



Papua New Guinea

CONSTITUTIONAL & LAW REFORM COMMISSION

Review of Incorporated Land Groups & Design of a System Voluntary Customary Land Registration

DRAFT REPORT

You are invited to provide a
submission or comment on this
Draft Report

**DRAFT REPORT 5
October 2007**

CLRC Reference No 5: Review of Incorporated Land Groups and Design of a System of Voluntary Customary Land Registration

I, **Bire Kimisopa**, Minister for Justice, having regard to:

- the recommendations of the National Land Development Task Force published in 2006 as National Research Institute Monograph 39 which recommended, *inter alia*, for a system of Voluntary Customary Land Registration in a fair and equitable manner by utilizing incorporated land groups to obtain group title under the land owning social unit at customary law; and
- the various concerns which have been raised concerning abuse of the system of incorporated land groups;

by virtue of the power conferred on me by Section 12(2) of the *Constitutional and Law Reform Commission Act 2004* (the Act) refer and direct the Constitutional and Law Reform Commission (CLRC) as follows:

- (1) Enquire into and report and recommend in accordance with Section 12(2) of the Act, on systemic development and reform of laws relating to the implementation of a two staged system of customary land registration involving:
 - a) first, the incorporation of incorporated land groups incorporating appropriate accountability mechanism for efficient and effective governance and management structures and systems; and
 - b) secondly, a voluntary system of customary land registration;
 - c) to the extent necessary to secure the reforms proposed above in (a) and (b), whether and how any relevant associated laws and practices should be amended or modified or abolished.
- (2) In performing its functions in relation to this reference, the CLRC will consider:
 - a) the extent to which the relevant provisions of the *Land Groups Incorporation Act 1974* (as amended) should be amended to give effect to the purpose and intent as stated above in paragraph 1;

- b) the extent to which relevant provisions of other related laws such as the *Land Registration Act* and the *Land Act* and such other related laws should be reviewed, modified or amended to give effect to, and meaning and purpose, to this reference;
 - c) any relevant research or developments, whether in this or other jurisdictions on the matters of enquiry.
- (3) The CLRC shall identify and consult with relevant stake holders including but not limited to members of the National Land Development Task Force; the Department of Lands and Physical Planning; the Department of Justice and Attorney General; the National Forest Authority and the Department of Petroleum and Energy.
- (4) The CLRC shall report to me within three (3) months of the date of publication of this reference in the Government Gazette.
- (5) This reference shall be referred to as CLRC Reference No. 5: Review of Incorporated Land Groups and Design of a System of Voluntary Customary Land Registration.

Dated this *4th* day of *July* 2007

HON. BIRE KIMISOPA, MP
Minister for Justice

Making a submission

The CLRC is seeking any form of submission from a broad cross-section of the community, as well as those with a special interest in the inquiry.

Submissions are usually written, but there is no set format and they need not be formal documents. Where possible, submissions in electronic format are preferred.

It would be helpful if comments addressed specific proposals or numbered paragraphs in this Draft Report (DR).

Open inquiry policy

In the interests of informed public debate, the CLRC is committed to open access to information. As submissions provide important evidence to each inquiry, the CLRC may draw upon the contents of submission and quote from them or refer to them in publications.

Submissions should be sent to:

The Secretary

Constitutional & Law Reform Commission

P O Box 3439

BOROKO

National Capital District

Email: lawrence_kalinoe@clrc.gov.pg

The closing date for submissions in response to DR 5 is Monday, 17th December, 2007

Participants

The Commissioners of the Constitutional and Law Reform Commission (CLRC) are:

- Hon. Joe Mek Teine MP Chairman
- Mr Gerhard Linge Deputy Chairman
- Prof. Betty Lovai
- Mr Tom Anayabere

The Commissioners appointed Prof. Betty Lovai to supervise this reference. The CLRC then established a Working Committee comprising representatives from key organizations who are involved either as member of the National Land Development Taskforce (NLDT) or the various Sub-committees of the NLDT to guide and supervise the work in this Reference. The Working Committee thus comprises:

- Dr. Thomas Webster Director, NRI, & Chairman, NLDT
- Mr Pepi Kimas Secretary, Dept. of Lands & Physical Planning
- Prof. Betty Lovai Exe. Dean, Sch. of Humanities & Soc. Sci.
- Mr Max Kep Director, Urbanisation
- Dr. Charles Yala Senior Research Fellow, NRI
- Mr Esekia Warvi Executive Officer, NLDTF
- Mr Paul Barker Executive Director, INA
- Mr Stephen Kassman Principal, Stephen Kassman Lawyers
- Mr Ian Marru Dept. of Petroleum & Energy
- Prof. Rudolph James Professor of Law, School of Law, UPNG
- Mr George Muroa Senior Lecturer, School of Law, UPNG
- Mr Oswald Tolopa Director, Policy & Planning, Lands Department
- Mr Patrick Harricknen Principal, Harricknen Lawyers

Published in Port Moresby by:

Constitutional and Law Reform Commission
Level 1, Bank South Pacific Building, Boroko
National Capital District

Telephone: (675) 325 2862
(675) 325 2840

Fax: (675) 325 3375

Email: lawrence_kalinoe@clrc.gov.pg

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List of Proposal

The relevant sections of the *Land Group Incorporation Act* and the *Land Registration Act* amended consistently with the proposals are set out in full in Appendices 1 and Appendices 2 respectively.

3. Customary Land Development Proposals 1: Reform ILGs

- 3-1 (a) delete paras (c), (d) and (e) of s.5(2) of the *Land Groups Incorporation Act* and insert – “and the applicant shall apply –
- (c) a list of all members of the group;
- (d) further information as stated in Schedule 1 being such certified information required in the application form;
- (e) a sketch of the boundaries of the land to which the applicants claim ownership;
- (f) such further information as the Registrar requires.”
- 3-2 Insert a new s.5A. If it appears to the Registrar that there are internal disputes either as to the identity of the group’s representatives, officers or membership; the Registrar shall determine whether to –
- (a) reject the application, or
- (b) incorporate the applicants, subject to a written undertaking by them to either –
- (i) settle the dispute; or
- (ii) institute proceedings for its settlement; or
- (c) incorporate the applicants.
- 3-3 Insert a new (s.5B)
- (1) The Registrar shall,
- (a) cause notice of all applications for recognition made under Section 5 to be published in the National Gazette and given to the District Administrator in whose area the group or any of the

property claimed on behalf of the group is situated, and to the Village Court within whose jurisdiction members of the group reside; and

- (b) give further notice of the application and particulars in such manner he thinks most likely to ensure that it is generally known to person having a knowledge of an interest in the affairs of the group or its members.

- (2) The Registrar of ILG shall not issue a Certificate of Incorporation unless he receives from the District Administrator a confirmation notice of receipt of the documentation referred to in subs.(1) and compliance with the provisions set out in the document(s).

3-4 Delete Subsection (3) of Section 13.

3-5 Division 3A: Meetings of Members

- (1) An annual general meeting of a group shall be held within 3 months of the incorporation of the groups and thereafter within 3 months from the anniversary of incorporation.

- (2) The purposes of the AGM are:

- (a) to appoint the management committee and other officers of the association if there is a vacancy;
- (b) appoint members to the Dispute Settlement Authority if there is a vacancy;
- (c) receive and consider the chairman's annual report and a financial report;
- (d) consider such matters referred to the meeting by the Registrar.

3-6 Insert "Special General Meetings"

Then inset Section 14B – Meeting to elect Management Committee.

- (1) Members of the land group shall meet at a specific time and place, in the area where the members of the ILG reside to elect not more than ten and not less than three persons to form a Management Committee in accordance with the *Constitution*;
- (2) The Management Committee shall include the Chairperson of the Association, Deputy Chairperson, Secretary, Treasurer and a person elected by the members of the ILG.

Insert Section 14C – Convening meetings

- If – (a) members forming fifty percent of the Group; or
(b) the Registrar; or
(c) the District Administrator;

so request the Chairman (or in his absence the deputy chairperson) shall convene a meeting of the members within 14 days after the request.

Insert Section 14D – Conduct of meetings

- (1) All members of an incorporated land group shall be entitled to attend the meetings of the group and vote.
- (2) A member under a disability enjoys rights under this Act as all members but no right to vote at meetings of members, except through his Guardian, or to hold offices.
- (3) No business shall be transacted at a meeting of the members unless at least sixty percent of the members of the group is present at the meetings.
- (4) A resolution at a meeting of the members, supported by votes of not less than sixty percent of the members of the group present at the meeting shall be treated as the decision of the group, though for removal of a member of members of the management committee the vote of 70 percent of the members present at the meeting is required.

3-7 Insert after Division 3A as Division 3B: Management Committee, then as Section 14E – Powers of Management Committee

“The Management Committee has the power subject to the *Constitution* and the Act to run the affairs of the association.”

Insert Section 14F – Changes in membership of Management Committee

- (1) Where a member of the management committee dies, becomes incapacitated or wishes to retire he may be replaced by resolution of the members of the ILG.
- (2) A member of the management committee may be removed or replaced by resolution of the members of the ILG at a General Meeting or a Special General Meeting.
- (3) On change of membership of the management committee, the Registrar shall –
 - (a) amend the register accordingly;
 - (b) inform the Registrar of Titles where appropriate.

Insert Section 14G – Disqualification from office

“No person who has been convicted of a crime involving fraud or dishonesty shall be capable of being appointed or elected to or remain in –

- (a) the office of treasurer, deputy treasurer or assistant treasurer of an ILG; or
- (b) any other office the holder of which is responsible for the collection, disbursement, custody or control of the funds of the ILG or for its account; or
- (c) the membership of the management committee; or
- (d) the position of the trustee or auditor of an ILG.”

3-8 Insert after Section 14G of Division 3B, Division 3C: Finances, then insert as Section 14H – Bank Accounts

The Management Committee shall –

- (a) cause such bank accounts as are necessary for the proper conduct of the affairs of the group to be opened and maintained; and
- (b) pay all moneys received by the group in connection with its business activities into those accounts; and
- (c) pay all moneys that the group is required to pay in connection with its business activities out of those accounts.

Insert as Section 14I – Statements of assets and liabilities

The Committee shall –

- (a) cause to be prepared, in a form approved by the Registrar, a statement of the assets and liabilities of the group for each period of 12 months of the operations of the group or for such longer period as the Registrar approves; and
- (b) lodge the statement with the Registrar not more than three months after the end of the period to which the statement relates.

Insert as Section 14J – Financial Instructions

- (1) The Registrar may direct that accounts and records of some or all of the affairs of a land group be kept in such manner as he thinks proper.
- (2) Where the Registrar gives a direction under Subsection (1)
 - (a) the Registrar, the dispute-settlement authority or any member is entitled at all times to inspect the accounts and records; and
 - (b) the Registrar may direct that copies of the accounts and records be given to him to be kept in the register of land groups.

Penalty: Failure to comply with Sections 14H or 14I is an offence and makes each Committee Member liable to be prosecuted and on conviction to pay a fine not exceeding

K500 or imprisonment for a term not exceeding 6 months, or both.

Penalty: Failure to comply with the Registrar's direction under Section 14J, the Committee Member becomes liable on conviction to a fine not exceeding K1,000 or imprisonment for a term not exceeding 12 months, or both.

3-9 Delete s. 29 and replace it with the following

s. 29 Willful Misconduct

- (1) Any person who –
- (a) willfully makes any false statement or declaration in any application under this Act;
 - (c) willfully suppresses, withholds or conceals or assist or is privy to suppressing, withholding or concealing from the Registrar any material documents fact or matter of information;
 - (d) willfully makes any false declaration or statement for purposes of or in relation to any dealing with land under this Act;
 - (e) fraudulently procures, assists in fraudulently procuring or is privy to the fraudulent procuring of a certificate of incorporation;
 - (f) knowingly misleads or deceives any person authorized under this Act or regulations to require information or explanation in respect of any application; or
 - (g) occupy a fiduciary relationship misappropriates any funds or property belonging to the ILG,

shall on conviction be liable to a fine of up to two thousand kina and or imprisonment for five years.

3-10 Add a new Subsection:

s. 28(2) “Any person may inspect at the office of the registrar, the register and any document relating to any group lodged under this Act with the registrar, and may obtain from the registrar a copy of or an extract from such register or document.

3-11 Register of Members

The Management of the ILG shall:

- (a) maintain a register of its members in such manner as the Registrar may require, or as may be prescribed, containing the name of each member, the date he qualified for membership;
- (b) deliver to the Registrar at his request a current register of members.

3-12 Documents available for inspection

The Management of the ILG shall make available for inspection of its members or the Registrar or any person authorized by him in writing, at all reasonable time –

- (a) its books of accounts, and all documents relating thereto; and
- (b) a list of the members.

If Subsection (1) of this section is contravened each committee members shall be guilty of an offence.

3-13 Formalities of Group Action

Repeal Subsection (2) of Section 14 of the *LGI Act* and replace it with the following Subsection –

- (2) “The *Statute of Frauds and Limitations Act, 1988* applies to or in relation to –
 - (a) an agreement under Section 13(2)(c); or
 - (b) an agreement entered into by an incorporated land group affecting its land”

3-14 A certified copy of all documents purporting to deal with an interest in land of an ILG shall on incorporation be lodged with the Registrar of incorporated land groups;

The Registrar shall record each document by a reference number and the date the document is filed and the name and address of the person lodging the document.

5. **From Incorporation of ILG to Registration of Title**

5-1 Appointment of Director

The Minister may, by notice in the National Gazette appoint a Director of Customary Land Registration.

5-2 Powers and functions of Director of Customary Land Registration

(1) The Director shall –

- (a) be responsible for dealing with applications for customary land registration;
- (b) perform such powers, functions duties and responsibilities as are specified and prescribed in this Act.

(2) In addition to any other powers given to him under this Act; the Director may –

- (a) require any person to produce any document in his possession or control relating to any land or dealing in land;
- (b) summon any person to appear before him to given information or explanation relating to any land or dealing in land;
- (c) refuse to approve for registration any land or dealing in land where a document required under paragraph (a) is not produced or an information or explanation required under paragraph (b) is not given to his satisfaction or if any other act, matter or thing required under this Act to be done is not done.

- (d) administer an oath or affirmation or take a statutory declaration and require that any proceeding, instrument, information or explanation relating to or affecting land or any dealing in land be verified on oath or affirmation or by statutory declaration;
 - (e) by himself or his agent enter upon any land for purposes in connection with this Act; and
 - (f) order that any costs, charges or expenses incurred by him or by any person in or in connection with any investigation or hearing held by him for the purposes of this Act be borne by any such person and in such proportion as he thinks fit.
- (3) A person who –
- (a) refuses or neglects to produce any document in his possession or control; or
 - (b) refuses or neglects to appear and give information or explanation; or
 - (c) knowingly misleads or deceives the Director; or
 - (d) knowingly makes a false oath, affirmation or declaration; or
 - (e) willfully obstructs or prevents the Director or his agent from entering upon any land; or
 - (f) willfully refuses or neglects to pay any costs, charges or expenses as ordered by the Director,
- is guilty of an offence.

5-3 Duties of Deputy Director

- (1) A Deputy Director has the duties, powers and functions as assigned to him by the Director;

- (2) A duty, power or function carried out by a Deputy Director has the same force or effect as if it were or had been carried out by the Director.

5-4 Application for Registration

- (1) Subject to this Act representatives of the ILG may apply to the Director in the prescribed form for registration of ownership of customary land or an interest in customary land.
- (2) The application for registration shall include a registration plan –
 - (a) describing the land or parcels of land owned absolutely under customary tenure by the customary group including its boundaries; and
 - (b) containing the names of such individuals or customary groups which established derivative interests in the land, including the boundaries of the parcels of such land and the nature of the interests.
- (3) The registration plan shall be in such form and shall contain such particulars as are prescribed.

5-5 Verification

- (1) Where an application has been made to the Director for registration of customary land, the Director shall as soon as practicable commence verification of the plan submitted.
- (2) For the purposes of Subsection (1), the Director shall –
 - (a) conduct such investigation as are necessary to establish the membership of customary groups; and
 - (b) make such inspections of land, together with appointed representatives of such customary groups as are necessary to verify the identify and the boundaries of the land or parcels of land claimed by such

customary group as stated in the registration plan.

5-6 Authorisation of plan for publication

- (1) Upon the completion of its investigation, the Director shall, as soon as practicable, –
 - (a) endorse; or
 - (b) reject the registration plan; or
 - (c) seek further information before making a decision.
- (2) For the purposes of Subsection (1)(a), the Director shall concern himself only with the are of the land determined as being in the ownership of the clan.

5-7 Publication of Registration Plan

- (1) The Director shall within 14 days of endorsement of a registration plan:
 - (a) forward a copy of the Plan to the Surveyor General and the District Administrator;
 - (b) give notice to the public indicating –
 - (i) where the Registration Plan may be examined; and
 - (ii) the procedure for making an objection to the contents of the Registration Plan; and
 - (iii) the period of not more than 90 days within which an objection can be made.
- (2) The District Administrator shall cause a notice made under Subsection (1)(b) to be advertised in such a manner he considers appropriate to being it to the attention of all persons who may have an interest in the land or parcels of land the subject of the Registration Plan.

5-8 Adjusted Registration Plan

On receipt of a copy of the Registration Plan the Surveyor General shall, where necessary, prepare an Adjusted Registration Plan showing such adjustments as are necessary to indicate-

- (a) the situation of the land or parcels of land, and
- (b) any reservation, easement or other such interest made by the State for public purposes under any law; and
- (c) any estate, right, title or interest granted by the State under any law

and shall return the Adjusted Registered Plan to the Director as soon as practicable.

5-9 Objections to Registration Plan

- (1) A person who objects to the contents of a Registration Plan may, within the period specified in the Section 11(1)(b)(iii), make an objection in writing to the Director.
- (2) An objection under Subsection (1) shall specify –
 - (a) whether in the case of an objection from an individual, the person is objecting in his person capacity or as a representative of a customary group; and
 - (b) the matters in the Registration Plan which are the subject of objection; and
 - (c) the area or areas within the Registration Area which are the subject to objection; and
 - (d) the grounds upon which the objection is made.

5-10 Final Registration Plan

- (1) Subject to Subsection (3), in respect of a Registration Plan –
 - (a) the period specified in 11(1)(b)(iii) has expired; and

- (b) the Registered Plan has been adjusted, where necessary, by the Surveyor General, the Director shall, as soon as practicable, prepare the Final Registration Plan.
- (2) In preparing the Final Registration Plan, the Director shall take into consideration –
 - (a) the Registration Plan prepared under 5-4; and
 - (b) the Adjusted Registration Plan prepared under 5-8; and
 - (c) any objection made pursuant to 5-9.
- (3) Where any objection made under 5-9 conflicts with the Registration Plan or the Adjusted Registration Plan or both, the Director shall hear and determine the matter and shall not proceed with the preparation of the Final Registration Plan until the objection has been settled.

5-11 Registration of Ownership

For completion of registration on behalf of an Incorporated Land Group, the Director shall forward to the Registrar of Titles:

- (a) the instrument of incorporation; and
- (b) the final registration plan; or
- (c) other document or instrument forming a good root of title.

5-12 Issue of Certificate of Title

- (1) Where –
 - (a) a customary group has been incorporated under the *Land Group Incorporation Act* (Chapter 147); and
 - (b) the customary group has been registered as the owner of land,

the Registrar shall, upon payment of a prescribed fee, prepare and issue a Certificate of Title in the prescribed form in the name of the group.

- (2) In preparing a Certificate of Title under Subsection (1), the Registrar shall prepare a copy of the title for the purposes of registration in the Register.

5-13 Effect of Registration

- (1) An entry in the Register –
 - (a) is conclusive evidence of the facts therein stated as at the date of entry; and
 - (b) unless endorsed otherwise, shall be deemed to guarantee the area and the boundary of the land to which the entry relates, and
 - (c) shall be subject to such rights and interests as are recorded in the register.
- (2) Registration of ownership which is inconsistent with –
 - (a) a title previously registered under the provisions of this Act, or
 - (b) a reservation, easement or other such interest made by the State for public purposes under any law, or
 - (c) an estate, right, title or interest granted by the State under any law,

shall be ineffective to the extent of the inconsistency.

5-14 Customs

- (1) Land entered in the Register under this Part and the right to ownership or possession of any such land or any right, title, estate or interest in or in relation to any such land shall cease to be subject to customary law.

- (2) Subsection (1) has no application to the transmission of a member's rights and customs shall apply.

6. **The Impact of the Proposals on the Law and Practice**

- 6-1 Amend s.42 to add Subsection “(7) Transfer of ownership in clan land is prohibited.”

1. Introduction to Land Tenure Laws

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This Reference discusses the recommendations of the National Development Task Force on the captioned subjects and their implementation. These recommendations were published in 2007 as Monograph 39 of the National Research Institute. The Task Force expressed various concerns of the abuse of the system of incorporated land groups, and recommended *inter alia* reforming the law and establishing a complementary system of Voluntary Customary Land Registration. This Reference considers the recommendations in the following 6 Parts:

- Background: land tenure law and policy, with particular concern being given to unalienated land, the purpose of and attempts at reforms, and their shortcomings;
- The current state of the law to access/acquire customary land and significant legal developments;

- The customary land development proposals on reforming ILGs;
- Establishing a voluntary system of customary land registration;
- Transition from incorporating ILGs to land title registration; and
- The impact of the reform proposals on the law and practice.

Land Tenure Law: Duality of Law and Policy

Less than 3 percent of the total land area in Papua New Guinea is alienated from the traditional system of land holding and held by the State, or as private freeholds or on state leases. On the other hand more than 97 percent of the land remains unalienated, i.e., held under the unwritten customs and usages of the indigenous inhabitants. This system varies, for example, there are matrilineal and patrilineal societies, and it is further characterized by flexibility and a corporate nature i.e. the landholding unit, namely the tribe, clan or extended family, etc, owns the land as a corporate body.

The inherent nature of the system is expressed to be a brake on land development in the modern economic milieu. There is no document of title to be used to guarantee loans for development or to resolve conflicting boundary claims, and although in the latter case reliance can be placed on memories, memories die out with the passing of a generation or could be manipulated; the multiplicity of consents necessary to effect dealings with the land can be a pitfall; in a money economy, there is no motivation for the individual to invest in such property at the expense of his obligations to his immediate family. There are the inevitable land disputes; and the inability to access land belonging to a landholding community in times of need to resettle victims where there has been a natural disaster (volcanic eruption or floods, for example). This has led to greater frustration with the traditional system of land holding.¹

On the other hand, the system gives the members of the community self-sufficiency and security, and unites them as a unit. Under existing law, customary landowners are protected from losing their land or becoming a landless class. The State can acquire land from them on such terms as are agreed to, but only after inquiry has shown that the land is not required or likely to be required by them in the foreseeable future, and if it were, the State could at best settle for a lease. Non citizens are absolutely prohibited from direct dealings in customary land.

The alternative policy of individualizing the tenure system that was proposed by the Colonial administration in the 1960s, with further

¹ C Yala, "Rethinking customary land tenure issue in Papua New Guinea" 2006 *Pacific Economic Bulletin*, 129.

proposals for its implementation made by SR Simpson in 1969, were rejected. In their place, piecemeal devices such as the lease- leaseback and clan lands agreements were tried in order to secure loans for development. These were without success for the process was slow and cumbersome and they failed to gain universal acceptance, though by the process of tenure conversion which survived the colonial administration's 1960s reforms, in very restricted circumstances, citizens may and still do acquire freehold titles to portions of their clan's land.

The major break through in policy was derived from the recommendations contained in the Report of the CILM which proceeded on the assumption that land in Papua New Guinea is a most valuable asset and there is need for it to contribute to economic development, but through the use of PNG's customary forms of political and social organizations. The Commission recommended extending the corporate characteristic by recognising the traditional landholding communities as legal persons under state law, and investing these units with the capacity to complement their incorporation with registered title, effected under a title registration enactment. The implementation of this policy has been the major challenge in the land reform program for the last 3 decades.

In contrast the forms of land holding of alienated lands have been the individual freehold, natural or corporate, and the law is the underlying law i.e. the received common law and doctrines of equity. The law is to a large extent consolidated in the *Land Act* (1996) and *Land Registration Act* (1981). The only issue of policy in relation to alienated land tenure which was addressed by the CILM was` the conversion of all freeholds into government leases in line with State grants under the *Land Act*. This recommendation was based on the objective of making security of tenure dependent on land use. It was only partially implemented in 1976 when upon the passage of the *Land (Ownership of Freeholds) Act*, freeholds of non citizens were required to be converted into government leases of 99 years, subject to development conditions and covenants contained in the *Land Act*. Citizens in contrast can own freehold property and they enjoy the property protection of the Constitution.

Customary Land Tenure Reforms

Transformation policy of the 1960s

The colonial administration in the 60s articulated the first policy on transformation of customary land tenure. This involved the substitution of individual registered title for traditional communal forms of landholding,

and replacing customary land tenure law by the common law. The specific commitments were stated to be:

“[The] introduction of a single system of land-holding which was regulated by central government and administered by the Department of Lands, provided for secure titles, following the pattern of the Australian system; retention of land, as subject to native custom, only until it is taken out of custom either by acquisition of the Administration, or by a process of conversion of title to an individual, registered title: and acquisition or conversion of title, should involve compensation in respect of the extinction of rights held under native custom.”²

Three statutes were enacted to effect the policy but they were not fully implemented: The *Lands Titles Commission Ordinance*, 1962, to adjudicate land rights; the *Land (Tenure Conversion) Ord.* 1963, to effect the process of conversion of the adjudicated title from traditional to freehold title; and the *Real Property Act* of Papua and *Lands Registration Act*, New Guinea, then consolidated in 1981, for the registration of converted interests. Implementation was slow; therefore Mr. Simpson was invited to review the machinery.

The *Land Registration (Communally Owned Land) Ordinance*, 1962 (No 10 of 1963) was intended to provide an option to those who deemed it desirable to register their lands retaining customary land tenure, but no land was registered under this process, and the Act was suspended in 1970.

The Simpson’s proposals of the seventies

Simpson’s study was directed at overcoming the delays in the system and the inefficiency of the machinery. His recommendations, if accepted, would have brought about a number of substantial changes in the customary land tenure system in line with the Kenya model. The major elements of the process were: -

Land Adjudication, Demarcation etc

The standard processes of implementing a tenure conversion scheme were ‘systematic adjudication’, ‘consolidation and demarcation’, and

² Lea D *Customary Land Tenure in Papua New Guinea* (NRI Special Publication No. 35, 2004) at p.24 and James R.W. *Land Law and Policy in Papua New Guinea* (Law Reform Commission Monograph No. 5, Port Moresby 1985) at pp. 44-45.

‘conversion and registration’. The Land Adjudication Bill was designed both to clarify “cloudy titles” and to bring all land – both State and privately owned - into the register. At the appropriate time the Minister would declare an “adjudication area” in which all titles, rights and interests in land will be finally and authoritatively ascertained. These areas will be divided up into more manageable sized sections, each with one or more adjudication teams. Claims based on certificates of registrable titles and consensus of the owners will be accepted almost without question, and conflictual claims would be adjudicated. Of equal importance as adjudicating and recording land claims, would be the ascertainment of ancillary rights and demarcation of the land on a parcel demarcation map.

Registration of titles/interests

Registration follows automatically the conversion process, and the scheme provides for registered proprietors as individuals or co-owners. The registered proprietors are given an indefeasible title.

Land Control

Although the registered proprietor enjoys the advantages of a document of title and the freedom of alienation, the *Land Control Act* was intended to avoid land fragmentation, speculation in land and rural indebtedness.

Land mobilization by individualization of tenure was predicted, based on the experience of Kenya, to cause huge social problems of class division (landed and landless), and the unsolvable plight of the landless class. It was thought that the unfamiliarity of the system would lead to paper dealings in land, which, within a short time, would make the register misleading and redundant. On the other hand it had the advantage of according to the owner a document of title acceptable to the lending institutions and creating land mobility, which could ensure that land came into the hands of the more efficient farmers.

The disadvantages were thought to outweigh the advantages and the draft bills to implement the program were rejected.

Land Mobilisation of the eighties and nineties

Fingleton's model of land registration

In March 1987, the East Sepik Provincial Government passed two laws: the *Land Act* and *Customary Land Registration Act*, which came into force in the Province in May of that year. Those Acts, in the words of Dr. Fingleton who was responsible for drafting them:

“Represent the most significant break through in the field of customary land tenure reform, not only in Papua New Guinea but in the South West Pacific generally, since the current period of independent nationhood began.”

The *Provincial Land Act* purported to vest in the provincial government concurrent powers with the national government in land matters in the Province. The powers are exercisable by provincial instrumentalities. The Act, therefore, presented parallel legislation and institutions regulating national land in the Province.

The *Customary Land Registration Act* provided for the registration of customary land. The powers of administration and control of dealings over such lands are vested in the Provincial Land Management Committees. These are dealt with not in the *Customary Land Registration Act*, but in the *Provincial Land Act*.

In sum, therefore, (national) State Land in the Province could be administered and controlled by the Provincial Government via the *Provincial Land Act* if the powers are devolved from the National to the provincial government or the land has been acquired under the machinery of the Provincial legislation. The *National Land Act* also controls dealings in customary land between customary landowners and the State. Customary land could be registered under the provincial *Customary Land Registration Act*, but administered under the *Provincial Land Act*.

Principles of Land Registration

The object of the *Customary Land Registration Act* was to implement the Province's policy on land tenure and development. It was particularly intertwined with the Provincial Land Act, which set out the machinery for dealing with and controlling the registered land. The policy aimed at permitting the owners of customary land in the Province “to take part in the development of businesses on their land.”

The main goals of the *Customary Land Registration Act* were stated by Dr. Fingleton as being, to provide procedures for the formal recognition of group ownership of customary land; and facilitate the adaptation of

customary land tenure to emerging land use requirements in the province, in particular those identified in the Land Mobilisation Program.

These goals were intended to be achieved by providing for registration at two levels: (a) registration of full ownership, and (b) registration of interests less than full ownership.

The process was:

- The Act provided a machinery for systematic adjudication and registration, done under the direction of the District Land Management Committee, the resolution of disputes in the process of recording land rights and boundaries, and the creation of Registration Plans from which there will be the registration of titles in a customary Land Register, showing the land owned by each clan. Although the principle established is stated to be that all lands in the Province is either State Land or Customary Land, the unit of ownership could be an individual, clan or ILG incorporated under the *Land Groups Incorporation Act*, and, under section 25, customs continue to apply to the land even after registration.
- A central feature of the Act is the process of systematic registration of titles, which entails not only the determination of the rights and interests in the land, but also the physical limits of the land i.e. the boundaries. An area will only be systematically registered if (i) it is the wishes of the landowners in the area, (ii) there is a genuine need for statutory confirmation of ownership among the landowners, and (iii) there is available adequate financial and administrative resources to realize the project.
- Registration under the systematic process is conclusive evidence of the facts stated on the register at the date of registration. Sporadic registration, because of its nature, is only prima facie evidence of the facts stated on the register.

Freehold conversion by kinship and descent groups

Land tenure conversion is referred to above as a process of transforming communal titles into individual ones, and customary titles into registered freehold titles. The Act was amended in 1987 in order to permit applications for conversion by business groups, land groups, customary kinship and descent groups to their lands. The responsibility for conducting the adjudication, demarcation and conversion processes are given to the Land Titles Commission. Upon the making of the conversion order, but subject to review or appeal, the land the subject of the order ceased to be

customary land and ceased to be subject to custom. The applicable law became the *Land Registration Act*.

Henaos Lawyers Draft Customary Land Registration Bill

Whilst the Fingleton proposal is provincial, Henaos Lawyers were instructed by government in 1995 to draft a national legislation for the registration of customary land. This law firm was qualified to accomplish this important task. It submitted a draft amendment bill to the *Land Registration Act*. It defined the purpose of the amendment and the objective of the program as being

“For the registration of customary land, the objective being to mobilise customary land for development and in particular to make the land available as security for finance.”

In an accompanying document it sets out in simple language the benefits of the project and addressed some concerns of the customary land owners. These included, inter alia, a desire that registration should be voluntary and it should not have the effect of making the land available for sale to outsiders, so that they can gain permanent ownership thereof. Banks and other institutions lending finance on the security of customary land should not be able to take that land away from the group permanently and sell it elsewhere.

This draft legislation was a national act, with some shortcomings referred to below. It was rejected out of hand by those who favoured the status quo, and were fearful of change.

Incorporated Land Group

The *Land Groups Incorporation Act* of 1974, made provisions for the recognition of customary land holding groups, their incorporation and vesting of group title in the body corporate. The initial thinking in drafting the Act was to acknowledge by legislation the corporate status of the customary land holding communities in order to allow them the capacity to acquire land to be distributed under the plantation redistribution program. Secondly, to protect their customary land rights and resolve boundary disputes. Incorporation was the first stage in any initiative to mobilize their land, and this was possible by a further incorporation under the amended *Companies Act* or the newly enacted *Business Groups Incorporation Act*. Further incorporation under one or other of these Acts was necessary because of the obvious deficiencies of the *Land Group Incorporations Act*,

including the absence of management and accounting obligations which are normally imposed on business entities.

L. Kalinoe, (2003) alluded to a circumscribed ILG as follows:

“The ILG as a corporate vehicle, has statutory limitations by the operation of section 13(2) of the Act; where its powers and sphere of operation is restricted to the holding and dealing in land: both customary land and alienated land. It has no power or jurisdiction to conduct business To that extent, business groups incorporated under the *Business Groups Incorporation Act* provides the corporate vehicle”.³

Hindsight has shown that the imprecision in defining the membership of an unincorporated group led to abuses by what researchers have branded as “spurious ILGs” whose memberships’ aim was not for legitimate purposes but to deceive and extort from genuine land owners any financial returns in the form of rent or royalty from the land. The Act made no provisions for a management structure of ILGs and the transparency and accountability of its executive members, or those who assumed a leadership role in the corporation.

The cynicism caused by those who operated spurious ILGs is aptly documented in the following letter titled “Con men, Spivs in Control” and reproduced in the essay by David Lea;⁴

“I would like to thank the Government for bringing to some of us in Papua New Guinea, con men and spivs, both within our community and outside. We kept them under control before, but now because of the new developments brought to us by our government, the con men and spivs control us.

I am also talking about the development of incorporated land groups. Before, we never heard of these things. Now in areas that have development, there are hundreds of them, many such groups only having one or two people. Because of the development our Government has brought us, we now have brothers fighting against brothers, sisters fighting against sisters.

³ Kalinoe L “Incorporated Land Groups in Papua New Guinea; (2003-2004) 29 *Melanesia Law Journal* 73.

⁴ Lea, D (2004) Customary Land Tenure in Papua New Guinea (NRI Special Publication No. 35, National Research Institute: Port Moresby pp.41-42.

If you doubt that I am speaking the truth, you haven't been reading my favorite newspaper much. The advertisements of one land group fighting another, over millions in oil royalties, the blow-up of incorporated land groups that the Government seems to register and deregister, one flip flop after another....”

Limitations on the land reform programs

The focus of the proposed land reform programs was as we saw, very narrow, being restricted to customary land registration. The comparable areas which required review and reforms were the abuses taking place in the application of the *Land Groups Incorporation Act* and the break down of the land disputes settlement machinery. Even in the area of land registration there were conflicting principles that were proposed. For example whilst the Fingleton model largely emphasized systematic registration, the Henao draft emphasized voluntary and sporadic registration. Both provided for the application of customs even after registration, a contradiction of principles of land registration; registration is conclusive evidence of title, though under the Fingleton proposal, sporadic registration is merely evidential of the facts.

The 1987 amendment to the *Land (Tenure Conversion) Act*, was, like the lease leaseback experiment, little known. It was also a mistake to vest the conversion process in the hands of the Land Titles Commission which is characterized by inefficiency and whose decisions are bogged down by delays. The amendment was not well thought out. Conversion on the application of kinship and family groups although permitted, left the freehold title uncertain. The only direction was that –

“The Commission shall not direct the registration of, and Registrar of Titles shall not register...more persons than six as joint tenants or tenants in common of any interest in land.”

The *Land Group Representation Act* of Kenya went further and provided as an alternative, the incorporation of representatives of land groups in whom the freehold title is vested with trustee duties to all the landowners.

Rather than the piecemeal approach to land tenure reform, a more comprehensive approach became evident, encompassing related issues of ILGs, customary land registration and land disputes settlement. This was the strategy adopted in the *Customary Land Development Program* discussed in Parts 3, 4 and 5, below.

2. Current Law in Accessing/Acquiring Customary Land

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Introduction

There are five methods for accessing customary land viz, tenure conversion, lease leaseback, clan land agreement and negotiation. Both citizen and State may negotiate for an interest therein and the latter could expropriate land, under its compulsory powers of acquisition.

Land tenure conversion has been controversial and the nature of the current law misunderstood, as such it requires further consideration. Tenure conversion predates independence and is well entrenched in the legal system of PNG.

The “land corporation” was perceived as being an instrumentality for the recognition of the corporate status of the traditional land holding group, with power to (i) hold, manage and deal with land, ILGs; and (ii) establish business and economic enterprises, BGIs. It was never intended as an instrumentality to erode communal ownership. However, incorporation followed by tenure conversion has got this potential. In contrast incorporation followed by customary land registration is intended to protect the clan ownership of land.

Under our system of jurisprudence statute law is only one means of developing the law, and not necessarily the best; case law is an important source of law and has impacted on property law in a positive manner.

Freehold land tenure

Post independence reform of customary land tenure has been minor. What reforms there were in the land tenure sector, were in the areas of land policy, administration and land redistribution, and they, to a large extent, affected alienated lands. The Land Groups and Business Groups Incorporation statutes, though dealt with as post independence statutes, (both were passed in 1974 just prior to independence) are intended to give recognition to the corporate status of traditional landholding groups. The intention was that with the enactment of the appropriate complementary system of land registration, group ownership of land would prevail over pressure for individual freehold title. With the application of the 1987 amendment of the *Land (Tenure Conversion) Act* and the extension of the right to convert ownership given to ILGs, customary kinship group and customary descent group, etc, the change in the law was significant.

Whilst tenure conversion is perceived narrowly as “conversion of communal into individual freehold”, the conversion of customary tenure could now vest a freehold estate in customary kinship, descent or land groups (see ss 4 & 7) and their registration becomes possible under the *Land Registration Act* (ss 11 & 16). Conversion of such lands is, potentially, equally destructive of the traditional system as is individual freehold conversion. Where the land is then made disposable and capable of subdivision, the threat to traditional community ownership becomes real. This destructive feature of the *Land (Tenure Conversion)(Amendment) Act*, 1987, has evaded the scrutiny of researchers. That there might not have been massive conversion of communal tenure could be accredited to conveyancers overlooking the implications of the amendment and the breakdown of the Land Titles Commission.

The further intention in the amended Act to erode communal land ownership is apparent from the provisions dealing with co-ownership which apply in circumstances where no ILG is formed. In such circumstances:

“The Commission shall not direct the registration of, and the Registrar of Titles shall not register...more persons than six as joint tenants or tenants in common of any interest in land.”- s.24(2) ; see also s.27 which sets out options to reduce the co-owners to not more than six persons on devolution.

This development in the scope of the Act argues the case for the repeal of the *Tenure Conversion Act* and an amendment of the law to protect the ownership rights of the community, be it the clan, kinship, descent or ILGs,

whilst vesting it with power to lease (not sell) and fully utilize the land “in the modern business environment”. This is the thrust of the proposed reform.

Only Citizens can own Freehold

Section 56 of the *Constitution* states that only citizens may acquire freehold in post independence PNG, and where a non citizen owned freehold prior to independence he could convert it into a government lease for 99 years (substituted lease), a course which is absolute necessary for him to transfer it to another non citizen. A citizen with freehold title could transfer his/its freehold to another citizen, but if he holds under customary law he is prevented from disposing of it or an interest therein to another citizen otherwise than in accordance with custom, s132 *Land Act*.

In the urban and peri- urban areas there has evolved a lively market for land between citizens. A citizen has constitutional protect to his existing freehold (s.53 *Constitution*).

Lease Lease-Back System

The lease lease-back system is provided for under the *Land Act* 1996. Reports of the successful use of this transaction are coming from the agricultural sector, where it is being widely used. However, the application of the transaction to other sectors, such as the real estate sector, remains restricted.

The main feature of the system is that customary land use is suspended during the lease period. Upon the expiry of the lease the land reverts back to the customary landowning unit.

It might be considered as being one of the instruments to release land for development, in the short term.

Land Corporation

In the original conception of group incorporation, a distinction was made between the Land Group and Business Group. The former was intended to be landholding and or management units composed of relatives near and distance or persons with a common custom or interest. The Act paid very little attention to matters of finance and accountability. In contrast the business group was to organize business and other economic purposes.

Groups were incorporated under the former Act with no enquiries made into the authenticity of the applications, the credibility of the applicants and the nature of their assets. It is reported that the government did not make

available to the Lands Department the resources necessary for the proper implementation of the Act and in those circumstances “poor administration is the main cause for the failures”.¹ With reference to the magnitude of the problem that prevailed, the authors wrote:

“With potentially 70,000 land groups and more than one million named land parcels to register, the task is huge and will require significant government and donor support for many years”².

These figures might be inflated, but there are hundreds of applications for tenure conversion and a greater number for registration.

The recognition of ILGs followed by tenure conversion and registration under the *Land Registration Act*, would lead to the further destruction of group ownership of land.

The Underlying law

The national and Supreme Courts have handed down decisions of importance that transcend the division of land tenure into customary and non customary law and land into alienated and unalienated lands.

These are in many cases protective of the landowners. For example after two false starts (in re *Rose Tarare v ANZ Bank* [1988] PNGLR 319 and *Bank of PNG v Basa* [1992] PNGLR 271) the Court acknowledged the existence of a jurisdiction to protect the mortgagor’s right to his property notwithstanding the mortgagee’s right of enforcement (*PNGBC v Aruai* [2002] PNGLR forthcoming). And in *Dumal Dibiaso v Kuma* (2005) SC805, it issued orders protective of landowners right to funds in the hands of their fiduciary.

On the need for prudence in handling the landowners’ money Injia, DCJ stated:

“The money held in trust for the benefit of landowners ...should be protected from the actions of ‘their representatives’ who it seems to me, tend to procure services away from home, in outside locations like Port Moresby, and incur expenses, with or without the knowledge or approval of the landowners and they may or may not be for the real benefit of the landowners, which are then charged on the trust funds and the landowners beneficiaries of

¹ See T Power & P Sullivan (Unpublished), “Incorporated land groups in Papua New Guinea and Australia: two case studies” (August, 2007).

² Ibid at p.14.

those funds miss out. All too often, we hear about the plight of aggrieved, dissatisfied or disgruntled landowners, unsatisfied at not being paid. Projects get interrupted. Many landowners incur their own expenses in making long journey themselves to Port Moresby to check on payments. Their representatives must conduct themselves in such a way that they do not abuse the trust placed on them by the landowners by keeping administrative costs at a minimum.”

The role of the courts as an engine of change cannot be overlooked, though its protection is incremental, and the urgency and magnitude of the problems indicate the urgency for land reform.

3. Customary Land Development Proposals 1: Reforming ILGs

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Introduction

As we discussed above despite the extensive search for appropriate models of land reform to realize better customary land use and development, and even though as many as 30 years have elapsed following independence, there has been no meaningful changes. Land reform has therefore been referred to by many researchers as a “failed policy initiative”. There have been lots of policies and proposals for reforming the law, but no implementation. A fresh start was made with the holding of a Land Summit convened by the National Research Institute in 2005, which brought

together many with expertise in customary land tenure. The summit recommended the establishment of a Task Force to take the problem in hand and this was duly done by the appointment by the NEC of the “National Land Development Task Force” with the responsibility to identify the problems and issues relating to “land administration”, “customary land development” and “customary land disputes settlement”. The Task Force agreed on a modus operandi of giving priority to issues of land administration, disputes settlement mechanism and land tenure reform. It proceeded to establish three appropriate committees, to study and report on its area of responsibility. The Customary Land Development Committee being tasked with reforming the land tenure and related topics.

Following a wide consultation with communities around the country, workshops and its own discussions, the Customary Land Development Committee stated as its overall goal of the reform program that:

“customary land will remain in the possession (ownership) of the landowning group, yet can be comfortably leased and utilized freely, in the modern business environment”.

It expressed as the best way forward to realize this challenge, the need to amend the *Land Groups Incorporation Act* in order to ensure the establishment of authentic ILGs, and their proper management and empowerment; amendment of the *Land Registration Act*, in order to register title of the land of ILGs and empower them to make derivative grants of land, particularly leases. These reforms, it argues, will ensure that ownership of land in PNG would vest in only two institutions: the State (alienated land) and ILGs (customary land). The features of the proposed changes are dealt with below in a manner stated in the Terms of Reference No. 5. These are to enquire into and report and recommend on -

- (a) “the Incorporation of incorporated land groups, incorporating appropriate accountability mechanism for efficient and effective governance and management structures and systems”;
- (b) “a voluntary system of customary land registration.”; and
- (c) “to the extent necessary to secure the reforms proposed in paras (a) and (b) above, consideration of related matters of law and practice”.

This discussion considers in Chapter 5, the process of progressing from incorporation of the ILG to registration of its title to land. Whilst overall responsibility for incorporation is that of the Registrar of Incorporated Land Group, land registration process is mainly through the creation of a new functionary (the Director of customary land registration who is) charged with the responsibility to manage the process “customary land registration”.

What is important to note, however, is that proposals for customary land reform cannot be made with finality without considering the proposals for land administration and disputes resolution.

Proposed Reforms

“The Incorporation of incorporated land groups, incorporating appropriate accountability mechanism for efficient and effective governance and management structures and systems.”

In order to make the ILGs effective vehicles for land development, the Committee recommended that provisions should be drafted to ensure-

- their authenticity on incorporation;
- their effective management, and the accountability of their executives. Related matters discussed include,
- recognition of the members’ rights to information and inspection;
- principles of law and equity in the affairs of ILGs.
- the application of provisions of the *Frauds and Limitation Act* which require written evidence of dealings in their land; and
- a registration of documents system in order to make public land transactions.

The Authenticity of the ILG

The CLDC recommended an amendment of the *Land Groups Incorporation Act* to provide for the submission of certain certified information from those seeking recognition/incorporation. These are –

“The group/clan name, group/clan lineage, and birth certificates of all the named persons, for purposes of the membership to the ILG.... The land to be registered, or land registered, including recognized survey papers by a registered surveyor; and witness and/ or identification statements from the local – level governments and district administrators.”- rec 50(g).

Section 5 of the *Land Groups Incorporation Act* requires an application for incorporation to be made on a prescribed form. The Registrar is empowered to require from the applicant “such further information as (he) the Registrar

requires”, para 5(2)(d). This provision enables him to demand the information listed above. There is, however, an advantage in making explicit that which is implicit and this can be done by amending either the application form or Section 5 accordingly.

Proposal 3-1. (a) delete paras (c), (d) and (e) of s.5(2) *Land Groups Incorporation Act* and insert – “and the applicant shall supply –

- (c) a list of all members of the group;**
- (d) further information as stated in Schedule 1 being such certified information required in the application form;**
- (e) a sketch of the boundaries of the land to which the applicants claim ownership;**
- (f) such further information as the Registrar requires.”**

(Note: The schedule will provide for 2 forms: Form 1 will require the prescribed information required under s.5(2) and Form 2 will provide for the sketch map of the boundaries including a requirement for the boundary under dispute to be acknowledged by the elders of the applicants on the one part and the elders of the other clan(s) disputing the boundaries.)

Evidence of Ownership and Boundaries of Land

The Act aims at incorporating customary landholding groups. It is therefore necessary for the applicants to establish rights to land by producing a state grant, a court order or the like, or to identify and establish rights under customary law. In the latter case, if boundaries are disputed, the nature of the dispute would be noted and recorded on the sketch map. For example, if there is a dispute between neighbouring clans of the boundaries to the respective clan land, for purposes of achieving the incorporation of the ILG, the disputing clans will indicate on the sketch map the extent to which their claim over the boundaries go into each others sides and the elders of the clan would then be required to sign off on the foot of the sketch map acknowledging the extent of each others extent of the boundaries.

Resolution of disputes

Where there are internal disputes among those seeking incorporation, eg. as to membership, etc, the Registrar may reject the application, or incorporate the group on a written undertaking of the applicants to resolve the dispute or he may incorporate the applicants.

Proposal 3-2. Insert a new Section 5A, thus: If it appears to the Registrar that there are internal disputes either as to the identity of the group's representatives, officers or membership; the Registrar shall determine whether to –

- (a) reject the application, or**
- (b) incorporate the applicants, subject to a written undertaking by them to either –**
 - (i) settle the dispute; or**
 - (ii) institute proceedings for its settlement; or**
- (c) incorporate the applicants.**

Procedure for incorporation

The procedure to incorporate a land group is by application in a prescribed form to the Registrar of Incorporated Land Group. This must be accompanied by; (a) such documentation, discussed above, required to establish the authenticity of the application, and (b) the *Constitution* of the proposed association, which includes *inter alia* the management committee, and evidence of rights to land including a sketch map of the customary land which the groups owners under customary land tenure.

Publicity of Application

Most importantly is to satisfy the requirements for publicity of the application and compliance with the processes necessary to ensure transparency. To achieve these, it is necessary to incorporate in the Act appropriate provisions which we propose as follows:

Proposal 3-3. Insert a new (s.5B):

- (1) The Registrar shall,
 - (a) cause notice of all applications for recognition made under Section 5 to be published in the National Gazette and given to the District Administrator in whose area the group or any of the property claimed on behalf of the group is situated, and to the Village Court within whose jurisdiction members of the group reside; and
 - (b) give further notice of the application and particulars in such manner he thinks most likely to ensure that it is generally known to person having a knowledge of or an interest in the affairs of the group or its members.
- (2) The Registrar of ILG shall not issue a Certificate of Incorporation unless he receives from the District Administrator a confirmation notice of receipt of the documentation referred to in subs.(1) and compliance with the provisions set out in the document(s).

Powers of Incorporated Land Groups

Subs.3 of s.13 states that “no right or interest in or in relation to land that is given by an incorporation land group to a person who is a member of the group is registrable under any law relating to the registration of land or an interest in land.” This provision conflicts with the proposal to give the ILG power to convert customary rights to derivative interests on registration and is better addressed in the Chapter dealing with registration.

Proposal 3-4. Delete subsection (3) of Section 13.**Management and Accountability**

Under traditional law and custom, the leaders act as trustees in the management and control of land, but their duties stop short of those of trustees in the received legal system. For example a junior member could not call on an elder to account. This has largely been the cause of the

unsatisfactory results of reforms based on the trusteeship model of landholding. Crocombe observed with reference to Niue reforms:

“History is full of examples....where they have looked after their own personal interests and these are often contrary to the interests of the people-”¹

In discussing the *Communal Land Rights (Vesting in Trustees) Act* of Western Nigeria, it is observed-

“The Nigerian experience with the trustee model is not reassuring. In the first few years of introducing the system there was need for a number of Commissions of Inquiry to look into breaches and abuses of power by trustees. Everywhere the Commissioners found that trustees were most irresponsible and frittered away the funds of the Trust in merriment and the entertainment of friends.”²

In Papua New Guinea, the absence of clear principles of accountability and sanctions for breach has contributed to financial mismanagement of some ILGs and the general disaffection with them; and was one of the causes for the Bougainvillean upheaval. This development is increasingly coming under the scrutiny of the Courts due to the actions of group representatives “ who tend to procure services away from home, in outside locations like Port Moresby, and incur expenses, with or without the knowledge of the landowners, and which or may not be for the real benefit of the landowners which they then charge to the trust fund.” Per Injia DCJ, in *Steven Mendopo v Samson Bora (2004)*; *Dumal Dibiaso ILG v Kola Kuma (2005)* – Supreme Court.

The CLDC recommended that “New provisions concerning the management of ILGs will be introduced by amending the current *Land Groups Incorporation Act*, in a similar way to the *Business Groups Incorporation Act*, where a Management Committee is empowered, under the Act, to oversee the management of the business groups and that the Management Committee is subject to strong fiduciary conditions clearly and specifically imposed under the amended Act” rec 54(b); rec 50(e).

¹ ‘The Niue Alternative’ in P Sack, *Problem of Choice: Land in Papua New Guinea Future*.

² James R. W. *Land Law and Policy in Papua New Guinea* (Law Reform Commission Monograph No. 5, (LRC: Port Moresby 1985) at p.49.

There are a number of precedents one can adopt in whole or in part: the structure existing in the *Business Group Incorporation Act* is one, but it is deficient. Neither that nor the *Land Groups Incorporation Act* has given the centrality necessary for the General Meeting, the Management, or financial accountability of representatives, and their relationship. Much clearer provisions on these instruments of control are required to ensure proper management of the Incorporated Land Group. To achieve these it is proposed that the *Principal Act* should be amended to incorporate 3 new divisions: 3A: Meetings of Members; 3B: Management Committee; and 3C: Finances.

Proposal 3-5: *Division 3A: Meetings of Members*

Insert new Section 14A - General Meetings:

- 1. An annual general meeting of a group shall be held within 3 months of the incorporation of the group and thereafter within 3 months from the anniversary of incorporation.**
- 2. The purposes of the AGM are:**
 - (a) to appoint the management committee and other officers of the association if there is a vacancy;**
 - (b) appoint members to the Dispute Settlement Authority if there is a vacancy;**
 - (c) receive and consider the chairman's annual report and a financial report;**
 - (d) consider such matters referred to the meeting by the Registrar.**

Proposal 3-6: Insert “Special General Meetings”

Then insert section 14B – Meeting to elect management committee.

1. Members of the land group shall meet at a specified time and place, in the area where the members of the ILG reside to elect not more than ten and not less than three persons to form a management committee in accordance with the *constitution*;
2. The Management Committee shall include the Chairperson of the association, deputy chairperson, secretary, treasurer and a person elected by the members of the ILG.

Insert Section 14C – Convening meetings

If - (a) members forming fifty percent of the Group; or
(b) the Registrar; or
(c) the District Administrator;

so request the Chairman (or in his absence the deputy chairperson) shall convene a meeting of the members within 14 days after the request.

Insert section 14D – Conduct of meetings

1. All members of an incorporated land group shall be entitled to attend the meetings of the group and vote.
2. A member under a disability enjoys rights under this Act as all members but no right to vote at meetings of members, except through his Guardian, or to hold offices.
3. No business shall be transacted at a meeting of the members unless at least sixty percent of the members of the group is present at the meetings.
4. A resolution at a meeting of the members, supported by votes of not less than sixty percent of the members of the group present at the meeting shall be treated as the decision of the group, though for removal of a member or members of the management committee the vote of 70 percent of the members present at the meeting is required.

Proposal 3-7: Insert after Division 3A as Division 3B: Management Committee, then as Section 14E – Powers of Management Committee.

“The Management Committee has the power subject to the *Constitution* and the Act to run the affairs of the association.”

Insert section 14F – Changes in membership of management committee

- 1. Where a member of the management committee dies, becomes incapacitated or wishes to retire he may be replaced by resolution of the members of the ILG.**
- 2. A member of the management committee may be removed or replaced by resolution of the members of the ILG at a General Meeting or a Special General Meeting.**
- 3. On change of membership of the management committee, the Registrar shall –**
 - (a) amend the register accordingly;**
 - (b) inform the Registrar of Titles where appropriate.**

Insert section 14G – Disqualification from office

“No person who has been convicted of a crime involving fraud or dishonesty shall be capable of being appointed or elected to or remain in –

- (a) the office of treasurer, deputy treasurer or assistant treasurer of an ILG; or**
- (b) any other office the holder of which is responsible for the collection, disbursement, custody or control of the funds of the ILG or for its account; or**
- (c) the membership of the management committee; or**

Finance

By virtue of Section 27 of the *Land Groups Incorporation Act*, accounts and records of transactions are elements of the supervisory powers of the Registrar and or the disputes settlement authority. The *Business Groups Incorporation Act*, Division 4, entitle “Finance” contains three important

sections, which could with advantage be incorporated into the ILGs Act. These are:

- Keeping Bank Accounts for the proper conduct of business affairs of the corporation;
- receipts for all money collected; and
- annual statements of assets and liabilities of the entity.

It is proposed to introduce these obligations on finance in a new division 3C of the *Incorporated Land Groups Act* as follows:

Proposal 3-8: Insert after section 14G of Division of 3B, Division 3C: Finances, then insert as section 14H – Bank Accounts

The Management Committee shall -

- (a) cause such bank accounts as are necessary for the proper conduct of the affairs of the group to be opened and maintained; and
- (b) pay all moneys received by the group in connection with its business activities into those accounts; and
- (c) pay all moneys that the group is required to pay in connection with its business activities out of those accounts.

Insert as Section 14I – Statements of assets and liabilities

The Committee shall –

- (a) cause to be prepared, in a form approved by the Registrar a statement of the assets and liabilities of the group for each period of 12 months of the operations of the group or for such longer period as the Registrar approves; and
- (b) lodge the statement with the Registrar not more than three months after the end of the period to which the statement relates.

Insert as Section 14J – Financial Instructions

1. The Registrar may direct that accounts and records of some or all of the affairs of a land group be kept in such manner as he thinks proper.
2. Where the Registrar gives a direction under Subsection (1)
 - (a) the Registrar, the dispute-settlement authority or any member is entitled at all times to inspect the accounts and records; and
 - (b) the Registrar may direct that copies of the accounts and records be given to him to be kept in the register of land groups.

Penalty: Failure to comply with Sections 14H or 14I is an offence and makes each Committee Member liable to be prosecuted and on conviction to pay a fine not exceeding K500 or imprisonment for a term not exceeding 6 months, or both.

Penalty: Failure to comply with the Registrar's direction under Section 14J, the Committee Member becomes liable on conviction to a fine not exceeding K1,000.00 or imprisonment for a term not exceeding 12 months, or both.

Sanctions for Misrepresentation and Misconduct.

A person who misrepresents or deliberately contravenes any conditions which will disqualify him from membership of an ILG or its office should be liable on conviction to a stiffer penalty than that prescribed by section 29, *Land Groups Incorporation Act*. Any committee member or officer of the ILG who misappropriates any funds or property belonging to the ILG shall be criminally liable to imprisonment or and payment of a fine on conviction.

Proposal 3-9. Delete s. 29 and replace it with the following:

s.29. Willful Misconduct**(1) Any person who –**

- (a) willfully makes any false statement or declaration in any application under this Act;**
- (c) willfully suppresses, withholds or conceals or assist or is privy to suppressing, withholding or concealing from the Registrar any material documents fact or matter of information;**
- (d) willfully makes any false declaration or statement for purposes of or in relation to any dealing with land under this Act;**
- (e) fraudulently procures, assists in fraudulently procuring or is privy to the fraudulent procuring of a certificate of incorporation;**
- (f) knowingly misleads or deceives any person authorized under this Act or regulations to require information or explanation in respect of any application; or**
- (g) occupying a fiduciary relationship misappropriates any funds or property belonging to the ILG,**

shall on conviction be liable to a fine of up to two thousand kina and or imprisonment for five years.

Information and Inspection

A member of an ILG should have a right to as much information as is possible of his association and its management and to inspect at the office of the registrar, the register and any documents relating to the association which is lodged with him under the Act, and the right on payment of the cost of printing, a copy or an extract from such register or document.

Proposal 3-10. Add a new subsection:

s 28(2) “Any person may inspect at the office of the registrar the register and any document relating to any group lodged under this Act with the registrar, and may obtain from the registrar a copy of or an extract from such register or document.

Proposal 3-11 *Register of Members*

The Management of the ILG shall:

- (a) maintain a register of its members in such manner as the Registrar may require, or as may be prescribed, containing the name of each member, the date he qualified for membership;**
- (b) deliver to the Registrar at his request a current register of members.**

Proposal 3-12 *Documents available for inspection*

The Management of the ILG shall make available for inspection of its members or the Registrar or any person authorised by him in writing, at all reasonable time –

- (a) its books of accounts, and all documents relating thereto; and**
- (b) a list of the members.**

If subsection (1) of this section is contravened each committee member shall be guilty of an offence.

Principles of Law and Equity

Members of the Management Committee occupy a fiduciary relationship to the ILG and its members, as do directors to their company and trustees to their beneficiary, and they are not allowed to profit from or take advantage of the position they hold. They must ensure that their personal interests do not conflict with that of the ILG and its members.

Unless the constitution expressly provides to the contrary, decisions on major matters require unanimity. They are individually and collectively liable for losses due to wilful default or gross negligence of themselves and other Committee members, and by the proposed amendment they are criminally liable for dishonesty.

On the whole, equity imposes special duties and responsibilities on a fiduciary. These have been enunciated in recent decisions of the Courts: *Stephen Mendopo v Samson Bora* [2004] N2535; *Dumal Dibiaso ILG v Kola Kuma* (2005) SC 805, for example.

Transparency to be evidenced by writing

In order to ensure transparency of dealings with the land, it is necessary, following incorporation, for provisions of Part 1 of the *Frauds and Limitations Act*, 1988 to apply to dealings with ILG in land matters. Those provisions require a land transaction to be evidenced in writing, failure of which, the transaction becomes void and unenforceable. However, the law is not inflexible and the court ensures that the provision is not used as a cloak for fraud. For example an oral agreement for short-term leases which take effect in possession, or the existence of an act of part performance of the agreement would, under the *Walsh v Lonsdale principle*, be enforceable: *Wine v Giglmai* [1990] PNGLR 462.

Proposal 3-13. Formalities of Group Action.

Repeal Subsection (2) of Section 14 of the LGI Act and replace it with the following Subsection –

- (2) “The Statute of *Frauds and Limitations Act*, 1988 applies to or in relation to -**
- (a) an agreement under Section 13(2)(c); or**
 - (b) an agreement entered into by an incorporated land group affecting its land”**

Registration of instruments

There are many objectives of an instrument registration system; to prioritise land transactions, for example; but there is a basic advantage relevant to the management of clan lands. It brings dealings in lands of the ILG into the public domain, for the benefit of members and strangers wishing information on the land. Instrument registration is the function of the Registrar.

Proposal 3-14. A certified copy of all documents purporting to deal with an interest in land of an ILG shall on incorporation be lodged with the Registrar of incorporated land groups;

The Registrar shall record each document by a reference number and the date the document is filed and the name and address of the person lodging the document.

4 Customary Land development Proposals 2: Establishing a Voluntary System of Customary Land Registration

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Introduction

One basic objective of the reform program is to provide the facilities for the mobilization of customary land. It is argued that with population growth, the rise of the money economy and the rural – urban drift, the options to land owners are to provide themselves with the means for growth on the basis of trade and specialization or to provide those willing to effect growth, with secured means to access the vast quantity of un- and under- utilized lands. Thus customary arrangements which inhibit access to, and the development of land, beyond mere subsistence level, must be revisited and new legal systems devised to facilitate the wishes and aspirations of customary land owners to engage and participate in the cash economy should they wish to by utilizing the vast potential that customary land has.

The reforms, however, must not be a radical transformation of the traditional system of land ownership as was the Simpson model which adopted systematic registration and conversion into individual ownership as the norm. The arguments against systematic registration are that it is unnecessarily wasteful and expensive to register whole areas simultaneously when only a small percentage of the land is committed to immediate development. Other criticisms of the systematic procedure which featured in the Knetch and Trebilcock report are noted:

“The possibility of problem cases arising in the registration [process] will put the progress in that area at risk”;

To initiate applications for registration in a wider area than is necessary could -

“provoke a host of otherwise dormant disputes, the parties to which would be obliged to press their claims, given the “once and for all” nature of registration process.”

The arguments against the individualization of land are the social problems predicted from landlessness discussed above.

Though land registration is complementary to the incorporation of clan ownership, the National Land Development Task Force favored the voluntary process of sporadic registration. Land registration only becoming necessary when there is an intention to grant interests in or portions of the land to a stranger, a clan member or the association itself, either directly or via Section 48 of the *Land Registration Act*.

It is argued that the *Land Registration Act*, duly modified can provide the vehicle for this change. It has a number of advantages: (1) it is multi purpose and provides for registration of State leases, trusts land etc.; (2) it protects third party rights and interests in the land; and (3) The system is free from technicalities, the forms to be used for dealings are simple and easily understood and land transactions are effected speedily. This simplified method of dealing in land could accelerate the rate of economic development by creating a favourable image for foreign and local investors.

The system could form the basis of electronic conveyancing and a public sector modernisation program, the latter bringing together; (a) efficient and transparent land titling, (b) a national land valuation data base, (c) optimal use of land, and (d) an infrastructure on which to build a modern spatial information service, i.e. an expansion of the proposed customer service centre¹.

Classes of rights in registered land system

Under the *Land Registration Act* (LRA) there are three categories of interests in land which are protected, viz: the registrable interests, overriding interests and minor interests.

Registrable interests

The following interests are by virtue of the LRA registrable:

¹ See Discussion Paper, “*Land Registration*” dated 14 June, 2007.

Freehold, a lease for a term exceeding three years (s49); state leases (ss. 35 and 36); a lease for a term of three years or less may be registered (s.49 (2)). These estates and interests when registered are evidenced by certificates of title prepared and registered by the registrar, and a copy is given to the interest holder. The registrar's duplicate copy is (i) evidence of the particulars it specifies, and (ii) is conclusive evidence of the title of the registered proprietor (ss 10, 11, *ibid*).

Conversion Procedure

Under the freehold conversion enactment, the effect of a conversion order is that:

- (a) the land the subject of the order would cease to be customary land, and the land and any right to the ownership or possession of the land, and any other right, title, estate or interest in or in relation to the land ceases in all respect to be subject to or regulated by custom;
- (b) all rights, titles, estates or interests in the land other than those specified in the order are abolished;
- (c) the Registrar of Titles is required to register in the Register established under the LRA, on application, an entitlement to a fee simple instead of customary title, subject to any lease or encumbrances which existed – ss.16 and 11, *Land Tenure (Conversion) Act*.

Under our proposed amendments, the ILG becomes entitled, subject to compliance with the prerequisites for first registration (for these see para 5.2 below), to apply to register the ownership of the land in question.

Overriding interests

These exist in registered land and are overriding because they bind the registered proprietor and a purchaser, even though they are not themselves registrable or protected, like minor interests which are noted on the register. The list of overriding interest is small: Tenancies from year to year or for a term not exceeding three years, see s. 33(1)(f); interests created by a “prior tenancy document” where the tenant is in actual occupation under the document. These include the agreement for a lease, an unregistered lease or for a term not exceeding three years (s. 28 (1) & (2)):

- A lease, licence or other authority granted by the Head of State or a Minister in respect of which no provision for registration is made.
- Any right of way or other easement created or existing on the land.

- Unpaid rates, taxes, or other money which, without reference to registration under the Act, are expressly declared by law to be a charge on land in favor of the State or Department or officer of the State or a public corporate body.

Minor interests

This expression is neither used nor defined in the *Land Registration Act* (LRA) but the categorization is of a residual category, which includes: encumbrances required to be notified by entry or memorial on the relevant folio of the register. If such interests or encumbrances are not protected by being noted on the register or by a caveat (see Part VIII of the LRA), then according to Section 33 *ibid*, the registered proprietor will hold his interest absolute free of them. Thus minor interests are interests in registered land which are incapable of being disposed of or created by registered disposition and which are not overriding interests. They include an option for a lease in land (s 28(3) LRA); beneficiaries' interest in a trust of land; equitable rights in land including equitable mortgages, s.81 (2); restrictive covenants, s.97; easements, s.95; and interests created by registered dispositions between their actual execution and registration (cf s 17 LRA)

Registration gives a State Guaranteed interest

Where land is sought to be registered, the ownership of the applicant, the boundaries and the grant must be proved to the satisfaction of the State. Any dispute that arises in the process must be dealt with and authoritatively resolved. When the adjudication of ownership and demarcation of boundaries are completed, the registrar will register the land and thereafter he has the responsibility to register any subsequent dealings with the land, so that the register will at all times be an accurate reflection of the legal status of the particular parcel of land. The person dealing with clan land is therefore in an impregnable position as the State would guarantee his title.

Registration and Indefeasibility

The registration process, but for a few exceptions set out in section 33 LRA, gives the proprietor an indefeasible title including guarantee of the physical boundary of the parcel of land. Indefeasibility was expressed by Kidu CJ in *Mudge & Mudge v Secy for Lands* [1985] PNGLR 387 as being-

“settled law that, apart from few exceptions ...once land is registered under the Torrens system the owner acquires indefeasibility of title.”

Registration is the last step in the transmutation of the customary tenure into a form of title acceptable to the commercial community. Customary law ceases to apply, apart from the exception discussed below, and in its place statute law prevails.

5. From Incorporation of ILG to Registration of Title

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Introduction

The proposals for land reform suggest two distinct processes viz the incorporation of the landowners (ILGs) and registration of their land ownership. Both processes are entirely voluntary. The process of incorporation is for the recognition of the corporate nature of customary land owners and vesting them with legal personality. It is also an acknowledgement that they have some rights to land. Registration, on the other hand, vests in the ILGs a state guaranteed title of land to which they established ownership, including its boundaries. Registration gives the registered proprietors the ability to make grants of the land by way of leases or other registrable interests, to itself, its members or a stranger. Transfer of ownership rights is prohibited by appropriate provisions contained in a proposed Part IIIA of the *Land Registration Act*.

Following the structure of the *Land Registration Act*, it is necessary to introduce a new Part in the Act, viz Part IIIA entitled: Clan Lands, which like State Leases, which forms Part IV of the Act, consolidates the law dealing with registered Clan Lands. This is the technique adopted by the Henao lawyers draft Land Registration (Customary Land(Amendment) Act, 1995, which, along with the Fingleton's proposals, has been a source for

some proposals recommended in the proposed draft Registration of Clan Lands (Amendment) Bill.

Procedure for Customary Land Registration

Appointment, powers and functions of the Director of Customary land registration.

Under these proposed arrangements for registration of customary land groups (ILG), responsibility is vested in an Official viz: Director (for Customary Land Registration), whose office is responsible for customary land registration.

[Note that this proposal is tentative and the changes must await the report of the ‘Dispute Resolution and Compensation Committee’ tasked with advising on-

- i. the structure of a single land court system to replace:
 - the land courts established by the *Land Dispute Settlement Act*, the National Lands Commission established by the *National Land Registration Act*, and the Lands Titles Commission, established by the *Lands Titles Commission Act*.
- ii . the repeal of the legislations, and
- iii. transferring their remaining functions to the DLPP including reallocation of their personnel and resources.]

Proposal 5-1. *Appointment of Director.*

The Minister may, by notice in the National Gazette appoint a Director of Customary Land Registration.

Proposal 5-2. Powers and functions of Director of Customary Land Registration.

- (1) The Director shall –**
 - (a) be responsible for dealing with applications for customary land registration;**
 - (b) perform such powers, functions duties and responsibilities as are specified and prescribed in this Act.**
- (2) In addition to any other powers given to him under this Act, the Director may –**
 - (a) require any person to produce any document in his possession or control relating to any land or dealing in land;**
 - (b) summon any person to appear before him to give information or explanation relating to any land or dealing in land;**
 - (c) refuse to approve for registration any land or dealing in land where a document required under paragraph (a) is not produced, or an information or explanation required under paragraph (b) is not given to his satisfaction or if any other act, matter or thing required under this Act to be done is not done.**
 - (d) administer an oath or affirmation or take a statutory declaration and require that any proceeding, instrument, information or explanation relating to or affecting land or any dealing in land be verified on oath or affirmation or by statutory declaration;**
 - (e) by himself or his agent enter upon any land for purposes in connection with this Act; and**
 - (f) order that any costs, charges or expenses incurred by him or by any person in or in connection with any investigation or hearing held by him for the purposes of this Act be borne by any such person and in such proportion as he thinks fit.**
- (3) A person who –**
 - (a) refuses or neglects to produce any document in his possession or control; or**
 - (b) refuses or neglects to appear and give information or explanation; or**
 - (c) knowingly misleads or deceives the Director; or**
 - (d) knowingly makes a false oath, affirmation or declaration; or**
 - (e) willfully obstructs or prevents the Director or his agent from entering upon any land; or**
 - (f) willfully refuses or neglects to pay any costs, charges or expenses as ordered by the Director;**

is guilty of an offence.

Proposal 5-3. Duties of Deputy Director

- (1) A Deputy Director has the duties, powers and functions as assigned to him by the Director;
- (2) A duty, power or function carried out by a Deputy Director has the same force or effect as if it were or had been carried out by the Director.

Decentralisation of Functions

An important issue is that of decentralization of the functions of the Registrar of Customary Land Registration, Conversion and Compensation. Whilst the above provisions which are adopted from the Henao proposals support delegation to Deputy Registrars, an alternative model is devolution to a provincial body.

Any meaningful decision on this matter must await the recommendations of the Committee on Land Administration.

Application for Registration

It is proposed that application for customary land registration should be made to the office of the Director for Customary Land Registration which acts as a clearing house with power to reject doubtful cases, refer disputed claims to the applicants for them to pursue settlement or adjudication and where claims are established, send these for registration. The processes that follow on the application are set out below.

Proposal 5-4. Application for Registration

- (1) Subject to this Act representatives of the ILG may apply to the Director in the prescribed form for registration of ownership of customary land or an interest in customary land.
- (2) The application for registration shall include a registration plan –
 - (a) describing the land or parcels of land owned absolutely under customary tenure by the customary group including its boundaries; and
 - (b) containing the names of such individuals or customary groups which established derivative interests in the land, including the boundaries of the parcels of such land and the nature of the interests.
- (3) The registration plan shall be in such form and shall contain such particulars as are prescribed.

Proposal 5-5. *Verification*

- (1) Where an application has been made to the Director for registration of customary land, the Director shall as soon as practicable commence verification of the plan submitted.
- (2) For the purposes of Subsection (1), the Director shall –
 - (a) conduct such investigations as are necessary to establish the membership of customary groups; and
 - (b) make such inspections of the land, together with appointed representatives of such customary groups as are necessary to verify the identity and the boundaries of the parcels of land claimed by such customary group as stated in the registration plan.

Proposal 5-6. *Authorisation of plan for publication*

1. Upon the completion of its investigation, the Director shall, as soon as practicable,
 - (a) endorse; or
 - (b) reject the registration plan; or
 - (c) seek further information before making a decision.
2. For the purposes of Subsection (1)(a), the Director shall concern himself only with the area of the land determined as being in the ownership of the Clan.

Proposal 5-7. *Publication of Registration Plan*

- (1) The Director shall within 14 days of endorsement of a registration plan
 - (a) forward a copy of the Plan to the Surveyor General and the District Administrator;
 - (b) give notice to the public indicating –
 - (i) where the Registration Plan may be examined; and
 - (ii) the procedure for making an objection to the contents of the Registration Plan; and
 - (iii) the period of not more than 90 days within which an objection can be made.
- (2) The District Administrator shall cause a notice made under Subsection (1)(b) to be advertised in such a manner he considers appropriate to bring it to the attention of all persons who may have an interest in the land or parcels of land the subject of the Registration Plan.

Proposal 5-8. *Adjusted Registration Plan*

On the receipt of a copy of the Registration Plan the Surveyor General shall, where necessary, prepare an Adjusted Registration Plan showing such adjustments as are necessary to indicate -

- (a) the situation of the land or parcels of land, and
- (b) any reservation, easement or other such interest made by the State for public purposes under any law; and
- (c) any estate, right, title or interest granted by the State under any law

and shall return the Adjusted Registered Plan to the Director as soon as practicable.

Proposal 5-9. *Objections to Registration Plan*

- (1) A person who objects to the contents of a Registration Plan may, within the period specified in section 11(1)(b)(iii), make an objection in writing to the Director.
- (2) An objection under Subsection (1) shall specify –
 - (a) whether in the case of an objection from an individual, the person is objecting in his person capacity or as a representative of a customary group; and
 - (b) the matters in the Registration Plan which are the subject of objection, and
 - (c) the area or areas within the Registration Area which are the subject of objection, and
 - (d) the grounds upon which the objection is made.

Proposal 5-10. Final Registration Plan

- (1) Subject to Subsection (3), in respect of a Registration Plan -**
 - (a) the period specified in section 11(1)(b)(iii) has expired; and**
 - (b) the Registration Plan has been adjusted, where necessary, by the Surveyor General, the Director shall, as soon as practicable, prepare the Final Registration Plan.**
- (2) In preparing the Final Registration Plan, the Director shall take into consideration –**
 - (a) the Registration Plan prepared under 5-4; and**
 - (b) the Adjusted Registration Plan prepared under 5-8; and**
 - (c) any objection made pursuant to 5-9.**
- (3) Where any objection made under 5-9 conflicts with the Registration Plan or the Adjusted Registration Plan or both, the Director shall hear and determine the matter and shall not proceed with the preparation of the Final Registration Plan until the objection has been settled.**

Land Adjudication and Demarcation

In cases where there is no documentary evidence accompanying an application for land registration and the claim is based on customs, or there are conflicting claims to ownership, or boundaries are disputed, the application may be subject to the processes of “land adjudication” and “boundary demarcation”.

Land adjudication resolves (1) doubts about titles and (2) boundary disputes. In some countries a simple Land Adjudication of Rights and Interests Act is enacted which could be invoked preliminarily to first registration. Suitable precedents already exist in Part III of the *Land Titles Commission Act (ss 17 – 25)*. The arrangement under that Act is for responsibility for both adjudication and boundary demarcation to vest in the Land Titles Commission, consequently, it was thought that the processes for

freehold conversion and customary land registration were being unduly delayed. The National Land Development Task Force after careful discussion opted for a model of self sufficiency by the applicants, the Director's role being one of verification of the Registration plan they submitted.

There is concern that the adjudication exercise must remain a public affair aimed at ensuring all affected persons are aware of the processes and to resolve conflicts, if they exist. The issue widely debated is as to the nature of the functionary responsible for carrying out the adjudication. It is argued that the process is judicial and therefore best performed by persons with legal qualifications. The better view is that "personality and probity" are more important than professional qualifications. Therefore, where there is an absence of documentary evidence of the land rights, it is best that the functionary be drawn from the area where the land is situated. However, to avoid conflict of interests and the infusion of biases in the process, the use of assessor to assist professional functionaries is the best formula where there are customary usages and practices to be determined.

The land disputes settlement mechanism is central to the land reforms, tenure conversion and resolving grievances out of declarations of 'national lands', and can best be left to the study to be undertaken by the Committee on Dispute Resolution.

Land Registration (Administration)

The *Land Registration Act* provides for three component elements for the administration of the land registration system: the appointment of a Registrar of Titles and Deputy Registrars of Titles. (These are functionaries responsible to administer the land registry). (ii) The establishment of a land registry for storing and recording documents, land transactions and duplicate certificate of title; and (iii) physical components, viz the land register, registry map; index of properties, etc. The task of reviewing the system of land administration has been given to the Land Administration Committee.

First Registration of Clan Ownership

An application for registration to the Registrar of Title must include the 'certificate of incorporation', and such "good root of title", establishing title to the land rights of the applicants. These include any certificate of title, the Final Registration Plan, the adjudication record, where land adjudication took place, Crown/State grant under section 133 of the *Land Act*, court order, purchase documents or any instrument that evidences an agreement

to purchase. The Registrar of Titles on receipt of a good root of title enters the title on the register.

Proposal 5-11. *Registration of Ownership*

For completion of registration on behalf of an Incorporated Land Group, the Director shall forward to the Registrar of Titles:

- (a) the instrument of incorporation; and
- (b) the final registration plan; or
- (c) other document or instrument forming a good root of title.

Proposal 5-12 *Issue of Certificate of Title*

(1) Where -

- (a) a customary group has been incorporated under the *Land Groups Incorporation Act* (Chapter 147); and
- (b) the customary group has been registered as the owner of land;

the Registrar shall, upon payment of a prescribed fee, prepare and issue a Certificate of Title in the prescribed form in the name of the group.

(2) In preparing a Certificate of Title under Subsection (1), the Registrar shall prepare a copy of the title for the purposes of registration in the Register.

Proposal 5-13 *Effect of Registration*

(1) An entry in the Register -

- (a) is conclusive evidence of the facts therein stated as at the date of entry; and
- (b) unless endorsed otherwise, shall be deemed to guarantee the area and the boundary of the land to which the entry relates, and
- (c) shall be subject to such rights and interests as are recorded in the register.

(2) Registration of ownership which is inconsistent with -

- (a) a title previously registered under the provisions of this Act, or
- (b) a reservation, easement or other such interest made by the State for public purposes under any law, or
- (c) an estate, right, title or interest granted by the State under any law.

shall be ineffective to the extent of the inconsistency.

Application of Customs Cease

Land, when registered under the *Land Registration Act*, custom ceases to apply and it becomes subject to the statute law. This principle does not, however apply to transmission. The *Land Registration Act* provides for the application of customs on transmission on the death of an interest holder, s. 125. Transmission is the acquisition of title or an interest in or to land, consequently upon the death of the interest holder. This provision is an important safeguard of the customary laws of inheritance to the rights of individual members.

Proposal 5-14 Customs

- 1. Land entered in the Register under this Part and the right of ownership or possession of any such land or any right, title, estate or interest in or in relation to any such land shall cease to be subject to customary law.**
- 2. Subsection (1) has no application to the transmission of a member's rights and customs shall apply.**

6. The Impact of the Proposals on the Law and Practice

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Introduction

This Reference suggests amendments of two existing statutes: *Land Groups Incorporation Act* which provides for the incorporation of ILGs, with the object of ensuring that only existing social units associations are incorporated, their integrity and transparency; and the *Land Registration Act* (LRA), in order to protect group ownership and enable the registered proprietors to grant registrable interests in their land on principles contained in the Act. There are some consequential and related amendments necessary for the more effective functioning of the ILGs

Empowerment

Registration of an ILG under the LRA empowers it to grant leases and other transactions. Section 42 of the LRA, however, should to be amended to exclude the ‘transfer’ of Clan Lands.

Transfers Prohibited

Section 42 of the LRA needs to be amended to insert a subsection prohibiting transfers of clan lands:-

Proposal 6-1 Amend s.42 to add subsection “(7) Transfer of ownership in clan land is prohibited”

Leases

Clan lands may be leased for long or short periods, of a maximum of 99 years, at a rent, and the purpose could be for agriculture, residence, tourism or other productive and sustainable purposes. The purpose of the lease would generally determine its duration. For example, whilst a lease for tourism purposes might justify the longest period, one for agricultural purpose might be for a much shorter period.

The following conditions are implied in leases -

- A right in the lessor to re enter and determine the lease if the lessee is in breach of any covenant or condition, or he sublets without the consent of management committee;
- Not to sublet, charge/mortgage or part with possession without the land lord's consent (for implied terms in leases see LRA Part V1).

Leases may be granted to members of the landholding unit or even to the unit itself at a rent or rent free, and residents may apply in order to use part of the clan land in a manner consistent with traditional rights either on formal or informal arrangements.

Special conditions need to be formulated for mining leases on clan lands in a manner beneficial to its members, and for the use of forest lands and forest produce. Although large scale mining on clan land, involves the agreement of the National and provincial governments as well, agreement with the clan should contain provisions guaranteeing the residents employment, purchase of their produce and reinstatement and protection of their environment.

Some leases fall within the definition of controlled dealings which require ministerial approval (Section 128 of the *Land Act*).

Other Land Transactions

These include licences, sub-leases and mortgages. These are usually from agreements freely entered into and protected by their terms. The mortgage transaction is affected by land policies which are protective of the mortgagor and impact negatively on the mortgagee's remedies. On the one hand there could be incorporated in the mortgage transaction those statutory limitations in ss 26 and 26A of the *Land (Tenure Conversion) Act, 1963*. These provide that on the exercise of the mortgagee's remedies of possession and sale, if the mortgagor defaults, it (the mortgagee) is not permitted to take possession for more than 25 years; or to lease the land to a third party for more than 25 years; or to foreclose the right of the mortgagor

or chargor to redeem the mortgaged or charged land, and, the land could not be taken under a writ or execution. The Minister of Lands is given a discretion to remove the restrictions in appropriate cases. These provisions can form a section in Part IIIA of the LRA: Clan Land Registration.

On the other hand, the courts have an equity jurisdiction to aid the mortgagor in times of need and this might be even against the expressed terms of the agreement. This has been so in protecting the equitable right of redemption and more recently in granting relief, *PNGBC v Aruai et or* [2002] PNGLR 179. This decision is in contrast with the court's reluctance to grant relief, as was the case in *Bank of Papua New Guinea v Muteng Basa* [1992] PNGLR 271; and *Tarere v ANZ Bank Group (PNG) Ltd* [1988] PNGLR 201, but it has a basis in s. 41 of the *Constitution* and in the court's equitable jurisdiction, which is protected by s. 108 of the LRA.

Rationalising Land Tenure System

The CLDC made recommendations to rationalize the system of land ownership. These are with respect to the radical title of land and freeholds.

The Radical Title

The *Land Act* vests the radical title of all land, other than customary land, in the State. There is no radical title to unalienated land but the concept is one of allodial ownership in customary owners. This leaves in doubt the so-called waste and vacant land.

It has been argued on behalf of landowning communities that there is no concept of ownerless land at customary law and what appears to be waste and vacant falls within the territorial domain of one group or the other, with rights in its members to hunt, fish, gather forest products or firewood, etc. This concept is stated to be expressed by a Manus Chief as being that "every land has a mother". However under the *Land Act*, waste and vacant land is defined as "land that appears... not to be customary land" and becomes State land when a declaration is made to that effect. It is arguable that this category of land only becomes State Land on such a declaration, a principle restated in the *Land Act*, s 5(4) and (5). Until then, it is customary land and enjoys the Constitutional protection of s 53 (5)(e) of the *Constitution*, which states:

"Nothing in the preceding provisions of this section prevents any taking of possession or acquisition of ownerless or abandoned property (other than customary land)".

This statement of the law, like *Mabo*, questions the validity of the decision of O’Meally AJ in *Agevu v The Govt. of Papua New Guinea* [1977] PNGLR 99, who held that annexation vested all waste and vacant lands in the Crown/State, and “a declaration of State Land” is only confirmatory of that fact. Moreover the procedure for acquiring customary land is governed by Section 9 of the *Land Act* and differs from that of acquiring waste and vacant land under section 5.

To classify such land into one or the other category would bring symmetry into the structure. The CILM recommended that government should have the power, where “big virgin lands were idle”, to declare parts of it as “national lands”.

Freeholds

This leaves in abeyance freehold titles of citizens, individuals or corporate, or groups, kinships or descent, acquired under the conversion process. With the rejection by the NEC of the recommendation to repeal the *Land Tenure (Conversion) Act*, and the constitutional protection given to freeholders, such lands are alienated land, and the radical title is vested in the State in accordance with the general principle.

Protection of Clan Land.

Clan lands qualify for the same protection as State Lands against unlawful occupation. (see Part XXIV of the *Land Act*). For example squatting on State Lands in the words of Jalina J, in *Kameku v Gamato* [2004] PNGLR, (forthcoming) amounts to “illegal occupation” and cannot be the basis for acquiring a squatter’s title. Such occupation could at best permit an equity under Section 41 of the *Constitution*. Clan lands held under customary law qualifies for the same protection. Registered clan lands do not.

The issue of limitation/prescription continues to evoke controversy. The CILM supported the principle of security to land being dependent to use and from a practical point it resolves, fairly, a great number of difficulties, not least being boundary questions. As soon as the prescriptive period has expired, the physical boundary delimiting on the ground the area actually occupied becomes the de jure as well as the de facto boundary. As Simpson remarked,

“It is unfortunate that the question of prescription should have got tied up with the unpleasant word ‘squatter’ and, worse still, with the idea of ‘land stealing’”

The *Statute of Frauds and Limitations Act*, 1988 sets a limitation period for the recovery of land as being 30 years, “commencing on the date when the right of action accrued.” The period is unduly long and alternatives of 12 or 15 years adverse possession applies elsewhere, though the period against the State is much longer being thirty or sixty years.

Land Groups Incorporation (Amendment) Act 2007

INDEPENDENT STATE OF PAPUA NEW GUINEA.

A BILL

for

AN ACT

entitled

Land Groups Incorporation (Amendment) Act 2007

Being an Act to amend the *Land Groups Incorporation Act*, (Chapter 147) to apply and give effect to the National Goals and Directive Principles of the Constitution as they relate and apply to ownership of lands held under customary tenure and dealings in those lands, and in particular to –

- (a) allow development to take place primarily through the use of Papua New Guinea forms of social and political organization; and
- (b) encourage active steps to be taken to facilitate the organization and legal recognition of groups engaging in development activities; and
- (c) and to ensure the integrity and viability of these associations; and
- (d) provide for their transparent and effective management.

MADE by the National Parliament to come into operation in accordance with a notice published in the National Gazette by the Head of State acting with, and in accordance with, the advice of the Minister.

1. AMENDMENT OF PRINCIPAL ACT.

This Act may be cited as the Land Groups Incorporation (Amendment) Act and amends the Lands Groups Incorporation Act, Chapter 147.

2. COMPLIANCE WITH CONSTITUTIONAL REQUIREMENTS.

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

(a) the 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 movement conferred by Section 52 of the *Constitution*.

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

(2) For the purposes of Section 29 of the *Organic Law on Provincial Government*, it is declared that this law relates to a matter of national interest.

3. INTERPRETATION.

In this Part, unless the contrary intention appears -

"absolute ownership" or "absolute ownership title" means a title which is not dependent upon any higher title but which is subject to and qualified by an interest derived from or dependent on that title;

"Assurance Fund" means the Fund established by Section 35;

"Registrar" means the person appointed as Registrar of Customary Land under Section 5;

"Court" means the National Court;

"customary land" means land that is owned or possessed by virtue of rights of a proprietary or possessory kind and regulated by custom, and includes -

- (a) land below low-water mark and within jurisdiction; and
- (b) land covered with water; and
- (c) rights to rivers and streams;

"customary owners" means a clan, lineage, family, extended family or other group of persons who hold, or are recognised under custom as holding, rights and interests in customary land, and includes a land group incorporated under the *Land Groups Incorporation Act* (Chapter 147);

"dealing" means a disposition of an estate or interest and includes a transfer, lease, surrender, mortgage, charge, discharge, easement and similar interests;

"document" means any writing relating to land whether of a formal nature or otherwise;

"interest" or "interest in land" means -

- (a) a legal or equitable estate or interest in land; or
- (b) a right, power or privilege over, in or in connection with land;

"land" includes an interest in land;

"owner" in relation to land, means a person or group entitled to an absolute ownership of the land;

"Regional Surveyor" means a person appointed by the Department responsible for land matters to be a Regional Surveyor, and, in respect of a province, means the Regional Surveyor for that province;

"register" or "registered", in relation to a matter affecting an estate or interest in land means-

- (a) the entry of the matter in the Register, as the nature of the estate or interest requires; and
- (b) the endorsement of the matter in the instrument of title to the estate or interest;

"registered owner" means an owner of land registered under this Act;

"registered title" means a title registered under this Act;

"Registration Plan" means a Registration Plan prepared under Section 19;

4. APPLICATION

- (1) This Act binds the State.
- (2) All customary land in Papua New Guinea is subject to this Act.

5. AMENDMENT TO SECTION 5

- (a) delete paras (c) and (d) of subsection 2 ;
- (b) insert "and the applicants shall supply-
- (c) a list of all members of the group;
- (d) further certified information required by the application form provided by Schedule No ;
- (e) Evidence of ownership including the boundaries of land to which they claim an entitlement; and
- (f) such further information as the Registrar requires."

[Amend the prescribed application form by incorporating provisions requiring the applicants for incorporating the ILG to provide the certified information listed above including the sketch plan showing boundaries].

5A Insert section 5A after s.5: Internal Disputes

5A. If it appears to the registrar that there are internal disputes either as to the identity of the group's representatives, officers or membership, the registrar shall determine whether to-

- (a) reject the application, or
- (b) incorporate the applicants, subject to a written undertaking by them to either –
 - (i) settle the dispute; or

-
- (ii) institute proceedings for its settlement; or
 - (c) incorporate the applicants.

5B Insert: 5B. Publication of application for incorporation

- (1) The Registrar shall,
 - (a) cause notice of all applications for incorporation made under section 5 to be published in the National Gazette and given to the District Administrator in whose area the group or any of the property claimed on behalf of the group is situated, and to the Village Court within whose jurisdiction members of the group reside; and
 - (b) give further notice of the application and particulars in such manner he thinks most likely to ensure that it is generally known to persons having a knowledge of or an interest in the affairs of group or its members.
 - (c) The Registrar of ILG shall not issue a Certificate of Incorporation unless he receives from the District Administrator a confirmation notice of receipt of the documentation referred to in subs. (1) and compliance with the provisions set out in the document(s).

6. AMEND SECTION 13 BY

Deleting sub section 3.

**7. AFTER SECTION 14 OF THE APRINCIPAL ACT:
INSERT DIVISION 111A: MANAGEMENT OF ILGS.**

8. INSERT SECTION 14A

14A Meeting to elect management committee

1. Members of the land group shall meet at a specified time and place, in the area where the members of the ILG reside to elect not more than ten and not less than three persons to form a management committee in accordance with the constitution;
2. The Management Committee shall include the Chairperson of the association, deputy chairperson, secretary, treasurer and a person elected by the members of the ILG.

9. INSERT SECTION 14B

14B. Powers of Management Committee

“The Management Committee has the power subject to the *Constitution* and the Act to run the affairs of the Incorporated Land Groups”.

10. INSERT SECTION 14C

14C Meetings of the ILGs

- (1) The Registrar may order the Management committee to to discuss such matters he refers to the Committee.
- (2) An annual general meeting of the ILG shall be held every year in the month prescribed for the annual meeting in the *Constitution*.
- (3) If-
 - i. members forming fifty percent of the Group; or
 - ii. the Registrar; or
 - iii. the District Administrator,so request the Chairman (or in his absence the deputy chairperson) shall convene a meeting of the members within 14 days after the request.

-
- (4). A resolution at a meeting of the members supported by the votes of not less than sixty percent of the members at the meeting shall be treated as the decision of the meeting.

11. INSERT SECTION 14D

14D. Changes in membership of management committee

- 1) Where a member of the management committee dies, becomes incapacitated or wishes to retire he may be replaced by resolution of the members (of the ILG.
- (2) A member of the management committee may be removed or replaced by resolution of the members of the ILG.
- (3) On change of membership of the management committee, the Registrar shall –
 - (a) amend the register accordingly;
 - (b) inform the Registrar of Titles where appropriate.

12. INSERT SECTION 14E

14 E Disqualification from office

“No person who has been convicted of a crime involving fraud or dishonesty shall be capable of being appointed or elected to or remain in –

- (a) the office of treasurer, deputy treasurer or assistant treasurer of an ILG; or
- (b) any other office the holder of which is responsible for the collection, disbursement, custody or control of the funds of the ILG or for its account; or
- (c) the membership of the management committee, or
- (d) the position of trustee or auditor of an ILG”.

13. AFTER SECTION 14E OF DIVISION 3A INSERT DIVISION 3B FINANCES

14. INSERT AS SECTION 14F:

14 F Bank accounts.

The Management Committee shall—

- (a) cause such bank accounts as are necessary for the proper conduct of the affairs of the group to be opened and maintained; and
- (b) pay all moneys received by the group in connection with its business activities into those accounts; and
- (c) pay all moneys that the group is required to pay in connection with its business activities out of those accounts.

15. ISERT AS SECTION 14G:

14G Statements of assets and liabilities.

The committee shall—

- (a) cause to be prepared, in a form approved by the Registrar, a statement of the assets and liabilities of the group for each period of 12 months of the operations of the group or for such longer period as the Registrar approves; and
- (b) lodge the statement with the Registrar not more than three months after the end of the period to which the statement relates.

16. INSERT AS SECTION 14H:

14H Financial instructions.

- (1) The Registrar may direct that accounts and records of some or all of the affairs of a land group be kept in such manner as he thinks proper.
- (2) Where the Registrar gives a direction under Subsection (1)
 - (a) the Registrar, the dispute-settlement authority or any member is entitled at all times to inspect the accounts and records; and

- (b) the Registrar may direct that copies of the accounts and records be given to him to be kept in the register of land groups.

17. REPEAL AND REPLACEMENT OF SECTION 29

Section 29 of the principal Act is a repealed and substituted with the following:

s.29. **Wilfull Misconduct**

- (1) Any person who-
 - (a) wilfully makes any false statement or declaration in any application under this Act;
 - (b) wilfully suppresses, withholds or conceals or assist or is privy to suppressing, withholding or concealing from the Registrar any material documents fact or matter of information;
 - (c) wilfully makes any false declaration or statement for purposes of or in relation to any dealing with land under this Act;
 - (d) fraudulently procures, assists in fraudulently procuring or is privy to the fraudulent procuring or is privy to the fraudulent procuring of a certificate of incorporation;
 - (e) knowingly misleads or deceives any person authorized under this Act or regulations to require information or explanation in respect of an application; or
 - (f) occupying a fiduciary relationship misappropriates any funds or property belonging to the ILG,

shall on conviction be liable to a fine of up to two thousand kina and or imprisonment for five years.

18. AMENDMENT AND INSERTION TO SECTION 28

Section 28 of the principal Act is amended by numbering the text as Subsection 1 and inserting as subsection 2:

“Any person may inspect at the office of the registrar the register and any document relating to any group lodged under this Act with the registrar, and may obtain from the registrar a copy of or an extract from such register or the document”

19. INSERT AS SECTION 28A:.**Section 28A Register of members**

“ The management of the ILG shall

- (a) maintain a register of its members in such manner as the Registrar may require, or as may be prescribed, containing the name of each member, and the date he qualified for membership; and
- (b) deliver to the Registrar at his request a current register of members.

20. INSERT AS SECTION 28B:**Section.28B: Documents available for inspection**

“The management of the ILG shall make available for inspection of its members or the Registrar or any person authorized by him in writing, at all reasonable time –

- (a) its books of accounts, and all documents relating thereto; and
- (b) a list of the members.

If Subsection (1) of this Section is contravened, each committee member shall be guilty of an offence”

21. REPEAL AND INSERT SECTION 14(2) (3)AND (4)

Repeal Subsection 2 of Section 14 and replace with-

s. 14 (2)“The *Statute of Frauds and Limitations Act*, 1988 applies to or in relation to-

- (a) an agreement under Section 13(2)(c); or

- (b) an agreement entered into by an incorporated land group affecting its land.”
- (3) A certified copy of all documents purporting to deal with an interest in land of an ILG shall on incorporation be lodged with the Registrar of incorporated land groups and;
- (4) The Registrar shall record each document by a reference number and the date the document is filed and the name and address of the person lodging the document.

Land Registration (Customary Land) (Amendment) Act 2007**INDEPENDENT STATE OF PAPUA NEW GUINEA.****A BILL****for****AN ACT****entitled*****Land Registration (Customary Land) (Amendment) Act 2007***

Being an Act to amend the *Land Registration Act* (Chapter 191) to apply and give effect to the National Goals and Directive Principles of the Constitution as they relate and apply to ownership of lands held under customary tenure and dealings in those lands, and in particular to –

- (a) allow development to take place primarily through the use of ILGs; and
- (b) encourage traditional villages and communities to remain as viable units of Papua New Guinea society, and for active steps to be taken to improve their culture, social, economic and ethical quality; and
- (c) promote and facilitate the registration of land held under customary law.

MADE by the National Parliament to come into operation in accordance with a notice published in the National Gazette by the Head of State acting with, and in accordance with, the advice of the Minister.

PART IIIA. - REGISTRATION OF CUSTOMARY LAND.

1. AMENDMENT OF PRINCIPAL ACT.

The Principal Act is amended by adding this Part to the Principal Act as Part IIIA.

2. COMPLIANCE WITH CONSTITUTIONAL REQUIREMENTS.

(1) This Act, to the extent that it regulates or restricts a right or freedom referred to

in Subdivision III.3.C of the *Constitution*, namely -

(a) the 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 movement conferred by Section 52 of the *Constitution*.

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

(2) For the purposes of Section 29 of the *Organic Law on Provincial Government*, it is declared that this law relates to a matter of national interest.

3. INTERPRETATION.

In this Part, unless the contrary intention appears -

"absolute ownership" means a title which is not dependent upon any higher title but which may be subject to and qualified by an interest derived from or dependent on that title;

"Adjusted Registration Plan" means an Adjusted Registration Plan prepared under Section 13;

"Court" means the Land Court;

"customary land" means land that is owned or possessed by virtue of rights of a or possessory kind and regulated by custom;

"customary owners" means a clan, lineage, family, extended family or other group of persons who hold, or are recognised under custom as holding, rights and interests in customary land, and includes a land group incorporated under the ***Land Groups Incorporation Act*** (Chapter 147);

"dealing" means a disposition of a derivative interest in land and includes a lease, surrender, mortgage, charge, discharge, easement and similar interests;

"Deputy Registrar" means a Deputy Registrar of Customary Land appointed under Section 5;

"document" means any writing relating to land whether of a formal nature or otherwise;

"Final Registration Plan" means a Final Registration Plan prepared under Section 15;

"good root of title" means a document or other source from which title to the interest claimed is traced

"interest" or "interest in land" means -

- (a) a legal or equitable interest in land; or
- (b) a right, power or privilege over, in or in connection with land;

"land" means the soil and everything above and below the soil and includes

- (a) land below low-water mark and within jurisdiction; and
- (b) land covered with water; and
- (c) rights to rivers and streams;

"Register" means the Register of Clan Land established under Section 5;

"owner" in relation to land, means a person or group entitled to an absolute ownership of the land;

"Regional Surveyor" means a person appointed by the Department responsible for land matters to be a Regional Surveyor, and, in respect of a province, means the Regional Surveyor for that province;

"register" or "registered", in relation to a matter affecting an interest in land means-

- (a) the entry of the matter in the Register, and
- (b) the endorsement of the matter in the instrument of title of the interest;

"Registrar" means the person appointed as Registrar of Customary Land Registration and tenure conversion under Section 5;

"Registrar of Titles" means the person appointed Registrar of Titles under the principal Act;

"Registration Plan" means a Registration Plan prepared under Section 19;

4. APPLICATION

- (1) This Act binds the State.
- (2) All customary land in Papua New Guinea is subject to this Act.

5. APPOINTMENT OF DIRECTOR OF CUSTOMARY LAND REGISTRATION

The Minister may, by notice in the National Gazette appoint a Director of Customary Land Registration and such Deputy Directors as necessary.

6. POWERS AND FUNCTIONS OF THE DIRECTOR OF CUSTOMARY LAND REGISTRATION.

- (1) The Registrar shall -
- (a) be responsible for dealing with applications for customary land registration.
- (2) In addition to any other powers given to him under this Act, the Director may -
- (a) require any person to produce any document in his possession or control relating to any land or dealing in land; and
 - (b) summon any person to appear before him to give information or explanation relating to any land or dealing in land; and
 - (c) refuse to approve an application for registration of any land or dealing in land where a document required under Paragraph (a) is not produced or an information or explanation required under Paragraph (b) is not given to his satisfaction or if any other act, matter or thing required by or under this Act to be done is not done; and
 - (d) administer an oath or affirmation or take a statutory declaration and require that any proceeding, instrument, information or explanation relating to or affecting land or any dealing in land be verified on oath or affirmation or by statutory declaration; and
 - (e) by himself or his agent enter upon any land for purposes in connection with this Act; and
 - (f) order that any costs, charges or expenses incurred by him or by any person in or in connection with any investigation or hearing held by him for the purposes of this Act be borne by any such person and in such proportion as he thinks fit.
- (3) A person who -
- (a) refuses or neglects to produce any document in his possession or control; or
 - (b) refuses or neglects to appear and give information or explanation; or
 - (c) knowingly misleads or deceives the Director; or
 - (d) knowingly makes a false oath, affirmation or declaration; or

- (e) willfully obstructs or prevents the Director or his agent from entering upon any land; or
 - (f) willfully refuses or neglects to pay any costs, charges or expenses as ordered by the Registrar,
- is guilty of an offence.

7. DUTIES, ETC., OF DEPUTY DIRECTOR.

- (1) A Deputy Director has the duties, powers and functions as assigned to him by the Director.
- (2) A duty, power or function carried out by a Deputy Director has the same force or effect as if it were or had been carried out by the Director.

8. APPLICATION FOR REGISTRATION

- (1) Subject to this Act representatives of the ILG may apply to the Director in the prescribed form for registration of ownership of customary land or an interest in customary land.
- (2) The application for registration shall include a registration plan:
 - (a) describing the land or parcels of land owned absolutely under customary tenure by the customary group including, its boundaries, and
 - (b) containing the names of such individuals or customary groups which established derivative interests in the land, including the boundaries of the parcels of such land and the nature of the interest.
- (3) The Registration Plan shall be in such form and shall contain such particulars as are prescribed.

9. VERIFICATION

- (1) Where an application has been made for the registration of customary land the Director shall as soon as practicable commence verification of the registration plan.
- (2) For the purposes of Subsection (1), the Director shall -
 - (a) conduct such investigations as are necessary to verify the membership of customary groups; and

- (b) make such inspections of the land, together with appointed representatives of such customary groups as are necessary to verify the identity and the boundaries of parcels of land claimed by such customary land group as stated in the registration plan.

10. VERIFICATION OF REGISTRATION PLAN.

- (1) Upon the completion of his investigation, the Director shall, as soon as practicable, prepare a Registration Plan showing -
 - (a) the land or parcels of land owned absolutely under customary tenure by the customary group including, the boundaries; and
 - (b) the names of such individuals or customary groups which established derivative interests in the land, including the boundaries of the parcels of such land and the nature of the interest.
- (2) For the purposes of Subsection (1)(a), the Director shall concern himself only with the area of the land determined as being in the ownership of the Clan.

11. PUBLICATION OF REGISTRATION PLAN.

- (1) On the acceptance of a Registration Plan, the Director shall, as soon as practicable-
 - (a) forward a copy of the Plan to the Regional Surveyor; and
 - (b) give notice to the public indicating -
 - (i) where the Registration Plan may be examined; and
 - (ii) the procedure for making an objection to the contents of the Registration Plan ; and
 - (iii) the period of not more than 90 days within which an objection can be made.
- (2) The Director shall cause a notice made under Subsection (1) (b) to be advertised in such a manner he considers appropriate to bring it to the attention of all persons who may have an interest in the land or parcels of land the subject of the Registration Plan.

12. ADJUSTED REGISTRATION PLAN.

On the receipt of a copy of the Registration Plan the Regional Surveyor shall, where necessary, prepare an Adjusted Registration Plan showing such adjustments as are necessary to indicate -

- (a) the situation of the land or parcels of land; and
- (b) any reservation, easement or other such interest acquired for public purposes by the State under any law; and
- (c) any, right, title or interest granted by the State under any law and shall return the Adjusted Registered Plan to the Director as soon as practicable.

13. OBJECTIONS TO REGISTRATION PLAN.

- (1) A person who objects to the contents of a Registration Plan may, within the period specified in the notice, make an objection in writing to the Director.
- (2) An objection under Subsection (1) shall specify -
 - (a) whether, in the case of an objection from an individual, the person is objecting in his personal capacity or as a representative of a customary group; and
 - (b) the matters in the Registration Plan which are the subject of objection; and
 - (c) the area or areas within the Registration Area which are the subject of objection; and
 - (d) the grounds upon which the objection is made.

14. FINAL REGISTRATION PLAN.

- (1) Subject to Subsection (3), where, in respect of a Registration Plan -
 - (a) the period specified in 11, 1 (b)(iii) has expired; and
 - (b) the Registered Plan has been adjusted, where necessary, by the Regional Surveyor, the Director shall, as soon as practicable, prepare the Final Registration Plan.
- (2) In preparing the Final Registration Plan, the Director shall take into consideration-
 - (a) the Registration Plan prepared under section 8 and
 - (b) the Adjusted Registered Plan prepared under 12; and

- (c) any objection made pursuant to 13.
- (3) Where any objection made under 13 conflicts with the Registration Plan or the Adjusted Registration Plan or both, the Director shall hear and determine the matter and shall not proceed with the preparation of the Final Registration Plan until the objection has been settled.

15. REGISTRATION OF CLAN LAND

The application for registration on behalf of the ILG shall-

- (a) be in the prescribed form ;
- (b) be accompanied by a copy of the instrument of incorporation; and
- (c) be accompanied by
 - (i) registration plan
 - (ii) such order of the court, document or instrument forming a good root of title.

16. ISSUE OF CERTIFICATE OF TITLE

- (1) Where -
 - the customary group has been registered as the owner of land;
 - the Registrar of Titles shall, upon payment of a prescribed fee, prepare and issue a Certificate of Title in the prescribed form in the name of the group.
- (2) In preparing a Certificate of Title under Subsection (1), the Registrar of Titles shall prepare a copy of the title for the purposes of registration in the Register.

17. EFFECT OF REGISTRATION.

- (1) An entry in the Register -
 - (a) is conclusive evidence of the facts therein stated as at the date of entry; and
 - (b) unless endorsed otherwise, shall be deemed to guarantee the area and the boundary of the land to which the entry relates; and
 - (c) shall be subject to such rights and interests as are recorded in the register.
- (2) Registration of ownership which is inconsistent with -
 - (a) a title previously registered under the provisions of this Act; or
 - (b) a reservation, easement or other such interest made by the State for public purposes under any law; or
 - (c) an estate, right, title or interest granted by the State under any law, shall be ineffective to the extent of the inconsistency.

18. CUSTOMS

- (1) Land entered in the Register under this Part and the right to ownership or possession of any such land or any right, title, or interest in or in relation to any such land shall cease to be subject to customary law.
- (2) Subsection (1) above has no application to the transmission of a member's rights and customs shall apply

19. LAND TRANSACTIONS

- (1) An ILG registered as owner of clan land has power to grant derivative rights and interests in the land or portions to itself, any land group, unincorporated or incorporated, an individual or any entity on payment of a rent or rent free in such manner as provided in Part VI of the Principal Act;

- (2) Land transactions, unless provided to the contrary, are deemed to be on such terms and conditions provided for in Parts VI, VII and IX of the Principal Act;
- (3) The transfer of allodial title in clan land is prohibited .

20. CONTROLLING LAND TRANSACTIONS

- (1) Part XVII of the *Land Act*, Approval of Dealings, apply to dealings in land registered under this Part, except to transactions between the ILG and its members, corporate or unincorporate.
- (2) The grant of a mortgage or charge of land is regulated by terms and conditions contained in section 23.

21. REGULATION OF DEALINGS.

In respect of land registered under this Act—

- (a) the Registrar of Titles shall register against the proprietorship a limitation that—
 - (i) the land may be leased for a longer period than 25 years only with the consent of the Land Board; and
 - (ii) the land may be mortgaged or charged but, notwithstanding any law in force to the contrary, the mortgagee or charges is not entitled—
 - (a) to remain in possession for more than 25 years; or
 - (b) to lease that land to a third party for more than 25 years; or
 - (c) to foreclose the right of the mortgagor or chargor to redeem the mortgaged or charged land; and
 - (iii) the land shall not be taken under a writ of execution or under or in consequence of a bankruptcy or insolvency, or in any similar or analogous manner; and
- (b) subject to Section 22, the Minister shall not approve under Part VIII of the *Land Act* (Chapter 185) and the Registrar of Titles shall not register, a transfer or dealing contrary to a limitation registered under Paragraph (b).

22 REMOVAL OF RESTRICTIONS UPON DEALINGS.

Where—

-
- (a) the registered proprietor of land, the subject of a limitation under Section 23 (b), desires to deal with that land in a manner contrary to that limitation or in a manner or with an intent rendered wholly or partially ineffective by reason of that limitation; and
 - (b) the Minister is satisfied after due inquiry that the proposed dealing will not adversely affect the interests of the registered proprietor (and where the interests of a business group, land group, customary kinship group, customary descent group or customary local group or community are, or are likely to be, affected, the interests of that group or community),

the Minister may direct the Registrar of Titles to cancel the registration of the limitation and the Registrar shall act accordingly.

25. UNLAWFUL OCCUPATION OF CLAN LAND

Sections 144, 145, 146 and 147 of the *Land Act* apply for the protection of clan land.

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