

PNG CLE COMMERCIAL LAW & DISPUTES 3 September 2024

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Business & Investment Legal Issues

Good afternoon olgeta

I would like to begin by acknowledging the traditional custodians of the land on which we gather, the Motu Koitabu people. I pay my respects to Elders past and present and emerging and recognise their enduring contribution to the culture and spirit of the land.

I acknowledge our Chief Justice Sir Gibbs Salika and members of the Judiciary, President and councillors of the PNG Law Society, distinguished lawyers of the PNG Government and private sector, ladies and gentlemen.

As introduced I am Wavie Kendino Leki, the Managing Partner of Dentons PNG and it is a pleasure for me to be speaking to you this afternoon.

Thank you to David Denniston and the team from Commonwealth Lawyers Association, PNG Law Society, Queensland Bar Association and PNG Centre for Judicial Excellence for your efforts in putting together this important CLE and for giving me the opportunity to speak.

Today I have been asked to talk about the trends we are seeing in PNG's investment climate particularly as it pertains to changes to the regulatory environment for business, and legal and regulatory issues businesses are facing in the country.

One thing is for certain whether there is an uptick or downturn in the economy, there's always work for lawyers. A key factor in ensuring the efficient delivery of legal services whether in the private or public sector is whether there are effective laws and regulations in place.

Effective laws and regulations are vital for the growth of any economy. Having good processes for developing, implementing and reviewing regulation is vital to ensuring regulatory policies achieve policy goals that maximise benefits and minimise costs for all. Yet

across the world governments are not achieving their goals because of policies that are not working to their fullest capabilities.

Since 2012 Business Advantage International has run the annual PNG 100 CEO Survey of senior PNG executives. It explores the CEOs' expectations for profits, investment and employment, as well as how the previous year's profits compared to expectations. Perhaps most importantly, though, and relevant for the purpose of my talk, it uncovers critical impediments facing PNG businesses.

For 2024 the top 6 impediments facing PNG businesses were:

1. Lack of foreign exchange
2. Security law and order issues
3. Unreliable utilities
4. Lack of government capacity
5. Shortage of expertise and skills; and
6. Regulatory uncertainty.

In today's presentation I'll be highlighting the issues that we as lawyers in the private sector and our clients face due to regulatory uncertainty, to some extent lack of government capacity and briefly touch on the issue of lack of foreign exchange and how that is affecting the work we are seeing.

Unsurprisingly, the Alternative Government has unveiled this morning a bold Strategy Policy Action plan which includes amongst other things a promise to address some of these impediments, including to:

1. Solve the foreign currency crisis by attracting investments and prioritising essential imports to bring down costs; and
2. Cutting down the red tape to allow for streamlined processed for businesses and more efficient government.

What do I mean by regulatory uncertainty? Well in the PNG context our experience is that it can mean two things, firstly and the most common issue faced and predominantly the subject of my talk today amongst other practical issues faced, the delay in the enactment of subordinate legislation after legislation has been repealed and replaced or where new legislation has come into force and resulting in ambiguity and lack of clarity often causing confusion. Secondly it can also mean the enactment of laws without proper stakeholder consultation and at the whim of the government of the day, in recent years the market concentration levy, or 'super tax' imposed on BSP and Digicel in 2022 which has since been repealed, more recently in 2023 the imposition of the "bank tax" on commercial banks whereby the Corporate Income Tax rate for commercial banks was increased from 30% to 45% and the most recent instance being the alleged bulldozing of the proposed National Gold Bill which faced much public backlash including from the PNG Law Society and other industry bodies, it has since been placed on the back burner. While the government has been placing much emphasis on building investor confidence, regulatory uncertainty erodes investor confidence and the government must pay serious attention to allaying these concerns by ensuring that when enacting new legislation, the full suite of legislation is enacted concurrently and there is proper stakeholder consultation when drafting legislation. It is encouraging to note that the Department of Lands and Physical Planning is currently undertaking extensive stakeholder consultation throughout the country on the proposed Strata Title legislation. We hope to see more sponsoring government departments follow suit for proposed legislation.

As an eternal optimist I would like to first begin by highlighting some of the welcome regulatory changes that have recently taken place. First, there have been recent amendments to the PNG Companies Act which:

- required all existing companies to apply for re-registration by 1 December 2023, or risk being de-registered; and
- introduced the new electronic online filing system to replace the previous system.

With regards to the de-registration aspect, the IPA which is PNG's main regulator for corporate bodies, was prompt in de-registering non-compliant companies who had not re-registered by 1 December 2023. This was helpful in removing defunct entities no longer actually operating in PNG and unburdening the IPA and its system from having to handle these entities and freeing them up to focus on compliance by existing entities.

As to the new electronic online filing system, the introduction of this system has significantly reduced the turnaround time in which a company is registered and new forms are available to facilitate this as well as other aspects of corporate governance on the online portal. Since the inception of the IPA Online Registry System, new companies can now be registered within 24-48 hours as opposed to what would usually take a few days if not weeks.

Companies Act forms may now be lodged anytime anywhere as long as there is steady internet access and a credit card or funds deposited in the IPA online account. The online portal also prevents incomplete applications from being lodged in real time as opposed to former paper-based applications which took a considerable amount of time for requisitioned applications to be dealt with. This brings PNG's company lodgement processes in line with other jurisdictions across the globe and makes it easier for entities to comply with their regulatory obligations. This has significantly improved the ease and speed to doing business in PNG which was in the not too distant past a significant impediment.

With the IPA leading the way in paperless electronic lodgements available 24 hours, we look forward to other government departments following suit.

On the topic of electronic lodgements, another significant challenge we face is not being able to have access to records that should be publicly available on electronic registers. Other than the IPA for company and PPSR searches, when conducting due diligence for transactions the process is cumbersome and time consuming where most searches of registers that should be publicly available are paper based manual records which involve us having to:

1. write to the Registrar of the relevant department for permission to conduct a search of the register;
2. follow up on permission/approval being granted to conduct the search; and
3. attending to payment of the search fees and receipting before we can access the records.

Often our searches are delayed due to the relevant staff being absent from work, power issues and the relevant departments running out of paper and toner which we often have to donate in order to obtain the searches. That is only one aspect, once the due diligence is complete often the application process involves printing lengthy paper-based applications and scurrying to lodge before 4.06pm to meet the government close of business timing.

We do note that it is pleasing to see that the PNG Department of Information and Technology or DICT is making great strides with the Government Digital Transformation Policy and working towards interoperability between the government departments. Just last month the DICT in collaboration with the Royal PNG Constabulary launched the Police Clearance Management System. Secretary of DICT Matainaho explained that the system introduces a seamless digitalized process for our people to apply and pay online, receive a digital police clearance certificate, and utilize QR code technology for electronic verification and biometric data collection and further revealed that eight more digital services, along with a digital wallet app, would be launched this month to further enhance online accessibility and simplify services for the public.

We await with eager anticipation on these developments as the government moves towards online accessibility and interoperability.

In other regulatory developments, while the merger control rules under the Independent Competition and Consumer Commission Act have been in place for some time now, it has been an increasingly important consideration in mergers and acquisitions in recent years.

The notification of mergers and acquisitions in PNG was formerly voluntary, and there were no minimum turnover or other monetary thresholds for notifying mergers to the ICCC.

Instead, merger parties could voluntarily seek clearance or authorisation for mergers from the ICCC, ordinarily if there was a risk that the merger would be likely to have the effect of substantially lessening competition in a market.

Now there is an additional stand-alone test that captures the requirement to give notice to the ICCC if the value of a transaction proposed (as a whole) is K50Million or more or if the proposed acquisition is likely to, or would be likely to, result in a market share increase of 50% or more of the person who is acquiring. Penalties are imposed for failure to comply. Notification is mandatory and the prescribed Form 2 is the form of notice to be given.

Another recent regulatory update has been the introduction of the New Takeovers and Mergers Code in effect from 22 June 2023. Since then, take-over offers under the *Capital Market Act 2015* in respect of Code Companies must comply with the Code.

The Code prescribes a 'fundamental rule' which prohibits a person who holds or controls:

- less than 20% of the voting rights (including no voting rights) in a Code Company from becoming, with them and their associates, a holder or controller of more than 20% of the voting rights in the Code Company; and
- 20% or more of the voting rights in a Code Company from becoming the holder or controller of an increased percentage of the voting rights in the Code Company,

unless an exception applies.

Exceptions include full offers, partial offers, acquisitions or allotments approved by ordinary resolutions and acquisitions if a person already holds or controls 90% or more of the shares.

The Code prescribes rules in respect of each type of exception and covers procedural matters such as timeframes, takeover notices, offer documents, target company statements, offer periods, conditions, consideration, director statements and the need for independent reports in specified circumstances.

Of note, the national interest test sits outside of the Code and is embedded in the Capital Market Act – whereby the Securities Commission is given a reserve power to issue permanent restraining orders pursuant to Section 281(1) of the Capital Market Act, if the Commission considers that a take-over, merger, compromise or acquisition is not in the national interest of Papua New Guinea.

Since the Capital Market Act commenced operation in December 2017, the Regulations are yet to be drafted and come into operation and the Takeovers and Mergers Code only came into effect 5 years after the Capital Market Act commenced operation. In the absence of the takeovers code, takeovers in PNG were largely unregulated. This is an example of one of the main issues faced regarding gaps in the regulatory framework when legislation is repealed and replaced. Often there is a significant gap in the time in which the relevant regulations or supporting legislation of the new legislation come into operation. When the necessary structure is not in place this can lead to uncertainty on the relevant processes and requirements in place in achieving desired outcomes.

As with any new regulatory instrument, there will undoubtedly be some teething problems while parties work through the new requirements and see if they work in practice. It will be interesting to see how the next PNG takeover plays out and whether the new Code works to foster or inhibit future takeover activity in PNG.

Regarding the work that we are seeing, we are seeing a lot of property acquisitions and also business or share acquisitions of companies both at a local subsidiary level and at the parent entity levels in foreign jurisdictions. We understand the flurry of activity with local share acquisitions and property acquisitions are largely due to the foreign currency availability issues experienced in PNG in recent years. There is a lot of trapped capital and therefore one of the major issues our clients are experiencing is the inability to repatriate profits and our clients are therefore looking for ways to invest that trapped capital in PNG, hence the investment in acquisition of properties or other profitable companies.

Unfortunately, the inability to repatriate profits to foreign shareholders we believe has also

resulted in the departure of a number of globally recognised multinational corporations of late and it does not appear that there is much that can be done about this until PNG is able to resolve its foreign currency availability issues.

We are also seeing a lot of increased activity and interest in investment with Special Economic Zones. Special Economic Zones are designated areas in PNG that are subject to unique economic regulations which are more favourable and differ from other areas in the country. While we welcome the government's efforts in encouraging foreign direct investment in the country, in our recent experience in advising an international financier in relation to the financing of a proposed project, our recommendation is that it is crucial that the SEZA Policy is finalised and that the government takes active steps to issue regulations and review the legislation to avoid ambiguity and provide clarity around matters including but not limited to ownership in relation to titles to land on which SEZ Projects are located, value and duration of benefits provided, the proposed one stop shop mechanism and SEZA approvals that may be required for investments into, or selling, conveying, assigning, or transferring in whole or in part a Special Economic Zone Licence, or a direct or indirect interest in that licence, to any person. This highlights again the issue of the need to have clarity in legislation and ensuring the regulations are enacted in a timely manner to avoid confusion and provide certainty on the relevant processes, requirements and benefits to encourage participation and investment in such projects.

In closing we recognise that these steps that have been taken to date are steps in the right direction to give certainty to investors and to provide benefits and streamline processes for investors, particularly international investors, however we acknowledge that there is still some room for improvement and as lawyers, we will keep working to identify and advocate for those improvements to ensure that there is certainty and ease in doing business and PNG continues to be an attractive investment opportunity for investors.