

No. 25 of 1999.

Y2K Fairness in Litigation Act 1999.

Certified on: / /20 .

INDEPENDENT STATE OF PAPUA NEW GUINEA.



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INDEPENDENT STATE OF PAPUA NEW GUINEA.



AN ACT

entitled

Y2K Fairness in Litigation Act 1999,

Preamble

WHEREAS it is anticipated that the year 2000 may cause technical problems for many information technology services, devices and programmes if necessary adjustments are not made;

AND WHEREAS such technical problems could result in the failure of such services, devices and programmes thereby causing a significant volume of legislation which could strain the Nation's legal system;

AND WHEREAS it is in the national interest that producers and users of such services, devices and programmes be encouraged to assess the likely problems, take action to prevent or eradicate them and develop contingency plans;

AND WHEREAS it is expedient that special procedures be in place in respect of litigation arising or likely to arise from the problems, and that certain limitations on damages and on non-compliant computer equipment be imposed to encourage prevention of such problems;

THEREFORE it is enacted as follows:—

Being an Act to provide for certain procedures in relation to year 2000 civil actions and to provide for certain limitations of damages in relation to such claims, and to prevent the importation, manufacture, sale or distribution of non-compliant computer equipment and for related purposes.

PART I. – PRELIMINARY.

1. COMPLIANCE WITH CONSTITUTIONAL REQUIREMENTS.

This Act, to the extent that it regulates or restricts a right or freedom referred to in Subdivision III.3.C (*qualified rights*) of the *Constitution*, namely—

- (a) the right to freedom from arbitrary search and entry conferred by Section 44 of the *Constitution*; and
- (b) the right to privacy conferred by Section 49 of the *Constitution*; and
- (c) the right to freedom of information conferred by Section 51 of the *Constitution*,

is a law that is made for the purpose of giving effect to the public interest in public safety and public order.

2. INTERPRETATION.

In this Act, unless the contrary intention appears—

“alternative dispute resolution” has the meaning given by Section 10;

“complaint” means grievances set out in a statement of claim contained in a writ of summons;

“contract” means a contract, tariff, licence or warranty;

“defendant” means any person against whom a year 2000 claim is asserted and includes the State;

“economic loss” means any damages other than damages arising out of personal injury or damage to tangible property and includes—

- (a) loss of profits or sales; and
- (b) business interruption; and
- (c) losses that arise because of the claims of third parties; and
- (d) losses indirectly suffered as a result of the defendant’s wrongful act or omission; and
- (e) losses that are required to be pleaded as special damages; and
- (f) consequential damages;

“material defect” means a defect in any item, whether tangible or intangible, or in a provision of a service, that subsequently prevents the item or service from operating or functioning according to its specifications but does not include a defect that—

- (a) has an insignificant effect on the operation or functioning of an item or computer programme; or
- (b) affects only a component of an item that, as a whole, substantially operates or functions as designed; or
- (c) has an insignificant effect on the sufficiency of the service provided;

“non-compliant computer equipment” means any equipment, device or system (including computer system and any microchips or integrated circuit embedded in another device or product) or any software,

firmware, or other set or collection of processing instructions which has not been built, assembled or modified so as to prevent a year 2000 failure;

“person” means any natural person and any entity, organization or enterprise including any corporation, company, association, partnership, trust or government entity;

“plaintiff” means a person who asserts a year 2000 claim;

“this Act” includes the Regulations;

“year 2000 civil action” means a civil action of a kind brought in any Court under Papua New Guinea law, in which—

- (a) a year 2000 claim is asserted; and
- (b) a claim or defence is related directly or indirectly, to an actual or potential year 2000 failure,

and does not include an action brought by the National Government, a Provincial Government, a Local-level Government or other public body, agency or authority acting in a regulatory, supervisory or enforcement capacity;

“year 2000 claim” means a claim or cause of action of any kind, whether asserted by way of claim, counter claim, cross-claim, third party claim or otherwise in which the plaintiff's alleged loss or harm resulted, directly or indirectly, from an actual or potential year 2000 failure;

“year 2000 failure” means a failure by any device or system (including computer system and any microchip or integrated circuit embedded in another device or product), or any software, firmware, or other set or collection of processing instructions, to process, to calculate, to compare, to consequence, to display, to store, to transmit or to receive year 2000 date-related data and includes a failure—

- (a) accurately to administer or account for transitions or comparisons from, into and between the year 1999 and 2000; or
- (b) accurately to recognize or process any specific date in 1999, 2000 or 2001; or
- (c) accurately to account for the status of the year 2000 as a leap year, including recognition and processing of the correct date on February 29, 2000.

3. APPLICATION OF THIS ACT.

No action shall be brought under this Act prior to 1 January 2000 or after 31 December 2003.

**PART II. – PRE-LITIGATION PROCEDURES FOR YEAR 2000 CIVIL
ACTIONS.**

4. PRE-TRIAL NOTICE.

(1) Before filing a year 2000 claim, (except an action for a claim that seeks only injunctive relief) a prospective plaintiff shall provide to each prospective defendant by a written notice that identifies and describes with particularity–

- (a) any manifestation of a material defect alleged to have caused injury or loss; and
- (b) the injury or loss allegedly suffered by the prospective plaintiff; and
- (c) how the prospective plaintiff would like the prospective defendant to remedy the problem; and
- (d) the basis upon which the plaintiff seeks that remedy; and
- (e) the name, address and telephone number of any natural person who has authority to negotiate a resolution of the dispute on behalf of the prospective plaintiff.

(2) Except as provided in Sections 5 and 7, a prospective plaintiff shall not file a year 2000 claim in the National Court or any other Court until the expiration of a 90 day period beginning on the date on which the prospective plaintiff provides notice under Subsection (1).

(3) Not later than 30 days after receipt of the notice under Subsection (1), each prospective defendant shall provide each prospective plaintiff with a written statement that–

- (a) acknowledges receipt of the notice; and
- (b) describes any actions that the prospective defendant will take, or has taken, to address the defect, loss or injury identified by the prospective plaintiff in the notice.

(4) Where a prospective defendant fails to respond to a notice provided under Subsection (1) during the 30 day period prescribed in Subsection (3) or does not include in the response a description of actions referred to in Subsection (3)(b)–

- (a) the 90 day waiting period specified in Subsection (2) shall terminate at the expiration of the 30 day period specified in Subsection (3) with respect to that prospective defendant; and
- (b) the prospective plaintiff may commence a year 2000 civil action against the prospective defendant immediately upon that termination.

5. FAILURE TO PROVIDE NOTICE.

Subject to Sections 4 and 6, a defendant may treat a complaint filed by the plaintiff as a notice required under Section 4 by so informing the Court and the

plaintiff where the defendant determines that a plaintiff has commenced a year 2000 civil action—

- (a) without providing the notice specified in Section 4(1); or
- (b) before the expiration of the waiting period specified in Section 4(2).

6. STAY OF DISCOVERY, ETC.

Where a defendant elects under Section 5 to treat a complaint as a notice—

- (a) the Court shall stay all discovery and other proceedings in the action for the period specified in Section 4 beginning on the date of filing of the complaint; and
- (b) the time for filing answers and all other proceedings shall be deferred until the expiry of the 90 day period.

7. EFFECT OF CONTRACTUAL WAITING PERIODS.

In a case in which a contract requires notice of non performance and provides for a period of delay before the limitation of suit for breach or repudiation of contract, the contractual period of delay controls and shall apply in lieu of the waiting period specified in Sections 4 and 5.

8. SANCTION FOR FRIVOLOUS INVOCATION OF THE STAY PROVISION.

Where—

- (a) a defendant acts under Section 6 to stay an action; and
- (b) the Court subsequently finds that the assertion by the defendant that the action is a year 2000 civil action was frivolous and made for the purpose of causing unnecessary delay,

the Court may impose a sanction, including making order for payment of costs to opposing parties in accordance with the rules of the Court.

9. COMPUTATION OF TIME.

For the purposes of this section, the rules regarding computation of time shall be governed by the applicable rules of the Court in civil procedures.

PART III. – ALTERNATIVE DISPUTE RESOLUTION.

10. ALTERNATIVE DISPUTE RESOLUTION.

(1) In this Act, “**alternative dispute resolution**” means any peaceful method of reaching a settlement or attempting to reach a settlement of a year 2000 claim or year 2000 civil action other than in the Courts and includes negotiation, conciliation, mediation, neutral evaluation and arbitration and any combination of these and any other peaceful method of reaching a settlement or attempting to reach a settlement in respect of any such claim or action.

(2) For the purposes of Subsection (1)–

“**mediation**” means a process in which the parties to a year 2000 claim or year 2000 civil action attempt to reach a settlement of their claim or action with the assistance of a neutral respected third party;

“**conciliation**” means a form of mediation in which the third party takes a less active role in the negotiations.

11. REQUESTS MADE DURING NOTIFICATION PERIOD.

(1) At any time during the 90 day notification period under Section 4, either party may request the other party to use alternative dispute resolution.

(2) Where a request under Subsection (1) is made, and the other party is agreeable the parties may enter into an agreement to use alternative dispute resolution and may also agree to an extension of the 90 day period.

12. REQUEST MADE AFTER NOTIFICATION PERIOD.

At any time after expiration of the 90 day notification period under Section 4, whether before or after the filing of a year 2000 claim, either party may request the other party to use alternative dispute resolution and where the other party is agreeable the parties may enter into an agreement to use alternative dispute resolution.

13. COURT MAY ORDER ALTERNATIVE DISPUTE RESOLUTION.

(1) At any time after the filing of a year 2000 civil action the Court may, where it considers that alternative dispute resolution may be successful–

(a) on its own motion; or

(b) on the motion of a party to the action,

order the parties to engage in alternative dispute resolution in relation to the claim.

(2) An order under Subsection (1) may–

(a) specify the method of alternative dispute resolution in which the parties are to engage or may leave it to the parties to agree on a method; and

- (b) specify all or any of the matters referred to in Subsection (4)(a) to (d) inclusive.

(3) Where an order has been made under Subsection (1) the parties to the action shall make every effort to effect a settlement of the claim by alternative dispute resolution.

(4) The regulations may prescribe procedures and other matters relating to alternative dispute resolution under this Part, and may, without prejudice to the foregoing generality prescribe—

- (a) the time within which the alternative dispute resolution ordered under Subsection (1) is to commence; and
- (b) the time within which alternative dispute resolution ordered under Subsection (1) is to be completed; and
- (c) the method of reporting the results of alternative dispute resolution to the Court; and
- (d) the powers of the Court where a party does not co-operate in the alternative dispute resolution.

PART IV. – PLEADING REQUIREMENTS.**14. APPLICATION OF THE NATIONAL COURTS RULES.**

This Part applies exclusively to year 2000 claims except to the extent that this Act requires additional information to be contained in, or attached to, or amends or otherwise supersedes applicable Rules of the National Court.

15. NATURE AND AMOUNT OF DAMAGES.

In a year 2000 civil action in which a plaintiff seeks an award of monetary damages, the complaint shall, with regard to each year 2000 claim, provide full particulars of–

- (a) the nature and amount of each element of damages; and
- (b) the factual basis for the calculation of damages.

16. MATERIAL DEFECTS.

In a year 2000 civil action in which the plaintiff alleges that there is a material defect in a product or service, the complaint may, with respect to each year 2000 claim, provide full particulars of–

- (a) the manifestations of the material defects; and
- (b) the facts supporting the conclusion that the defects are material.

17. REQUIRED STATE OF MIND.

In a year 2000 civil action in which a year 2000 claim is asserted with respect to which the plaintiff may prevail only on proof that the defendant acted with a particular state of mind, the complaint shall with respect to that element of the claim, state in detail the facts giving rise to a strong inference that the defendant acted with the required state of mind.

18. DISMISSAL FOR FAILURE TO MEET PLEADINGS REQUIREMENTS.

In a year 2000 civil action, the Court may, on the motion of the defendant, dismiss without prejudice a year 2000 claim asserted in the complaint where any of the requirements under Section 15, 16 or 17 is not met with respect to the claim.

19. STAY OF DISCOVERY.

In a year 2000 civil action, all discovery and other proceedings shall be stayed during the period of time of any motion pursuant to this section to dismiss, unless the Court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or prevent undue prejudice to that party.

20. PRESERVATION OF EVIDENCE.

(1) During the period of any stay of discovery entered under Section 19, unless otherwise ordered by the Court, any party to the action shall treat the items described in Subsection (2) as if they were a subject of a continuing request for production of documents from an opposing party under the rules of Court in relation to civil court procedure.

(2) For the purposes of Subsection (1), “**items**” shall include all computer programmes, microchips, software, firmware or other sets or collections of processing instructions that are—

- (a) in custody or control of the party; and
- (b) relevant to the allegations asserted in Section 15, 16 or 17.

21. SANCTIONS FOR WILFUL VIOLATION.

A party aggrieved by the wilful failure of an opposing party to comply with Section 20 may apply to the Court for an order awarding appropriate sanction.

22. DUTY TO MITIGATE DAMAGES.

Damages awarded for a year 2000 claim shall exclude any amount that the plaintiff reasonably should have avoided in light of any disclosure or information with respect to which the plaintiff was, or reasonably should have been aware.

PART V. – YEAR 2000 CIVIL ACTIONS INVOLVING CONTRACTS.**23. GENERALLY.**

Subject to Sections 24 and 25, notwithstanding any other provision of any law, in an action in which a year 2000 claim is advanced, in resolving that claim all written contractual terms, including limitations or exclusions of liability or disclaimers of warranty, shall be fully enforceable.

24. INTERPRETATION ON CONTRACT.

In a case in which a contract is silent as to a particular issue, the interpretation of the contract as to that issue shall be determined by applicable law in effect at the time that the contract was entered into.

25. UNENFORCEABLE CONTRACTS.

Section 24 does not apply in any case in which a Court determines that—

- (a) the contract as a whole is unenforceable due to an infirmity in the formation of the contract under applicable law in effect at the time the contract was entered into; or
- (b) enforcement of a term of the contract would contravene any applicable law.

26. REASONABLE EFFORTS TO LIMIT AWARD OF DAMAGES.

In any action in which a year 2000 claim is advanced and in which a breach of contract or related claim is alleged, in resolution of that claim, in addition to any other rights provided by applicable law, the party against whom the claim is asserted shall be allowed, for the purpose of limiting the award of damages, to offer evidence that the implementation of the contract by that party, or the efforts made by that party to implement the contract, were reasonable in light of the circumstances.

27. COMMERCIAL IMPRACTICABILITY.

In an action in which a year 2000 claim is advanced and in which a breach of contract or related claim is alleged, in resolving that claim applicability of the doctrine of impossibility and commercial impracticability shall be determined by applicable law in existence on 31 December 1999.

28. RULE OF CONSTRUCTION.

Nothing in this Act shall be construed as limiting or impairing a party's right to assert defences based upon the doctrines referred to in Section 27.

**PART VI. – YEAR 2000 CIVIL ACTIONS INVOLVING TORTS AND OTHER
NON CONTRACTUAL CLAIMS.**

29. GENERAL.

(1) Except as provided in Subsection (2), a person against whom a final judgement is entered on a year 2000 claim shall be liable solely for the portion of the judgement that corresponds to the percentage of responsibility of that person as determined under Section 30.

(2) Subsection (1) does not apply where–

(a) the plaintiff is an individual whose net income is less than K200,000.00 and the plaintiff's damages were more than 10% of his net worth, in which case the proportionately liable defendants are jointly and severally liable for any uncollectable amount; or

(b) the defendant acted knowingly.

(3) For the purposes of Subsection (2)(a), “**net income**” shall be calculated on the annual income of the plaintiff as calculated in the financial year prior to the year 2000 failure that caused the plaintiff's harm, loss or damage.

30. DETERMINATION OF RESPONSIBILITY.

As to a year 2000 claim, the Court shall determine with respect to each defendant, (including defendants who have entered into settlements with the plaintiff or plaintiffs) the percentage of responsibility, if any, of each defendant, measured as a percentage of the total fault of all persons caused or contributed to the total loss incurred by the plaintiff.

31. CONTENTS OF SPECIAL INTERROGATORIES OR FINDINGS.

The responses to interrogatories, or findings, as appropriate, under Section 30 shall specify–

(a) the total amount of damages that the plaintiff is entitled to recover; and

(b) the percentage of responsibility of a person found to have caused or contributed to the loss incurred by the plaintiff or plaintiffs.

32. FACTORS FOR CONSIDERATION.

In determining the percentage of responsibility under this Part, the Court shall consider–

(a) the nature of the conduct of each person alleged to have caused or contributed to the loss incurred by the plaintiff; and

(b) the nature and extent of the casual relationship between the conduct of each such person and the damages incurred by the plaintiff or plaintiffs.

33. NEGLIGENCE.

With respect to a year 2000 claim for actual damages, the defendant shall not be liable unless the plaintiff establishes, in addition to all other requisite elements of the claim, that the actions of the defendant created an unreasonable risk of personal injury to the plaintiff.

34. PRESERVATION OF EXISTING LAW.

Nothing in Section 33 is deemed to create a year 2000 claim or to relieve the plaintiff in a year 2000 civil action of the obligation of that plaintiff to establish an element of the cause of action of that plaintiff under applicable law.

35. REASONABLE EFFORTS DEFENCE.

Except for breach or repudiation of contract claims, as to a year 2000 claim seeking monetary damages—

- (a) the fact that a year 2000 failure occurred in an entity, facility, system, product, or component that was within the control of the party against whom the claim is asserted shall not constitute the sole basis for recovery; and
- (b) the party against whom the claim is asserted shall be entitled to establish, as a complete defence to the claim, that the party took measures that were reasonable under the circumstances to prevent the year 2000 failure from occurring or from causing the damages upon which the claim is based.

36. ECONOMIC LOSSES.

Subject to Section 37, a party to a year 2000 civil action may not recover economic losses for a year 2000 claim based on tort unless the party is able to show that at least one of the following circumstances exists:—

- (a) the recovery of those losses is provided for in the contract to which the party seeking to recover such losses is a party;
- (b) where a contract is silent on losses, the applicable law that governed interpretation of the contract at the time the contract was entered into would allow recovery of such loss;
- (c) loss is incidental to a claim in the year 2000 civil action based on personal injury caused by a year 2000 failure.

37. TREATMENT OF ECONOMIC LOSSES.

Economic losses shall be recoverable in a year 2000 civil action only where applicable law embodied in an Act, or binding judicial precedent as of 31 December 1999 permits the recovery of such losses in the action.

PART VII. – LIMITATION.

38. LIMITATION ON RECOVERY AGAINST THE STATE.

(1) Subject to Subsection (2), a year 2000 claim against the State, its instrumentalities, Departments, agencies and governmental organizations, including Provincial Governments and Local-level Governments, shall not exceed K20,000.00.

(2) The State may by expressed provision in a legally binding contract forgo its right under Subsection (1).

(3) No officer, servant, agent or representative of the State shall be made a party to any proceedings or have awarded any damages against him in his personal capacity in a year 2000 claim where such person acted or omitted to act in his official capacity which gave rise to the claim.

(4) Subject to Section 40, a plaintiff making a year 2000 claim alleging a non intentional tort may recover economic losses only upon establishing, in addition to all elements of the claim under applicable law, that any one of the following circumstances exists:–

- (a) the recovery of such losses is provided for in a contract to which the plaintiff is a party;
- (b) such losses are incidental to a year 2000 claim based on damage to tangible personal or real property caused by a year 2000 failure (other than damage to property that is the subject of a contract between the parties involved in the year 2000 claim).

39. RECOVERY MUST BE PERMITTED UNDER APPLICABLE LAW.

Economic losses shall be recoverable under this Part only if applicable law as at 31 August 1999 permits the recovery of such losses.

40. LIABILITY OF OFFICERS AND DIRECTORS.

A director, officer, or trustee of a business or other organization (including a corporation, unincorporated association, partnership, or non profitable organization) shall not be personally liable with respect to a year 2000 claim in his capacity as a director, officer or trustee of the business or organization for an aggregate of amount that exceeds the greater of–

- (a) K100,000.00; or
- (b) the amount of the gross income received by the director, officer or trustee from the business or organization during the 12 month period immediately preceding the act or omission for which liability is imposed.

41. RULE OF CONSTRUCTION.

Nothing in this part shall be deemed to impose or to permit the imposition of personal liability on any director, officer, or trustee who would be subject under applicable law in existence on 31 August 1999.

42. LIMITATION ON BYSTANDER LIABILITY FOR YEAR 2000 FAILURES.

(1) With respect to any year 2000 civil action for monetary damages in which—

- (a) the defendant is not a manufacturer, seller or distributor of a product, or the provider of a service, that suffers or causes the year 2000 failure at issue; and
- (b) the plaintiff is not in substantial privity with the defendant; and
- (c) the defendant's actual constructive awareness of an actual or potential year 2000 failure is an element of the claim under applicable law,

the defendant shall not be liable unless the plaintiff, in addition to establishing all other requisite elements of the claim, proves that the defendant actually knew, or recklessly disregarded a known and substantial risk, that such failure would occur.

(2) For purposes of Subsection (1)(b), a plaintiff and a defendant are in substantial privity where, in a year 2000 civil action arising out of the performance of professional services, the plaintiff and the defendant either have contractual relations with one another or the plaintiff is a person who, prior to the defendant's performance of such services, was specifically identified to and acknowledged by the defendant as a person for whose special benefit the services were being performed.

(3) For purposes of Subsection (1)(c), a claim in which the defendant's actual or constructive awareness of an actual or potential year 2000 failure is an element of the claim under applicable law does not include a claim such as fraud, constructive fraud, breach of fiduciary duty, negligence or misrepresentation.

43. STANDARDS OF AWARD.

(1) With respect to a year 2000 claim for which punitive damages may be awarded under applicable law, the defendant shall not be liable for punitive damages unless the plaintiff proves that conduct carried out by the defendant showed a conscious flagrant indifference to the rights or safety of others and was the proximate cause of the harm or loss that is the subject of the year 2000 civil action.

(2) The requirement in Subsection (1) is in addition to any other requirement in applicable law for the award of such damages.

44. CAPS ON PUNITIVE DAMAGES.

(1) With respect to a year 2000 civil action, where a defendant is found liable for punitive damages, the amount of punitive damages that may be awarded to a plaintiff shall not exceed the greater of—

(a) three times the amount awarded to the plaintiff for compensatory damages; or

(b) K200,000.00.

(2) Notwithstanding Subsection (1), with respect to a year 2000 civil action, where the defendant is found liable for punitive damages and the defendant—

(a) is an individual whose net worth does not exceed K500,000.00; or

(b) is an owner of an unincorporated business that has fewer than 25 full time employees; or

(c) is—

(i) a partnership; or

(ii) a corporation; or

(iii) an association; or

(iv) a governmental body at local or community level; or

(v) an organization,

that has fewer than 25 full time employees,

the amount of punitive damages shall not exceed the lesser of three times the amount awarded to the plaintiff for compensatory damages or K200,000.00.

(3) For the purposes of determining the applicability of this section to a corporation, the number of employees of a wholly owned corporation shall include all employees of a parent corporation and any subsidiary of that parent corporation.

PART VIII. – CLASS ACTIONS INVOLVING YEAR 2000 CLAIMS.**45. CLASS ACTIONS.**

In any action including a year 2000 civil action where it is alleged that a product or service has a material defect, the action may be maintained as a class action in the National Court with respect to that claim where–

- (a) the Court finds that the alleged defect in the product or service was a material defect with respect to a majority of the members of the class; and
- (b) the class satisfies all other prerequisites established under this Act and other applicable law.

46. REQUIREMENT UNDER SECTION 45.

As soon as practicable after the commencement of an action involving a year 2000 failure where it is alleged that a product or service has a material defect and where the action is brought as a class action, the Court shall determine by order whether the requirements under Section 45 are satisfied.

47. ORDERS.

An order under this Part may be–

- (a) conditional; and
- (b) altered or amended before the decision on the merits.

48. FORMS.

Forms used under the National Court Rules and Procedures set out under the National Court Rules shall be used in a year 2000 civil action where that is not provided under this Act.

PART IX. – MISCELLANEOUS.

49. OFFENCE TO MANUFACTURE, IMPORT, ETC., NON-COMPLIANT COMPUTER EQUIPMENT.

(1) A person, who imports into the country or manufactures, sells or distributes non-compliant computer equipment, is guilty of an offence.

Penalty: A fine not exceeding K5,000.00.

(2) All non-compliant computer equipment in respect of which a person is convicted of an offence under Subsection (1) is forfeited to the State and shall be disposed of as the Attorney-General may direct.

50. REGULATIONS.

The Head of State, acting on advice, may make regulations not inconsistent with this Act prescribing all matters that are by this Act are required or permitted to be prescribed or are necessary or convenient to be prescribed for giving effect to this Act.

Office of Legislative Counsel, PNG