liable on conviction to a fine not exceeding [ ].<br>(5) The auditor shall in his report state whether-<br>a) the financial statements fairly state the affairs of the Commission and reflect the financial transactions undertaken by it; |

- b) proper accounting and other records have been kept, including records of all assets and liabilities of the Commission; and
- c) such other matters arising from the audit as he considers necessary.

(6) The Commission shall, as soon as its accounts and financial statements have been audited, send a copy of the audited financial statements together with the report of the auditor to the Minister.

**Annual report**

17. (1) The Commission shall, within [three] months after the end of each financial year, or within such longer period as the Minister may in special circumstances allow, cause to be made and submitted to the Minister, an annual report dealing generally with the activities of the Commission during the preceding financial year and containing information relating to the proceedings and policy of the Commission.
- (2) There shall be included in the annual report, the audited financial statements of the Commission and the report of the auditor.
- (3) The Minister shall as soon as practicable cause a copy of the annual report submitted under subsection (1) to be presented to Parliament.
- (4) Notwithstanding the provisions of this section, the Commission may from time to time furnish to the Minister, a report relating to any particular matter investigated or the subject of an investigation, being a matter which in its opinion, requires the special attention of the Minister.

**PART IV – ANTI-COMPETITIVE AGREEMENTS AND ABUSE OF DOMINANT POSITION**

**Anti-competitive agreements**

18. (1) Any agreement between enterprises, decision by associations of enterprises or concerted practice which has as its object or effect the prevention, restriction or distortion of competition in [name of state] is prohibited.
- (2) Without prejudice to the generality of subsection (1), agreements, decisions and concerted practices may in particular have the object or effect of preventing, restricting or distorting competition, if they contain provisions which-
- a) directly or indirectly fix purchase or selling prices or determine any other business activity;
  - b) limit or control production, markets, technical development or investment;
  - c) share markets or sources of supply;

- d) constitute a bid-rigging agreement;
  - e) apply dissimilar conditions to equivalent transactions with trading parties, thereby placing the trading parties at a competitive disadvantage; or
  - f) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the said contracts.
- (3) An agreement, decision or concerted practice under subsection (1) shall not be prohibited-
- a) if it falls within an agreement, decision or concerted practice or a category of agreements, decisions or concerted practices, for which an authorisation has been duly granted by the Commission under Part VI; or
  - b) if in the opinion of the Commission it-
    - (i) contributes to the improvement of production or distribution of goods or services or the promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefit; and
    - (ii) imposes on the enterprises concerned only such restrictions as are indispensable to the attainment of objectives mentioned in sub-paragraph (i); and
    - (iii) does not afford such enterprises the possibility of eliminating competition in respect of a substantial part of the goods or services concerned.
- (4) Any provision of any agreement or any decision which is prohibited by subsection (1) shall be void to the extent that it infringes that subsection.
- (5) Unless the context otherwise requires, a provision of this Act which is expressed to apply to, or in relation to an agreement shall be read with the necessary modifications, as applying equally to, or in relation to, a decision by an association of enterprises or a concerted practice.
- (6) For the purposes of this section, a bid-rigging agreement having as object or effect the prevention, restriction or distortion of competition, exists between two or more enterprises where-
- a) one of the parties to the agreement agrees not to submit a bid or tender in response to a call or request for bids or tenders; or
  - b) the parties to the agreement agree on the price, terms and conditions of the bid or tender to be submitted in response to a call or request for bids or tenders.

- (7) Subsection (6) does not apply where-
- a) the enterprises to an agreement are inter-connected bodies corporate; or
  - b) the person making the call or requests for bids or tenders is made aware of the terms of the agreement before the making of a bid or tender by a party to the agreement.
- (8) For the purposes of this section any two bodies corporate are to be treated as inter-connected if one of them is a subsidiary of the other or if both of them are subsidiaries of the same body corporate.
- Dominant position**            19.            An enterprise holds a dominant position in a relevant market if, by itself or together with one or more enterprises, it is in a position to exclude competition, control prices or to behave to an appreciable extent independently of its competitors, potential competitors, customers or suppliers.
- Identification of relevant market**            20.            For the purpose of identifying the relevant market under this Part, the Commission shall take into account, inter alia-
- a) the geographical boundaries that have been applied to identify groups of sellers and buyers of goods or services within which competition is likely to be restrained;
  - b) all goods or services which are regarded as interchangeable or substitutable by the consumer, by reason of the characteristics of the goods or services, the prices and the intended use; and
  - c) all suppliers to which consumers may turn in the short term, if the abuse of dominance leads to a significant increase in price or to other detrimental effects upon the consumer.
- Abuse of dominant position**            21.            (1)            Any conduct on the part of one or more enterprises which amounts to the abuse of a dominant position in a relevant market is prohibited.
- (2)            A dominant enterprise abuses its position if it acts in a manner that impedes the maintenance or development of effective competition in a relevant market.
- (3)            Without prejudice to the generality of subsection (2), the following acts may in particular amount to an abuse of dominant position-
- a) restricting any other enterprise from entering the market;
  - b) preventing or deterring any other enterprise from engaging in competitive conduct in a market;
  - c) eliminating or removing an enterprise from a market;

- d) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- e) limiting production, supply of goods or services, markets or technical development to the prejudice of consumers;
- f) applying dissimilar conditions to equivalent transactions with trading parties, thereby placing the trading parties at a competitive disadvantage;
- g) engaging in exclusive dealing, market restriction or tying; or
- h) generally making the conclusion of agreements subject to acceptance by other parties of supplementary obligations which by their nature, or according to commercial usage, have no connection with the subject of such agreements.

(4) For the purposes of this Part-

- a) “exclusive dealing” includes any practice whereby a supplier of goods or services –
  - (i) as a condition of supplying the goods or services to a consumer requires the consumer to –
    - a. deal only or primarily in goods or services supplied by or designated by the supplier or his nominee;
    - b. refrain from dealing in a specified class or kind of goods or services except for the goods or services supplied by the supplier or his nominee;
  - (ii) induces a consumer to meet a condition referred to in paragraph (a) by offering to supply the goods or services to the consumer on more favourable terms or conditions, if the consumer agrees to meet that condition;
- b) “market restriction” means any practice whereby a supplier of goods or services, as a condition of supplying those goods or services to the consumer, requires the consumer to supply the goods or services only in a defined market or exacts a penalty of any kind from the consumer if the consumer supplies any goods or services outside that market;
- c) “tying” means any practice whereby a supplier of goods or services–
  - (i) as a condition of supplying the goods or services (hereinafter referred to as tying) to a consumer, requires the consumer to–

- a. acquire any other goods or services from the supplier or his nominee; or
  - b. refrain from using or distributing, in conjunction with the tying, any other goods or services that are not of a brand or manufacture designated by the supplier or their nominee; and
- (ii) induces a customer to meet a condition set out in paragraph (i) by offering to supply the goods or services to the consumer on more favourable terms or conditions if the consumer agrees to meet that condition.
- (5) Any conduct of a dominant enterprise shall not be prohibited if-
- a) it is the subject of an authorisation granted by the Commission under Part VI; or
  - b) it contributes to the improvement of production or distribution of goods or services or the promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefit.

## PART V – MERGERS AND ACQUISITIONS

### **Mergers prohibited**

22. (1) Any merger that has resulted, or is likely to result, in a substantial lessening of competition within any market in [name of state] for goods or services is prohibited.
- (2) A merger occurs when one or more enterprises directly or indirectly acquire or establish direct or indirect control over the whole or part of the business activities of another enterprise.
- (3) A merger may be achieved in any manner, including through-
- a) purchasing, leasing or otherwise acquiring the shares, an interest or the assets of the other enterprise in question; or
  - b) effecting an amalgamation or other combination with the other enterprise in question.

### **Substantial lessening of competition**

23. (1) The Commission may, when deciding whether a merger is likely to result in a substantial lessening of competition, with regard to goods or services take into account any of the following considerations-
- a) the actual and potential level of import competition in the market;
  - b) the ease of entry into the market, including tariff and regulatory barriers;

- c) whether the merger will result in the removal of an effective competitor;
- d) whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail; and

whether the merger can or cannot be justified on any exceptional and compelling reason of public policy.

## PART VI – AUTHORISATIONS AND EXEMPTIONS

### Grant of authorisation

24. (1) Any enterprise which proposes to become a party to an agreement, a conduct, or a merger prohibited under sections 18, 21 and 22 may apply to the Commission for an authorisation to become a party to the agreement, conduct or merger.
- (2) In determining an application under subsection (1), the Commission shall consult the Minister and take into account the following-
- a) the vulnerability of the sector concerned;
  - b) the effect of the agreement, conduct or merger on the ability of small and medium sized enterprises to compete effectively;
  - c) the promotion of the establishment and development of domestic industries;
  - d) the promotion of economic development of other sectors of the economy; or
  - e) any other exceptional and compelling reasons of public policy.
- (3) The Commission may grant an authorisation for a specified term and impose such terms and conditions as it deems fit.
- (4) The Commission may refuse to grant an authorisation and shall inform the applicant in writing of the reasons for the refusal.

### Effect of authorisation

25. While an authorisation under section 24 is in force, nothing in this Act shall prevent the enterprise to whom such authorisation is granted from giving effect to any agreement or engaging in any conduct or merger to which the authorisation relates.

### Revocation of authorisation

26. (1) Subject to subsection (2), the Commission may revoke or amend an authorisation granted under section 24 if it is satisfied that-
- a) the authorisation was granted on information that was false or misleading;
  - b) there has been a breach of any terms or conditions subject to which the authorisation was granted; or



- b) an agreement between an enterprise and a consumer, as a result of a purchase, lease, gift, contest or other arrangement in which the enterprise is to supply goods or services to another consumer specified in the agreement, but does not include any transaction specified in the Fourth Schedule.

## PART VIII – INVESTIGATION AND HEARING

### Complaints and requests

31. (1) Where, following a complaint or a request made to the Commission by any person, or at the Commission's own initiative, the Commission has reasonable grounds to believe that an enterprise has engaged or is engaging in one or more of the prohibited activities under Parts IV, V and VII of this Act, the Commission may conduct an investigation.
- (2) For the purposes of an investigation under subsection (1), the Commission may appoint its Executive Director or such other employees as it considers appropriate, to be an investigating officer and may appoint or employ any other person to assist the investigating officer.
- (3) The Commission may, where it decides to conduct an investigation, by notice in writing to any person require that person to-
- a) produce to the Commission a specified document or provide it with a specified information, relevant to the investigation within such time as may be stated in the notice; and
  - b) attend at a specified place and time, to answer questions of the investigating officer and provide him with information or produce any document he may have in his possession or custody in relation to the investigation.
- (4) The Commission may specify in the notice served pursuant to subsection 3(a), the time and place any document is to be produced or any information is to be provided and the manner and form in which it is to be produced or provided.
- (5) The power under this section to require a person to produce a document includes the power to take copies or extracts from any document produced.
- (6) Where an investigation reveals an alleged infringement of any one or more of the prohibited activities under this Act, the Commission shall inform the enterprise in writing of the alleged infringement and invite the enterprise to make representations in connection with the alleged infringement.
- (7) The Commission shall, where the enterprise admits the alleged infringement, give such directions as it considers appropriate to remedy the infringement and may impose a financial penalty.

- (8) Where the enterprise denies the alleged infringement or makes representations which the Commission considers to be unsatisfactory, the Commission shall convene a hearing and inform the parties accordingly.
- (9) The Commission may conduct further investigations for the purposes of the hearing.
- (10) Upon conclusion of the hearing, the Commission shall, where it finds-
  - a) that there was an infringement of a prohibited activity, issue such direction and may impose such financial penalty as it considers appropriate; or
  - b) that no infringement of a prohibited activity has taken place, inform the parties forthwith.
- (11) The Commission shall before issuing a direction or imposing a financial penalty, give an opportunity to the party affected by the findings of the Commission, to make representations in mitigation.

**Investigation discontinued**

- 32. (1) At any stage of an investigation or a hearing under this Act, if the Commission is of the opinion that the matter being investigated or subject of a hearing does not justify further investigation or hearing, the Commission may discontinue the investigation or hearing.
- (2) Where the Commission decides to discontinue an investigation or a hearing under subsection (1), it shall inform the parties forthwith of its decision.

**Interim measures**

- 33. (1) Where, in the course of an investigation-
  - a) the Commission has reasonable grounds to suspect that an enterprise is a party to one or more of the prohibited activities under this Act; and
  - b) considers that as a consequence it is necessary for it to take an interim measure as a matter of urgency for the purpose of-
    - (i) preventing serious and irreparable damage to a particular person or category of persons;
    - (ii) protecting public interest; or
    - (iii) preventing a person from taking any step that would hinder or impede the investigation of the Commission;
 the Commission may give such directions to any person as it considers appropriate for that purpose.
- (2) A direction given under this section shall be in writing.
- (3) The Commission shall give the person to whom it intends to give a direction an opportunity to make representations to the Commission before issuing the direction.

- Examination of witnesses**      34.      The Commission may, for the purposes of a hearing, do all or any of the following-
- a) summon witnesses to appear before it ;
  - b) administer oath and examine the witnesses;
  - c) require any such witness to produce to the Commission any document or to furnish any information in his power, control or custody.
- Immunity and privileges**      35.      A witness before the Commission shall be entitled to the same immunity and privileges applicable to a witness before a court of law.
- Witness refusing to comply**      36.      (1) Any person who-
- a) on being duly summoned to attend as a witness, fails to attend without reasonable excuse;
  - b) being in attendance as a witness refuses to take an oath or to furnish any information or produce any document in his control or possession or to answer any question;
  - c) destroys any document or other record likely to be required for an investigation that has commenced under this Act;
  - d) prevents or impedes the investigation;
  - e) without reasonable excuse fails, to comply with a notice served under section 31 (3);
  - f) knowingly provides the Commission with information that is false or misleading; or
  - g) does any other thing which would constitute contempt before a court of law;
- shall commit an offence and shall be liable on conviction to a fine not exceeding [ ] and to imprisonment for a term not exceeding [ ].
- (2) It shall be a reasonable excuse, for the purposes of subsection (1)(e) for a person to refuse or to fail to answer a question put to him or refuse or fail to produce a document that he was requested to produce, if the answer to the question or the production of the document might tend to incriminate him.
- Procedures for hearing**      37.      For the purposes of a hearing, the Commission shall, subject to the provisions of this Part, establish its own procedures and act expeditiously taking into account the interests of the parties before it.
- Power to prohibit disclosure of information, documents and evidence**      38.      (1) The Commission may prohibit the publication or communication of any information furnished or obtained, documents produced, obtained or tendered, or evidence given to the Commission in connection with the proceedings of the Commission.
- (2) A person who publishes or communicates any information, document or evidence, the publication of which is prohibited

under subsection (1), shall commit an offence and shall be liable on [summary] conviction to a fine not exceeding [ ] or to imprisonment for a term not exceeding [ ].

**Power of entry  
and search**

39. (1) The Commission may, for the purpose of ascertaining whether an enterprise has engaged or is engaging in a prohibited activity, require an investigating officer appointed under section 31 (2), to enter and search any premises.
- (2) An investigating officer entering any premises under this section may-
- a) inspect and remove any document, equipment and article which he considers to be relevant to the investigation;
  - b) require any person on the premises to provide an explanation in respect of any of the items referred to under paragraph(a);
  - c) take copies of, or extracts from any document which is removed;
  - d) require any information which is stored in any electronic form and is accessible from the premises and which the investigating officer considers relevant for the purpose of the investigation to be produced in a form in which-
    - (i) it can be taken away;
    - (ii) it is visible and legible.
- (3) An investigating officer shall only exercise the powers conferred by subsection (2) with a warrant issued under subsection (3).
- (4) Where a [Magistrate] is satisfied by information on oath that there is reasonable ground for believing that any person has engaged or is engaging in conduct constituting or likely to constitute a prohibited activity under this Act, the [Magistrate] may issue a warrant permitting an investigating officer to exercise the powers conferred by subsection (1) in relation to any premises specified in the warrant.
- (5) A warrant shall not authorise the retention of a document, equipment or article for more than [ ] days.
- (6) An investigating officer shall-
- a) on entering any premises pursuant to a warrant, produce evidence of his identity and the authority to enter; and
  - b) upon completing the search authorised by the warrant, leave a receipt containing a list of any document, equipment or article that has been removed in connection with the investigation.

- (7) The occupier or person in charge of any premises entered pursuant to this section shall provide the investigating officer with all reasonable facilities and assistance for the effective exercise of his function.
- (8) Any person who obstructs or impedes an investigating officer in the performance of his duties under this Act commits an offence and shall be liable on [summary] conviction to a fine not exceeding [ ] or imprisonment for a term not exceeding [ ] years [or to both such fine or imprisonment].

**PART IX – ENFORCEMENT**

- |   |     |  |
|---|-----|--|
| <b>Enforcement of decisions of Commission</b> | 40. | <ul style="list-style-type: none"> <li>(1) Where the Commission has made a finding that an enterprise is a party to a prohibited activity, in breach of any of the provisions falling under Parts IV, V and VII, the Commission may give such directions as it considers appropriate to the enterprise, directing it to bring an end to the prohibited activity and if necessary, requiring the enterprise to take such action as is specified in the direction to eliminate the harmful effect of the prohibited activity and to prevent the recurrence of such prohibited activity.</li> <li>(2) A direction issued under subsection (1) may, in particular, provide- <ul style="list-style-type: none"> <li>a) in relation to an agreement prohibited under section 18, for the parties to modify or terminate the agreement;</li> <li>b) in relation to a conduct prohibited under section 21, for the enterprise to modify or cease the conduct;</li> <li>c) in relation to a merger prohibited under section 22, for the merger to be dissolved or modified in such manner as the Commission may direct;</li> <li>d) in relation to an unfair practice prohibited under section 29, for the enterprise to cease the unfair practice and where appropriate restitution of any money, property or other consideration furnished by the consumer;</li> <li>e) for such financial penalty as the Commission deems fit to impose in relation to a prohibited activity; and</li> <li>f) for a party to furnish a performance bond, guarantee or any other form of security as the Commission may determine.</li> </ul> </li> </ul> |
| <b>Enforcement by court</b>                   | 41. | <ul style="list-style-type: none"> <li>(1) For the purposes of enforcement of any direction made by the Commission under section 33 or 40, the Commission may apply for the direction to be registered with the [court] in accordance</li> </ul>   |

with the Rules of Court and the [court] shall register the direction in accordance with the Rules of Court.

- (2) The direction shall as from the date of registration, be deemed to be of the same force and effect as if it had been an order originally obtained in the [court] and on application being made, the [court] shall have power to enforce the direction.

**Rights of private action**

42. (1) Any person who suffers loss or damage as a result of a breach of a prohibited activity shall have a right of action for relief in civil proceedings against any enterprise which is, or which has at the material time been, a party to the prohibited activity.
- (2) No action under subsection (1) may be brought-
- a) until after a finding has been made by the Commission or where the finding of the Commission is the subject of an appeal, until after the final determination of the appeal; and
  - b) where the action has been lodged, within [ ] years from the date of the finding of the Commission, or the final determination of an appeal, where the finding of the Commission is the subject of an appeal.

**PART X – APPEALS**

**Appeals**

43. (1) Any person who is aggrieved by a decision of the Commission under sections 26, 33 or 40 may, within [ ] days after the date of that decision, appeal to a [Court][Judge in Chambers].
- (2) The [Court][Judge in Chambers] shall hear and determine the appeal and may-
- a) confirm, modify or reverse the decision of the Commission;
  - b) remit the matter to the Commission giving such directions as it considers appropriate;
  - c) impose or revoke, or vary the amount of financial penalty;
  - d) make such further or other order, whether as to costs or otherwise as the [Court] [Judge In Chambers] may deem appropriate.

**Effect of appeal on direction**

44. Where an appeal under section 43 is entered against any decision of the Commission, any direction of the Commission that is based on such decision shall remain in force pending the determination of the appeal, unless the [Judge][Court] otherwise orders.

## PART XI – MISCELLANEOUS

- Regulations**            45.    (1)    [The Commission may, with the approval of the Minister] [The Minister may] make regulations for any purpose for which regulations are required to be made under this Act and generally for carrying out the purposes and provisions of this Act.
- (2)    Any regulations made under this Act may provide for-
- a)    the procedures to be followed in respect of applications and notices to proceedings of the Commission;
- b)    the form and manner in which a complaint or a request for investigation is to be made;
- c)    the fees to be charged in respect of anything done or any services rendered by the Commission under this Act;
- d)    the category of agreements that shall qualify for a block exemption and such factors as may be considered before granting a block exemption; and
- e)    anything which may be prescribed or is required to be prescribed under this Act.
- Guidelines**            46.    (1)    The Commission may publish in the gazette guidelines to indicate its policy approach to any matter within its jurisdiction under this Act.
- (2)    For the purpose of preparing any guidelines under subsection (1), the Commission may consult such persons as it thinks appropriate.
- (3)    Any guideline published in accordance with subsection (1) shall not be binding on the Commission.
- Acts of employee or agent**    47.    In deciding whether an enterprise is a party to a prohibited activity, any act or omission by an employee or agent of an enterprise shall be deemed to be an act or omission of the enterprise, if the act or omission occurred in the course of-
- a)    the employee's employment with the enterprise; or
- b)    the agent exercising the powers or performing the duties on behalf of the enterprise within the scope of the agent's actual or apparent authority.
- Protection from personal liability**    48.    (1)    No action, suit or other legal proceedings shall lie personally against-
- a)    the Commission;

- b) any member, employee or an agent of the Commission;
- c) any person who is on secondment or attachment to the Commission;
- d) any person authorised, appointed or directed by the Commission to exercise the powers of the Commission, to perform its functions or discharge its duties

for anything done or omitted to be done in good faith in the course of or in connection with-

- (i) the exercise or purported exercise of any power under this Act or any other enactment;
- (ii) the performance or purported performance of any function or the discharge or purported discharge of any duty under this Act or any other enactment; or
- (iii) the compliance or purported compliance with this Act or any other enactment.

**Confidentiality**

49.

- (1) It shall be the duty of every person referred to in subsection (3) to preserve secrecy with regard to all matters that have been classified as being confidential by the Commission and that may come to his knowledge in the performance of his functions and discharge of his duties under this Act and he shall not communicate any such matter to any person, except in so far as such communication-
  - a) is necessary for the performance of any such function or discharge of any such duty; or
  - b) is lawfully required by any court, or lawfully required under this Act or under any other enactment.
- (2) Any person who fails to comply with subsection (1), commits an offence and shall on conviction be liable to a fine not exceeding [ ] and to imprisonment for a term not exceeding [ ] years.
- (3) For the purposes of this section, a person who has a duty to preserve secrecy is a person who is or has been-
  - a) a member, an officer, employee or an agent of the Commission;
  - b) a member of a committee appointed by the Commission or any person employed, authorised, appointed or employed to assist the Commission;
  - c) an investigating officer or any person authorised, appointed or employed to assist the investigating officer.

## FIRST SCHEDULE

section 4

### EXCLUDED MATTERS

This Act shall not apply to the following matters:

- a) an agreement, understanding or arrangement for collective bargaining on behalf of employers and employees for the purpose of fixing the remuneration, terms or conditions of employment of the employees;
- b) an agreement expressly authorised by an enactment or a scheme made pursuant to an enactment, including such matters which are under the licensing or supervisory control of a regulatory regime for prudential or economic reasons;
- c) activities expressly exempted by virtue of any treaty or any legally enforceable agreement in relation thereto or flowing therefrom;
- d) activities of professional associations designed to develop or enforce professional standards of competence reasonably necessary for the protection of the public; and
- e) such other business or activity as may be from time to time prescribed by the Commission after consultation with the Minister.

## SECOND SCHEDULE

section 8(2)

### CONSTITUTION AND CONDUCT OF THE BUSINESS OF THE COMMISSION

- |                         |    |  |
|-------------------------|----|--|
| Eligibility for Members | 1. | The persons to be appointed to serve as members of the Commission shall be selected for their ability and experience in industry, commerce, economics, law, public administration, consumer protection or their professional qualifications or their suitability otherwise for appointment.  |
|                         | 2. | The Executive Director shall be an ex officio member of the Commission.  |
|                         | 3. | The members (hereinafter referred to as the appointed members) shall be appointed by the Minister for such period not exceeding [ ] years as may be specified in the letter of appointment and each member shall thereafter be eligible for reappointment for a further [ ] years.   |
| Chairperson             | 4. | The Minister shall appoint one of the appointed members of the Commission to be chairperson of the Commission.   |
| Acting Appointments     | 5. | The Minister may appoint any person to be a temporary Chairperson or member during the temporary incapacity from illness or otherwise or during the temporary absence from [ ] of the Chairperson or any member, as the case may be.   |
| Resignations            | 6. | <p>(1) An appointed member other than the Chairperson may at any time resign his office by letter in writing addressed to the Minister and transmitted through the Chairperson; and from the date of the receipt by the Minister of that letter, the member shall cease to be a member of the Commission.</p> <p>(2) The Chairperson may at any time resign his office by instrument in writing addressed to the Minister; and such resignation shall take effect as from the date of receipt of that instrument by the Minister.</p>  |
| Revocation              | 7. | <p>The Minister may revoke the appointment of any appointed member, if such member-</p> <ul style="list-style-type: none"><li>a) is unable to perform his functions by reason of physical or mental infirmity;</li><li>b) is convicted and sentenced to a term of imprisonment for a term exceeding [ ] years;</li><li>c) fails, without reasonable excuse, to effectively carry out any of his functions under the Act;</li><li>d) engages in such activities as are reasonably considered prejudicial to the interest of the Commission;</li><li>e) is adjudged bankrupt;</li><li>f) actively engages in politics; or</li><li>g) for any other reason the Minister may consider.</li></ul> |

Gazetting of appointments	8.	The names of all members of the Commission as first constituted and every change of membership shall be published in the Gazette.
Leave of absence	9.	The Minister may, on the application of an appointed member, grant leave of absence to that member.
Seal and Documents	10.	<p>(1) The seal of the Commission shall be kept in the custody of the Executive Director or the Secretary and shall be affixed to any instrument or document requiring the seal of the Commission pursuant to a resolution of the Commission.</p> <p>(2) The seal shall be authenticated by the signatures of the Executive Director or any other member authorised by the Commission to act in that behalf, and the Secretary.</p> <p>(3) All documents, other than those required by law to be under seal, made by the Commission and all decisions of the Commission may be signified under the hand of the Executive Director or any other member authorised to act in that behalf and the Secretary.</p>
Procedure and meetings	11.	<p>(1) The Commission shall meet as often as may be necessary or expedient for the transaction of its business, (and in any case not less than [ ] times in each financial year), and such meetings shall be held at such places and times and on such days as the Commission may determine.</p> <p>(2) The Chairperson shall preside at all meetings of the Commission at which he is present and in his absence the members present shall elect one of their number to preside at the meeting.</p> <p>(3) [ ] members of the Commission, shall constitute a quorum.</p> <p>(4) The decisions of the Commission shall be approved by a majority of votes and, in addition to an original vote, the Chairperson or other person presiding at a meeting shall have a casting vote in any case in which the voting is equal.</p> <p>(5) The minutes of each meeting shall be faithfully recorded and confirmed at a subsequent meeting.</p> <p>(6) Subject to the provisions of this Act, the Commission may make standing orders to regulate its own procedure generally, and in particular regarding the holding of meetings and special meetings, the notice to be given of such meetings, the proceedings thereat and the opening, keeping, closing and auditing of accounts.</p>
Disclosure of interest	12.	(1) A member who is directly or indirectly interested in any matter which is being dealt with by the Commission shall disclose the nature of his interest at a meeting of the

		Commission and shall not take part in any deliberation or decision with respect to that matter.
	(2)	For the purposes of sub-paragraph (1) the word 'member' shall include the Chairperson.
Validity of proceedings	13.	No act or proceeding of the Commission shall be invalid merely by reason of- <ul style="list-style-type: none"> <li>a) any vacancy in or any defect in the constitution of the Commission; or</li> <li>b) any defect in the appointment of a person as a chairperson or as a member; or</li> <li>c) any irregularity in the procedure of the Commission not affecting the merits of the matter decided.</li> </ul>
Remuneration of members	14.	There shall be paid from the funds of the Commission to the Chairperson and other members of the Commission, such remuneration, whether by way of honorarium, salary or fees, and such allowances as the Minister may determine.

### THIRD SCHEDULE

Section 29(2)

#### UNFAIR PRACTICES

1. Hiding material facts from the consumer by using small print or misleading the consumer generally as to material facts, in connection with the supply of goods or services.
2. Representing that goods or services have approval, performance, efficacy, characteristics, accessories, ingredients, components, qualities, uses or benefit that they do not have.
3. Representing that a test, duly approved by the [Standards Bureau] has been carried out in respect of goods or services and as a result the goods or services have received formal approval as to standard, performance, efficacy, characteristics, quality, when that is not so.
4. Representing that goods or services are of a particular standard, quality, grade, style, model, origin, method of manufacture, and have been supplied by an enterprise of a particular trade, qualification and skill, when they are not.
5. Representing that a price benefit or advantage exists respecting goods or services where the price benefit or advantage does not exist.
6. Charging a price for goods or services that is substantially higher than an estimate provided to the consumer, except where the consumer has already agreed to the higher price in advance.
7. Charging a price for goods or services that is higher than that which is represented as a discounted price.

8. Representing that goods or services are available at discounted prices whilst the enterprise making the representations knows or ought to have known that it will not be able to supply the goods or services in reasonable quantities having regard to the nature of the relevant market.

9. Representing that a service, part, repair or replacement is needed or desirable if that is not the case, or that a service has been provided, a part has been installed, a repair has been made or a replacement has been provided, if that is not so.

10. Taking advantage of a consumer by inserting in a contract terms or conditions that are harsh or oppressive or exerting undue pressure or undue influence on the consumer to enter into a transaction involving goods or services.

11. Representing to the consumer that in connection with the purchase of goods or services, gifts, prizes or other free items will be offered, when the enterprise making the offer knows or ought to have known that the items will not be offered.

#### FOURTH SCHEDULE

Section 30

#### EXCLUDED TRANSACTIONS

1. The term “consumer transaction” does not include any of the following transactions-
  - (a) acquisition of an estate or interest in any immovable property;
  - (b) any transaction or activity expressly authorised by an enactment or a scheme made pursuant to an enactment, including such matters which are under the licensing or supervisory control of a regulatory regime for prudential or economic reasons;
  - (c) any other transaction or activity which the Commission may prescribe after consultation with the Minister

# INVESTIGATION AND HEARING PROCEDURES

