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**THE GENESIS OF THE PAPUA NEW GUINEA LAND REFORM PROGRAM
Selected Papers from the 2005 National Land Summit**

**Edited
by
Charles Yala**

**NRI
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I dedicate this book to my late wife, Josephine Ambai Yala. She was diagnosed with breast cancer in 2005, the same year the National Land Summit was held. We relocated to Canberra in 2006 to seek medical treatment that was not available in Papua New Guinea. With the support of many friends and family in Canberra, we managed to prolong her life, until she succumbed to the illness on 14 March 2008. Before and during her illness, Josephine encouraged me to give my best to the land reform program. She believed that a land reform initiative that delivered broad-based growth and development was good for our people.

This book was collated while living as a single father of two young children — Manny (now 10) and Tata (now 7) — in Canberra, away from relatives and friends. Without the support of Hillas and Rhoda Maclaen and Brad, Sharee, and Aliya Nagle, this book would not have been possible.

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Charles Yala

FOREWORD

Hon. Sir Puka Temu, MP

Having worked first as a medical doctor and later as a public servant I have seen at first hand the plight of my fellow Papua New Guineans. Their access to basic services, health, and education is very limited. Papua New Guinea is rich in land and natural resources, and yet its people are poor. With the determination to make a difference to the welfare of my fellow Papua New Guineans, I entered politics in 2002.

The need to reform the institutions that define, enforce, and administer property rights over land — with a view to converting Papua New Guinea's vast land resources into assets — became clear to me when I served as the Minister for Lands and Physical Planning in 2005. Undertaking these reforms appealed to me as the basis for sustainably transforming the welfare of Papua New Guineans living in the urban, peri-urban, and rural sectors.

The customary land tenure system, which administers over 97 percent of the total land in Papua New Guinea, was sufficient for supporting us in so-called subsistence affluence. But such livelihoods condemned Papua New Guineans to living in a twenty-first-century museum. My vision was for every Papua New Guinean to enjoy the living standards taken for granted in the developed economies. My starting point was to empower Papua New Guineans to use what God has given them — land — to carve out a future of sustained improvements in welfare across the generations.

The launch of the government's Medium Term Development Strategy 2005–2010, which set out to grow the economy by 5 percent per annum, complemented my own plan to introduce land reforms aimed at mobilising land for development. It was clear that undertaking land reform would help achieve the 5 percent growth target and deliver broad-based economic growth and development capable of releasing people from the shackles of subsistence affluence, poverty, and destitution.

Unfortunately, the lessons of earlier failed land reforms — especially the 2002 anti-land-reform protests that resulted in the deaths of four people, three of whom were students from the University of Papua New Guinea, and the subsequent decimation of the incumbent Morauta government during the 2002 national election — sounded a solid warning to the government to strategise well how the land reform agenda would be conceived, formulated, and implemented. Discussions with a wide range of stakeholders, including the Prime Minister, colleague ministers, and other politicians, as well as my own departmental secretary and staff and policy analysts in Papua New Guinea and abroad, highlighted the fact that land reform would only succeed if it were initiated and controlled by Papua New Guineans.

Having considered all the options, the government made a deliberate decision to invest in a Papua New Guinea-controlled process. The government then communicated to the wider stakeholder community, through the Minister for Lands and Physical Planning, its intention to undertake a land reform initiative that was truly home-grown. To begin the process, the government announced plans for a National Land Summit to analyse the problems and issues associated with landownership and land use, explore options and strategies for addressing these issues, and conceive the form the initiative should take. The government stated that it would pursue land reform only if the people, through the Summit participants, gave it a mandate to do so.

The National Research Institute, a statutory authority of the PNG Government, was entrusted with the responsibility to lead a team of strategic partners to coordinate the Land Summit. The rest is, as they say, history! The Summit was well organised, and land reform has been broadly accepted within Papua New Guinea. For this, I pay tribute to Dr. Thomas Webster, the Director of the National Research Institute, who chaired the Land Summit Coordinating Committee, the National Land Development Taskforce (2006), and the National Land Development Advisory Group (from 2007 onwards), for demonstrating quality leadership throughout. The Papua New Guinean experts who worked tirelessly with Dr. Webster at every stage of the land reform process are also duly recognised. Finally, this is an area in which the Australian Agency for International Development can be recognised for providing unconditional support. Providing a research support grant to the National Research Institute, without technical assistance, has helped the Institute to demonstrate institutional leadership, using local experts, in undertaking an important and sensitive reform.

Implementation will have its own challenges. In my lifetime as a medical doctor, public servant, and politician, I have witnessed many well-intended initiatives falter at implementation. We have collectively started a journey that we must complete. An open invitation is extended to political leaders, public servants, landowners, investors (both national and foreign), and development partners to implement this land reform program, with a view to delivering the children of Papua New Guinea the quality of life taken for granted in developed countries. Collectively, we can make a difference!

PREFACE

Dr. Thomas Webster

The passing by the Papua New Guinea National Parliament on 19 March 2009 of two laws aimed at mobilising land held under customary tenure for development was a major achievement in a process that started with the hosting of the National Land Summit in Lae in August 2005. This landmark achievement is set to place the country on a new path to sustained economic growth and development.

This book provides the genesis of the ideas and experiences that formed the basis of the Papua New Guinea National Land Development Program. That program is the culmination of five years of hard work and commitment by a group of Papua New Guineans who wish to see the country develop and prosper. This tireless group of people was led by the Minister for Lands and Physical Planning at the political level, and by myself at the technical level as the chairman of the Summit Coordinating Committee in 2005, the National Land Development Taskforce in 2006, and the National Land Development Advisory Group since 2007.

Upon receiving the invitation from the government of Papua New Guinea through the Minister for Lands and Physical Planning to lead in organising the Land Summit, it became obvious that to implement land reform required teamwork. The institutions and individuals that volunteered to commit their time and effort without a fee, starting with the land summit coordinating team, the National Land Development Taskforce, and now the National Land Development Program, are Papua New Guineans wanting to see the country and its people liberated from the shackles of underdevelopment and poverty.

This land reform program was conceived, formulated, and implemented by Papua New Guineans. The core team of experts and contributors represent a growing cadre of young, educated Papua New Guineans, formulating policies with a clear understanding of their social, cultural, and political circumstances and motivated by their collective desire to see the country prosper.

The dismal land policy that held sway in Papua New Guinea's first thirty-four years of independence will soon be history. The adoption by the National Parliament of two major laws aimed at mobilising land held under customary title for development, and progress towards the implementation of the land program, are major milestones. However, major challenges remain in terms of implementation.

Not only did the land reform initiative succeed, but the process used in conceiving, formulating, and implementing it provides a useful guide for those undertaking difficult and sensitive reforms in Papua New Guinea and elsewhere in the developing world.

The children of Papua New Guinea deserve a better future than what their forebears have experienced. The new land reform policy sets the foundation for this better future. However, the ideas underpinning the new land policy will be deemed good if and only if they are responsibly implemented. The challenge now falls to the implementers to responsibly carry out the land reform program for the greater good of the country.

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¹ This list outlines the various positions held by contributors at the time of writing.

CHAPTER 1: OVERVIEW

Charles Yala

1. Introduction

The majority of the chapters in this book began as papers presented at Papua New Guinea's first National Land Summit, held at the Papua New Guinea University of Technology in Lae, Morobe Province, from 20–23 August 2005. The summit took the theme Land, Economic Growth, and Development, and was aimed at generating strategic options for a new land policy for Papua New Guinea.

The government, having launched the Medium Term Development Strategy 2005–2010, initiated the program aimed at reforming the system of property rights governing land in Papua New Guinea. A successful land reform program that delivered security of tenure for both landowners and land users was deemed necessary for sustained, broad-based economic growth and development.

In conceiving the idea to undertake land reform in Papua New Guinea, the government was mindful of the following:

- Land reform remains a difficult policy initiative in many parts of the developing world.
- Past land reform initiatives had failed in Papua New Guinea.
- Opposition to land reform had resulted in death and destruction of property.
- Customary land tenure continued to support more than 85 percent of Papua New Guinea's rural population.

These considerations led to the government investing in a process in which Papua New Guinean institutions and experts maintained complete control of the land reform process, from conception to formulation to implementation. The summit was to be the sounding board for the launch of the national land reform agenda. Presentations at the summit included both conceptual and practical papers.

This introductory chapter aims to collate the key motivations, present the main points of each chapter, highlight the achievements made to date, and draw attention to the challenges that lie ahead.

The remainder of this chapter is organised as follows. Section 2 describes the land reform process. An overview of each chapter is provided in section 3. The main achievements since the summit are discussed in section 4, followed by a discussion of the key elements that underpinned progress in section 5. Section 6 highlights the challenges that lie ahead.

2. The land reform process

The Papua New Guinea government, through the political leadership of the Minister for Lands and Physical Planning, Dr. Puka Temu, entrusted Papua New Guinean institutions and experts to lead the land reform initiative. The government invited its own National Research Institute to lead a team comprised of:

2 *The Genesis of the Papua New Guinea Land Reform Program*

- three line departments (Lands and Physical Planning, National Planning and Implementation, and Justice and Attorney General);
- two universities (University of Papua New Guinea and University of Technology); and
- two research institutes (National Research Institute and Institute of National Affairs).

These organisations formed the committee that coordinated the summit. In implementing the government's decision to allow Papua New Guinean ownership of the reform agenda, the committee resolved to maintain Papua New Guinean dominance in the presentations at the summit.

Sixty-eight recommendations were made at the conclusion of the summit in three broad thematic areas:²

1. improving the system of land administration;
2. improving the system of land dispute settlement; and
3. mobilising land held under customary tenure for development

The overarching theme was the need to ensure that all land with formal titles, either on land owned by customary land owning social units or by the State was secure enough to be utilised as collateral for loans from the mainstream financial sector.

In 2006, the government established the National Land Development Taskforce (NLDT) to formulate the national land policy framework. The core team that coordinated the land summit was retained as the core of the NLDT. Expert committees representing the three thematic areas were also formed to undertake detailed analysis and provide options for each component.

The NLDT completed its report in October 2006 and presented it to the government (National Land Development Taskforce 2007). The government adopted the report and proceeded to have it implemented under the National Land Development Program, launched by Prime Minister Sir Michael Somare in February 2007.

3. Overview of individual chapters

The abstracts of all the papers presented at the summit were documented in a report released in 2005 by the National Land Summit Coordinating Committee. Except for chapters 5, 6, and 9, all the papers in this book were presented at the summit.³

Drawing from the summit program, the chapters are organised into five themes: (1) property rights systems and their impact on national development, (2) Papua New Guinea's system of land administration, (3) legal frameworks for developing land under customary tenure, (4) development on land held under customary tenure, with a focus on resource extraction projects and land in urban settings, and (5) the difficulties that land reform initiatives have faced and are facing in Papua New Guinea and Australia and throughout the Pacific.

² See National Land Summit Coordinating Committee (2005) for the full list of recommendations.

³ Chapter 5 was prepared for the summit but was not presented because the author was unable to attend. Chapters 6 and 9 were prepared after the summit; chapter 9 is the product of a research project contracted by the National Research Institute. Presentations on land dispute settlement (covered in chapter 6) and the Ahi program (covered in chapter 9) were made at the summit by different authors.

Theme 1: Property rights systems and their impact on national development

The next two chapters provide a conceptual analysis of the property rights system in Papua New Guinea and its impact on national development. The gist of the discussions in chapter 2 is that increased security of land tenure is fundamental to raising agricultural productivity in order to feed a growing population. Maintaining the status quo will inevitably result in higher levels of poverty.

Chapter 3 demonstrates that customary land tenure is undergoing permanent and irreversible changes. The social and economic implications of these changes are significant. The state has a role to play, in particular, in establishing institutions that efficiently define and enforce security of property rights on land held under customary tenure.

These two chapters together argue that land reform in Papua New Guinea is inevitable. It is crucial for arresting the rapid decline in the standard of living and rapidly expanding incidence of poverty, violence, and social disintegration. The consequences of inaction are dire for Papua New Guinea. The state thus has the legal and moral responsibility to initiate reforms that will arrest these trends and put the country on a path of sustained economic growth and development.

Theme 2: The system of land administration

The second theme covers the system of land administration. Chapter 4 reviews the formal land administration system. The lead government agency responsible for the administration of all lands with formal tenure is the Department of Lands and Physical Planning. Less than 5 percent of the total land area in the country falls within this category. Initiatives undertaken by the department to bring more land currently under customary tenure into the formal tenure system are also discussed.

Summit participants gave a strong warning to the department that the land administration system is corrupt, inefficient, and dysfunctional and needs an urgent overhaul. More importantly, an improved land administration system was presented as a precondition for undertaking customary land tenure reform.

Chapter 5 reviews the system of physical planning. This aspect of land administration has been long overlooked in Papua New Guinea. As the discussions reveal, the system remains dysfunctional. It is inconceivable to have orderly development of towns and cities and a viable land and properties market with the current poor state of physical planning.

Discussions in these two chapters highlight the poor state of land administration in Papua New Guinea. An efficient system of land administration is fundamental to the development of a viable land and properties market. It is also important to creating support for formalising land currently held under customary tenure. Thus it emerged as a key component of the land reform agenda in Papua New Guinea.

Theme 3: Legal and administrative systems for developing land under customary tenure

About 95 percent of the land in Papua New Guinea is held under customary tenure. As discussed later in chapter 11, many unsuccessful attempts have been made to reform

customary land tenure. Chapters 6 and 7 analyse the existing legal and administrative systems that facilitate the development of land held under customary tenure.

There are two legal frameworks, the *Land Tenure Conversion Act* 1963 and the lease-leaseback provisions of the *Land Act* 1996. The land tenure conversion process permanently terminates customary land tenure and provides freehold title. The lease-leaseback system suspends customary land tenure for the duration of the lease period. Supporting these two legal frameworks are three vehicles for developing land held under customary tenure: the *Incorporated Land Groups Act* 1974, the *Land Disputes Settlements Act* 1974, and the *Business Groups Incorporations Act* 1974. Chapter 6 focuses on the application of the land disputes settlements system and chapter 7 on the incorporated land groups.

The *Land Dispute Settlements Act* 1974 provides the legal framework for identifying ownership claimants of portions of land under customary tenure, as defined by customary land law. This law provides the mechanism for identifying claimants who wish to convert their land to formal land titles, either under the land tenure conversion system or the lease-leaseback system. An analysis of the legal framework and its application demonstrates that the existing system is inefficient and dysfunctional and that there is a need for an improved system of land dispute settlement as an important component of the land reform program.

The *Incorporated Land Groups Act* 1974 provides a framework for formally incorporating social units, be they family, clan, or tribal groups that claim rights to a portion of land under customary tenure by customary law. This institution recognises that land under customary tenure is owned through social network systems wherein individual rights are defined by membership or association. The analysis in chapter 7 depicts an inefficient and dysfunctional system that promotes the incorporation of bogus groups. The data presented suggest that rent-seeking is driving the rapid growth in the incorporation of land groups.

The two systems were expected to function as complements with improved land dispute settlements leading to the proper identification of social units for incorporation. However, the empirical evidence provided shows up the inefficiencies in both the land dispute settlement and land group incorporation processes. The arguments for overhauling both these systems are compelling.

Theme 4: Development on land held under customary tenure

Discussions in this section focus on development within both rural and urban settings. Chapter 8 explores the use of the land disputes process and the incorporated land groups system in facilitating the development of major resource projects. Chapter 9 deals with the application of the existing legal and administrative framework to accommodate the development of urban townships.

Chapter 8 provides a detailed description of the application of the incorporated land groups and the land dispute settlements processes. Its examples are drawn from the petroleum sector but apply equally to the mining and gas sectors.

The data presented depict the inherent inefficiencies in these processes. More importantly, the existing framework promotes social disintegration and rent-seeking. Customary landowners are falling victim to an inefficient system. Developers engaged in the extractive resources

sector have the necessary scale to administer complex landowner disputes. In contrast, the high transaction costs inhibit development initiatives that lack economies of scale.

As discussed in chapter 9, the need to expand existing cities and towns is growing. However, land with secure tenure capable of accommodating residential, commercial, industrial, and other urban amenities, which are largely of a long-term nature, is limited. It is inevitable that land will need to be accessed from the customary land-owning social units to accommodate urban expansion. Chapter 9 discusses such an experiment in the second biggest city in Papua New Guinea, Lae.

In this experiment, the absence of a secure system has prompted the Morobe provincial government, the private sector in Lae, and the customary landowners to explore ways of accessing land to accommodate the expansion of Lae city. The *Incorporated Land Groups Act 1974* and the *Business Groups Incorporation Act 1974* were used to mobilise customary landowners. The Ahi Land Mobilisation Policy was established as a vehicle to mobilise all the stakeholders. The analysis demonstrates that the existing legal and administrative frameworks are not useful for developing townships in Papua New Guinea. It highlights the need to design efficient frameworks for accommodating urban growth on land held under customary tenure.

These two chapters demonstrate that the existing institutions for facilitating development on land currently held under customary tenure are inefficient and dysfunctional. They point to the need to develop new and better institutions.

Theme 5: Difficulties facing indigenous land reform

The last two chapters warn that reforming customary land tenure systems is fraught with difficulties. This has been the case in Australia, as well as in the Pacific Islands and Papua New Guinea.

Chapter 10 investigates indigenous land tenure issues in Australia. The customary land tenure reform debate in Australia has significant implications for Papua New Guinea given the level of influence Australia has in Papua New Guinea through development aid, academic interest, and the general level of political and economic interest that Australia and its people have in Papua New Guinea. The important lesson from the Australian experience is that even given all its human, financial, and political capacity, Australia is struggling to find a lasting solution to the plight of its indigenous people and their land.

We learn from chapter 11 that the Pacific Islands region is littered with failed attempts to reform customary land tenure. The discussion in this chapter joins earlier findings by Larmour (2002, 2003) that policies targeted at reforming customary land tenure have failed in Papua New Guinea and other Melanesian states. The chapter sounds a strong warning to land reform advocates on the type, scale, and scope of reforms of customary land tenure.

Internationally, there is no best-fit model for dealing with customary land tenure reform and no single policy prescription (Fitzpatrick 2005). Rather, every country should chart its own course, taking into account its social, economic, and political stage of development. The aim of achieving security of tenure (Deininger 2003) should, however, remain as the guiding principle.

The papers summarised provide clear direction for a new national land development program for Papua New Guinea. The four key thematic issues from the summit proceedings are:

1. Reform the system of land administration.
2. Reform the system of land dispute settlement.
3. Design a new framework for mobilising land held under customary land tenure for development.
4. Invest in a Papua New Guinean-owned land policy development framework that draws from international and domestic experiences and carves out a Papua New Guinean response.

Above all, the reform program should lead to security of tenure for all land because security of tenure is the basis for improving the productivity of land.

4. Achievements since the summit

Unlike previous attempts, the land reform initiative that began in 2005 has achieved much. The government established the NLDT in November 2005 to implement the summit recommendations. The core membership of the NLDT comprised the institutions and individuals that formed the National Land Summit Coordinating Committee.

The NLDT had three expert committees, one for each of the thematic areas that emerged from the summit — improving land administration, improving land dispute settlement, and designing a framework for developing customary land — which were made up of Papua New Guinea-based institutions and experts. The committees met frequently, and the NLDT had monthly meetings at which the chairperson of each committee provided updates. The NLDT, in turn, prepared monthly briefs for the Minister for Lands and Physical Planning.

By August 2006, the three committees had firmed up their findings, including the formulation of policy options. At a joint meeting of the NLDT and the three committees in September 2006 collective agreement on the broad policy options from each committee was confirmed. The taskforce then took the following steps to begin a public consultation process:

- publicising the major policy initiatives in the media;
- making presentations to key stakeholders;
- organising regional public forums targeted at the diverse range of stakeholders;
- making presentations to key government ministers and ministerial committees; and
- preparing a policy brief for the cabinet's information to gain its endorsement of the broader policy initiatives.

The taskforce reconvened in October 2006 to update the recommendations, using the feedback gathered from the public consultations. A report containing its major recommendations was submitted to the government that month. The government adopted the findings of the NLDT in November 2006, and the Prime Minister, Sir Michael Somare, launched the National Land Development Program in February 2007 to begin implementing Papua New Guinea's home-grown national land reform program.

The taskforce report identified the policy options for a national land reform program. It estimated the costs at a minimum of K100 million over at least twenty years to fully implement the package for maximum impact.

Much of 2007 was devoted to formulating a concept design document, which identified the activities for the first five years, provided cost estimates for each activity, and identified the key stakeholders and implementing agencies.

The government adopted the concept design document in May 2008. The cost estimate for the first five years is K82 million. The funding and implementation of the National Land Development Program is to be secured in the government's National Development Budget. This will pave the way for implementing the first five-year phase of the land program.

Additional notable achievements include the following:

- On 19 March 2009, the Papua New Guinea National Parliament passed two landmark laws — *Land Groups Incorporation Act 2009* and *Land Registration Act 2009* — aimed at mobilising land held under customary tenure for development (Constitutional and Law Reform Commission 2009).
- The Magisterial Services has made progress towards establishing a land court system.
- The Office of Urbanisation has identified land in various parts of the country to pilot the new framework for mobilising customary land. It has also undertaken initiatives to review the laws on urban and town planning.
- The management committee headed by the Secretary for Lands and Physical Planning has begun meeting to coordinate the implementation of the land program.

5. Factors underpinning progress

The Papua New Guinea land reform policy process provides useful lessons for undertaking sensitive reforms. This section highlights a few of the key factors that helped in achieving this agenda.

First, policy formulation took place in a systematically structured process. This process included conception (by the National Land Summit in 2005), formulation (of the core principles and strategies by the NLDT in 2006), and implementation (with the 2007 launch of the National Land Development Program).

The implementation stage has its own process, with the concept design document establishing a framework, the land program incorporated into the National Development Budget, and implementation by the various stakeholders and agencies.

A second key factor has been national ownership. Consistency in leadership, commitment, and passion at the political, bureaucratic, and technical levels has been a critical element. Political commitment and leadership were provided by Hon. Dr. Puka Temu, who has been the Minister for Lands and Physical Planning since 2005.

Technocratic leadership was provided by a cadre of academics, civil servants, and land practitioners. The core that formed the Land Summit Coordinating Committee Taskforce and the expert committees provided the technical input into the design and implementation of the land reform program. The leadership of the technical team by the Director of the National Research Institute, Dr. Thomas Webster, was crucial throughout. Dr. Webster also chaired the Land Summit Coordinating Committee (2005), the NLDT (2006), and the Advisory Group (from 2007 onwards).

The land program as a whole has lacked bureaucratic leadership. This was evident when the Secretary for National Planning and Implementation refused to chair the Management Committee. However, bureaucratic leadership within the various components of the program was consistent. The Secretary of the Constitutional and Law Reform Commission began the process of reviewing and formulating the laws for developing land under customary tenure in 2007 and saw them passed by Parliament in March 2009. The Magisterial Services began reviewing laws and formulating the establishment of the Land Court in 2007. The Office of Urbanisation began identifying land held under customary tenure that may be used to accommodate urban expansion. It also reviewed the town and physical planning laws and administrative processes.

Thus, many individuals have worked hard to champion land reform, which is a difficult issue in many developing countries, including Papua New Guinea. The commitment and passion of the Minister for Lands and Physical Planning and the team of technocrats led by the Director of the National Research Institute played a crucial role in keeping the reform agenda alive, even under difficult circumstances.

Third is the role of international donors in supporting sensitive reforms. The Australian Agency for International Development (AusAID) provided financial support to the Papua New Guinea land reform program. AusAID funded the National Land Summit in 2005, the NLDT in 2006, and the preparation of the concept design document in 2007.

The government of Papua New Guinea itself committed substantial funding to the land reform program, totaling K33 million by 2009. Unfortunately, drawing down this money on a timely basis was difficult. This is when AusAID funding support became useful. The land program would have struggled without such financial support.

There is an important lesson to be drawn from AusAID's willingness to fund the Papua New Guinea land program without providing technical oversight and assistance. The entire land policy development process, from conception and formulation through implementation, was driven by the Papua New Guinean technical team. This marks a significant departure from the standard practice of donors imbedding international experts within the framework of a funding arrangement. This approach greatly assisted the Papua New Guinean process in the following ways:

- It freed land reform of the stigma of being an externally imposed policy.
- It maintained national ownership of the land reform program.
- It gave Papua New Guineans the opportunity to develop a reform program that draws from the international literature (theoretical and empirical) but suits the Papua New Guinea context. The reform program in Papua New Guinea differs significantly from programs advocated elsewhere (for background on other reforms, see Deininger and Feder 2009; Fitzpatrick 2005; Deininger 2003; Feder and Nisho 1999; and World Bank 1975).

The Papua New Guinean program is comprehensive and inclusive. It is targeted at improving land administration and dispute settlement, reforming customary land tenure, and establishing institutional frameworks for facilitating the development of an efficient land and properties market. It is based on the need to institute an incentive-based land market system. This is crucial when the state is inefficient and weak. In fact, the role of the state has been confined to the essential one of enforcing the security of property rights.

6. Challenges ahead

Full and effective implementation of the land program remains a challenge. In the past, many well-intended initiatives have floundered at implementation. Protecting the Papua New Guinea land program from such a dismal outcome will be a challenge for land reform proponents.

Institutional ownership of program components by the various implementing agencies is one way of ensuring success. This has been an area of focus when packaging the land reform program. However, more needs to be done.

Dissemination of information on the land program to the broader community will be an important component of the land program. An effective awareness program has been built into the overall land program to achieve this target.

The National Land Development Advisory Group and the Land Research Program have been established to provide independent oversight and feedback to the overall implementation system. However, the real action is expected to take place at the agency level. Deficiencies in competencies within these agencies have the potential to undermine any progress.

7. Conclusion

At the time of writing, notable progress has already been made. The two laws aimed at mobilising land held under customary tenure for development were passed by the Papua New Guinea National Parliament on 19 March 2009, and the land program was being prepared for inclusion in the national development budget as of 2011. These developments are a promising start to implementation. But implementation remains fraught with many challenges; thus, designing an institutional framework to facilitate it remains important.

The National Land Summit held in 2005 was the forum that conceived the national land reform agenda. Given the economic importance of land reform to national development, this summit will always have a special place in Papua New Guinea's development history. In that respect, this book plays an important role by capturing the core ideas that conceived the Papua New Guinea land reform program.

Three key issues that emerged from the Summit were: improving the system of land administration, improving the system of land dispute settlement, and designing a better framework for mobilising customary land for development. Subsequently, the National Land Development Taskforce had three expert committees working on these issues, which have shaped the progress made to date.

The National Land Development Program is Papua New Guinea-owned, conceived, and formulated. It covers every aspect of land administration aimed at developing a viable land and properties market. This has the potential to stimulate sustained and broad-based economic growth and development in Papua New Guinea. However, its full and efficient implementation remains a major challenge.

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CHAPTER 2: MAKING LAND MORE PRODUCTIVE

Charles Yala, Satish Chand, and Ron Duncan

1. Introduction

Prime Minister Sir Michael Somare has stated that placing most land in Papua New Guinea under customary ownership at Independence rather than under state ownership was a mistake. This statement is an indication that land is not providing the kind of foundation for economic growth in this country that it could or should. However, customary ownership of land is unlikely to change, and the limited area of alienated land (3 percent) has not provided the foundation needed for development. Therefore, it is useful to examine arrangements that could lead to land providing a better basis for economic growth and development.

There is a well-tested conceptual framework that links security of landownership to farm productivity (for example, Feder and Nisho 1998; Feder, Onchan, Chamlamwong, and Hongladarom 1988). A generalised version (Bayamugisha 1999) of this framework shows that land registration impacts positively on economic growth by triggering economy-wide strengthening of institutions, including those for property rights and financial intermediation. A secure title to land encourages efficient use of the resource whilst providing access to competitively priced credit. The theory underpinning this relationship is that of positive information and transaction costs. Secure title to land can be expected to have a positive impact on economic growth through the labour market and the financial market and by creating incentives for greater investments in fixed assets. The last-mentioned is particularly important, given the need for expansion of infrastructure to enable land to be used in the most productive ways.

Chand and Yala (2002) have argued for moving people in Papua New Guinea closer to the available transport infrastructure. This is a possibility, and the strategy could be complemented by investments in expanded infrastructure in areas that could be more productive if they had it. A large proportion of the Ramu Valley, for example, could become much more productive through expansion of the road network. Such infrastructure development and productivity increases are critical to raising incomes for two reasons: first, most people live in rural areas and draw on agriculture for their livelihoods; and second, the customary land tenure system impedes people's mobility.

For land to positively affect economic growth and development, land title and tenure security and efficient land market development are essential. Papua New Guinea currently does not have these, even for the 3 percent of alienated land that is owned by the state (Yala 2004, 2005). This situation has significant policy and development implications and underpins the need for a new land policy and legal framework for this country.

However, land is clearly a politically sensitive matter, and issues relating to it have to be treated with extreme care. Customary land tenure arrangements have served the community well, particularly in the pre-colonial era. A system that offers greater security of property rights, the documentation of such rights in a central repository, and use of land as collateral for credit, will require change. To be acceptable, such change will have to be demand-driven and in all likelihood will entail incremental shifts that provide greater security of tenure to those who use the resource whilst providing a predictable and secure return to the landowners.

This chapter examines developments in Papua New Guinea that are giving rise to, or could give rise to, demands for change in the land tenure regime. In particular, it looks at the impacts of population growth and the failure of land to function as collateral for credit. It discusses the ways in which land could be made more accessible for investment by individuals, and the effects that this would have on the financial sector and the availability of credit, as well as on the productivity of land.

The rest of the chapter is organised as follows. Section 2 discusses population growth and agricultural productivity. Section 3 focuses on the collateral value of land. Section 4 discusses demand-induced reforms to customary land. Section 5 summarises the key issues raised in this chapter.

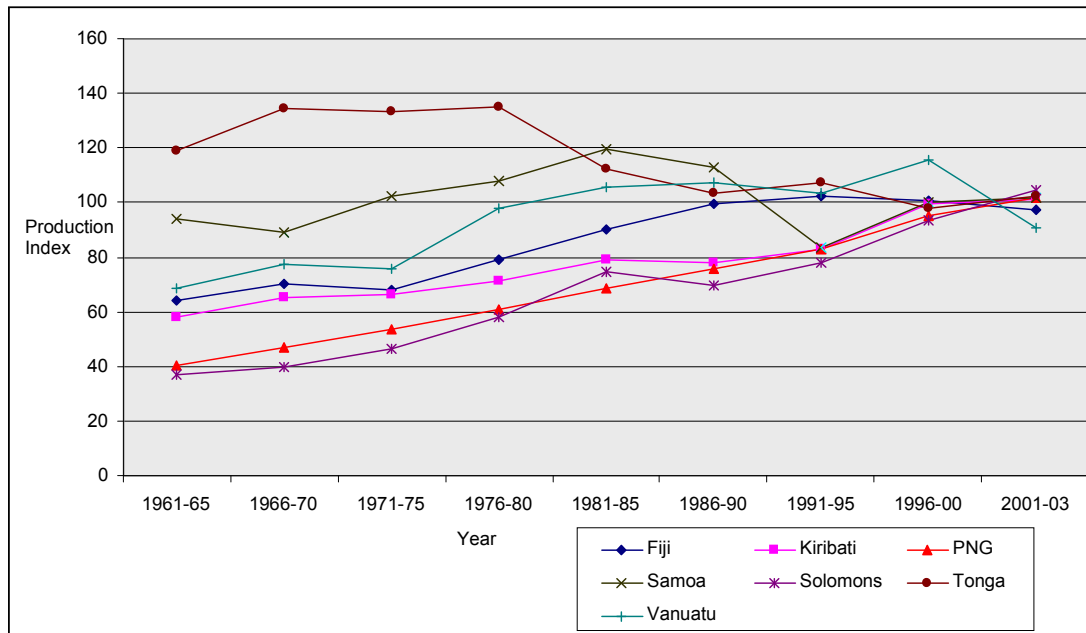
2. Population growth and agricultural productivity

Recent population projections for Papua New Guinea (Booth *et al.* 2006) have seen the population increasing from its present level of around 5.7 million to around 7 million by 2014, and around 8.5 million by 2024. These projections assume some decline in fertility rates, to give expected annual population growth rates in the range of 2–2.2 percent. With the large majority of Papua New Guinean people living on customary land in rural areas, it is of key interest whether agricultural productivity can increase at the same rate as the population — or even faster, if living standards are to improve. Judging by recent experience, the prospects for this are not good.

The only available measures of total agricultural output for Pacific Island countries (PICs) are the crop and livestock indexes compiled by the Food and Agriculture Organisation (FAO), and analysis of developments in the agriculture sector is necessarily limited to them. Subsistence agriculture is a large part of agricultural production in the Pacific, and subsistence and commercial production are mostly joint household activities. Estimates of subsistence agriculture are provided to the FAO by the country statistical offices, and there is likely a large degree of uncertainty associated with them. Therefore, they can only be used to gain a broad perspective of changes in agricultural activity.

Figure 1 shows total agriculture production for the seven PICs for which these data are available. Of the seven countries, only in four — Fiji, Kiribati, Papua New Guinea, and Solomon Islands — has total production been increasing since the 1960s. Figures 2 and 3 show crop and livestock production, respectively, for the same seven countries. Total crop production has been stagnant in all seven countries since the early 1990s. As Figure 3 shows, any growth in total agricultural production has come from growth in livestock production.

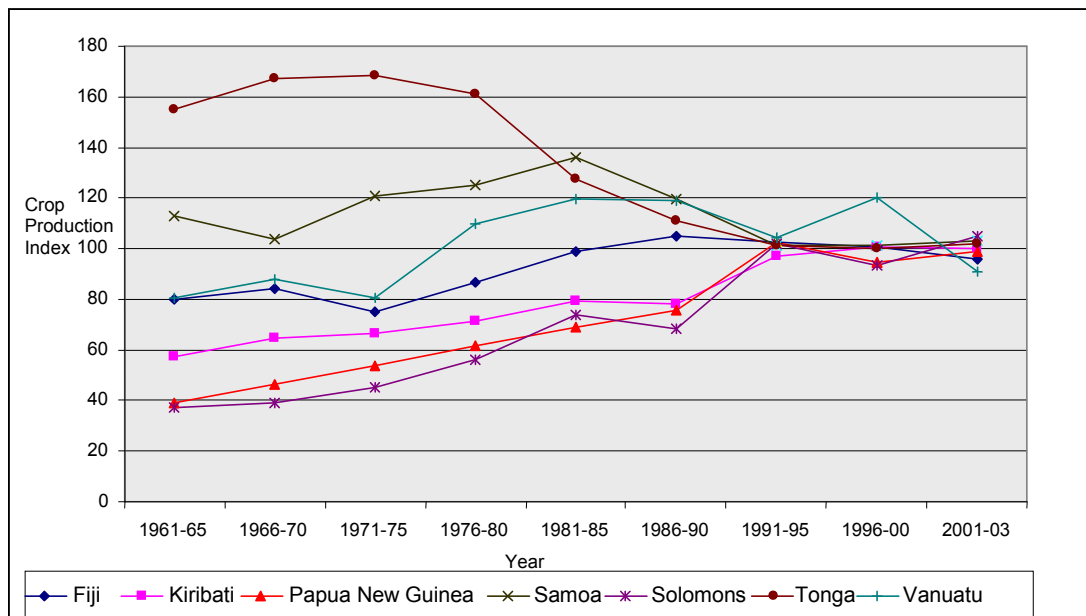
Figure 1: Pacific Island countries' agricultural production index, 1961–2003



Source: FAO 2004.

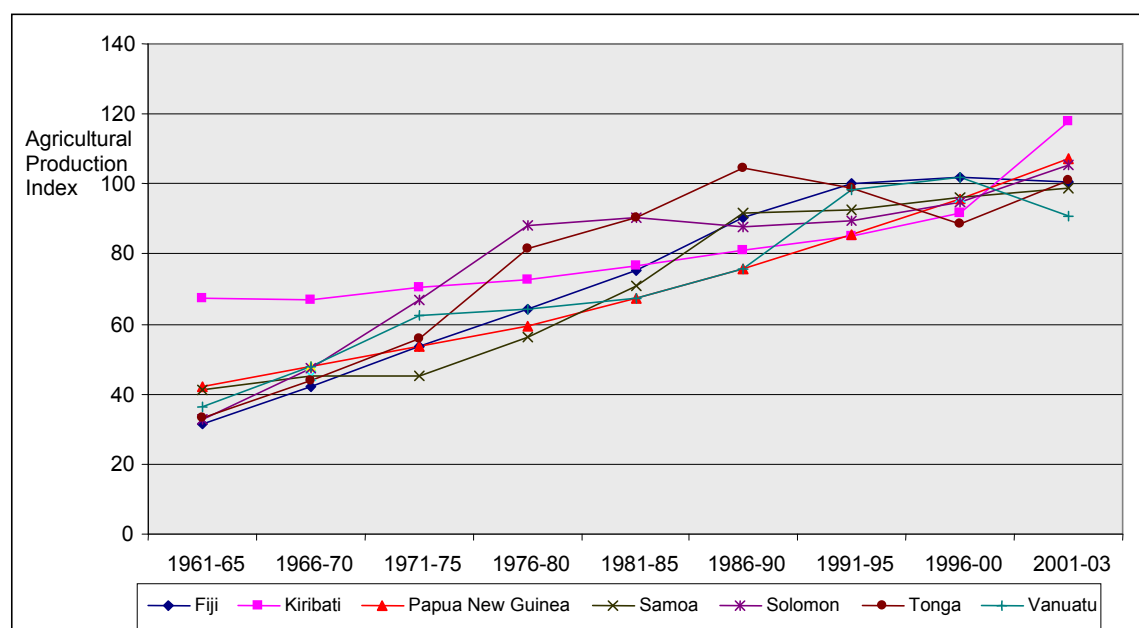
Note: 1999–2001 = 100.

Figure 2: Pacific Island countries' crop production index, 1961–2003



Source: FAO 2004.

Note: 1999–2001 = 100.

Figure 3: Pacific Island countries' livestock production index, 1961–2003

Source: FAO Statistics 2004.

Note: 1999–2001 = 100.

While total agricultural output may be increasing, the important issue in countries where most people are dependent on the agricultural sector is per capita production. In other words, is production keeping up with population growth? Table 1 shows per capita agricultural production for the seven PICs discussed above. While total agricultural production in Fiji, Kiribati, Papua New Guinea, and Solomon Islands has been increasing since the 1960s, per capita agricultural production has been declining. In Papua New Guinea, per capita production has been declining since the mid-1980s. The steep decline in per capita agricultural production in Vanuatu, a country with population growing at around 2.5 per cent, must be of great concern.

Table 1: Per capita agricultural production index for Pacific Island Countries, 1961–2003

Years	Fiji	Kiribati	PNG	Samoa	Solomons	Tonga	Vanuatu
1961–1965	119.8	112.3	97.8	135.5	125.2	162.2	192.8
1966–1970	114.8	115.5	102.1	113.0	115.3	153.1	187.4
1971–1975	100.3	108.7	104.8	119.8	113.0	143.6	157.4
1976–1980	105.7	107.5	104.8	121.7	118.0	143.3	174.7
1981–1985	108.1	108.3	104.8	132.3	128.8	117.0	165.2
1986–1990	112.8	95.2	103.0	123.0	102.2	106.4	149.1
1991–1995	111.0	92.6	99.5	88.3	97.4	109.5	125.3
1996–2000	102.8	103.0	99.8	102.2	99.6	98.8	122.0
2001–2003	95.5	98.3	97.4	100.0	98.8	100.2	86.2

Source: FAO 2004.

Note: 1999–2001 = 100.

It should be noted that the FAO data measure only the volume of output of agricultural products. If there has been a change in the composition of output so that lower volumes of higher-value products are being produced, declining trends in volume may not be of such concern.

Worldwide evidence points to growth in agricultural productivity being the basis for sustained economic growth, particularly for predominantly rural countries with very low income levels. As Timmer (2004) noted:

In poor countries, the majority of the population, and most of the poor, live in rural areas. Their primary vehicle for sustaining food security—at household and national levels—is rising agricultural productivity. In the long run, this means increasing labour productivity, and non-farm employment and migration are important mechanisms. But in the short run, the main vehicle for raising agricultural productivity is to raise the value of output per hectare. And this almost always means using new agricultural technology: high yielding varieties (HYVs) of seeds, improved livestock genetics and feeds, fertilizer, mechanical equipment, farmer knowledge, and management skills, especially in diversifying into higher-value activities.

Many developing countries made the mistake of believing that the agricultural sector could not be important in economic growth and development. For a long time there was an emphasis in developing countries on promoting growth through industrialisation by protecting manufacturing industries and by heavy state involvement in industry, finance, and essential services. These policies not only failed miserably but also held back development of the agricultural sector by raising the costs of agricultural inputs and forcing the exchange rate higher than it otherwise would be. There is now greater awareness of the important role of agricultural growth for promoting growth in the whole economy and reducing poverty.

As emphasised by Mundlak *et al.* (2004), growth in total factor productivity (TFP) is the ultimate source of sustained economic growth and improved welfare. TFP growth depends on two factors: improvements in the efficiency of resource allocation, and technical change. How have the PICs fared in respect to these two components of agricultural productivity? The answer to this question can provide some clues as to whether poverty and food insecurity are worsening in the rural areas — a matter of considerable debate in these countries — and how well land is being used.

Reddy and Duncan (2006) have estimated TFP in agriculture in the seven PICs compared earlier, using the FAO data referenced above. Levels of allocative efficiency, technical change, and TFP were estimated for five-year periods starting in 1961. In Papua New Guinea's case, levels declined in each category between 1976–80 (beginning at independence) and 2000–02 — allocative efficiency from 0.99 to 0.85, technical change from 1.03 to 1.02, and TFP from 1.02 to 0.87.

What can explain such declines? Inappropriate government interventions such as price supports, subsidies, and overvalued exchange rates will lead to declines in allocative efficiency. Papua New Guinea has had more than its share of these inefficiency-promoting policies. Declining technical change is more difficult to explain. In Fiji's case, increased uncertainty over sugarcane leaseholds as their expiration date approached discouraged farmers from investing, and probably also from maintaining their equipment and improving

the technology employed in cane farming. Uncertainty over government policies could have had the same effect in Papua New Guinea.

Whatever the causes in Papua New Guinea of the decline in efficiency, technical change, agricultural TFP, and per capita agricultural production, the expected growth in population can only mean increasing poverty in rural areas unless the situation can be turned around. This means creating the conditions necessary for rapid increases in agricultural productivity. The changes needed for this to happen — for example, improved law and order, transport infrastructure, education, and farming systems, as well as new crop varieties — all require enhanced research and development.

However, for any of these changes to have an impact on farm production, farmers themselves have to be willing to invest their time and intellectual and physical effort, as well as their capital. It is of no use doing research to produce a new or improved crop, or fertilizer, or farming system, if farmers will not adopt it. New or improved roads or better law and order will not have any impact on the volume of farm production going to market unless farmers first increase production.

A substantial body of economic opinion holds that unless individual farmers have secure title to their land, their inputs of time, energy, and capital will be sub-optimal. This is not to say that there will be no increases in farm output under a traditional communal ownership system with individual usufruct rights to farm, as is common in the Pacific, but that they will not be optimal. Similarly, collective efforts on communal land can lead to higher output and productivity, but they will likely be less than they would be under a secure system of individual tenure whereby farmers hold a transferable leasehold title against which they can borrow commercially and which gives them more certainty that they will be able to claim the full benefits of their investment of time, energy, and capital.

Admittedly, there are weaknesses to the data on which this analysis is based. Still, the data suggest that all is not well with agriculture in the Pacific. Commentators such as Fingleton (2004, 2005) believe that existing customary tenure arrangements are a satisfactory basis for agricultural and economic development in Papua New Guinea. The slowly changing nature of customary tenure recorded by Fingleton (2004) and Ward (1997) may have fitted the circumstances when population growth was very low because of high mortality rates. However, with improvements in the availability of clean water and sanitation and the resulting reductions in infant mortality, and better control of infectious diseases, population growth has increased substantially and will, notwithstanding the possibly devastating effects of the HIV/AIDS epidemic, remain high for a considerable time. It is reasonable to ask whether evolutionary change in customary ownership arrangements will remain appropriate.

There are many possible reasons for the apparently poor performance of agriculture in Papua New Guinea. Lack of secure individual title to customary land, weaknesses in the security and stability of land titles, poor enforcement of state ownership, and the obstacles these problems create for accessing credit and promoting individual effort, could also be important. The next section discusses the arguments over the development of more secure individual title to customary land in Papua New Guinea and the likelihood of change in this direction.

3. Benefits of secure land tenure

There is considerable opposition to the idea that the absence of secure individual title to customary land is having a negative impact on the productivity of land and economic growth in the PICs. For example, Ward (1997:20) argued that “other mechanisms have been used successfully as the basis for credit, at least for small holder farmers.”

Recent research has investigated the availability of credit to oil palm farmers in Papua New Guinea. Table 2 presents data on credit activities of smallholder oil palm growers in the Hoskins Project in West New Britain Province, generated from field work conducted in 2003 (Yala 2004). There are three groups of smallholder oil palm growers in this project: Lease State Settlement (LSS), Village Oil Palm (VOP) and Customary Purchase (CP) growers. LSS growers have formal 99-year agricultural lease titles to State land. VOP growers are village-based growers cultivating oil palm on customary land. CP growers were originally from outside the customary landowning community and are cultivating oil palm on customary land, having acquired the land from customary landowners.⁴

Table 2: Credit Activities of Smallholder Oil Palm Growers in the Hoskins Project, West New Britain Province

Credit applicants		Lease State Settlement	Village Oil Palm	Customary Purchase
Borrowers from in-kind credit schemes		48(100%)	48(100%)	32(100%)
Applicants to Papua New Guinea Rural Development Bank	all	6	16	17
	successful	1	1	0
	% successful	17%	6%	0%
Applicants to commercial banks	all	2	4	2
	successful	1	2	1
	% successful	50%	50%	50%

Source: Yala 2004.

Property rights theory suggests that LSS oil palm growers could use their land titles as loan collateral because these lands have boundaries and formal registered titles. The same cannot be said about VOP and CP growers because they are cultivating oil palm on customary land. Customary land does not have formal boundaries, titles, or registries. LSS growers should therefore have better access to credit from conventional commercial financial institutions than VOP and CP growers.

The data in Table 2 show that all the smallholder oil palm growers were able to gain access to credit from the in-kind credit scheme provided by the estate company, New Britain Palm Oil Limited. The Papua New Guinea Rural Development Bank was the popular choice for all groups of growers, but it has rejected almost all loan applications. The two commercial banks in Kimbe, Bank South Pacific and Westpac PNG, received the least number of applications for loans (eight). But 50 percent of applicants were granted a loan.

These results show that the formal financial sector has had great difficulty in providing credit to most of the smallholder oil palm growers in the Hoskins project. Not even the Papua New

⁴ Oil palm is the leading agricultural export crop in Papua New Guinea, and New Britain Palm Oil Limited is the most successful oil palm project in the country.

Guinea Rural Development Bank could help them. Thus, there was an almost total failure in the delivery of financial services to these growers. For land with formal titles, several factors — outstanding land rental payments, poor land administration (especially a costly and cumbersome process for title transfers and transmissions), and the erosion of the underlying security and stability of the state land as the result of reclaiming ownership and compensation claims by traditional customary owners — have collectively undermined the use of formal title deeds as loan collateral. Therefore, all land, including state land, is insecure and is unable to play its role as collateral in the Hoskins smallholder oil palm project. This is the only study of its kind to date, so it is impossible to draw more general conclusions. However, these results are supported by anecdotal evidence.

In the absence of land with securitizable title, the only forms of security for commercial loans are personal guarantees and forms of short-term security such as crop liens. This is exactly what is happening in the Hoskins project, where there is almost total reliance on the in-kind credit scheme sponsored by the estate company. Where land is unavailable as security — either because it does not carry a transferable leasehold title (as under customary tenure) or because formal title is insecure (as it is for the LSS smallholder oil palm growers in the Hoskins Project) — the possibilities for accessing credit are very limited. de Soto (2000) has described such land as “dead capital.” The people who hold it may be land rich, but they are asset poor. This is a problem not only in Papua New Guinea but throughout the developing world.

These land-rich owners of dead capital are in some ways no better off than those without assets to use as collateral and for whom microcredit schemes were invented. In many of these schemes, the personal guarantees of a group become the security for the loan. Taxpayer-funded agricultural banks and development banks are to a large extent the outcome of people not being able to use land as collateral for loans.

In the Pacific, commercial borrowings are small and primarily confined to urban areas, where alienated land that can be used as security is available. So long as this situation persists, it is unlikely that mature financial sectors, with the full range of financial instruments, will develop in the region, or that the commercial financial sector will expand beyond the major urban areas.

4. Inducing demand-driven changes to land tenure

The customary arrangements prevalent throughout the Pacific are the result of a long evolutionary process that has historically served the communities well. Adjoining tribes and communities competed fiercely for centuries for the land and coastal resources that provided their livelihoods. Traditional mechanisms evolved to ensure sustainable use and secure access to these highly treasured resources. Customary tenure in much of Melanesia has evolved as a mechanism to enable closely knit communities to defend their rights to a piece of land. These rights may include building a residence, growing food, hunting, and gathering food and firewood. The extent of exclusivity between individuals within the clan has always been well defined. The community knows with certainty the exclusive rights of individuals to building a house or to keeping a food garden as distinct from the collective rights of the clan to the adjoining forest and marine resources.

Conservation practices evolved to care for the resources to which the community as a whole had access. As an example, taboos developed on catching fish in the lead-up to a major

ceremony, such as a feast following the burial of a chief. The rights of individuals to the plot on which their house was built or on which their food was grown were known and enforced by the community at large. The community had rules that demarcated these rights, which were common knowledge to the individual members.

Two features of these customary arrangements have relevance for the following discussion: (1) the group as a whole enforced property rights; and (2) the rules were known only to the community. It would be incorrect, therefore, to suggest that customary ownership is the same as communal ownership, since the former has rights that are graduated from individual to communal. Wars over land were not uncommon. What if a community failed to protect its collective claim to the land from an adjoining tribe? In such a case, both individual and collective property rights were lost.⁵

Thus, individual rights were secure only to the extent that the rights of the clan as a whole were secure. The latter could involve various arrangements, including deals with adjoining communities (marriages across clans could serve this purpose), the maintenance of a warrior class, and the use of natural barriers such as the ocean, rivers, and mountains to demarcate boundaries.

The traditional system described above served the people well, but changes are now necessary. Land is no longer a source of livelihood alone but now has the potential to provide credit for growth. The rapid increase in population means that many communities are no longer able to rely solely on subsistence. Expectations have changed over time, too: individuals and communities now expect to be able to engage with and draw upon the benefits of interaction with the modern, globalised economy. While in the past trade only took place between members of neighbouring communities, the growth of national and international commerce now allows exchange between complete strangers, which is possible only under transparent rules and a system that protects the rights of individuals nationally and internationally.

The choice with respect to land reform is clear: maintain the customary system in a form that is divorced from the modern economy, or adopt a regime that allows exchange across both space and time. The latter entails use of debt contracts — ideally between parties well beyond the immediate kin — in an environment that must provide certainty if the costs are to remain low.

Land tenure arrangements have already changed in various ways in Papua New Guinea, and these experiences offer several lessons for thinking about further changes. Property rights have changed in places where the implicit value of land has risen over time. Several areas that have mining projects or high-value timber or are near a major urban centre have developed property rights systems that offer security of tenure.

A good case in point is the development of property rights over land held under customary title within settlements in Port Moresby. Landowners and their intermediaries have willingly provided long-term security, often under semi-formal arrangements, to settlers who have needed such security. This is not yet a perfect system, but it is a move towards making land available under customary title for long-term access to investors. The oil palm growing areas offer another example in which changes have been made in an attempt to provide secure,

⁵ In many cases, the men lost their lives, property, and women to the conquering tribe.

long-term access to land for farming. Another example is the outright purchase of land by Tolai men marrying into a patrilineal society⁶. The men could marry within the Tolai community, and many do, but those who decide to marry outside of the community are beginning to demand individual rights to land that they can pass down to their children according to their own wishes. The traditional systems have to change and are in many respects already doing so.

The creation of local and national governments has led to the broadening of the sphere of exchange. While exchange traditionally was confined to the immediate kin with the blessings of the clan, and thus was based solely on personal trust, the modern system extends much farther and thus needs to be codified, possibly standardised, and made transparent. This in turn will allow exchanges well beyond the immediate community and at minimal costs. The state and its institutions take on the responsibility of enforcing the rules; a credible commitment to such enforcement relieves the need for actual enforcement as most individuals comply voluntarily with the rules. The State and the supranational authorities thus in effect resolve a “coordination failure” between isolated and fragmented communities.

In Papua New Guinea, the State falls well short of having the credibility to enforce the rules and institutions that codify the property rights of individuals. The challenge, therefore, is to change from the current system to one in which the coordination failure is resolved by a strong State able to enforce the rules that the community as a whole has agreed to in the form of enacted legislation.

How to achieve the transition from the existing customary tenure to one that provides greater security is an issue that needs to be debated within Papua New Guinea. An abrupt or heavy-handed approach would be doomed to fail. Customary tenure will change as the implicit value of land rises. Lessons for guiding and managing this change can be drawn from existing arrangements, including those in the settler communities in Port Moresby. Understanding these lessons is part of these authors’ ongoing collaborative research.

5. Conclusion

Conflict over land rights has been a recurring theme throughout history and across the globe.⁷ Communities have evolved strategies to provide rights over land for the individual; these rights are imbedded within the broader rights and responsibilities of the community as a whole. This fundamental principle holds true as much now as it did in the past. The customary land tenure arrangements in the Pacific can be seen as the clan conferring individual and joint rights of use over specific pieces of land. The individual members of the clan have a clear understanding of their exclusive and joint rights to specific pieces of land.

There is minimal room for conflict within the community, but conflict increases considerably when dealing with outsiders or across generations. As an example of the latter, members of the current generation often do not feel bound by the agreements of their forefathers, which gives rise to the issue, familiar to economists, of the “time inconsistency” of contracts. For example, witness the increase in people claiming ownership of land that had been freeholded or alienated by the State and the increase in compensation payments for alienated land.

⁶ Tolai society is matrilineal so when Tolai men marry into patrilineal societies their rights to land are limited.

⁷ A number of these conflicts, such as those on the West Bank and in Gaza, are continuing.

Similar problems arise when the implicit value of leased land rises, for example as the result of mineral discoveries.

The sphere of exchange in Papua New Guinea has broadened rapidly; it now extends to the global community, where exchanges of goods and services take place between complete strangers. In other words, the “clan” has extended well beyond the family and immediate kin. Understandings between the members of this wider group can no longer remain implicit; the members may not speak the same language or belong to the same generation. Individual rights to property in such an impersonalised world have to be codified and made readily available for verification. The State, rather than the clan, now takes responsibility for protecting individual property rights. Voluntary compliance on the part of the individual follows, so long as the State’s commitment and capacity to enforce these rights remains credible.

Communal land tenure arrangements in the Pacific, Papua New Guinea included, have proved extremely difficult to change. The arrangements in place constitute a stable institutional equilibrium. However, the status quo has costs in terms of inferior economic and technical efficiency. Insecure access to land has discouraged long-term investments in infrastructure. The inability to use land as collateral to access credit makes land “dead capital.” Given that most people continue to depend on agriculture for their livelihoods, the low and declining productivity of land implies higher levels of poverty than what could be possible under a different system. Smallholders remain deprived of usable capital, while those with funds are unable to invest in customary land because of the insecurity of tenure. Landowners with savings prefer to invest in the limited freehold land, bidding up its price, or to invest in other countries.

A large body of evidence, both from the Pacific and the developing world more generally, supports the view that insecure property rights impede investment and thus impede the growth of the broader economy. The existing customary land tenure arrangements have also impeded labour mobility. For instance, settlers have extreme difficulty in accessing land under customary ownership. When they are given such access, they often bring their kin to insure against eviction by the landowners. This explains the regional affiliation of settlements around the major urban centres.

For their part, landowners have resisted making land available to settlers out of fear that settlements with strong clan and kinship ties might challenge their rights to land. These concerns are legitimate, given the landowner-settler conflicts in Bougainville and West New Britain and on Guadalcanal in Solomon Islands. This makes it all the more urgent that considered thought be given to how to move forward with institutional arrangements that will give greater security of access to land for investors whilst providing landowners secure rights to their property.

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CHAPTER 3: SOCIO-ECONOMIC CHANGES AND THEIR IMPLICATIONS FOR CUSTOMARY LAND TENURE

Lawrence Kalinoe and Josepha Kiris

1. Introduction

Life for the majority of people in Papua New Guinea, estimated to be more than 80 percent, is based on a subsistence economy, in which food production for immediate consumption is the primary focus and surplus produce, if there is any, it is sold at local markets for cash. Food production consists of vegetable gardening and gathering edible plants from the wider environment. Land is used for relatively short periods of time.

Customary land tenure accounts for a massive 97 percent of the land in Papua New Guinea. Customary land is therefore the basis of life for the vast majority of Papua New Guineans. It feeds them and sustains them, both physically and spiritually, and is the basis upon which indigenous Papua New Guinea is built.

It is therefore vital for the nation that the system of customary land tenure continues to exist, and even more so, be nurtured so that it remains robust and continues to maintain its utility and vitality. Customary land has been and must continue to be the bedrock upon which indigenous communities exist. In a nation with no State-run social security system, it is customary land that offers people security, hope, and confidence. For all these reasons, Papua New Guinea should continue to protect, preserve, and strengthen customary land tenure.

This does not mean singing the praises of the system and doing nothing about any problems it may have. Indeed, the massive socio-economic changes in modern Papua New Guinea are putting pressure on the customary land tenure system. Corrective measures are necessary to address these adverse impacts. As land use patterns change, customary land tenure is under pressure, probably more so in some parts of the country than in others. To stand by and do nothing would be utterly reckless and a dereliction of duty.

The rest of the chapter is organised as follows. Section 2 reviews the impact of modern uses of land on customary land tenure. Section 3 reviews the impact of social changes on customary land tenure. Section 4 concludes the chapter.

2. Impact of modern uses of land on customary land tenure

There is little doubt that the traditional lifestyles of indigenous Papua New Guineans are changing — from a largely subsistence way of life to involvement in the cash economy, which places immense pressures on the people to make money and engage in the modern sector or else be left behind. Without money, they cannot get medical treatment at health centres or hospitals, send their children to school, or participate in the opportunities presented by the modern economy. Such pressures are driving increasing numbers of people to engage in the cash economy. This is, of course, good for everyone in the country and the country itself. The crucial questions then becomes: if most if not all people wish to build their own coffee, cocoa, vanilla, or coconut gardens or plantations, will the existing customary land tenure be able to sustain that shift in land use?

The statistics presented in tables 1 through 3, taken from a survey of agricultural projects on customary land (Kalinoe 2002), provide useful insights into the dynamics of customary land tenure. The survey covered parts of Southern Highlands, Eastern Highlands, and Madang provinces. It used a standard questionnaire, both as a guide for the field research assistant to use in collecting data through on-site inspections and interviews and also as a questionnaire for the interviewees to fill out and return to the field assistant. The sites for the survey were identified on the basis of prior information concerning the existence of a plantation in the area and practical considerations.

Survey questions placed particular emphasis on the relationships in the community in which the plantations were located, particularly between the owners and operators of these plantations and the extended relatives, with a view to obtaining data on how they managed their relationships and possibly attended to any demands or expectation from the community, but more so from their clansmen and women. The data are presented by province.

Table 1: Growers' relationships with customary landholding communities, Madang Province

Garden or plantation	Cash crop	Relationship	Comments
A — 12 blocks built by block owners themselves	Copra and cocoa	Cordial	No major conflict. The block owners are very sympathetic and assist members of the wider customary landholding social unit in various ways.
B	Copra	Not good	There have been several conflicts. Plantation owners are not respectful or helpful to other members of the customary landholding social unit.
C	Copra	Not good	There have been several conflicts. Plantation owners are disrespectful. Members of the customary landholding social unit feel that this plantation is taking up their gardening land.
D — Built by the family, particularly the father	Copra and cocoa	Cordial	No conflict. The family that owns the plantation is supportive of others in the wider landholding social unit. They give financial assistance, for example for school fees.
E — Built by the grandfather and improved by the father	Copra and cocoa		There have been some disputes. Landownership is now under dispute.
F — Built by the father, who is now deceased	Copra		There have been no open disputes but there has been some gossip along with other problems. The sons who now have the plantation allow their cousins, both maternal and paternal, to collect coconuts and to cut their copra on a rotational basis.

Source: Kalinoe 2002.

Table 2: Growers' relationships with customary landholding communities, Eastern Highlands Province

Garden or plantation	Cash crop	Relationship	Comments
A	Coffee	Cordial	The grower is very supportive and sympathetic to other clansmen. The owner budgets K1,500 annually for the three sub-clans and, through the sub-clan committee that he set up, distributes the money to individuals in amounts such as K20 or K30. The grower also organises feasts and funeral activities and employs other clansmen on a rotational basis.
B — Built by current owner with a bank loan which has now been fully paid	Coffee	Mostly cordial	Members of the wider customary landholding social unit are happy. The owner helps people in times of need, such as feasts and funerals. He also employs local labourers for coffee harvesting. Whilst there have been no real disputes, there have been some differences between the proprietor and other members of the wider social unit.
C	Coffee	Initially not very good but improving	Local landholders shot and killed the owner's eldest son because he was not helpful. Since then, the relationship between the owner and the landholders has improved. Compensation of K12,000 and three cows was paid by the people to the plantation owner.

Source: Kalinoe 2002.

Table 3: Growers' relationships with customary landholding communities, Southern Highlands Province

Garden or plantation	Cash crop	Relationship	Comments
A	Coffee	Cordial	No major disputes.
B	Coffee	Cordial	No major disputes.
C	Coffee	Cordial	No major disputes.
D	Coffee	Cordial	No major disputes.
E	Coffee	Cordial	No major disputes.

Source: Kalinoe 2002.

The main conclusion that can be drawn from the data presented in these tables is that those who develop major agricultural projects on land under customary tenure also have to manage their social relationships with members of the wider landholding social unit. In other words, the interests of other customary landholders must be considered and accommodated.

Another conclusion is that the lands upon which these plantations have been built have been used by the plantation owners to the exclusion of the other members of the landholding social

unit. For all practical purposes, land that was once customary land of a clan or other social unit has been appropriated by an individual and his immediate family and privatised so that, although still under customary land tenure, it is exclusively used by the plantation owner. His children will continue this exclusive use, representing a semipermanent to permanent exclusive land use. Therefore, the wider social unit that claims rights to this land no longer has access to it and is thus disadvantaged.

Some other case studies further demonstrate the direct impact of these socio-economic changes on social relationships in these indigenous communities. In some areas relationships are strained to the extent that clansmen are in conflict, and in some cases, brothers or cousins are even killing each other.

Case study 1

This case from Goroka in the Eastern Highlands Province is taken from Ward (1981:253):

About 1970, a prominent local politician or bigman secured a Land Tenure Conversion order, in his own name, over a block of land which contained a hamlet of his kinsmen and sacred site. The hamlet dwellers told the Land Titles Commissioner that they were happy for this to happen, and the local leader said, he would protect them. However, in 1976, with coffee prices rising, he extended his plantings onto the hamlet's garden land and sought to clear the villages off. They complained to local officials but had no easy recourse in law. By the end of 1977, the hamlet-dwellers had relinquished much of their garden land to coffee plantings and some had moved away to other clan land.

The implication of this scenario, if repeated on a wider scale throughout the country, is frightening. Ward certainly viewed it as frightening (*ibid.*:253), and the authors of this chapter concur. This case study highlights the threat that wealthy and influential customary landholders pose to the continued viability and utility of customary land and its continued access and use by the other members of the landholding clan or other unit. By essentially converting the land to private leasehold under the process set out under the *Land (Tenure Conversion) Act 1963*, this politically and economically powerful fellow customary landholder appropriated what was once customary land to his exclusive private use. Whatever wealth was then generated from this land belonged only to him. He had no obligation to share the wealth with the rest of the members of the landholding clan. This land, for all practical purposes, ceased to be customary land.

This case study underlines the fact that a major threat to the future viability and sustainability of the customary land tenure system comes from the financially and politically stronger members of landholding social units rather than from outside. Whilst the World Bank and the International Monetary Fund have become convenient whipping boys for many Papua New Guineans on the subject of customary tenure reform, we submit that the greatest threats to the future of customary land tenure are actually ourselves — particularly the well educated, wealthy, and politically and economically well connected Papua New Guineans. We must therefore take initiatives to examine the problems locally and take achievable corrective measures.

The state, through the Department of Lands and Physical Planning (DLPP), must take a leading role in customary land tenure reform. Currently, the DLPP is involved in the tenure conversion process under the *Land Tenure Conversion Act* 1963 and in the lease-leaseback system under Part III of the *Land Act* 1996. This situation should change so that the DLPP takes the lead in considering policy matters and introducing reforms to the customary land tenure system so that the state, through the DLPP, can have a say in controlling the massive social change in land use that is now upon us — even if it means reviewing the involvement of the Land Titles Commission in customary land tenure administration.⁸

Case study 2

The second case study involves a judgment handed down by Justice Injia on 24 July 1998 at the National Court sitting in Mount Hagen in the case of *State v James Make, William Dot and Norman Pokop* [1998] PNGLR 62. The three accused had pleaded guilty to murdering Daun Rombugl, and appeared before the judge for sentencing. The circumstances were set out by Justice Injia in the following passage on page 64 of the judgment:

The three accused and the victim are first blood cousin brothers. They had an internal land dispute which led to a small scuffle between them. The land the subject of the dispute belonged to the three accused but was being looked after by the deceased whilst the three accused lived on block land at Aviamp. When the victim claimed ownership over the land, the dispute arose. At one stage, the land mediators ordered the victim to vacate the land but he and his brothers refused to obey the order and worked on the land thus leading to the scuffle. During the scuffle, the accused James Make hit the victim on his head with a coffee stick causing the victim to fall to the ground. Whilst the victim lay on the ground, the accused William Dot then cut the victim on his left thigh with a bush knife followed by Norman Pokop cutting the deceased on his left back with a bush knife. The victim died few minutes later from severe blood loss as a result of the injuries.

This case sends out a chilling warning. It is imperative that the State attends to customary land tenure problems and effectively and swiftly addresses these problems by putting in place effective dispute settlement procedures and processes. If this is not done, customary landholders will continue to kill each other as in the case described above. In other words, the State has a responsibility not only to punish the perpetrators after land dispute-related crimes are committed but also to properly and effectively resolve these disputes before they escalate and lives are lost. The State has a responsibility to put in place policies and processes capable of responding to social problems brought about by the massive socio-economic changes that are occurring in Papua New Guinea.

Case study 3

This case involves a decision of the National Court in Lae, Morobe Province, on 17 April 2002. In this case, Seth Aniyo from Uмба village in Menyamyā District stood trial before Justice Kirriwom and was convicted of murdering his half-brother Sumapio. Seth and Sumapio had a heated argument over a disputed plot of customary land, resulting in a fight

⁸ The Land Titles Commission is currently involved in the land tenure conversion process and the hearing of disputes over ownership of customary land in instances involving large resource extraction projects, and the national government specifically appoints it to do so in the national interest.

and Sumapio's death. Evidence before the court showed that Seth had, on the morning of the fateful day, gone to the disputed land and was clearing it when he was summoned by Sumapio through one of his children. Sumapio then told Seth not to clear the land because they had given it away to one of their cousins. An argument ensued, and Seth, using the knife he was using to clear the bush, slashed Sumapio twice on the head. Sumapio bled to death from the injuries.

Brothers are now killing each other over customary land use rights. Papua New Guinea needs to act to avert this spiralling problem by actively seeking out ways to better manage customary land. Improving the customary land tenure system and bringing greater certainty to ownership rights, or better still some degree of certainty of title or deed of title that sets out and establishes clear land use rights that are recognised and accepted by all, has great potential for lessening the chances of the type of violence described in this case study.

3. Social change and customary land use

Undoubtedly, land use patterns in Papua New Guinea have changed, from temporary and short-term use to longer-term, in some cases permanent and exclusive use. This change has been a direct response to the inroads made by the cash economy, cultivation of cash crops, and the erection of permanent houses in villages. There is of course nothing wrong with this change. Quite the contrary, it is to be welcomed and embraced by all since it brings with it improvement in our standard of living and our collective national wealth.

In some parts of the country, as reflected in the statistics and case studies presented earlier, this social and economic change has exerted considerable pressure, if not strain, on the continued viability and sustainability of the customary land tenure system. With the desire of our people to be engaged in the cash economy by working their customary land, it is inevitable that more and more coffee, cocoa, vanilla, and coconut plantations will be built on customary land by well-intentioned and hard-working Papua New Guineans. When that happens, the immediate consequence is that individuals or families will be appropriating blocks of customary land for their private and exclusive use. Henceforth, they will virtually own the blocks of customary land for at least two generations, from the father to the children, with the possibility of ownership passing down to the third generation.

Given current life expectancy of around seventy years, if a father builds a plantation when he is thirty-five years old, the land could easily be tied up for anything up to 105 years. During this period, this so-called customary land would not be available to the rest of the members of the landholding clan. Although it will remain customary land, its use patterns and general outlook will be like alienated land held under agricultural leasehold title.

Reforms in customary land tenure should be seen not only as liberating customary land for economic use but also as a process of managing social change. There have been significant social and economic changes in customary land use patterns. These changes have themselves been spontaneous responses to other social, economic, and even political changes that have come to affect the lives of Papua New Guineans, who have moved on from a purely subsistence economy to embrace the modern cash economy. People in the villages have to have money to participate in the development opportunities that the emerging nation presents. They need money to have access to social services including health care. Money has become central in their lives.

The State has a role to play in managing this massive social change. It should position itself to do so by putting in place mechanisms for an orderly transformation. Customary land registration should be seen as one instrument for managing social change. If nothing is done to manage these changes effectively, their impact on society at large will be overwhelming. History demonstrates that social change is inevitable. The enclosure movement at the time of the industrial revolution in England is an apt example.

In customary land tenure law, the courts have been proactive in responding to socio-economic change. The former Chief Justice Amet's decision handed down on 25 July 1991, in *Re Hides Gas Land Case* [1993] PNGLR 309, stands out as one such decision. In this case, a series of disputes arose amongst several customary landowning clans of two major tribes, the Tuguba Tribe of Komo and the Hiwa Tribe, over portions of land commonly known as Hides Gasfield Project land. Both parties had genealogical evidence going back sixteen generations to the origin of human settlement in the Tari-Komo basin. This evidence prompted the judge to marvel: "It is truly remarkable that generations and generations of ancestors could be remembered by name, going back to their believed origin and founding ancestors" (*Re Hides Gas Land Case*:313). In the end, the judge awarded ownership of the disputed land to the clans that physically occupied it:

Whilst genealogy of ancestral origin might well have, in the past, been conclusive evidence of ownership, I am of the view that it is not the only evidence that is to be relied upon to confirm ownership at the present time. I believe that with fast development and considerable movement of tribes and clans and people from one region to another, factors which ought to be taken into account in determining ownership in the present context ought to be modified and more fluid than the traditional methods of determining ownership. (*Re Hides*:313)

The judge stressed the need to respond to and manage social and economic changes:

In my view, as a matter of principle, the tribunal determining the dispute of this nature . . . ought to begin to develop a system of determining ownership of land which takes into account both traditional values and methods of determining ownership as well as the developmental aspirations and interest of the wider provincial and national community to arrive at principles which will be uniformly utilised and applied, consistent with the Constitution's directive to develop a consistent and coherent system of indigenous jurisprudence (*Re Hides*: 315).

If the government does not take the lead in addressing and managing issues of social change, this case is testimony that the courts will. There may then be some disquiet, and people may view the courts' decisions as legalistic, with little or no regard for government priorities in social planning and development. Social planning, prioritisation, and implementation are the responsibility of the executive branch of government, not the judiciary. Therefore, the executive government should be in control, and seen to be controlling, molding, and managing social change in Papua New Guinea in an orderly way.

4. Conclusion

A personal experience of one of the authors of this chapter can illustrate the main theme of this chapter. Since the coffee boom in the early 1970s, and the introduction of other tropical cash crops such as cocoa, Papua New Guineans have been engaged to some extent in cash crop production. The author vividly recalls that in the early to mid-1970s there was a mad rush in his beloved village of Avatip to develop coffee gardens, and nuclear families began scurrying to the only mountain they had to build their coffee plots. Coffee gardens led to longer-term use of the land than the vegetable gardens that were the primary land use before. The majority of the coffee gardens remain, so they have been in production for thirty years or more. Their development represents a change in land use, very much unintentional, but significant nonetheless. The plots of bush land cut to make the coffee gardens became the “property” of the people who built the gardens. They not only own their coffee gardens but also have secured long-term, exclusive use of the land — if not legal ownership, then another form of legally enforceable right akin to private property.

Were there any traditional customary owners of the mountain land upon which the coffee gardens were built? There are clans that claim rights of first discovery over the mountain. However, the coffee garden developers assert rights over those portions of land on which their coffee gardens are situated. Inadvertently and spontaneously, and for all practical purposes, these plots of land have been privatised and are now actually owned by the people who built their coffee gardens on them.

It is inevitable that this kind of consequence would be forced upon customary land tenure by the advent of the cash crop economy. Is this an acceptable consequence? What longer-term implications are there? Should these inevitable changes be the catalyst for reforming the customary land tenure system? These are the questions that Papua New Guinea as a nation should consider now, rather than later. It is only proper and prudent that the government be involved in managing these socio-economic changes in a structured and controlled way, by initiating appropriate reforms aimed at safeguarding the longer-term utility and viability of the customary land tenure system.

Reform of customary land tenure has long been seen as overdue (see Lakau 1997:529; Haynes n.d.; Ward 1981:249). The main issue is how best to approach the task given its enormity. Land use patterns on customary land have changed; there are new, longer-term and “exclusive” uses that are bound to affect not only social relationships but the way society functions in different parts of Papua New Guinea. The most important threat to the future viability of customary land tenure is from within rather than from external sources.

Systematic registration of customary land is, in these authors’ view, just one of the options. If that course is to be pursued, group registration is the best way to go about it, as was recommended much earlier by the Commission of Inquiry into Land Matters in 1973 (CILM 1973: recommendation 11). The now well-documented customary land registration program, as proposed in the information paper and draft legislation circulated by Henao Lawyers in 1995 (Henao 1995), is consistent with many of the CILM’s recommendations — the main ones being group registration of title and the continued operation of customary law as the applicable law in customary land tenure after group registration is effected.

Customary land registration is the way to go now. A properly carried out State-run system for registration of customary land is bound to bring greater certainty of title, or at least of land

use rights, which will be a vast improvement over the current chaotic situation in which brothers are killing each other over customary land use rights.

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CHAPTER 4: ADMINISTRATION OF LAND HELD UNDER FORMAL TENURE

Pepi S. Kimas

1. Introduction

Land remains the main source of livelihoods, survival, and wealth for Papua New Guineans. In Papua New Guinea, a person without land is without culture, traditional values, and birthright. However, there is also a strong and widely held view that customary land tenure has many limitations in supporting livelihoods, survival, and wealth. Changes to the current system of customary tenure are inevitable.

This chapter argues that after thirty years of independence, Papua New Guinea has to rethink customary land tenure. There is sufficient experience and knowledge, both within and outside the Department of Lands and Physical Planning and the country, to help formulate a path of effective change that will enable land currently under customary tenure into the system of formal administration.

The following chapter details the activities that the Department has undertaken to pursue this agenda. It is organised as follows. Section 2 describes the nature of the land administration system in Papua New Guinea. Section 3 focuses on the need to bring land held under customary tenure into the formal system of land administration. Section 4 highlights the strategy the Department of Lands and Physical Planning has undertaken to promote the idea of customary land reform. Section 5 offers conclusions.

2. The system of land administration in Papua New Guinea

Papua New Guinea has three types of land: customary, state, and freehold land. Approximately 97 percent of the total land area is held under customary tenure. The use of this land by the indigenous landowning community is for subsistence farming or the cultivation of cash crops and is mostly limited to the productive soil areas. Large investors have been able to use large tracts of land under customary tenure for logging, mining, and petroleum and gas extraction. Use of this land for urban and property development is limited, however.

All land under customary tenure is administered by custom. Customary land tenure differs significantly across Papua New Guinea, a country with over 800 different languages. The National Constitution, *Land Act* 1996, and *Underlying Law Act* 2000 provide the legal basis for the application of customary land law.

The remaining 3 percent of land is classified as alienated land and is divided between State leasehold and private freehold lands. While most of the State land is found in urban centres and rural towns, some rural land is also held by the State, large tracts of which are classified as agricultural leasehold land. The private freehold component is further divided into alienated and converted land. Alienated land, the largest share, was acquired during the colonial administration by churches and private agriculturists. The remainder was converted to formal freehold by customary landowners or other Papua New Guineans under the *Land Tenure Conversion Act* 1963.

Over the years, an increasing amount of land held under customary tenure obtained formal titles under Part III of the *Land Act* 1996 for special business and agriculture leases. The Department of Lands and Physical Planning is responsible for the administration of all land under formal tenure. Customary land is outside the formal land administration system and is administered by customary land law. The State helps settle disputes between customary land groups under the *Land Dispute Settlement Act* 1974.⁹

Emanating from the three land tenure regimes are three land types: land with leasehold title on State land, land with freehold title on State or customary land, and land with leasehold title on customary land. Leasehold tenure of State land has a fixed term of possession and occupancy. Under the lease arrangement, the lessor (the State) leases to the lessee for a specific period of time, for specific use(s), with set terms and conditions. The lease is a contract between these two parties. The longest lease period is ninety-nine years. Some lease agreements provide for sub-lease arrangements with the consent of the lessor. The sub-lease always has a shorter term than the parent lease.

Freehold tenure titles do not have lease terms. Ownership in perpetuity remains with the titleholder. Freehold title is restricted to Papua New Guineans. Leases of freehold land are strictly by direct contract. The transfer of freehold titles are administered through the formal land administration system by the Department of Lands and Physical Planning.

Land accessed for special business use has specific applications and uses defined in the *Land Act* 1996. Lease-leaseback provisions suspend customary land for the duration of the lease period. The use of the land is administered by the formal land administration system during that time. At the expiry of the lease term, the land reverts to customary tenure.

Land held under customary tenure is defined and administered by customary law. The system of customary land tenure is highly fragmented and heterogeneous. Customary land law in one part of the country may not be applicable in another part because there is significant diversity in both the definition and application of custom.

Attempts to bring land held under customary tenure into the formal land administration system have largely failed. Only two laws allow the conversion of customary land: the *Land (Tenure Conversion) Act* 1963 and the lease-leaseback provisions of the *Land Act* 1996.

The land tenure conversion process provides for the registration of customary land. Titles can be registered by a business group, land group, customary kinship group, customary descent group, or customary local group or community. The registered parcel, which will have a freehold title, has the following restrictions:

- It may be transferred or leased for a period of no longer than twenty-five years, with the consent of the National Land Board.
- It may be mortgaged or charged, but the mortgagee or chargee is not entitled to:
 - remain in possession for more than twenty-five years;
 - lease the land to a third party for more than twenty-five years;
 - foreclose the right of the mortgagor; and
 - redeem the mortgaged or charged land.

⁹ Chapter 6 provides a detailed description of the land dispute settlement process.

- It may not be taken under a writ of execution or under or in consequence of a bankruptcy or insolvency.
- It cannot be sold to a non-citizen.

When land is registered under this act, the authority of customary land tenure law over it is permanently terminated, and it is no longer administered by custom. The tenure becomes individualised or privatised, legally excluding others in the clan or tribe from accessing the land. All benefits from developing this land accrue to the titleholder(s).

Anecdotal evidence, supported by views expressed by leading financial institutions in Papua New Guinea, demonstrates that freehold land titles acquired through the land tenure conversion process are restrictive and inherently risky.¹⁰ They fail to qualify as collateral and largely remain unbankable.

The lease-leaseback system is provided for under s.102 of the *Land Act* 1996. It grants a special agriculture and business lease, commonly referred to as a lease-leaseback title. Under this arrangement, customary landowners lease their land to the state for a period of their choice, in return for the security of a title. The title, in the name of the customary landowners, can be used as collateral for a bank loan or leased to a developer. The terms and conditions of the lease are spelt out in the title. Unlike the case of a title acquired through land tenure conversion, customary land law is suspended only for the duration of the lease. When the lease expires, the land reverts to customary tenure.

There are distinct differences between the two formal processes. The lease-leaseback process has recently become popular, even to the extent of having freehold titles converted to lease-leaseback titles. Table 1 summarises the available data on the use of lease-leaseback titles.

Table 1. Lease-leaseback agreements by province

Project	Province	Areas in hectares (number of portions*)	Lease periods (Years)
Higaturu Oil Palm	Oro	774.6 (5)	20 (with option to renew)
New Britain Palm Oil	West New Britain	a) 80865.5 (10) b) 14427 (4)	(a) 20–40 (b) still being logged
Milne Bay Estate	Milne Bay	4887 (34)	60 (20 year sub-lease)
Agricultural, light commercial and industrial	Five Highlands Provinces	99 137.7	15–99

Source: Data from the Department of Lands and Physical Planning up to 2005.

* Numbers in parentheses reflect the number of portions.

Individual applications for leases of plots of customary land are common in the Highlands region. In the five Highlands Provinces, most leases are for agricultural (smallholder coffee and other commercial farming), light industrial (coffee factories, mechanical repair, and retail), and commercial (wholesale and retail) enterprises.

¹⁰ Presentations made at the Land Summit by two major financial institutions — a commercial bank (Bank South Pacific) and a development bank (National Development Bank) — confirmed that land tenure conversion titles were not bankable.

It is often difficult for individuals to apply for large portions of customary land, because customary land is largely owned and administered at the group level. The group could be a family, clan, or tribal group. The vehicle commonly used in such cases is the *Incorporated Land Group Act 1974*, which incorporates the social unit that claims the right to the land. The titles in this case are vested in the landowning group. In some cases, the same land group is incorporated as a business group under the *Business Groups Incorporation Act 1974*. Business transactions on the land are then facilitated through the business group. West New Britain, Oro, and Milne Bay provinces utilise this method for expanding the development of oil palm plantations. As the data presented in Table 1 show, oil palm projects are utilising 86527.1 hectares. A further 14427 hectares are confirmed for registration for lease after the logging part is completed¹¹. A total of 200091.8 hectares of customary land are known to be registered under lease-leaseback nationally.

The preceding discussion and the data presented in table 1 highlight the need to devise a better system for making land currently held under customary tenure available for development. Given the important role that customary land plays in supporting the livelihoods and culture of over 85 percent of the national population, the Department of Lands and Physical Planning has committed itself to a process of public consultation aimed at encouraging Papua New Guineans to accept the idea of converting their customary land to formal tenure. The proposed new law and the consultation process are described in the next two sections.

3. Main features of the proposed customary land law

The limitations in the existing laws and their effect on the potential use of customary land are widely acknowledged. Many of these limitations were recognised prior to independence beginning in the late 1960s. The Department of Lands and Physical Planning, with the political guidance and leadership of the minister responsible for land matters, has initiated a process to generate interest amongst Papua New Guineans in rethinking customary land tenure.

The Department has also developed a legal framework aimed at mobilising land currently held under customary tenure for development. The proposed law, known as the Voluntary Customary Land Registration Bill, is not intended to replace the existing legal framework but to provide an additional option for registering customary land and making it available for development by the private or public sector. Its main features include the following.

- **Registration:** All titles would be recorded in a Register of Customary Land. Registration would be conclusive evidence of ownership. Registration is defined as a process of recording a description of the land, including its boundaries and ownership.
- **Title:** Customary land would be registered with absolute ownership title, meaning that the land is owned absolutely by the group in whose name it is registered.
- **Customary lease:** A group would be able to grant a lease of the land — a right to occupy the land, which does not amount to a transfer of ownership — to a person, group, or company. There would be a Register of Leases of Customary Land. Subsequent dealings on the granted lease in customary land would also be registered.

¹¹ This is an example of large tracks of forest land being first logged and later converted into oil palm plantation.

- **Procedure:** The Land Titles Commission would investigate boundaries and prepare a plan showing the boundaries of the land and the names of the members of the customary groups claiming ownership. The plan would be advertised publicly and a period allowed for public objections. These objections would be heard and determined by the Land Titles Commission before a final plan for registration is prepared. The Registrar would receive the final registration plan, register the boundary and ownership, and issue a certificate of title to the group representing the landowners.
- **Incorporation of landowning unit:** The landowning group would have to have legal status. To meet this requirement, it would be required to incorporate under the *Land Group Incorporation Act 1974*.
- **Effect of registration:** Registration of title would be conclusive evidence that the group is the owner of the land. It would not be possible to change the title until after a period of twenty years and then only on the grounds of significant changes. Adjustment of title would be possible to consolidate adjoining parcels of land or to subdivide land. An inquiry process would be followed for title adjustments.
- **Transfer of title:** The current limits, under which ownership of customary land may not be transferred except to the state or to another citizen or customary group, would remain in effect.
- **Customary law:** Custom would continue to determine ownership and matters affecting land generally. For example, whether or not a lease should be granted on registered land would remain a matter to be decided by custom. Ownership rights within a group that has a registered title to land would be decided by custom.
- **Boundaries:** The proposed law would require boundaries to be marked but not to be formally surveyed. The Registrar of Titles would be able to call for boundaries to be surveyed, and if this is done, the certificate of title would so indicate. In practice, it is likely that most boundaries would be formally surveyed.
- **Collateral use of land:** A customary group would be able to choose whether or not to register customary land. A demand for registration is likely to arise once landowners are aware that land has to be registered before it can be used as collateral. This is expected to institutionalise the process for customary land registration.
- **Restrictions on alienation:** Registration would not lead to permanent alienation of the land from customary owners; it would remain impossible to sell the land to non-citizens. Furthermore, financial institutions would be restricted from forfeiture.¹² On the other hand, the terms and conditions of any lease would have to be specified and respected by both parties. The lessee would have the right to occupy and use the land as he or she wished, according to the terms of the lease, and the group could not interfere with that right.

¹² The *Land Tenure Conversion Act 1963* forbids forfeiture of freehold titles in the case of default. The same idea is proposed here.

- **Evidence of title:** Registration would be conclusive evidence of ownership of the land. Once the land is registered as owned by a particular group, no other group would be able to deny that title.
- **Boundaries:** Once land is registered with formally surveyed boundaries, the boundaries could not be questioned. Although not required under the proposed law, it is likely that most boundaries of registered land would be formally surveyed, especially if the land is to be used as collateral for a loan.
- **Title investigation:** Investigation would be carried out by an independent and competent body, the Land Titles Commission, which already has experience and expertise in dealing with land disputes. There would be no political involvement in the process of registration.
- **Compensation:** A fund would be set up to compensate persons suffering loss or damage by reason of an error in the register or because the register is altered for some good reason. The amount of compensation would be decided by the National Court.

Significant benefits can be expected to arise from this legislation. Customary landowners would have a legally backed claim to their land. They would be able to lease it or mortgage it for a loan. The country as a whole would gain from increased investment, jobs, and income.

4. The public consultation process

The Department of Lands and Physical Planning is faced with the mammoth task of packaging and promoting the proposed customary land law to the wider community. The Department is mindful of the violent reaction to two earlier attempts at land reform in 1994–1995 and 2002.¹³

Mindful of the lessons from these experiences, the Department has adopted a ripple-effect approach in its public consultation process, giving different groups priority based on their level of influence. Educational institutions are considered to have the greatest influence. University students, who led public protests that ultimately derailed earlier initiatives, are seen as particularly influential. Helping them to understand the details of the proposed law and convincing them of the need to reform customary land tenure is crucial. Politicians and technocrats at all levels of government are considered the second most influential, followed by local authorities and community groups. The public at large comprises the final group of people in this consultative approach.

A comprehensive and articulate approach is crucial in order to avoid misinformation and ensure outreach to all provinces, all levels of government, the private sector, civil society groups, and landowning communities.

To achieve the above objectives, the process will be guided by the following principles.

¹³ In 1994 and 1995, the World Bank made reforms to customary land tenure as one of the conditions for a loan. In 2002, the government of Prime Minister Morauta was accused of initiating a land reform program. In both cases, opposition led by university students, trade unions, and a coalition of nongovernmental organisations resulted in the destruction of public property. In the 2002 incident, four people lost their lives when the police fired live bullets into a protesting crowd.

- **Use of appropriate language:** The draft law will be translated into language that is easily understood by stakeholders.
- **Commitment to a full consultation:** The draft law will not be finalised until the full consultation process has been exhausted. This approach is aimed at ensuring national ownership of the ideas as well as clearing up misinformation and misunderstandings.
- **Use of success stories:** The application of the two existing laws, the *Land Tenure Conversion Act* 1963 and the lease-leaseback provision of the *Land Act* 1996, will be discussed.
- **Acceptability to financial institutions:** The legislation should ensure that land titles are acceptable to financial institutions for use as collateral for loans. Financial institutions are identified as important stakeholders in the public consultation process.
- **Emphasis on voluntary nature:** It will be emphasised that the registration of customary land is voluntary.
- **Emphasis on compatibility with custom:** It will be stressed that the proposal is compatible with customary land tenure practices. The model for customary land registration being advocated draws from existing customary land tenure practices. The communal ownership of land is recognised, and the government, in recognition of this fact, aims to support the registration of land by communal groups registered under the *Incorporated Land Groups Act* 1974.
- **Emphasis on multiple benefits:** The consultation process will make clear that, while registration may not produce immediate tangible benefits, it begins a process of empowering people to be partners in the economic development of the country. The registration of land, whether it is customary, private freehold, or state land, serves a number of benefits. Notable among those are that it prevents disputes over ownership and boundary infringements; and other lesser interests in the land, such as user rights and occupational rights, are clearly recorded. Registration will put on record, according to custom, ownership rights, user rights, occupational rights, access rights, and succession rights, and dramatically reduce many of the land-related conflicts that are prevalent nationwide.
- **Multiple options:** It will be made clear that all existing legislation remains unchanged but the proposed law will provide additional options. The idea is to provide alternative models that enable customary land to be mobilised for development. Customary landowners will choose the model that best suits their circumstances.
- **Context:** The history of customary land registration, existing legislation and procedures, and details of the proposed draft law and procedures will be compared.

The consultation process needs to be comprehensive, accurate, inclusive, and articulate. So far, the reaction to the proposal has been positive. This is an early indication that our strategy is achieving its anticipated objective.

5. Conclusion

It is widely accepted that land plays an important role in a nation's development. It is inevitable therefore, that customary land tenure has to be reformed with the purpose of making it work for the benefit of all stakeholders. Hence, the public is invited to have a critical look at the proposed new law. This proposal should be discussed amongst all stakeholders and their views conveyed to the Department of Lands and Physical Planning. Every Papua New Guinean should know that this is an issue that is central to each citizen. Land reforms, inclusive of customary land, have been ongoing in this country since the colonial era, but with little success, and a new approach is needed.

The proponents of land reform know that it is not a panacea for the country's development malaise but a core piece of the development puzzle. Complementary interventions are therefore vital. For instance, infrastructure development can serve as the catalyst for people to mobilise their land for production targeted for established markets. Land reform should therefore be placed in the wider context of reforms for national development.

CHAPTER 5: PHYSICAL PLANNING

Morris Alaluku

1. Introduction

Foreseeing and guiding changes in township development is the responsibility of a physical planner. Physical or town planning is an important component of the system of land administration and supports all aspects of land administration. It involves two separate activities: preparing plans and implementing them.¹⁴ Both activities need to operate within a legislative framework that lays down procedures and standards. Depending on the nature of the plans, the decision to implement them may be taken by individual planners or, if so legislated, collectively by a body such as the Physical Planning Board.

This chapter provides an analysis of the effectiveness of the physical planning system in Papua New Guinea and is organised as follows. Section 2 provides a brief overview of the history of physical planning in Papua New Guinea. Section 3 discusses the application of the physical planning law and system in Papua New Guinea. Section 4 is a case study of the Milne Bay Provincial Physical Planning Board. Section 5 discusses the options for improving the role that physical planning plays in the orderly and efficient development and growth of towns and cities in Papua New Guinea. Section 6 concludes the chapter.

2. Physical planning in Papua New Guinea

Town planning in Papua New Guinea was originally carried out by surveyors in the absence of a planning board. The plans were elementary zoning plans that normally were approved by the surveyor general. As long as development was in the appropriate zone, there was no need for any other formal planning approval. In 1952, a rudimentary planning board, consisting of the Surveyor General, the Valuer General, and the senior officer of the Department of Works was established under the 1952 Town Planning Ordinance. Its main role was to approve land use zonings, but the approved plans were not legally enforceable. In 1972, a Town Planning Board was created, following amendment of the 1952 Town Planning Ordinance. This board was not a policy-making body. Its main function was to rule on submissions requesting approval of zoning and building developments and to ensure that the developments were zoned appropriately. All functions and operations were centralised and administered from the head office in Port Moresby.

The Town Planning Board established in 1972 remained operational until the *Physical Planning Act* of 1989. That act enabled much of the planning and decision-making process to be decentralised to those provinces that make a commitment to administer their own physical planning offices, including establishing physical planning boards.

Under it, the provincial boards consider land use zones and are empowered to perform a much broader role, including setting policy. Consideration of development plans for the future of towns and district centres is an important component entrusted to the provincial physical planning boards.

¹⁴ Town planning and physical planning are used interchangeably although town planning is generally broader than physical planning.

Planning boards are established under s.19 of the *Physical Planning Act*. A memorandum of agreement between the Department of Lands and Physical Planning and the provincial governments operationalises this arrangement. The provincial physical planner is entrusted to develop the plans, prepare submissions, and present them to the board for consideration. In effect, the planner makes policy by formulating proposals and securing validation from the board. Following board approval, the planner administers the plans and ensures their implementation.

Currently, there are six physical planning boards in operation: the National Physical Planning Board, three provincial boards (West Sepik, Milne Bay, and East New Britain provinces),¹⁵ and boards for the National Capital District and the city of Lae. The National Physical Planning Board is responsible for physical planning in the remaining seventeen provinces and in matters of national interest.

The membership of provincial physical planning boards is determined under s.20 of the *Physical Planning Act*, which allows for ten members, five of whom are from the public service. The other five are representatives from the business community (nominated by the respective chambers of commerce) and the general community (churches, settlements, and sporting bodies), and a specialist with qualifications in physical planning, engineering, architecture, law, valuation, or surveying.

The *Physical Planning Act* sets the framework for the development control mechanisms available to all provincial boards. The powers and functions of the provincial planning boards are determined under s.28. Provincial interests are varied and wide-ranging and include development plans (orders for preparation of development plans, progress reports, submissions and reviews of provincial development plans, urban development plans, local development plans, and subject plans), zoning and subdivision plans, control of development and use of land (declaration of land use zones and redevelopment zones and change of zones, nonconforming land use approvals, development in redevelopment zones, subdivision and consolidation of land parcels). The provincial boards also have the power to authorise demolition notices and stop-work notices for illegal construction, and to enter into s.18 Agreement under the *Physical Planning Act*. This Agreement sets out the required provision and/or payment in lieu of such provision and/or land to be released as a result of an approved application for planning permission.

Provincial planning boards have an important role. It is not confined to controlling current developments, but also includes projecting the long-term physical, social, and economic characteristics of the community. They can also guide public actions that produce growth and development in the provincial and district centres. This can be achieved by determining sites and guiding the preparation and refinement of plans for various land uses, such as transportation, infrastructure, public buildings, public utilities, recreational areas, and other capital improvements. In this regard, the professional and technical officers of the physical planning office should have the resources to make development plans and programs, based on careful study and analysis of the town's expected development outlook. They should also provide a clear guide for decisions in the construction of public facilities and in the regulation of the phase and character of private development through land-use controls. Once these

¹⁵ A fourth provincial board, in Western Highlands Province, was suspended for breaching provisions of the *Physical Planning Act*.

objectives are defined, the boards should be in a position to advocate plans and programs to help achieve the objectives.

3. The Physical Planning Act in practice

The membership of the board is of crucial importance in the planning process. The need for increased public involvement in planning highlights the existence of multiple lifestyles with varying goals, reflecting the diversity in social and economic groups. As towns and cities grow, an increasing number and variety of groups demand a voice in town affairs. Direct participation by all groups may be difficult, but their views can be represented through a physical planning board. Boards that are aware of the interests of the community and recognise the potential impact of major decisions will ensure that planning accommodates the views and interests of the wider community of stakeholders.

While physical planning boards are expected to make decisions in the interest of the community, an individual or organisation aggrieved by any decision has the right to appeal to the minister. The minister must weigh her or his decision carefully, so that basic planning principles and community interests are protected and placed above those of private interests.

Another important activity of the boards is an ongoing effort to increase public acceptance and understanding of and support for the planning programs and the principles of planning. The job of informing the residents of a community and public officials about approved development plans should be handled in large part by the physical planning office, and the boards should be able to assist through public forums. Unfortunately, this is not happening in Papua New Guinea. The typical planning board in Papua New Guinea spends much of its time on development control matters — considering zoning and development approvals and other short-term matters. This sends the wrong signal to the public that physical planning is anti-development. Furthermore, without public participation, the boards could hinder development and progress.

Zoning plans are the primary reference for a developer preparing a proposal or for the Land Board to allocate State-owned land. Zoning plans determine the range of lease purposes as well as land rental rates. Unfortunately, zoning in Papua New Guinea is not accurate because updates and verification through notices in official gazettes are irregular and the process suffers from a lack of transparency and consistency. Compounding the problem is the absence or unreliability of land use data from the National Department of Lands and Physical Planning. Even when data are available, they are often difficult to access from the provinces. In many instances, decisions are delayed indefinitely, awaiting the required information.

Town planning requires coordination across many agencies, including the Land Board, Physical Planning Board, Building Board, Department of Environment and Conservation, and various agencies responsible for issuing trading licenses. However, attempts by the National Physical Planning Office to promote links between agencies have largely failed.

Violations of the legally established processes are frequent. For instance, there have been many cases in which Land Board decisions have violated planning zones. The *Land Act* 1996 states that Physical Planning Board decisions take precedence over Land Board decisions. However, the reverse has been the case in practice, according to anecdotal evidence from Port Moresby and Lae. This constitutes a significant violation of an important piece of law. Similarly, a physical planning board's decision or a requirement for certification by a

physical planner under Section 8 of the Building Act Regulation has often been overlooked in practice. This is an important requirement that needs to be satisfied before a building board can consider a building application. In practice, developers have proceeded with construction work and have been fined for negligence only if caught.

There are town authorities without planning boards or physical planners, for example in Alotau, Goroka, and Mt. Hagen. These town authorities rely on consultants, not necessarily planners, to assist them with increasingly complex problems of urban design and development. They do this because they are directly responsible for the growth, security, and development of the town they serve. They see the importance of planning for the better distribution of their limited resources and the betterment of their communities. Generally, they do not use their provincial planners. Similarly, consultation between the town authorities and the provincial planners is limited.

Even when provinces have memorandums of agreement with the Department of Lands and Physical Planning, provincial governments often do not adhere to those agreements. The accompanying resources, to be transferred with the functions, have often been diverted elsewhere.

There is a general lack of attention to town growth and urban development. Many authorities seem to think that their towns are not large enough to pose problems and that planning is therefore not an issue. As a result, many towns experience uncoordinated and haphazard development. A case in point is the rapid growth in informal settlements, which develop and expand without adhering to any formal rules and regulations. This neglect is driven by the view that only formal development areas are worthy of planning. Interestingly, the development of the formal sector is also restricted by rules and regulations, which reinforces the widely held view that physical planning boards serve as an obstacle to development.

Increasingly, important planning decisions are being made by politicians or senior public servants without consultation with planners or the planning board. In some cases, the same people are members of all three relevant boards — the physical planning, land, and building boards — which raises important questions with respect to conflict of interests, transparency, and accountability.

4. The Milne Bay Physical Planning Board

The Milne Bay Physical Planning Board was established in 1997 and currently has ten members.¹⁶ Seven members have alternates who take their place when they are unavailable. Two of the regular members, as well as the provincial physical planner, are also members of the Provincial Building Board, so they try to provide coordination and liaison between the two boards. Amongst the members are two professional town planners, a civil engineer, a business executive representing the Chamber of Commerce, and two architects (one of whom has a doctorate in architectural design). All members have demonstrated an interest in the community and a commitment to ensuring the proper development of urban centres in the province, for the benefit of all urban residents. The board serves the town of Alotau, which has a population of fewer than 10000, and four other district centres with populations of up to 200 each.

¹⁶ The author is a member of this board.

Thus, Milne Bay Province has a well-qualified, competent, and committed board to deal with the pressures of urbanisation, which can also assist in the technical evaluation of plans submitted for consideration. The board is served by two officers, a professional planner who prepares the plans and provides specialist advice, and an assistant-cum-secretary, who assesses and documents planning applications for the board to consider.

Regardless of these qualifications and the commitment of the board members, a decision of the board can only be as good as the information on which it bases that decision. In practice, many submissions are made on the basis of inadequate information, in a disjointed and incremental way, and, for reasons that are often subjective, many decisions are deferred or delayed indefinitely. The prime reason for this behaviour is that the main data relating to land are kept by the National Department of Lands and Physical Planning. Its usefulness is often questioned because some of it is outdated, inaccurate, incomplete, and difficult to access from the province. Even the National Housing Commission, which has a substantial interest in the province, does not have accurate information to rely on. Yet its properties continue to change hands without titles in place. All these problems make it very difficult for the board to decide on approval for applications, as it is a requirement that zoning, cadastral, and ownership information must be accurately determined.

Approvals of plans and zoning of land, in particular declaration of planning areas and redevelopment zones, are required under the *Planning Act* to be gazetted, but they face the same fate. The minutes of each board meeting are forwarded to the Office of the Chief Physical Planner for noting and gazettal of those decisions that require it. Yet no action has been taken on any of the submissions made so far.

Communication seems to be part of the problem, as there is no clear direction from the Office of the Chief Physical Planner to indicate which office is responsible for gazettal.¹⁷ Legally, all decisions of previous boards as well those of the current board that have not been gazetted are ineffective. The allocations of land by the Land Board could also be questioned, as they may have granted leases not in accordance with approved zonings.

Over the past five years, there have been no reports or reviews to monitor the progress of the planning office or the board. Such a review is required to provide guidance on its roles and functions. Neither have there been any general reports to assess the performance of its functions, and more importantly, the results of its decisions.

The board faces other constraints. First is the lack of capacity of staff, which has, for instance, stalled work on the plans for the district centres. Second, lack of funding has led to infrequent board meetings, sometimes six months apart. Third, there appears to be a lack of awareness of the importance of the board's functions, and the fact that its decisions determine the physical development of the province and influence the valuation of property, including land rents.

The delay caused by these constraints has serious implications. It slows the rate of development of Alotau and the district centres, prevents the employment and business opportunities, and thus diminishes the social and economic wellbeing of the province.

¹⁷ The Office of the Chief Physical Planner is located within the National Department of Lands and Physical Planning.

Despite these constraints, the board strives to execute its duties. However, its decisions will have no effect unless they are enforced and supported by the appropriate authorities.

5. The future of physical planning in Papua New Guinea

Proper and organised development of towns and cities and efficient utilisation of land resources begin with the design and implementation of efficient plans. This crucial element has been either missing or undermined. To develop viable cities and towns and an efficient land and properties market in Papua New Guinea, town planning processes, systems, and capacities need to be substantially upgraded.

Decentralising town planning to city and town authorities is the future for Papua New Guinea. Part IV of the *Physical Planning Act*, s.19, creates the mechanism to decentralise planning functions to the provinces through the establishment of provincial planning boards. Section 29 provides further powers to establish local planning boards. This has happened in the case of Port Moresby and Lae. However, s.29 also restricts the delegation of functions to local boards. To rectify this anomaly, Part IV of the Act should be reviewed with a view to empowering town authorities in the capital town of each province to establish their own boards after satisfying certain minimum requirements. The office of the chief physical planner should be empowered to set the criteria and approve the establishment of the town authorities in provincial capitals.

This proposal is justified on the grounds that provincial government authorities are too large to respond adequately to the day-to-day needs of the provincial capitals. The town authorities, being smaller, would be directly responsible for town administration. They could also be responsible for providing insights into the physical, social, and economic characteristics of the community. The town authorities should also be made responsible for executing all policies concerning land subdivisions and land use. These are important for regulating private decisions regarding urban growth.

Decentralising physical planning responsibilities to town authorities will require the presence of a skilled administrator with a cadre of professional planners, supported by adequate resources to carry out their duties. These resources include all relevant land information, including cadastral and zoning plans. To meet requirements for timely updated information, the central land database at the Department of Lands and Physical Planning should be complete, accurate, regularly updated, and easily accessible. This is vital to effective planning decisions.

In the decentralised structure, the task of the chief physical planner and the National Physical Planning Board should remain as they are. This is necessary to maintain standards and quality control and provide guidance where required, as well as to deal with matters of national concern. While the provincial planning offices and boards should remain as they are, their efforts should extend to cover district centres.

An emerging issue worth further consideration is managing urbanisation that is inclusive of land held under customary tenure. Given that urbanisation is inevitable, and alienated state land is in limited supply, the need to pave the way for the orderly development of land held under customary tenure within urban centres deserves detailed attention. The inclusion of customary landowners in the planning process is expected to create a new dynamism in the process. Initiatives in this direction are being taken in some towns, such as Alotau in Milne

Bay Province. The Milne Bay Physical Planning Board has recently approved the extension of the Alotau town boundary. This extension was aimed at preventing the villages and settlements from becoming formless and congested following ribbon development along the main roads. The planning objective is to ensure that development takes place according to a planned layout, which provides for communal areas such as schools and recreation and community centres. This planning requires proper consultation with customary landowners.

6. Conclusion

Town development involves countless private actions. It includes decisions on how to use plots of land, what type of building to put up, the services required, and the mode of transport to be used. Town planning should focus on designing systems that provide the enabling environment and framework for these private actions, without negatively affecting the society at large.

Planning boards have an important role to play in nation building by shaping the growth of the urban environment and the welfare of the community. It is the role of the board to initiate and promote development plans and communicate with the community at large. Physical planning covers land use, transportation, community facilities and services, capital improvement, programming land release, zoning, and subdivision regulations. As far as the current laws are concerned, the decisions of the board are legally binding. It should also be highlighted that their decisions affect the value of land and property.

The application of the *Physical Planning Act* in Papua New Guinea has been poor. There have been frequent violations of its provisions, especially by the Land Board, which allocates State-owned land, and the Building Board, which approves property development. Decentralisation of town planning powers has also been a dismal process. However, the need for further decentralization — to provinces, provincial towns, and districts — remains.

Important lessons from the application of the current law should be used to formulate a new approach towards town planning in Papua New Guinea. One important step would be to strengthen the power of Physical Planning Boards and ensure that the Land Board, Building Board, and other relevant authorities conform to the town plans. Other areas of concern that need attention are financial and human resource capabilities, both at the national and provincial levels, and the maintenance of a land database.

CHAPTER 6: CUSTOMARY LAND DISPUTE SETTLEMENT

Lawrence Kalinoe

1. Introduction

Land held under customary land tenure accounts for 97 percent of the total land area in Papua New Guinea. Customary land tenure is a system that provides for customary land to be held by indigenous Papua New Guineans on the basis of the custom and traditions of their particular society.

The protection and preservation of customary land tenure has been a central policy of all colonial administrations in Papua New Guinea since the Land Ordinance 1911 (Papua) and the Laws Repeal and Adopting Ordinance 1921–1952. Successive land laws and ordinances have continued to maintain that position. It is fair to say that customary land tenure has generally served the nation well; it has not only prevented the emergence of a “landless proletariat” but has also acted as a social safety net and a “great absorbent” upon which the vast majority of indigenous Papua New Guineans now depend.

This chapter focuses on the customary land dispute settlement process, a mechanism provided for by the State to manage disputes on customary land. It is organised as follows. Section 2 discusses the legal basis for customary land tenure. Section 3 reviews the customary land dispute settlement process and analyses the application of the law and its relationship to other legislation. Section 4 concludes the chapter.

2. The legal basis for customary land tenure

The following statement by Justice Kelly in the case of *Gaya Nomgui & Others v The Administration of the Territory of Papua New Guinea* [1974] PNGLR 349 best captures the legal arrangements under which customary land tenure was nurtured by the colonial administration:

The legal effect of the existence of customary ownership by native groups in New Guinea is beyond doubt and the legislation in force in that Territory lead to a different result from that reached by Blackburn J. in the Supreme Court of the Northern Territory in *Milirrpum & Others v Nabalco Pty Ltd and Another* (1971) 17 FLR 141 which concerned claims to land on behalf of aboriginal tribesmen of the Gove Peninsula in Arnhem Land.

After these introductory remarks and a discussion of the basis of Blackburn’s decision in the *Milirrpum case*, Justice Kelly continued:

In the statute law of New Guinea there are to be found specific provisions which require recognition of communal native title. For instance, there is Section 9 of the Laws Repeal and Adopting Ordinance 1921–1952 which remains in the form it was originally enacted, namely: “9. Nothing in this Ordinance shall affect the right, title, estate or interest, vested, possessory or contingent, of any aboriginal native or tribe of aboriginal natives to any land within the Territory, whether such land has been proclaimed as native reserve or not, or any customary user by aboriginal natives of market-places and land-

places, or any existing right, privilege or custom of aboriginal natives in relation to cultivation, barter, hunting and fishing.”

Section 10 of that Ordinance provides that native customs and usages shall be permitted to continue in existence in so far as they are not repugnant to the general principles of humanity, while the Native Customs (Recognition) Ordinance 1963 although of more recent origin, requires this court to recognize and enforce native custom, part of which is of course a system of ownership of land by native custom. The Land Ordinance 1922–1927, although less explicit, certainly appears to contemplate communal native title when it refers in Section 8 to the purchase of land by the Administrator from native owners and again in Section 16 which, subject to certain exceptions, forbids the occupation of land owned by natives by any person other than a native. The consequence is that in the Territory of New Guinea customary ownership of land by native groups was and is recognized as a legally enforceable right.

This approach to customary land tenure has been carried through successive legislation on land and land law until now where s.4 of the *Land Act* 1996, in declaring State title to land, exempts customary land and all associated estate, right, title, and interest from the declaration of State title to land. Customary land is now defined under s.2 of the *Land Act* 1996 to mean “land that is owned or possessed by an automatic citizen or community of automatic citizens by virtue of rights of a proprietary or possessory kind that belong to that citizen or community and arise from and are regulated by custom.” Customary rights, accruing out of customary land, are defined under the same clause to mean rights of a proprietary or possessory kind in relation to land and arising out of customary land. Section 53(1) and (4) of the Constitution gives protection from unjust deprivation of proprietary or possessory interests and rights associated with customary land and of customary land itself.

The *Native Customs Recognition Ordinance* 1963 was carried over in its entirety into post-independence Papua New Guinea and now exists as the *Customs Recognition Act* Chapter 19 (Revised Laws of PNG). This legislation is significant in that it gives express legal recognition to customary land tenure as the continued basis of landholding in indigenous Papua New Guinea. Under s.3, general recognition is given. Section 3(1)(a) in particular declares that, except in instances where the Act states otherwise, “custom shall be recognized and enforced by, and may be pleaded in, all courts” unless the recognition and enforcement of a particular custom would result in injustice or may not be in the public interest. Section 5 of the Customs Recognition Act specifically recognises customary land tenure when it says:

Subject to this Act and to any other law, custom may be taken into account in a case other than a criminal case only in relation to:

- (a) the ownership by custom of or of rights in, over or in connexion with customary land or,
 - (i) any thing in or on customary land; or
 - (ii) the produce of customary land, including rights of hunting or gathering.
- ...
- (d) the devolution of customary land or of rights in, over or in connexion with customary land, whether,
 - (i) on the death or on the birth of a person; or

- (ii) on the happening of a certain event

Whilst the *Land Act* 1996 and its predecessors have consistently exempted customary land from their regulatory purview, and therefore indirectly preserved and protected it, it is actually the above-cited provisions of the *Customs Recognition Act* 1963 that legally recognise the entire body of customary land tenure right through to the devolution of customary land, ensuring its continuity. Under Schedule 2.1 of the Constitution, adopted at independence, custom now forms part of the underlying law and is to be adopted and applied provided it is not inconsistent with any statute law, including constitutional law, or that its adoption and application would not be repugnant to the general principles of humanity (Schedule 2.2).

Any dealings in customary land are restricted by s.132 of the *Land Act* 1996 to Papua New Guinea citizens; even then they must be authorised by the minister for lands (s.10). Under s.10(2), the minister for lands is empowered to acquire customary land on behalf of the state. However, before acquiring it, the minister must enquire into and be satisfied that the land proposed for acquisition is not required or likely to be required by the concerned customary landholders for future use. Legislative arrangements like these have ensured the availability of customary land under customary land tenure.

3. The customary land dispute settlement process

Customary land tenure was an important issue for the colonial administration of the then Territories of Papua and New Guinea because of the realisation that if the “natives” were kept in their villages and on their land, there would be less social disruption or related problems. Realising this and appreciating that customary land disputes remained the single most dangerous cause of tribal conflict, and that there was therefore a need to deal expeditiously with such disputes, the colonial administration set up special administrative tribunals and appointed administration officials, usually the *kiaps* (district commissioners), to preside over them and deal with land disputes. As Mugambwa and Amankwah (1996:31) explained, since customary land disputes

have potential for violence, therefore a policy was maintained that they should be dealt with “administratively” taking them out of the realm of the judiciary. The *Native Regulations* 1939 ensured that land ownership claims did not get to the courts. Since 97% of the total land mass is held under customary land tenure this situation has had serious repercussions in the past. The *Land Disputes Settlement Act* it seems has gone some way to rectify the situation.

In fact, the contributions that district commissioners (*kiaps*) made, sitting as Land Titles Commissioners, in determining customary land disputes were quite remarkable. Take, for example, the work of Commissioner Jack Page in and around Madang. He single-handedly determined many customary land disputes, particularly amongst the Ameles of Madang, both in the Central and South Ambenob local-level government areas. His decisions, made in the 1960s, stand to this day and form the basis of continued customary landholdings. At least these decisions give some degree of certainty to customary landholdings in and around Daunben and Bohor areas of Amele, on the outskirts of the Madang Township.¹⁸

¹⁸ For further discussion of this see *Adaug Dawong and 9 others of the Galalo Clan v Madang Provincial Government & 3 others*, DCC 326/2001, judgment by Mark Selekairu SPM.

The *Land Disputes Settlement Act 1975*, which introduced the local land courts and provincial land courts, upon the recommendations of the Commission of Inquiry into Land Matters, at independence, was an attempt to introduce judicial processes into the settlement of customary land disputes. Prior to that, customary land disputes were channeled through the Land Titles Commission, which was performing a largely investigatory function, more often than not, headed by district commissioners who were essentially administrative officials but who also had very wide powers, including police and judicial or quasi-judicial powers.

Currently, the institutions with legal jurisdiction over customary land disputes at first instance are the local and provincial land courts, set up under the *Land Disputes Settlement Act 1975*, and the Land Titles Commission, established under the *Land Titles Commission Act 1963*.

Local and provincial land courts

These courts are established, empowered, and regulated by the *Land Disputes Settlement Act 1975*. This Act provides a legal mechanism for settling disputes over customary land and associated interests. It provides an avenue for traditional dispute settlement, with the active involvement of the disputants and the assistance of local land mediators.

Chalmers and Paliwala (1984:86) aptly observed that the Act “tries to combine the elements of customary and western settlement procedures” with community participation and compromise through the mediation process. Its essential features are mediation and arbitration. Parts II and III of the Act set up the machinery for mediation by requiring provincial land dispute committees to be established (see s.5). These committees also appoint land mediators and approve the appointment of local land magistrates (s.7). The procedure for mediation of land disputes is laid out in Part IV. Land mediators are empowered under s.17. When a decision is taken to conduct mediation, land mediators are required to inform the nearest local land magistrate as soon as practicable.

Section 18 ss.1 and 2 provide the following:

- (1) If an agreement is reached between the parties to a dispute as to the whole or part of the dispute, the Land Mediator shall—
 - (a) record that an agreement has been reached; and
 - (b) unless he thinks it inappropriate to do so, record the terms of the agreement; and
 - (c) ensure that the terms of the agreement are understood by the parties and are formally and publicly acknowledged by or on behalf of the parties; and
 - (d) where the terms of the agreement are recorded, forward a copy of the record to the nearest Local Land Court.
- (2) Where the terms of an agreement include agreement as to the location of a boundary, the Land Mediator shall—
 - (a) as far as practicable, walk the boundary with the parties; and
 - (b) unless he thinks it impracticable to do so, direct the parties,
 - (i) to inform him of all prominent natural features located on the boundary; or
 - (ii) to mark the boundary in such manner and with such marks as he thinks appropriate; and

- (c) record the boundary in such manner as he thinks will enable it to be readily identified; and
- (d) record the names of not less than three witnesses who are prepared to testify to the position of the boundary as determined in the agreement.

Under s.19 of the Act, the parties to the agreement may apply to the local land court to have the agreement approved as a consent order.

Part III of the Act establishes the local land courts (s.21); their jurisdiction is set out under ss.26 and 27: the resolution of disputes concerning customary land rights and such interests. The local land courts conduct arbitration if mediation fails. Again, the emphasis is on mediation and compromise (s.28), but if that is not achieved, the court can give a firm decision. Chalmers and Paliwala (1984:87) best summarised the operation of the Local Land Court when they said:

The Local Land Court does not work like a western court. It does not have to decide in favour of one party or another but may reach a compromise. It does not have to make orders about who “owns” land in the western sense, it can make orders about any kind of rights allowed under custom. Thus it may make an order that a tree belongs to X but the land on which the tree stands belongs to Y.

Before handing down a decision, the Act also requires a local land court to inspect, with all the parties, the land in dispute and satisfy itself of:

- (a) the scope and extent of the land, where the dispute concerns interests in the use or possession of the land; and
- (b) the scope and nature of the produce of or improvements to the land, where the dispute concerns the produce or improvements; and
- (c) the location of alleged boundaries, where the dispute concerns a boundary to land; and
- (d) any other aspects of the land that will assist the court in reaching a just decision. (s.36(1)).

Section 39 of the Act empowers the court to hand down its decision in the form of orders. Such orders may include compromise orders, including orders for the land in dispute to be divided between the parties or for the land and associated customary interests to be held in common by them. Beginning twelve years after the date of the order, parties may apply for variation orders if they can establish that circumstances have changed so much that the continuation of the order would cause hardship or injustice. This is authorised under s.44.

Decisions of the local land court can be appealed to the provincial land court (established under Part V of the Act). Appeals must be filed within three months from the date of the original decision (s.54(1)). Grounds of appeal are restricted to those set out under s.58 of the Act:

- (a) that the Local Land Court exceeded or refused to exercise its jurisdiction; or

- (b) that the Local Land Court conducted its hearing in a manner contrary to natural justice; or
- (c) that in the circumstances of the case no court doing justice between the parties would have made the decision to appeal against or
- (d) that, in the case of an appeal against a decision given under Section 40, the order for the return of interest or interests in land or the grant of another equivalent interest or interests was not supported on the facts.

Decisions of provincial land courts are final and not subject to appeal (s.60) but may be reviewed by way of judicial review only.

Several decisions have gone before the National Court for judicial review. One such case was *The State v District Land Court Ex parte Casper Nuli* [1981] PNGLR 192. The Wasikuru and the Ruka clans in West New Britain Province went before the local land court over a piece of customary land known as Rakatava outside Talasea. On 23 April 1980, the court ruled that the land in dispute was owned by the Wasikuru clan, but since the Ruka had planted coconuts and other tree crops on the land, they could continue to harvest existing crops for up to five years but were not to plant any new crops. All undeveloped land remained with the Wasikuru. The Ruka were also ordered to pay an annual rent of K100 to the Wasikuru, and the Wasikuru were to compensate the Ruka at the end of the five-year period for the tree crops, which would then pass to the Wasikuru.

The Ruka appealed to the district (provincial) land court. That court upheld the local land court decision, but with a ‘slight alteration’ concerning the boundary of the disputed land and a further order for the land to be divided between the appellants (Ruka) and the respondents (Wasikuru): “All land above this boundary belongs to the Wasikuru clan and all land below this boundary, including the coconuts planted and disputed, belongs to the Ruka clan” (*ibid.* [1981] PNGLR 192). The cross-compensation orders of the local land court were set aside.

The case then went to the National Court, where Justice Bredmeyer found that “The ‘slight alterations’ or ‘slight variations’ which the magistrate has purported to add to the Local Land Court’s decision are by no means slight” and was in fact considerable, as it redefined the boundaries of the land (*ibid.* [1981] PNGLR 192). The National Court found that the district (provincial) land court acted outside its powers — which are limited to either affirming or quashing the local land court order and denying the appeal or remitting the matter or parts of it back to the local land court — and quashed its orders.

In another case, *In the Matter of Yabo Sabo for Nugi Clan of Amele in Madang Province and the Madang Provincial Land Court (Re Nugi Clan)* [1995] PNGLR 13, the applicant Yabo Sabo, as representative of the Nugi Clan, sought judicial review of a decision by the Madang Provincial Land Court made four years earlier. Much earlier, the local land court had awarded disputed customary land to another clan. The Madang Provincial Land Court upheld this decision but, to implement it, added a further order to the Nugi clan to vacate the land. Four years later they had not vacated the land and instead sought judicial review of the decision, citing the Casper Nuli case discussed earlier as a precedent and arguing that the Provincial Land Court exceeded its jurisdiction when it ordered the eviction.

Justice Doherty found (*ibid.* [1995] PNGLR 13, p.15) that the eviction order was not a complete variation (as in Casper Nuli) “but only an upholding of the original decision and an order facilitating its implementation by giving the unsuccessful appellants (current

applicants) time to vacate the land.” On this basis and because of other procedural requirements pertaining to time limits (under the National Court Rules Order 16 r 4) for judicial review, the court refused to review the Madang Provincial Land Court decision.

Another relevant case is *Meriba Tomakala v Robin Meriba* [1994] PNGLR 10, in which the local land court found for the appellant as being the sole and exclusive owner of the disputed customary land. On appeal, the Provincial Land Court upheld the orders of the local land court but added an order that “the children may however in the future take out an injunction order if and when Meriba Tomakala hands the land to his ‘vunatarai’ [clansmen] without proper consideration for his children who have a right of inheritance to his property.” Justice Doherty held that the Provincial Land Court had acted outside its jurisdiction when it made the additional order: “It cannot go outside the four corners of the order and amend it. It can only make further orders when it quashes the order. It therefore cannot uphold and amend” (*Meriba Tomakala v Robin Meriba* [1994] PNGLR 10).

Justice Bredmeyer, in the Casper Nuli case discussed above, remarked that if lawyers were allowed to appear in the local and Provincial Land Court proceedings, the land court magistrates would have benefited from their guidance and might not have committed these technical errors. He recommended that s.72 of the *Land Disputes Settlement Act* 1975, which restricts lawyers from appearing, be repealed.

It is difficult to assess the effectiveness of the customary land dispute settlement process under the *Land Dispute Settlement Act* 1975. The Land Courts Secretariat, established to oversee the system is no longer operational, as these functions have now been decentralised to the provinces. One province that has a fully operational and functioning customary land dispute settlement process is East New Britain. There, the provincial land dispute settlement committees are functioning and land court magistrates are handling customary land disputes.

Land Titles Commission

The Land Titles Commission was established in 1963 by the *Land Titles Commission Act* 1963 and continues to exist; but, with the enactment of the *Land Disputes Settlement Act* in 1975, and the introduction of the customary land dispute settlement regime reviewed above, many of its powers and functions, particularly relating to disputes about land and land boundaries, have been given to the local land courts.

In *Meriba Tomakala v Robin Meriba* [1994] PNGLR 10, p.12, Justice Doherty stated:

The powers of the Commission no longer extend to determining title under custom. This jurisdiction is now vested in a Local Land Court under the *Land Disputes Settlement Act*. In this, I refer to the decision of National Court Justice McDermott in *Olei v Provincial Land Court Port Moresby* [1984] PNGLR 295. He has made it clear at p.277 that once the transitional provisions of the *Land Disputes Settlement Act* are implemented, the Land Titles Commission powers are changed, and the power to determine title and to hear all disputes concerning claims of ownership by native custom or by right of native custom have passed from the Land Titles Commissioner and are now vested in the Local Land Court.

Strictly speaking, this view is correct, and it is in accordance with the concerns over the ineffectiveness of the Land Titles Commission in handling disputes. This was also found by the Commission of Inquiry into Land Matters in 1974. The Commission recommended that the customary land dispute settlement process under the *Land Titles Commission Act 1963* be “abolished and replaced by a three stage system of mediation, arbitration and appeal.” The appeals are to the provincial land courts. These recommendations resulted in the establishment of the land court system discussed above.

However, the *Land Disputes Settlement Act 1975* did not abolish the Land Titles Commission. Instead, it provided for co-existence and work sharing, or even a load shedding arrangement. Under s.66 of the *Land Dispute Settlement Act 1975*, the Land Titles Commission ceases to have jurisdiction if the dispute settlement mechanism under the Act has been established in the province. However, under s.4 of the Act, the head of state, acting on advice, may exempt the application of the Act and refer disputes to the Land Titles Commission under the following circumstances:

- (a) that the dispute is of long standing and that previous attempts at mediation have failed;
- (b) that the dispute has already resulted in serious breaches of the peace;
- (c) that there is no possibility of agreement being reached between the parties to the dispute;
- (d) that it is in the national interest that the dispute be settled in some other manner.

This is the process through which the Land Titles Commission has continued involvement in the determination of titles to and hears disputes over customary land, and through which the now famous *Re Hides Gas Project Land Case* [1993] PNGLR 309 was tried.¹⁹

The Land Titles Commission originally had two roles: settling disputes and registering titles. Whilst it made some progress in the settlement of customary land disputes, it has never been able to register titles of customary land. Currently, its role is to conduct investigations under the *Land Tenure Conversion Act 1963*, and it has had some success in this area.

When a dispute is referred to the Land Titles Commission, it is required to act within its jurisdiction, as conferred by s.15(1) of the *Land Titles Commission Act 1963*: except as otherwise provided, to hear and determine:

disputes concerning and claims to the ownership by custom of, or the right by custom to use, any land, water or reef, including a dispute as to whether any land is or is not customary land and may make all such preliminary inquiries and investigations as it deems necessary for the purpose of hearing and determining the disputes and claims.

When conducting a hearing, the Land Titles Commission is required under s.29A of the Act to physically inspect the land in dispute. The initial decision is made by one commissioner. If

¹⁹ This is a decision by the then Justice Amet sitting as a special land titles commissioner to hear the disputes over the various portions of land in the Hides Gas Project development area. After hearing the equally strong genealogical evidence concerning use of the land in question on both sides, he awarded ownership to those clans who were in actual possession of the land. Possession was the primary consideration in this decision, which has been widely debated. This author commented on the decision in Kalinoe (1993).

parties wish to have that decision reviewed, they must apply to the chief commissioner within ninety days (s.34). The review application is then heard by a three-member commission. The commissioner who made the decision under review does not sit on the review panel (s.36). The review panel is empowered under s.36(3) of the Act to “(a) affirm or quash the decision; or (b) if the justice of the case so requires, substitute for the decision any decision that might have been given.”

The decision can be further appealed, under s.38 of the Act, to the National Court. All appeals must be lodged within ninety days of a decision. The grounds for appeal are restricted, under s.38(2) of the Act, to the following:

- (a) the Commission has exceeded its jurisdiction;
- (aa) the decision was against the weight of the evidence;
- (b) the hearings of the Commission were conducted in a manner contrary to natural justice; or
- (c) the Commission was wrong in law.

On appeal, the National Court is empowered under s.38A of the Act to receive fresh evidence, reverse the decision of the commission, or — as happens more often than not — remit the case in whole or in part for further hearing before the commission.

In 2000, the Land Titles Commission decided *In the Matter of Various Applications under s.34 of the Land Titles Commission Act 1962 in Respect of South East Gobe Customary Land Ownership Dispute*, which involved fourteen applications. These were appeals from Special Land Titles Commission Justice Gibbs Salika’s decision in 1996, which had been immediately appealed to the National Court. The National Court, presided over by Justice Maurice Sheehan, ruled on 4 December 2000 that the Land Titles Commission decision, comprising Josepha Kanawi as chief commissioner and Bill Noki and Clement Malisa as commissioners, be set aside, as the commission exceeded its jurisdiction when it made certain declarations concerning interests in land and royalty payments. It also ruled that the commission had failed to be fair and impartial, in that Commissioner Noki was biased when he allowed evidence from a party that was outside the review process. The National Court stated that the biased actions of one Commissioner could not be separated from the decision by the whole commission because “bias of one taints forever the decision of the whole. This is the original sin of acting without jurisdiction.” It set aside the whole of the 20 May 2000 Land Titles Commission decision.

Customary land dispute settlement and the courts

Apart from the specialised land courts discussed above, the courts are generally excluded from hearing customary land disputes at first instance. Justice Sevua in *Ronny Wabia v BP Exploration Operating Co. Ltd; Department of Mining and Petroleum; and the State* [1998] PNGLR 8 made this absolutely clear. This case concerned a plaintiff seeking compensation for trespass on customary land. He sought declarations that he was the owner of the land in question, as well as an injunction to restrain the first defendant, BP Exploration, from remaining on the land or continuing its exploration activities there. Justice Sevua found the following (summarised):

- The National Court did not have jurisdiction at first instance because the issues related to customary land, over which the local land court, established under the *Land Disputes Settlement Act 1975*, had jurisdiction.
- The National Court lacked jurisdiction to arbitrate on forms of accession or succession, and hence ownership or interests in land held under customary land tenure.
- The National Court lacked jurisdiction to arbitrate on compensation claims relating to customary land connected with the exploration for petroleum. Under the *Petroleum Act*, ss.81 and 82, that jurisdiction is vested in the Warden's Court.

The judge dismissed the proceedings with costs awarded against the plaintiff.

Consistent with this decision, District Court Magistrate Selefkaru SPM, in *Adaug Dawong for and on Behalf of 9 Other Members of the Galalo Clan v Madang Provincial Government and 3 Others* DCC 326/2001, decided that since the complaint concerned ownership issues and rights over customary land, the district court did not have jurisdiction, and dismissed the proceedings with costs awarded against the complainants.

4. Conclusion

Customary land tenure has a firm legal foundation. The customary land dispute settlement process was established to deal with disputes over customary tenure. Under the *Land Dispute Settlement Act 1975*, only the local land courts have jurisdiction over matters concerning ownership of, or rights to customary land.

The customary land dispute settlement system and associated laws and systems make up a dysfunctional and rather confusing system. Land dispute cases have been shifted around from one court to another, either by design or default, with the latter resulting from confusion. Furthermore, the development of major resource projects on customary land, and the need to mobilise land held under customary title for development, have raised different kinds of disputes over land that cut across different cultural groups and generations.

These experiences highlight the need to review the existing system with a view to establishing a new system of land dispute settlement that is capable of addressing all forms of land disputes on land under customary tenure.

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CHAPTER 7: INCORPORATED LAND GROUPS

Wycliffe Antonio, Max Wagi, and Lewi Kari

1. Introduction

Although the Incorporated Land Group (ILG) concept has proven useful for making land held under customary title available for development, there are serious problems with the existing legislation and its application and administration. With a view to strengthening the ILG system, this chapter provides an analysis of the concept, its application, and its weaknesses, and makes suggestions for improvement.

The chapter is organised as follows. Section 2 provides a brief overview and history of ILGs. The ILG administration system is described in section 3, and sections 4 and 5 describe the ILG register and the national distribution of ILGs. Section 6 brings the chapter to a close with suggestions for improvement.

2. The Incorporated Land Group concept

The ILG concept emerged from the recommendations of the 1973 Commission of Inquiry into Land Matters. Recommendations 11, 12, and 13 provided the basic framework for the registration of customary land (CILM 1973). While an enabling act to carry out these recommendations was still in draft form, the *Land Groups Incorporation Act 1974*, the enabling act for ILGs, was enacted in February 1974.

This act allows for the incorporation of customary groups and enables the incorporated entity to hold, manage, and deal on its customary lands. Its purposes are as follows:

- Encourage greater participation by local people in the national economy through the use of their land.
- Provide greater certainty of title.
- Provide legal recognition of the corporate status of customary and similar groups.
- Confer on them, as corporations, the power to acquire, hold, dispose of, and manage land, as well as ancillary powers.
- Encourage better and more effectual settlement of land disputes.

The ILG concept embodies the ideals of the National Goals and Directive Principles for national development. It is a concept unique to Papua New Guinea, catering for land that is held predominantly under customary land tenure systems. Therefore, it could be considered a truly Papua New Guinean and Melanesian way of facilitating participation of landowners in the development of their land.

At the time of its conception, the incorporation of land groups was conceived as one component in the system to register customary land. The Commission of Inquiry into Land Matters recommended that a process for registering customary land be immediately established (recommendation 4). However, the idea of customary land registration has attracted opposition. The path to customary land registration has been and remains difficult.²⁰

²⁰ Two past attempts at land reform met strong opposition. The first was in 1994 and 1995 under a World Bank-sponsored Structural Adjustment Program. The second, in 2002, was initiated by the government of Prime

Despite its popularity, the ILG system suffers from a lack of institutional structure, support, and capacity. As a consequence, its use among land groups has been lacklustre. An analysis of existing data reveals that the land groups applying for a certificate of recognition fall into two categories: some apply because a major resource project is occurring on their land and others because they wish to develop their own land or secure formal title over it.

The actions of the latter group seem to be in line with the purpose envisaged for the ILGs. However, because this is only a component of the framework of the registration process, land groups' certificates of recognition have often been confused with land title certificates. In fact, these are two distinct documents and processes; the registration of an ILG does not imply the registration of that group's customary land.

The first category of ILGs now appears to dominate because it has become mandatory for project developments in the extractive resource development sector to incorporate land groups. These resource projects recommend that land groups in their area of interest apply for ILG certificates of recognition and may help them with the application. The ILGs are the channel through which resource developers disburse benefits (economic and project) to the members of the relevant landowning groups. Forestry, mining, and petroleum projects, as well as larger-scale agricultural projects, use the ILG system extensively (Graham and Holland 2002).

3. ILG administration

The Department of Lands and Physical Planning administers ILG registration through its ILG Office, which has two sections, one of which processes applications and issues certificates of recognition, while the other maintains the Land Group Register. Actors involved include the applicants, the lands officers of project developers (or consultants representing them), the provincial or district land offices, the local level government councils, and the registrar and staff of the ILG Office.

ILG applications from land groups in locations with active resource development projects usually receive substantial assistance — both financially and logistically — from the project developers. The lands officers of the project development companies undertake land investigations and guide the submission process. Provincial governments that support land group incorporation also offer assistance and guidance from provincial or district lands officers. In some cases, land groups have prepared and submitted their own applications, meeting all the costs, including the logistical costs associated with multiple visits to Port Moresby.

The *ILG Act* requires that the application forms be accompanied by a copy of the constitution of the ILG, a list of members of the group, and a list of members of its dispute settlement authority. It also imposes a fee for the cost of publication in the National Gazette. This money is collected by the ILG Office and passed on to the Government Printing Office. The entire administration process — processing, registry, storage, and issuance of an ILG registration — is carried out within the Department of Lands and Physical Planning.

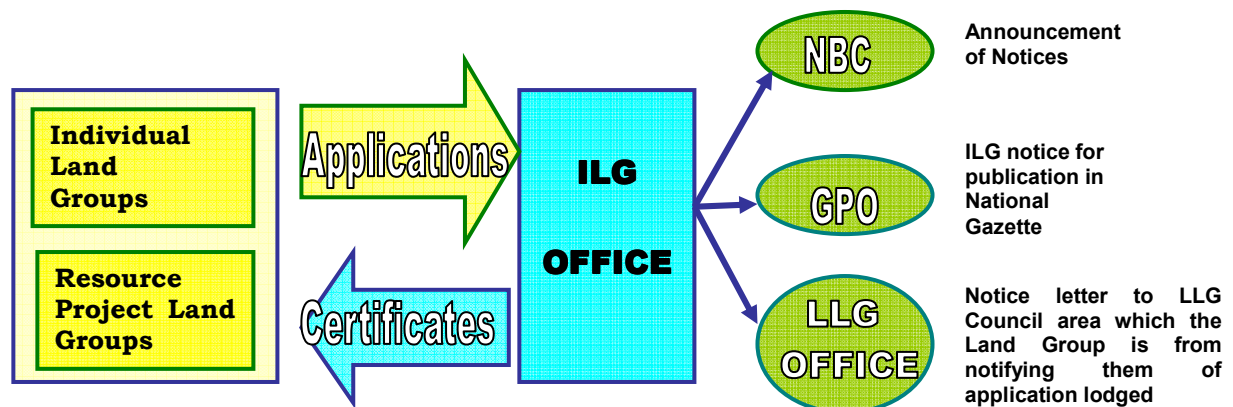
The ILG registration process involves the following steps:

Minister Mekere Morauta. At that time, opposition to land reform resulted in the deaths of four people in Port Moresby when police opened fire on a protesting crowd led by students from the University of Papua New Guinea, and representatives of nongovernmental organisations, and trade unions.

- Upon receipt of an application, the ILG office logs the application in the register and allocates an ILG number.
- The Registrar of ILGs then prepares a letter and notice of the application to send to the local level government council of the area concerned, the Government Printing Office for publication in the National Gazette, and the National Broadcasting Corporation for promulgation on radio.
- Any objections to ownership or conflicts with the group name must be brought to the attention of the Registrar in writing within two months. In such cases, the application is temporarily put on hold while the objections or conflicts are resolved. In most cases, they are resolved at the village level by the dispute settlement authority.
- After two months, if no objections are received, a Land Group Incorporation Certificate of Recognition is issued.

Figure 1 outlines the basic process described above.

Figure 1: ILG registration process



Note: NBC = National Broadcasting Corporation; GPO = Government Printing Office; LLG = Local-level Government Council.

The Land Groups Registrar is required to keep a register of incorporated land groups. The register must contain copies of all applications for recognition and all certificates of recognition issued with any variations, all comments received, all orders made, records of any appeals, and any other information deemed useful by the ILG Registrar.

4. The ILG register

The office responsible for the registration of customary land is located within the Land Management Division, in the Liaison with Customary Land Owners Section. There is a Registrar of ILGs with one lands officer. Responding to general inquiries consumes a considerable proportion of ILG Office staff's time. Many of the inquiries relate to the progress of applications or ILG memberships and disputations, and come from law firms doing searches on ILG matters, government statutory authorities (such as the Mineral and Resource Development Corporation), departments (such as the Department of Mining and Petroleum), and agencies (such as the National Forestry Authority), as well as developers seeking verifications for incorporated land groups.

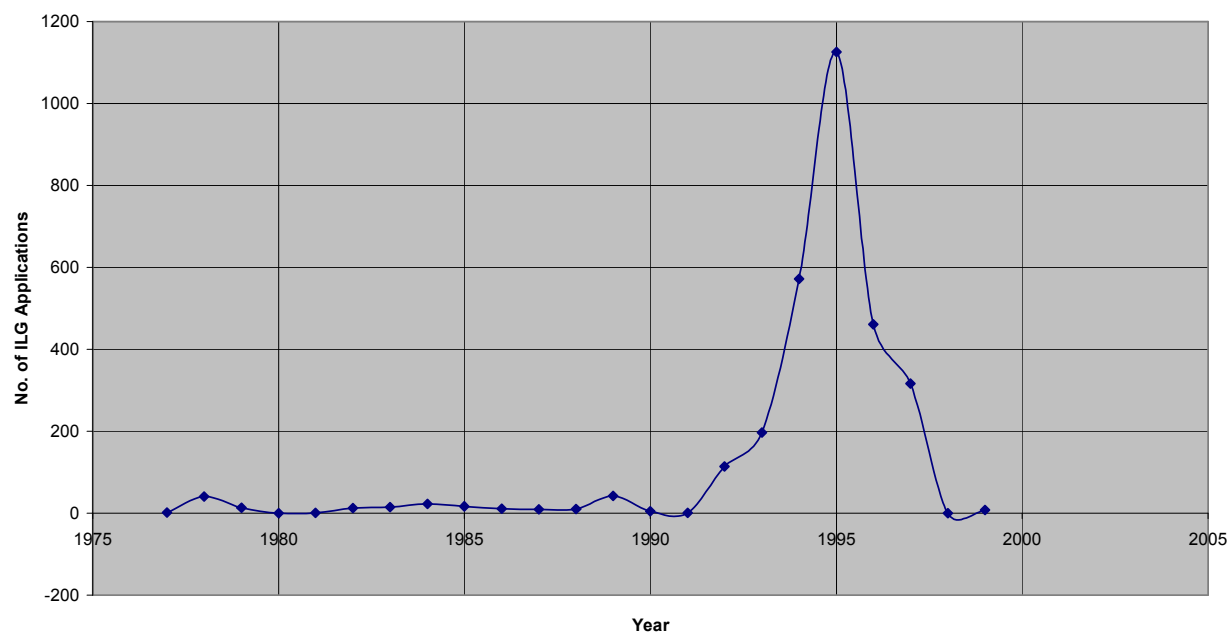
The ILG Office processes applications, issues certificates, and maintains a database. So far, over 10,000 land groups with ILG certificates of recognition are recorded in the database. The whole process, which involves preparing letters and notices, logging applications in the register, and allocating ILG numbers, is administratively taxing.

5. National distribution of ILGs

The results presented here are based on an analysis of the data derived from ILG numbers ranging from 1 to 5,000.²¹ About 3,000 files are missing from the present register while the rest are assumed to be kept in locations other than the ILG registration office. It is assumed that a significant proportion of these ILG files are maintained in alternative register repositories such as those of government departments, statutory authorities, government agencies, and private project developers.

Figure 2 is an attempt to demonstrate the increase in the interest to incorporate an ILG in recent years. Although, the missing ILG numbers discussed above distorts the complete picture, Figure 2 plotted using the available data demonstrate that greater interest in ILGs started in the mid 1980s.²² In 2003 alone, it is estimated that between 1,000 and 1,500 applications would have been submitted.

Figure 2: Number of ILG applications per year, 1977–1999



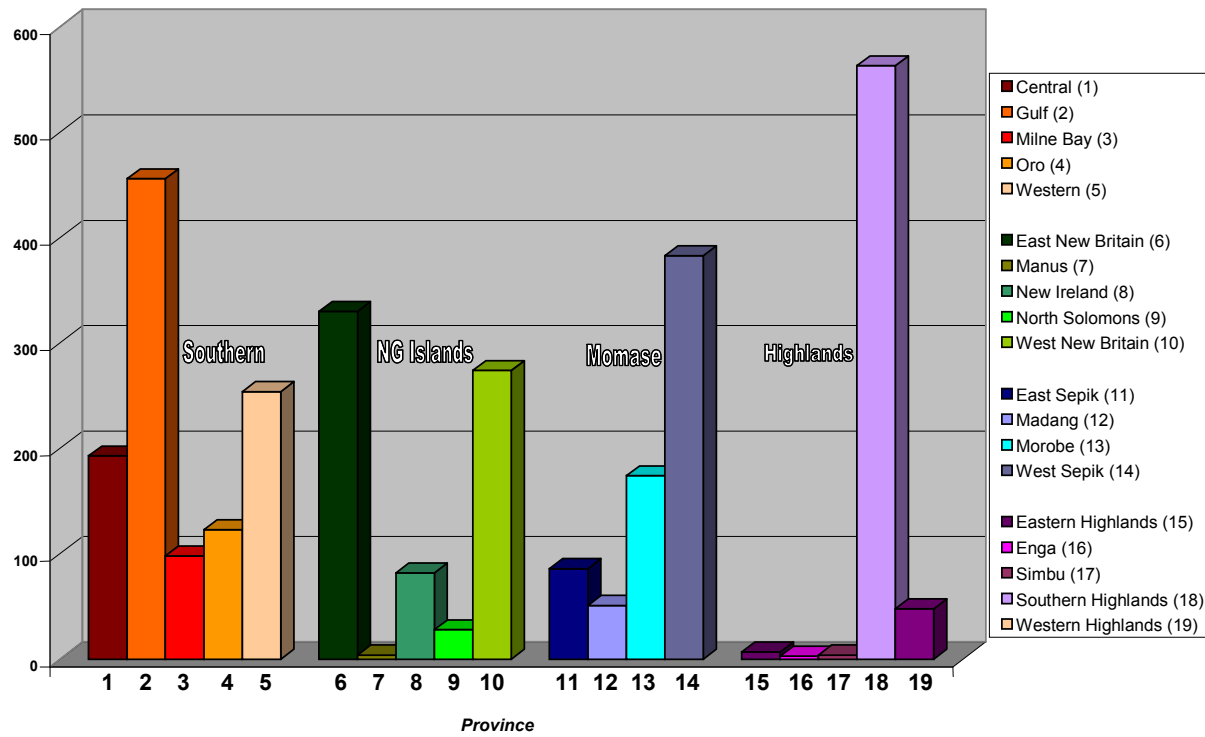
Although a substantial proportion of the files are missing thereby limiting detailed analysis, the results from this analysis provide important insights. Disaggregation of this data by region and province, presented in figure 3, shows that major resource projects are driving the formation of ILGs. Large numbers of applications from Southern Highlands and Gulf provinces, for instance, indicate the presence of large-scale resource development projects —

²¹ The data are derived from collaborative research undertaken by the ILG Office and the Melanesian Land Studies Centre at the PNG University of Technology.

²² The missing numbers are for the period 1990 onwards.

mining and gas in both areas as well as petroleum in the Southern Highlands and forestry in the Gulf provinces. There are more ILGs within the Southern region.

Figure 3: Distribution of ILG applications by province and region



6. Conclusion

This analysis of the law, its application, and its administration demonstrates the need to review the ILG legislation and its administrative system with a view to making it more suitable for mobilising land held under customary tenure for development.

The *ILG Act* does not provide for land investigations. Land investigations are useful for identifying individuals and groups with user rights, by customary law, through the documentation of genealogies and oral histories and the identification of members of land groups (to correctly identify clans and family groups) and the type of land tenure system. Major resource project developers have recognised the importance of land investigations and invested considerable time and resources on them. Their main motivation is to establish a channel for the smooth disbursement of benefits accruing to landowners. Using the lessons learnt from the developers' application of land investigation techniques and experience, land investigation should be made mandatory for all other development activities, including customary land registration.

There is a lack of capability to implement the ILG process (Tolopa 2002). Provincial and district offices do not have the resources to undertake this exercise (Graham and Holland 2002). It is no wonder that land group incorporation is common in resource project areas and near major urban centres. In both these cases, developers drive the incorporation process.

The incorporation of an ILG has transaction costs. These costs create an environment that cultivates rent-seeking within the Department of Lands and Physical Planning. For instance, staff within the department are illegally imposing an application fee that is not stipulated in the *ILG Act*. The second and perhaps the major source of transaction cost is associated with the logistics of preparing, submitting, and following up on an application. Transportation and accommodation costs incurred during travel to Port Moresby from the provinces significantly raise transaction costs, which underpins the need to make the ILG office more accessible. One possibility is to decentralise its functions to the provinces, and even to districts where possible.

There is a weakness in the present *ILG Act* that encourages the registration of bogus ILGs. A review of the law with the objective of bringing credibility into the registration system is required.

A fee of K160.16 imposed under existing arrangements goes directly to the Government Printing Office for the publication of the gazettal notice. The Department of Lands and Physical Planning, which processes and stores the ILG records, is subsidising the entire process. A review with a view to introducing a fee structure that appropriately reflects the costs associated with the administration of the ILG system (processing, issuance of certificates, storage, and responding to inquiries) is required.

The Department of Lands and Physical Planning at present places customary land matters low on its priority list. The argument often used by the Department is that it is mandated to administer only land with formal titles. This largely refers to the 3 percent of the land that the state owns. Further, it argues that customary land does not raise revenue for the state to the same extent as State land. However, this view ignores the increasing clientele, the volume of work, and the associated costs related to dealings on customary land for the customary lands section within the Department. The establishment of a separate office that deals with ILG incorporation and customary land matters is an option worth pursuing (see Antonio, Apelis, and Bannerman 2003 for one institutional structure). Alternatively, the customary land unit could be strengthened by upgrading its status within the Department of Lands and Physical Planning and decentralised, where possible, to the provincial or the district level (Tolopa 2002).

The current ILG database recording, updating, and digitising exercise should lead to the installation of a computerised system with appropriate storage and backup capability. However, to ensure long-term efficiency and sustainability, there is a need to train staff and install a system to maintain the database.

In conclusion, the analysis in this chapter demonstrates that, although the ILG concept has had some success in facilitating access to land held under customary tenure for development, especially in the large-scale extractive natural resources sector, there are serious problems with the existing legislation, the administrative system, and the application of the law. The experiences summarised in this chapter should help guide the review of the *ILG Act* with a view to developing an improved system that makes ILGs an efficient vehicle for development rather than a channel for distributing landowner benefits.

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CHAPTER 8: CUSTOMARY LAND AND THE EXTRACTIVE RESOURCES INDUSTRY

Willie Kupo

1. Introduction

Unlike many other parts of the world where the issuance of a petroleum prospecting or development license by the state gives the developer the right to access a particular piece of land, resource developers in Papua New Guinea must also work with customary landowners. Customary landowners in Papua New Guinea do not necessarily accept state ownership of sub-surface minerals, petroleum, and gas resources. More than 97 percent of land in Papua New Guinea is held under customary tenure.

All petroleum, mineral, and gas resource development occurs on land held under customary tenure. Landowner management is thus critical for the successful exploration and development of sub-surface resources in Papua New Guinea. This challenge is magnified when operations stretch over large areas covering diverse cultural and land tenure practices.

Two legal frameworks relied upon for the management of landowners in the country are the *Land Dispute Settlement Act 1975* and the *Land Groups Incorporation Act 1974*. Successful developers, such as Oil Search (PNG) Ltd, have established ways to manage landowner issues within these legislative frameworks.

This chapter uses experiences from Oil Search (PNG) Ltd's management of landowner issues to draw lessons and highlight areas of policy intervention aimed at improving the management of landowners in the resource development areas.

The rest of the chapter is organised as follows. Section 2 describes the interaction between developers and landowners, while Section 3 discusses the two laws and their applications. Section 4 brings the chapter to a close.

2. Developers and landowners

The principal petroleum industry activities that affect land are seismic inspection and drilling, and construction of pipelines, camps, processing facilities, and roads to link facilities. The impacts that the petroleum industry has on the physical environment are light compared to those of industries such as mining; they are also transient. For instance, at the exploration stage, drilling of wells often takes place as a concentrated burst of activity. It takes three to six months from cutting a well pad to demobilising a rig. When this once-off work is complete, the sites quickly revert to bush because the overall surface disturbance is minimal.

The fact that exploration takes place in discrete locations but over a large geographic area means that it could cover diverse landforms and environmental types and a variety of ethnic or language groups. As a direct consequence, different ethnic groups with different land tenure systems could exist within one license area. Such a diverse cultural setting complicates landowner identification and determination of land use rights.

Indeed, petroleum licences are issued over one or more graticular blocks.²³ Under the *Oil and Gas Act* 1998, benefits (royalties and equity dividends) accrue to all state-recognised landowners of such a block. In applying this legal provision, Oil Search (PNG) Ltd has to deal with all the concerned landowners covered by the licence. For instance, the current production operations and facilities stretch from Hides, near Tari in the Southern Highlands Province, down to the pipeline landfall in the Kikori River in the Gulf Province. Along this stretch, there are five production licences and two pipeline licences, covering more than 1,800 square kilometres, cutting across two provinces, seven local-level government areas, thirteen language groups, more than eighty villages, and hundreds of clans and sub-clans with a combined population of more than 25,000 people.

The above description highlights the complexities and uniqueness of dealing with landownership issues for petroleum development projects in Papua New Guinea. In addition to the physical and social impacts, the most important impact on the landowners is from the financial benefits that accrue to them — the compensation, royalties, and equity accruing to communities within the project license areas. As will be demonstrated in the subsequent discussion, problems associated with the identification of landowners have significant equity implications.

3. Legal framework

The legal framework for dealing with landowners is provided in the *Oil and Gas Act* 1998, which defines the benefits for landowners from project development. The *Land Dispute Settlement Act* 1975 and the *Incorporated Land Groups Act* 1974 provide for the identification of landowners and the distribution of the income generated, respectively. Landowner benefits are distributed through ILGs. The main benefits are cash payments for royalties and equity dividends. The ILGs are expected to distribute the money to individual members according to their custom.

Each resource project developer has a community affairs division that includes a dedicated lands section whose officers work on landowner-related issues. Much of their effort is directed towards managing landowner identification, land damage assessment and determination of compensation, and processing rental payments for land. In the case of Oil Search (PNG) Ltd., land and landowner management is an important component of the company's Community Affairs Division. The division's specific activities include the following.

- **Social mapping:** The *Oil and Gas Act* 1998 requires that all developers, prior to exploration, undertake a preliminary or full-scale social mapping exercise. This involves the identification of existing landowning clans, social structures, leaders, and clan and sub-clan land boundaries.
- **Ground truthing:** This is the next step after social mapping and involves a more detailed confirmation of the clans and sub-clans concerned with land ownership.
- **Assistance to government:** The Company provides logistical support in the registration of ILGs. This includes providing transportation for provincial and

²³ Refer to s.17 of the *Oil and Gas Act* 1998 for a description on the graticulation of the Earth's surface and constitution of blocks.

national government officials dealing with land disputes and issues involving landowner recognition or benefits distribution.

- **Recurrent lands work:** This involves making payments for annual land rents and one-time environmental and land compensation payments.
- **Land dispute management:** The community affairs division provides mediation services on disputed land claims. When mediation fails, they provide direction for the disputing parties to take the issue through the appropriate legal channel. Some cases end up in higher courts. Unpaid money from disputed cases is held in trust awaiting resolution of the disputes.

The application and administration of the ILG law has proven to be difficult, cumbersome, and costly. Over time, the number of ILGs has increased, and land disputes have escalated into high-cost legal challenges, with many cases entering the higher court system. Splinter ILGs have emerged and are adding to the proliferation of ILGs. Leaders of splinter ILGs have failed to realise that it is not in their best interest to encourage splinter groups, because the size of the benefits is fixed. Any duplication only decreases the amount due to each ILG. Therefore, it is in their collective interest to maintain a limited number of umbrella ILGs, with improved and transparent management. In fact, the ILGs should explore more effective ways of having their share of the income sustainably managed for the benefit of both the present and future generations.

Within the project areas that Oil Search PNG Ltd operates, the proliferation of ILGs is independent of the company. There are cases in which many of these ILGs have been incorporated outside the established guidelines. In extreme cases, some ILGs may have only one or two members, while the same individuals or families may be registered in more than one ILG.

The maintenance of landowner beneficiaries within the petroleum licence area under the present arrangements has proven to be costly, in terms of both time and money, for the project developer. This should not be the responsibility of the developers. However, the recent amendments to the *Oil and Gas Act* transferred the responsibility for the distribution of royalties and equity dividends to the developer.

There is an urgent need to review and overhaul ILGs and the system for distributing payments to the landowners. It should be designed to cater for larger geographical areas with multiple cultural groups. Oil Search (PNG) Ltd will face an enormous challenge in this regard in its new gas project, which cuts across vast land areas. In its present form the ILG process has proven inappropriate for the petroleum sector. The development of a better system is long overdue.

With respect to the application of the *Land Dispute Settlement Act 1975* within the petroleum sector, the first step for a land dispute is for the clans to reach an agreement, using their traditional land dispute settlement process. If an amicable solution is not found, the company (Oil Search PNG Ltd) assists the disputing parties to pursue the issue through the formally established procedure defined in the *Land Dispute Settlement Act 1975*. At this stage, the dispute is formally registered with the appropriate district authorities, and land mediators are appointed. Mediation by a third party is consistent with traditional dispute resolution systems. This process is consultative and participatory and results in a compromise acceptable to both

parties and their communities. Customary law on land tenure practices and precedents is applied in the mediation process. If mediation fails to reach a satisfactory outcome, the parties pursue their claims through the district land court system, defined in the *Land Dispute Settlement Act 1975*. In some instances, land disputes have ended up in higher courts.

Two actual cases can highlight the kinds of problems and challenges that emerge from the land disputes settlements process. These two cases are: the South East Mananda in the Kutubu Petroleum Development Licence 2 and the Gobe Petroleum Development Licences 3 and 4, from the Southern Highlands Province.

In both cases, the land under which the oil reserves were discovered, and on which wellheads are located, was traditionally used for hunting and gathering by clans that reside some distance away from these sites. In both cases, difficult topographic features made these areas unsuitable for permanent settlement. Previously, these clans had accessed the land without conflicts. This common usage and peaceful coexistence changed with the discovery of petroleum. The issuance of development licences and the legal requirement for the recognition of traditional ownership under the *Gas and Petroleum Act* raised the value of the land. Inevitably, this led to disputes amongst the landowning clans.

Case 1: Gobe

The development of the Gobe field proceeded after exploration wells were drilled in 1991. Landownership disputes began in the same year. During the dispute, money for compensation, royalties, and equity dividends earmarked for the landowners were held in trust.

After more than ten years and two Lands Titles Commission investigations by Justice Salika and then Chief Land Titles Commissioner Josepha Kanawi, no agreement could be reached. In March 2002, the disputing parties agreed to disagree on the ownership of the land but agreed on a formula to split the accumulated money and the future stream of income. This agreement was endorsed by a ministerial determination in June 2002, and the money accumulated during the dispute, which amounted to millions of kina, was distributed amongst the twenty-one ILGs.

Unfortunately, a significant proportion of the money was paid to creditors, because substantial debts had been accumulated for hotel, legal, and other related expenses while the court case was pending. This experience serves as an important warning to landowners about the costs associated with prolonged land disputes.

Case 2: South East Mananda

Land ownership claims were made by about twelve Sau-speaking clans from the Samberigi Valley, clans near Baina on the Kikori River, and a Foe-speaking clan from the Pimaga area. Representatives of the clans from the three ethnic groups, like their counterparts from the Gobe project area, agreed to disagree on land ownership but agreed on a formula for the distribution of the incomes and other related benefits from the project.

This cooperation was extended towards taking advantage of preferences in subcontracts for projects such as drilling, pipeline, and bridge construction. The ILGs involved formed the South East Mananda Unincorporated Joint Venture as their business entity to engage in the

subcontract construction work. The company has a monthly turnover of approximately half a million kina. This company is expected to cease operations after the completion of construction, towards the end of 2005. The joint venture will be dissolved and profits split between the ILGs.

4. Conclusion

The main lesson from the application of the existing legal framework for mobilising customary landowners (*ILG Act*) and dispute settlement (*Land Dispute Settlement Act*) in the petroleum sector is that both legal institutions have failed to function effectively to benefit the landowning community. At the same time, increasing numbers of landowners are coming to terms with the fact that they could not amicably resolve underlying land ownership disputes within the project areas. Consequently, they have allowed pragmatism to facilitate consensus building, leading to sharing of the income and benefits from the petroleum project developments on the land they claim to own. One motivating factor behind the compromise approach is the need to protect their money from creditors.

These experiences highlight the need to review the existing legal frameworks with the view to devising a more efficient system. The lessons learnt from the application of the ILG and Land Dispute Settlement processes in the petroleum industry provide useful lessons for the design of a new system for landowner identification, land dispute settlement, and the sustainable management of the incomes generated.

CHAPTER 9: URBAN EXPANSION OF CUSTOMARY LAND

Kathryn Apelis and Flora Kwapena

1. Introduction

Cities and towns within Papua New Guinea are facing shortages of land for expansion. The alienated state-owned land has by and large been built upon. Expansion of urban centres will inevitably be on land held under customary tenure. Added pressure arises from the rapid growth in informal settlements on land held under both formal and informal tenure. The main sources of problems are the lack of an efficient framework for facilitating access to land held under customary tenure for urban development, and the poor system of land administration, especially as it undermines urban town planning.

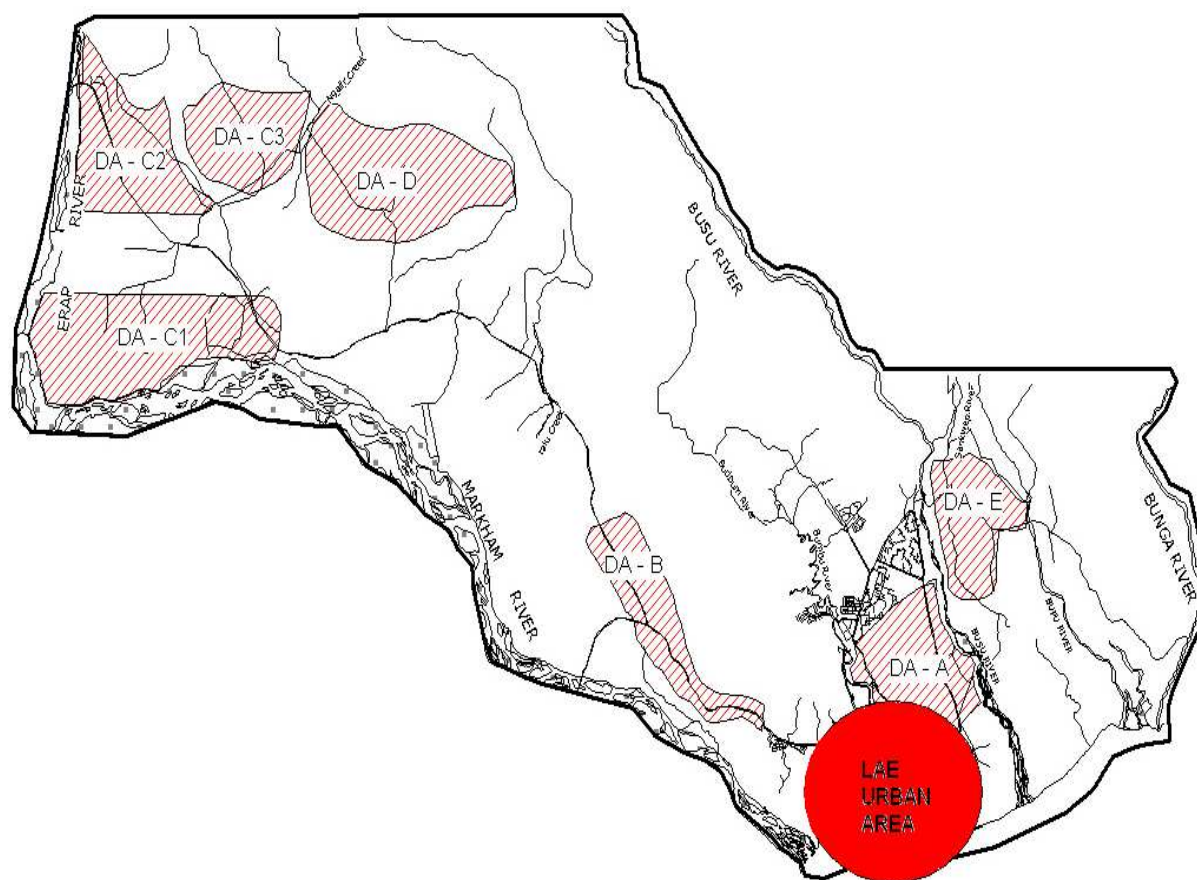
The focus of this chapter, the Ahi Land Mobilisation Policy (ALMP), provides a useful case study that brings to light the inherent challenges. The rest of the chapter is organised as follows. Section 2 provides the background to the ALMP. Section 3 presents an analysis on the status of the ALMP, five years after its launch. Section 4 analyses a pilot project for the ALMP. Section 5 brings the discussion to a close.

2. Background

Lae is the industrial hub of Papua New Guinea. It is linked to the populous Highlands Region by road and to the New Guinea Islands Region by a seaport. There are significant private sector activities with implications for Lae. Several new mining projects are planned within the Morobe Province: the Hidden Valley Gold Mine, Wafi Gold Mine, and Ramu Nickel Project. There is also the Kainantu Gold Mine in neighbouring Eastern Highlands Province. The large Ramu Valley is attracting major agricultural investments in cattle, oil palm, sugar, and peanuts. These developments are expected to increase the demand for land within Lae and its surrounding areas. It is highly likely that any void left by an inefficient formal urban sector development program will be filled by the informal sector.

The informal sector is rapidly expanding and surrounding the Lae city boundaries. The rapid growth in rural-to-urban migration expected from the boom in business within Lae is likely to drive a rapid expansion in the informal sector. Rural migrants with little income will either squat or enter into informal arrangements with customary landowners.

The responsibility for managing the formal and informal settlement expansion falls into the hands of both the customary landowners and the Lae urban town authorities. This challenge led to the formation of the ALMP, which was formulated to facilitate developments on Development Area A, as illustrated in Figure 1, one of the seven development areas identified to accommodate the formal expansion of Lae city (Wardlaw 1999).

Figure 1: Potential urban development areas, Lae

Source: Wardlaw 1999.
DA = development area.

Three stakeholders are involved in the ALMP: the Ahi Customary Landowners, the Morobe Provincial Government, and the Lae Chamber of Commerce and Industry. These stakeholders have distinctive roles to play. The Ahi Customary Landowners mobilises clan and family members within the proposed area with a view to making available identified land for development. The Morobe Provincial Government provides political leadership. The Lae Chamber of Commerce and Industry provides business leadership.

The overall objective of the ALMP is to coordinate and guide the different stakeholders to work towards mobilising this land for development. The ALMP was officially launched in February 2001. It is a pioneering attempt to mobilise land held under customary tenure for urban sector development. This has received significant media attention. The Ahis, who own the land defined on the plan as Development Area A, consist of six villages: Butibam, Wagang, Yanga, Kamkumung, Yalu, and Hengali.

The landowners appear to view the ALMP as an important process for protecting and reclaiming land already settled upon by informal settlers. Their intention is to define the future of illegal settlements on Ahi customary land, repossess land currently settled, and release land to the formal sector to accommodate the expansion of Lae city (Government of Papua New Guinea, 2001:3).

Not all informal settlements involved squatters. Some settlers had entered into informal agreements or contracts with some quarters of the landowning community, especially the younger generation of customary landowners. This has the potential to exacerbate divisions within the customary landowning community and complicate the motivations of the three major stakeholders: landowners, state agencies and the private sector.

3. Strengths, Weaknesses, Opportunities, and Threats

A SWOT (strengths, weaknesses, opportunities, and threats) analysis of the ALMP indicates significant difficulties. The key problem is the absence of an appropriate legal and administrative system.

Strengths include the following:

- This is a voluntary process.
- Customary landowners are set to reap financial benefits if this undertaking is successful.

Weaknesses include the following:

- The ALMP is not supported by any specific legislation. This has the potential to restrict its effectiveness.
- A significant injection of initial capital is required to effectively implement the ALMP, especially for infrastructure development.
- Managing conflicting interest groups within the ALMP is a major task. Poorly managed, this could trigger the disintegration of the ALMP.
- The rapid growth in the Ahi population could exert pressure on the ALMP to mobilise further land for development as well as to enforce property rights on the developed land.

Opportunities include the following:

- The ALMP concept has the potential to breathe life into what is currently the “dead capital” of customary land that cannot be utilised for collateral purposes.
- There is the potential to expand the property market in Lae.
- There is the potential to create employment and other spin-off benefits for the customary landowners and for city residents.
- The objectives of the ALMP are consistent with the government-initiated land reform agenda, which seeks ways to improve access to secure land for private- and public-sector investment.

Threats include the following:

- There are uncertainties over political leadership and commitment.
- Managing all landholders within the ALMP area would be a major challenge.
- There is limited institutional capacity within the ALMP structure to fully implement the policy.
- Ongoing informal land dealings with settlers within the ALMP area would undermine the effective implementation of the ALMP concept.

- The changing nature of traditional authority and decision-making has the potential to undermine decision-making at the ALMP level.
- Unsettled land disputes have so far delayed the registering of Incorporated Land Groups, the establishment of the Lae Land Development Corporation, and the Ahi Land Trust. These institutions are an integral part of the ALMP. This problem has resulted in delaying the progress of the ALMP, especially with respect to the pilot projects.

4. Ahi Land Mobilisation Policy Pilot Project

ALMP Pilot Project: Portion 351, Malahang

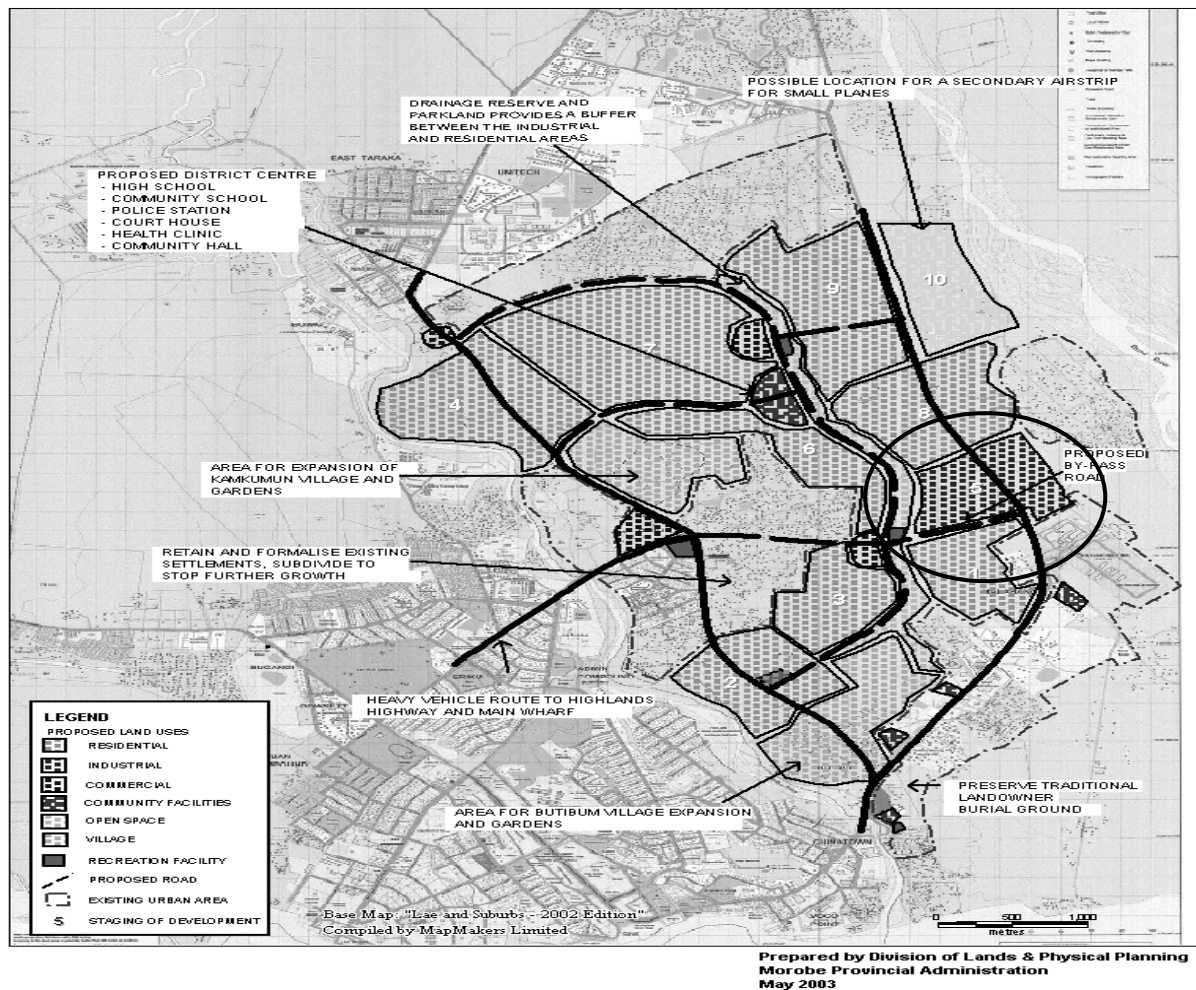
Since the launch of the ALMP concept in 2001, Portion 351, Malahang, has been selected as the first pilot project to develop land within Lae by the ALMP. This portion is Development Area A (Malahang Area), in the Lae-Nadzab Development Plan (Gima 2005). The proposed urban development of Lae city covers land currently held under customary tenure, freehold and state lease titles from Lae to Nadzab. The pilot project depicted in Figure 2 covers about 614 hectares.²⁴

Portion 351 was originally a plantation owned by the Evangelical Lutheran Church of Papua New Guinea. The land was acquired by the church prior to independence from three clans from the Ahi community.²⁵ It took eighteen years for the Ahi clans to negotiate a repurchase of the land from the church. This agreement was completed in 2001. The Morobe Provincial Government provided seed funding for the repurchase.

To effect the transfer of the land title to the three clans, a land group named the BUP Association was incorporated under the *Land Groups Incorporation Act 1974*. The BUP Association was later incorporated as a company under the *Business Groups Incorporations Act 1974* named the BUP Development Company Ltd. The title for the land was then transferred to it. With this corporate status, it has the legal right to engage in business using the land.

²⁴ The plan culminated in the allocation of Town Redevelopment Plan No. 2/161 in July 2006, after a one-year delay, by the National Physical Planning Board. This allowed the plan to proceed to the survey phase. This is in progress at the time of writing.

²⁵ These are the Busulum Village of Butibam, Uapu Village of Kamkumung, and Poalu Village of Yanga.

Figure 2: Malahang Development Area A including Portion 351

Source: Division of Lands and Physical Planning, Morobe Provincial Administration, 2003. Portion 351 is encircled.

In the larger development plan (Figure 1), Portion 351 is identified as a satellite town with 6,020 residential allotments, 63 commercial allotments, 229 industrial allotments, 35 allotments for public institutions, and 28 allotments for public use.

The total cost of infrastructure, including roads, drainage, lighting, and telecommunication services, is estimated at K100 million. The main features of the development plan are contained in a concept document (Gamato 2006) which is summarised in Box 1.²⁶

One significant aspect of the concept plan is the organisational structure for developing Portion 351, which is depicted in Figure 3. Three key organisations that will act as vehicles to facilitate the development of this land are the BUP Landowner Company, BUP Land Trust, and Lae Land Development Corporation. The BUP Landowner Company and BUP Land Trust are owned by landowners and will have representatives from the three landowning clans. The Lae Land Development Corporation is a corporate entity with representation from various stakeholders, including the three levels of government (national, provincial, and

²⁶ Patilias Gamato, the author of this document, was the Deputy Provincial Administrator for District Services in the Morobe Provincial Administration and is currently the Administration's caretaker administrator.

local), the landowners, the Lae business community, infrastructure service providers (Telikom, PNG Power, and the Water Board), and the wider Lae community.

Box 1: Main features of strategic concept document containing plans for Portion 351

Vision

- Maximise all opportunities on customary land through urban development.

Aims

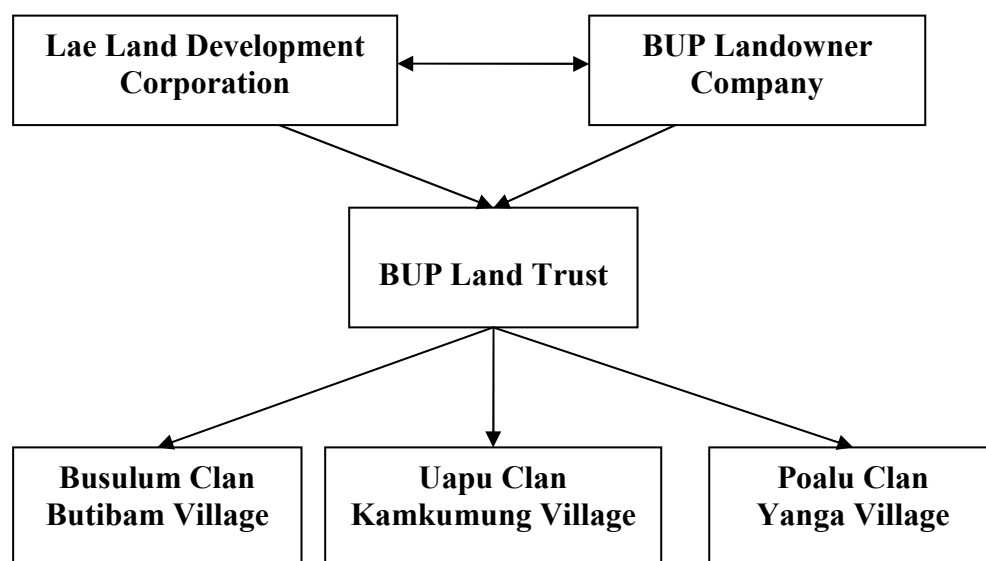
- Identify and make available customary land for meaningful urban development.
- Initiate survey and registration of customary land for the landowners of Ahi.
- Involve customary landowners in business activities and other developments.

Development strategies

- Identify suitable land and survey it for urban development.
- Deal with land disputes that may arise from the development.
- Survey and register all potential land on Development Area A.
- Identify and release customary land for urban development to the Lae Land Development Corporation.
- Negotiate long-term leases with Lae Land Development Corporation.
- Ensure that appropriate developments take place according to the Urban Development Plan.
- Ensure that the Lae Land Development Corporation shares the revenues from rentals, profits, and dividends with landowners until the total cost of capital investment is recouped.
- Ensure that the Lae Land Development Corporation releases the land with the developments to the BUP Landowner Company.

Source: Gamato 2006.

Figure 3: Organisational structure for developing Portion 351



There are major hurdles to overcome in implementing this scheme. First, the development of Portion 351 will directly cut through existing settlements. Some of these are heavily populated, while others have substantial developments including permanent houses (see figure 4), shops (see figure 5), and business ventures of substantial value. Because the inhabitants of these settlements have, one way or another, made arrangements with individual landowners or groups of landowners from within the Ahi community, strategies need to be devised to address issues relating to resettlement as well as adequate compensation. Signs of resistance are already evident, with the settlers successfully taking out a court order in 2006 to prevent eviction to pave the way for the development of Portion 351 (Patilias Gamato, interview, 26 October 2006).

Figure 4: A permanent residence near the proposed new road link from Kamkumung



Figure 5: A shop situated on Portion 351 on the main Malahang road



A second hurdle is presented by landownership disputes on Portion 351, of which there is increasing evidence. One source of dispute is from within the landowning group itself. Some members perceive that the land ought to be only for their clan or that their clan should hold superior land rights. The other source of conflict arises from claims registered by another ethnic group, totally different from the three clan groups currently involved, which claims that it is the rightful landowner of Portion 351 and that the BUP group should not have been given title to it (personal communication, Peter Katek of the Wain landowner group, November 2006).

5. Conclusion

The city of Lae has not seen many structural changes since independence in 1975. However, the increased rate of urbanisation is creating pressure for expansion of the city. The area of State land available to accommodate this expansion is limited, which raises the need to harness land held under customary tenure.

Because the same reality faces every urban centre in Papua New Guinea, the ALMP concept, if successful, will provide useful lessons for development in other urban centres. The development of Portion 351 is the first initiative under the ALMP concept. However, a SWOT analysis uncovers many challenges, in particular the absence of appropriate legal and administrative systems to support the development of land held under customary tenure in Papua New Guinea.

Strategies for managing informal settlements will be an integral part of the ALMP. Since squatter settlements have become a permanent feature of many towns and cities in Papua New Guinea, lessons learnt from this initiative will be useful for managing the growth of squatter settlements in other parts of the country.

Despite its shortcomings, the initiative, if properly implemented, has the potential to generate benefits for landowners, businesses, and the wider community of Lae city. Lessons from this exercise should be useful for mobilising land held under customary tenure for urban development across the country, as all towns and cities in Papua New Guinea face similar challenges.

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CHAPTER 10: CUSTOMARY LAND TENURE ISSUES IN AUSTRALIA

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1. Introduction

The debate concerning wealth creation on communally owned indigenous land is gaining momentum in Australia. This Australian debate has implications for Papua New Guinea, given the level of influence that Australia has on Papua New Guinea through its aid program and the long-standing colonial relationship between the two countries. Given the possibility that Australian commentaries on Australian indigenous land dealings will have some bearing on Papua New Guinea land issues, this chapter aims to describe for Papua New Guineans the context in which the Australian debate occurs, the legal framework defining indigenous lands, and the ways in which indigenous land is being developed.

The rest of the chapter is organised as follows. Section 2 discusses the debate in Australia on indigenous land tenure reform. Section 3 focuses on the definition of communal title. Section 4 explores the meaning communal title has for those who own it. Section 5 discusses the legislative structures for dealing with communal land. Section 6 provides an analysis of communal land tenure reform in Australia. Section 7 brings the chapter to a close.

2. The debate in Australia on indigenous land tenure reform

There is a debate taking place in Australia today that has gathered considerable momentum. This debate concerns wealth creation on communally owned indigenous land. The suggestion is that traditionally grounded, communal forms of title are a barrier to economic development and should give way to individualised and alienable rights in land. Australian commentators have also proposed that Australian aid to Papua New Guinea be made contingent upon the privatisation of communal lands (see for example Gosarevski, Hughes, and Windybank 2004).

This debate has been taking place amidst considerable change in Australia's political landscape. Indigenous affairs have been undergoing a major restructure. This has included the abolition by the federal government of the Aboriginal and Torres Strait Islander Commission, the elected body that was responsible for policy advice and the administration of some of the federal government's indigenous programs. Since the abolition of the Commission, the National Indigenous Council (NIC) has become the principal source of advice to the Australian government on Indigenous matters. The NIC is a self-nominated, government-appointed advisory body set up to provide "expert advice to government on improving the socio-economic status of indigenous Australians" and is the only indigenous advisory body now recognised by the Australian government. The NIC has called for the government to legislate that land held by indigenous people under communal titles be opened up to individuals and businesses, and compulsorily acquired, if necessary.

Why this debate is taking place at all is a little puzzling to the authors. There is simply no evidence that communal title is an impediment to wealth creation on indigenous land. In contrast, there is much evidence-based research from Australia (see for example Altman *et al.*

²⁷ An extended version of this chapter was originally published in 2006 as a Research Discussion Paper by the Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies.

2005 and Bradfield 2005b) and elsewhere (see Fingleton 2005 and Anderson 2005) to suggest that privatisation would worsen rather than improve the economic position of indigenous people living in remote areas. This being the case, there are no compelling arguments for the passage of racially discriminatory legislation that would compel indigenous landowners, and indigenous landowners alone, through a process of mandatory leasing, without collective consent, to relinquish their title to those who wish to pursue their private interests. The suggestion that indigenous people need to abandon their traditions in order to engage with the modern world is nothing more than support for assimilation.

3. What is communal title?

Australian parliaments have recognised communal title in a number of ways through legislative means. One set of legislative interventions has generally been described as “land rights”: for example, the *Northern Territory Land Rights Act* passed by the Federal Parliament in 1975 and the *New South Wales Land Rights Act* passed by the New South Wales Parliament in 1983.

The other category of recognition arose via the courts and the common law; namely, “native title.” This has since been codified through the enactment by the Federal Parliament of the *Native Title Act* 1993.

There are certain similarities between land rights and native title. Perhaps the most obvious is that both forms of title are collectively owned and inalienable and, in most cases, are held in trust for the community by a corporation. Under both regimes, the only land to which applicants can hope to gain a title comparable to freehold is in relation to Crown land that is either vacant or already reserved for indigenous people, or land on which indigenous people already hold the other rights and interests. The effect is that the land that may be claimed is generally that land which is least economically valuable — that is; essentially, the land not wanted by non-indigenous people.

Despite these similarities, there are some fundamental historical and operational differences between the two categories of communal title. Land rights have their basis in legislation and were designed as compensatory measures for the dispossession of Australia’s first peoples. The various state and federal land rights acts seek to provide this compensation in a way that is more or less congruent with traditional law. But they do not recognise this law as part of the law of the particular state or of Australia.

Native title, on the other hand, has been recognised under the common law and is now regulated by statute. The source of the legal rights that native title recognises is different from the source of law for common-law rights. Native title

is not simply the incorporation of Aboriginal law into the colonial legal system, it is a common law title. The courts have limited and re-defined native title in ways that make it more familiar to the colonial legal system and take it further away from Aboriginal law . . . It is a common law title that recognises the inherent, pre-existing and continuing rights of Indigenous people and it recognises the legitimacy and authority of these societies to determine their relationship with their land, and with each other in relation to that land (Strelein 2001:123).

There are also some crucial differences within these two categories: between the forms of land rights' derived titles and between the content of various native title determinations.

Land rights

Indigenous peoples have fought to protect and preserve their lands since the first European settlements emerged on the New South Wales coast in the late 1780s. The modern land rights movement is generally considered to have begun in 1963 when the Yolgnu people of North-East Arnhem Land (Northern Territory) presented a bark petition to the Australian Parliament, protesting an excision from their reserve lands at Yirrkala and seeking recognition of their land rights. In 1971, the Yolgnu people sought an injunction against mining activity on their lands, claiming that they enjoyed sovereign rights over this land (*Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, also known as the Gove Land Rights Case). Although this case was dismissed, the findings and recommendations of the subsequent Woodward inquiry formed the basis of the legislative regime of land rights introduced in the Northern Territory through the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). This was the first legislation in Australia to establish a land claim process by which traditional owners could claim various areas of land that were listed as available for claim.

Although all Australian states and territories recognise some form of indigenous rights in land (see section 5), the *Aboriginal Land Rights (Northern Territory) Act* (ALRA[NT]) has seen 400,000 square kilometres of the Territory's land returned to its traditional owners, with a further twelve national parks in the process of being scheduled as aboriginal land under a leaseback arrangement with the Northern Territory government. All in all, almost 50 percent of the Northern Territory's landmass is aboriginal land (Central Land Council 2005:4–5), and the ALRA(NT) remains the most extensive land rights legislation in Australia (Altman *et al.* 2005:3). “The *NT Land Rights Act* facilitates the conversion of crown land or land owned by Aborigines in the Northern Territory to ‘inalienable freehold’ where there are traditional Aboriginal owners of that land” (Taylor 2004:1).

This act defines “traditional owners” in terms of local descent groups whose members have primary responsibility for sacred sites on a particular area of land and who possess a traditional right to hunt or gather on the land.

Communal inalienable title under the ALRA is a form of title that attempts to accommodate customary rights of ownership and use of land within a western legal framework. [Successful applicants] have significant rights in relation to “inalienable freehold” which do not apply in relation to ordinary freehold. For example, there is a veto over mineral exploration (subject to its being overridden by the Governor General in the national interest). (Altman *et al.* 2005:5)

Traditional owners are able to negotiate economic benefits for their communities, including revenue streams that flow from royalty equivalents. In this way also, land rights are very different from native title rights.

Native title

The recognition of native title in Australia is a relatively recent phenomenon. In 1992 a test case was brought before the Australian High Court by a group of Meriam Island people who sought recognition of their rights in land: *Mabo and Others v Queensland* (No. 2). The Mabo decision altered the foundation of land law in Australia by overturning the doctrine of terra nullius (land belonging to no-one) on which British claims to possession of Australia were based. This recognition inserted the legal doctrine of native title into Australian law when the High Court recognised the traditional rights of the Meriam people to their islands in the eastern Torres Strait.

The Court also held that native title existed for all indigenous people in Australia prior to the establishment of the British colony of New South Wales in 1788. In recognising that indigenous people in Australia had a prior title to land taken by the Crown since Cook's declaration of possession in 1770, the Court held that this title exists today in any portion of land where it has not legally been extinguished.

Native title was described by the Court as *sui generis*, literally meaning of its own gender/genus or unique in its characteristics: "Native title is neither an institution of the common law nor a form of common law tenure but it is recognised by the common law. There is, therefore, an intersection of traditional laws and customs with the common law" (*Fejo v Northern Territory* (1998) 195 CLR 96 at 128).

It is inalienable, but it is subject to extinguishment by the valid exercise of legislative and executive power in circumstances in which other titles to land are not. It is a communal title that has an internal dimension that allows for the allocation of rights and interests within the group according to aboriginal law and custom.

The decision of the High Court was swiftly followed by the *Native Title Act* 1993 (Cth), which attempted to codify the implications of the decision, protect existing interests in land, and set out a legislative regime under which Australia's indigenous people could seek recognition of native title rights. It also established the structures and processes for the administration of native title land and future use and development of that land. In 2002, the full bench of the High Court confirmed that with the introduction of native title legislation, it is now the *Native Title Act* rather than the common law that sets the benchmark against which native title applications are to be judged (*Members of the Yorta Yorta Aboriginal Community v the State of Victoria*, 2002).

As a legislative concept, native title is predicated on the notion that the common law can recognise the rights and interests held by indigenous Australians in land where these rights and interests are "possessed under traditional laws acknowledged, and the traditional customs observed" (*Native Title Act* 1993, s.223.1(a)).

Under the *Native Title Act*, it is the "traditional laws and customs" of indigenous Australians that constitute the basis upon which native title can be recognised, and which provide the content of the native title "rights and interests" that are determined.

The outcomes for native title claimants from the native title process can be a hit-and-miss affair. In real terms, the recognition of native title in a final determination may mean anything from a nonexclusive right to visit or traverse the area to the recognition of a form of title that

resembles freehold in its exclusivity but is consistent with the traditional laws and customs that gave rise to it.

Indigenous peoples must demonstrate that they are an identifiable society bound by a normative system of law and custom and that this society is the same normative society that existed at the time of colonisation. That is, the rights and interests in the land now claimed must find their source in, or be rooted in, the pre-colonial societal norms. That law must provide the connection to land. For some, this can be a very difficult evidentiary burden. For the Yorta Yorta people, the result of this approach was the High Court's determination that "the tide of history" had "washed away" their native title (Glaskin 2003:2).

The Yorta Yorta judgement also had implications for the rights that might be recognised in any native title determination. Rather than the holistic title implied by the Mabo and Wik decisions, the High Court found that native title consists of a bundle of rights. Conceptualising native title as a "collection of distinct and severable rights . . . denies that there may be a unifying factor that is fundamental to the exercise of those rights and makes native title susceptible to being frozen in time" (Strelein 2001:102). Hence, the original fundamental interest in land may be extinguished, right by right, until only fragments of the original title remain. To quote from one of the most significant native title determinations to date:

The difficulty of expressing a relationship between a community or group of Aboriginal people and the land in terms of rights and interests is evident. Yet that is required by the NTA. The spiritual or religious is translated into the legal. This requires the fragmentation of an integrated view of the ordering of affairs into rights and interests which are considered apart from the duties and obligations which go with them.

...

The connection which Aboriginal peoples have with "country" is essentially spiritual . . . It is a relationship which sometimes is spoken of as having to care for, and being able to "speak for," country. "Speaking for" country is bound up with the idea that, at least in some circumstances, others should ask for permission to enter upon country or use it or enjoy its resources, but to focus only on the requirement that others seek permission for some activities would oversimplify the nature of the connection that the phrase seeks to capture. (*Western Australia v Ward; Attorney-General (NT) v Ward; Ningarmara v Northern Territory* [2002] HCA 28 (8 August 2002)).

4. What does communal title mean to those who own it?

Joseph "Nipper" Roe, a senior law man of the Yawuru, described the relationship between country, people, and law as follows:

The Yawuru people together own those places, as we together own all of Yawuru country. The way I look at it, the relationship between Yawuru people and country is really like a triangle made up of the people, the land, and the law. There is no such thing as a one-sided triangle or a two-sided triangle and there is no top or bottom or beginning or end of a triangle. In the same way,

the people, the land, and the law are three aspects of the same thing. We have a duty to look after them all, and looking after one of them means looking after the other two as well. (*Reasons for Judgement: Rubibi Community & Anor v The State of Western Australia & Ors* [2001] FCA 607).

Another senior Kimberley law man, Paddy Neowarra, described the relationship between people, land, law, and the spirit beings, Wanjina, to the Federal Court as follows: “Everybody under Wanjina. Myself, I’m under Wanjina. Animals, everybody. Everybody what in the earth. Yes, trees, everything, they all have to have names and they our families in the land. Even the river, everybody’s tribe, somebody’s name. My name is Neowarra. I got with my family with that black rock” (*Neowarra v State of Western Australia* [2003] FCA 1402).

Indigenous Australian systems of knowing, owning, inheriting, and caring for land are profoundly different from those that have their roots in European forms of landholding, from feudalism to full commodification. To give a sense of the complexity and particularity of these systems we can look briefly at the way in which Paddy Neowarra’s Ngarinyin community map out their relationships to their traditional lands.

The land comprising the estate of a patrilineal clan is known as a *dambun*. Individuals think of particular *dambun* as particular relatives, so that a tract of land may be known as *abi* (brother), *ngadji* (mother), *gaja* (mother’s mother), *waya* (wife), and so on. Each block of land becomes an embodiment of relationships with a range of people in different kin categories from surrounding *dambun*. This is not simply a metaphor for land. It serves to unify emotional stances within and between each group. All the people from one *dambun* will call another *dambun*, and all the people patrilineal with it by the same kin term (even though in certain closer contexts finer differentiations might be made between generations) (Redmond 2001). Hence Neowarra might say of a tract of country, a sacred place within it, or a man unrelated by blood: “that’s my mother” or “that’s my son.”

While westerners have no trouble thinking in terms of “motherlands” and “fatherlands,” these terms often become depleted of the emotional content of actual family relationships and come to serve as shorthand for an objectified nation-state. For northern Kimberley people and many other Australian indigenous people, the full range of human relationships is embodied in relationships to country. This includes thinking and talking of country as a child who needs love, protection, and care, or as a mother or father who provides that nurturing.

The characterisation of land as kin is not unique to the Kimberley. Both exchange and person/land relationships in the Western Desert, for example, are not characterised as relationships of reciprocity or production but rather as relationships of reproduction (see Myers 1993:36 and Ingold *et al.* 1990:11). The indigenous tropes that are used to describe both exchange and senior men’s relationships to country draw upon images of the mother-child relationship and talk of holding, feeding, growing up, and giving. Relationships between equals, such as brothers-in-law, are encompassed by this fundamental nurturing experience, which is expanded to include a reproduction of the whole of the social and natural world (Myers 1993:51). Specific rights, responsibilities, and obligations to people and places flow from these reproductive relationships.

It is the utterly un-European way of understanding the relationship between people and land that led the authors of the ALRA(NT) to define “traditional owners” as those patrigroup members who have the “primary spiritual responsibility for land” (Peterson 1976; Peterson,

Keen and Sansom 1977). The fit between traditional knowledge systems and Australian law is neither close nor comfortable. Australian law and legislation demand that claimants form themselves into groups that privilege one or another traditional grouping (be it language group, family, or clan) and that membership of these groups be codified, predictive, and immutable. The land that may be claimed is usually not defined by traditional boundaries but is determined by the contingencies of colonial history and law. The indigenous process by which historical events become part of an everlasting and immutable creation are ritual and religious and do not sit comfortably with simplistic demands to show, for example, biological descent from the original inhabitants of a claim area.

However, despite the lack of fit between very different ways of structuring the knowledge about, and relationships to land, it is the grossest of oversimplifications to characterise indigenous knowledge systems or the legislation to which they gave rise as “a socialist experiment” (Hughes and Warin 2005:1). Rather, it is the complexity, the wide variety of indigenous knowledge systems, and their incommensurability with western understandings of land that led anthropologist Stanner to remark: “no English words are good enough to give a sense of the links between an Aboriginal group and its homeland. Our word ‘home,’ warm and suggestive though it may be, does not match the Aboriginal word that may mean ‘camp,’ ‘hearth,’ ‘country,’ ‘everlasting home,’ ‘totem place,’ ‘life source,’ ‘spirit centre’ and much else. Our term ‘land’ is too spare and meagre. We can scarcely use it except without economic overtones unless we happen to be poets” (Stanner 1991:44).

Stanner was spot on. We are not talking about the ordinary English use of the word “country.” Country might mean to some a sovereign nation-state that has a right to be a member of the United Nations. Or it might refer to quieter, less populated areas outside the cities where people go for a drive on a Sunday afternoon. When indigenous people talk about country, they mean something different. They might mean homeland or tribal or clan area, and in saying so they may mean something more than just a spot on the map. They are not necessarily referring to a place in a geographical sense. They are talking about the whole of the landscape, not just the places in it.

The word “country” is an abbreviation of all the values, places, resources, stories, and cultural obligations associated with that area and its places. The word best describes the entirety of a people’s ancestral domains. It is place that gives meaning to their creation beliefs — the stories of creation form the basis of their laws and explain the origins of the natural world to them. And there are places that are regarded as particularly significant or even dangerous. People sometimes refer to them as sacred sites, and it is not always easy to explain these places. They are mostly about the spiritual. But they are also about the living and who they are. Because to them, country is also centrally about identity.

5. The structures and processes for dealing with communal land

Once indigenous people have gained title over their country, there are processes, often intricate, for determining how title will be held and how use and access by others should be determined. There is considerable variation in these processes. Table 1 provides a brief description of the regimes in each state or territory.

Table 1: Land rights legislation in Australia

State	Legal process
New South Wales	<p>The <i>Aboriginal Land Rights Act</i> 1983 provides for a claim process over certain categories of Crown land. Determinations of claims are made by the New South Wales government on advice from government departments. Under the <i>Land Rights Act</i>, the New South Wales Aboriginal Land Council (NSWALC) is empowered to do the following:</p> <ul style="list-style-type: none"> • Administer the NSWALC Account and Mining Royalties Account. • Grant funds for payment of the administrative costs and expenses of regional and local aboriginal land councils. • Acquire land on its own behalf or on behalf of, or to be vested in, local aboriginal land councils (LALCs). • Determine and approve/reject the terms and conditions of agreements proposed by LALCs to allow mining or mineral exploration on aboriginal land. • Make claims on Crown lands, either on its own behalf or at the request of LALCs. • With the agreement of the particular LALC, manage the affairs of that council. • Conciliate disputes between aboriginal land councils, between councils and individuals, or between individual members of those councils, • Make grants, lend money, or invest money on behalf of aborigines. • Hold, dispose of, or otherwise deal with land vested in or acquired by NSWALC. • Ensure that regional and local aboriginal land councils comply with the Act in respect of the establishment and keeping of accounts and the preparation and submission of budgets and financial reports. • Ensure elections for the chairpersons and other officers <p>Aboriginal Land Councils are conducted in accordance with the Act and do the following:</p> <ul style="list-style-type: none"> • Advise the minister on matters relating to aboriginal land rights. • Exercise such other functions as conferred or imposed on it by or under the <i>Aboriginal Land Rights Act</i> 1983 or any other Act (NSWALC 2004).
Victoria	<p>Under the <i>Aboriginal Land Act</i> 1970, <i>Aboriginal Land (Northcote Land) Act</i> 1989, <i>Aboriginal Lands Act</i> 1991, and <i>Aboriginal Land (Manatunga Land) Act</i> 1992, and the <i>Commonwealth Aboriginal Land (Lake Condah and Framlingham Forest) Act</i> 1987, grants of small parcels of land have been made to aboriginal peoples. But no comprehensive system was introduced to identify or allow claims in other parts of the state.</p>
Queensland	<p>The <i>Aboriginal Land Act</i> 1991 and the <i>Torres Strait Land Act</i> 1991 provide for the granting of inalienable freehold title to existing aboriginal and Torres Strait Islander reserve land and trust areas. Also under the Act, vacant Crown land outside towns and cities can become available for claim if so gazetted by the government. National parks can also be claimed if gazetted as available for claim, but must be immediately leased back to the government.</p> <p>In 1984, Queensland established a system of community level land trusts, to own and administer former reserves. This was under a special form of title called a Deed of Grant in Trust (DOGIT). Each trust area becomes a local government area. Incorporated Islander Councils, which elect representatives every three years, manage the community's affairs. The Councils are able to make by-laws, appoint community police and are responsible for maintaining housing, infrastructure, the Community Development Employment Program (similar to work for the dole), licenses and hunting and camping permits (Agreements Treaties and Negotiated Settlements Project, 2005).</p>

Western Australia	In Western Australia, the <i>Aboriginal Affairs Planning Authority Act 1972</i> enables aboriginal land to be vested in Aboriginal Land Trusts. Some former aboriginal reserves have been transferred to the Aboriginal Land Trust, but most aboriginal reserve land in Western Australia remains under direct government ownership and control. Proposals have been mooted to return Aboriginal Land Trust and reservation land to aboriginal ownership, but without specific legislation there is a risk that existing protections against resource exploitation will be lost.
South Australia	Crown land can be granted under the <i>Aboriginal Land Trust Act 1966</i> to the Aboriginal Land Trust, which leases the land to local aboriginal groups. In the north of the state, land has been granted as inalienable freehold to traditional aboriginal owners under provisions of the <i>Pitjantjatjara Land Rights Act 1981</i> and <i>Maralinga Tjarutja Land Rights Act 1984</i> .
Australian Capital Territory	The Wreck Bay aboriginal community has been granted a small area of land under the <i>Aboriginal Land Grant (Jervis Bay Territory) Act 1986</i> .
Tasmania	No land claims legislation has been enacted in Tasmania, although twelve parcels of land were handed back to the indigenous community in 1995 as a result of the passage of the Aboriginal Lands Bill on 2 November 1995 (discovertasmania.com:2001).

Source: All information in this table is taken from Smythe (1994) unless otherwise stated.

Aboriginal Land Rights (Northern Territory) Act 1976

There are two ways in which land in the Northern Territory can be made subject to the ALRA(NT): it may be scheduled and annexed to the Act, or a claim may be brought before the Aboriginal Land Commissioner and won. Land that is subject to the ALRA(NT) is not owned by individuals. It is granted as an inalienable freehold communal title. It can be leased, but it cannot be bought, acquired, or mortgaged.

For the most part, aboriginal landowners with inalienable aboriginal freehold have the exclusive power to control the direction and pace of development on their lands. The public, in the form of government at various levels, has only limited rights to impose external development or conservation direction or constraints (Central Land Council, 2005).

Communal title is formally vested in Aboriginal Land Trusts that are comprised of aboriginal people who hold the title for the benefit of the traditional owners and other people with a traditional interest in the land (*ibid.*). These trusts are statutory corporations, and their role is essentially passive. The trust holds the title but has no authority to undertake any dealings in relation to the land except as directed by a land council, which in turn is authorised by the traditional owners, precisely because land is owned communally and it is unlikely that any individual has the absolute right to approve an activity carried out on aboriginal land, particularly if that activity will involve substantial interference and disturbance to “country.” The land council’s role is to ensure that aboriginal culture, traditions, and law are respected and followed on aboriginal land; that the relevant aboriginal people make informed decisions; and that commercial and resource exploitation agreements are fair. The land council must be satisfied that the relevant traditional owners understand the nature and purpose of any land use agreement that is entered into on their behalf and that they have agreed to it as a group (*ibid.*).

Attention has been brought to bear on the communal nature of the titles as a brake on economic development hence the changes to the ALRA(NT) that will be implemented in the following manner:

- The Australian government will change its own law (*Aboriginal Land Rights [Northern Territory] Act 1976*) to allow the Northern Territory government to establish an entity to talk with the traditional owners and the land council of a particular town area about the head-lease.
- The Northern Territory government will pass its own law so that it can get this entity to talk to the traditional owners and land councils to agree on a head-lease for the whole town area in the community.
- The traditional owners and land councils will set all the conditions of the ninety-nine-year head-lease, including the rent up to the maximum set in the *Land Rights Act*.
- Once there is agreement for a head-lease, the people who live in the town area can then ask the entity for a lease on part of the town land, which they can use for their own home or business.
- If the people who lease the part of the town land want some help with money for their own home or business, they can contact the Australian government.

The Office of Indigenous Policy Coordination's literature on the reforms raises as many questions as it answers. In particular, there is a risk that the Aboriginal Benefits Account (ABA) will be beggared by the set-up costs (including the retention of legal counsel and other consultation expenses), surveying of both head-lease and sub-lease areas, rental payments, and other administrative costs of this scheme. It is also unclear what will happen with the housing and infrastructure currently owned by land trusts. If they are to remain with the land trusts, how will their upkeep be funded if the ABA is to be used to fund the scheme? Does the government hope to replace royalties with rent?

It should also be noted that the purpose of the ABA is to provide a mechanism for providing funds for the benefit of aboriginal people in the Northern Territory. Such funds are compensatory in nature and are not intended to substitute for normal government expenditure for aboriginal development.

Pitjantjatjara Land Rights Act 1981 (South Australia)

The administrative and procedural structures on the Pitjantjatjara lands of South Australia are similar to those in the Northern Territory, with one crucial difference. Anangu Pitjantjatjara Yankunytjatjara Land Management is the body corporate established under the *Pitjantjatjara Land Rights Act 1981*. It is the landholding body and is responsible for the administration of the Act. While the Board is responsible for obtaining the consent of traditional owners in relation to proposed activities on the Pitjantjatjara lands, the Council also has local government responsibilities. The effect is that the body responsible for conducting consultations that protect the interests of traditional owners against proponents may be a proponent itself, giving rise to a potential conflict of interests.

Native Title (New South Wales) Act 1994

The land rights regime in New South Wales is fundamentally different from that in the Northern Territory and South Australia. There is no requirement that claimants demonstrate a traditional connection to the land claimed (except if that land is a traveling stock reserve). Claimable lands consist of land held or available for sale or lease under the *Crown Lands Act*. This land must not be lawfully used or occupied; must not be needed or likely to be needed for residential or essential public purposes; and must not be affected by a registered native title claim.

The New South Wales Aboriginal Land Council (NSWALC) was established under the *Land Rights Act* 1983 (NSW). It is a statutory authority responsible for protecting and promoting the rights and interests of the indigenous people of New South Wales. From 1982 to 1998, after the passage of the Act, the State of New South Wales paid 7.5 percent of land tax raised from nonresidential property to NSWALC as compensation for the land lost by the indigenous people of New South Wales. This money was invested, and NSWALC is now funded by the interest that accrues to these investments. The State's Land Council network operates as a three-tiered system consisting of the peak body, NSWALC, thirteen Regional Aboriginal Land Councils (RALCs), and 120 Local Aboriginal Land Councils (LALCs). Land that has been successfully claimed is held as freehold or leasehold by the relevant LALC. This land can be used for any community purpose, and the LALC has the authority to decide how it will be used. It can be leased, mortgaged, or sold (NSWALC 2005).

Native Title Act 1993 (Cth)

Under the *Native Title Act*, the role of native title representative bodies is to assist native title claimants in preparing, negotiating, and where necessary litigating their claims. If the claimants achieve recognition of their native title, the native title holders are required by the Act to establish a body that represents them as a group and manages their native title rights and interests. This body is called a prescribed body corporate (PBC). The native title of indigenous Australians varies from region to region across Australia because the traditional laws and customs of indigenous people are diverse. The PBC must reflect the unique nature and wishes of the particular group.

At the time that the court makes a determination that native title exists, it will request that the native title holders choose what kind of PBC they want from one of two alternatives. In the first model, the native title is held in trust by the PBC, which acts as the trustee for the native title holders and operates for the benefit of the common-law holders of native title. In the second model, the native title is held by the common-law holders of native title, and the PBC acts as their agent, operating upon their instructions. The title held by the PBC is communal and inalienable.

Once the corporation is established by the native title holders and approved by the court, it is entered into the National Native Title Register. Once registered, the PBC becomes the legal body that conducts business between the native title holders and other people with an interest in the area, such as pastoralists, government agencies, or developers (sourced from the National Native Title Tribunal 2005).

Any proponent, including government, that wishes to use native title lands for any purpose has to go through the future act procedures specified under the Act: s.11 NTA. The procedural rights of the native title holders can vary from the right to be notified of proposed activities to strong rights to negotiate. There is no scope under these procedures for native title holders to veto developments. Nevertheless, developers and native title holders can enter into a voluntary Indigenous Land Use Agreement to authorise future management of land or waters and set out the terms of the agreement. Indigenous Land Use Agreements are registered under the Act and are legally binding on the people who are party to the agreement and all native title holders for that area, even if they were not involved in the agreement.

While these regimes are designed to provide certainty for proponents, at the same time protecting the intergenerational nature of the titles, it is perhaps not surprising that they are

perceived by some, as too onerous an imposition and a hindrance to economic development. Attention has been brought to bear on the communal nature of the titles as a source of the brake on economic development, and this has ignited debate on indigenous land tenure.

6. The tenure debate

In Australia, the push to privatise indigenous land began in 2004 when Warren Mundine, senior vice president of the Australian Labour Party, NIC member, and chief executive officer of New South Wales Native Title Services, released a statement to the media that called for fundamental legislative changes to the *Native Title and Land Rights Acts*. Mr. Mundine said the aboriginal community had the key to economic advancement locked up in communal landholdings and suggested that they could be selectively sold. In February 2005, he tabled a paper titled, “Privatising Indigenous Land” at a meeting of the National Indigenous Council (Mundine 1995).

In early March 2005, Hughes and Warin (2005) published, “A New Deal for Aborigines and Torres Strait Islanders in Remote Communities.” In this article, they claimed that “communal ownership of land, royalties and other resources is the principal cause of the lack of economic development in remote areas.” They likened remote communities to museums, designed to preserve a hunter-gatherer culture that is uneconomic in modern Australia. They called for aboriginal people to catch up with post-industrial society and enjoy Australia’s “ever increasing capital and advancing technology.” Their argument revived the social Darwinist idea that aboriginal society lags behind on a one-way evolutionary superhighway. They argued against bilingual education, “separatism,” and the recognition of customary law, and described remote communities as “a nation independent from the rest of Australia.” Hughes and Warin, of course, never mentioned the word “assimilation” — they simply pathologised all manifestations of cultural difference.

On 30 May 2005, Prime Minister John Howard addressed the National Reconciliation Workshop and said that his government was “committed to protecting the rights of communal ownership [and] . . . does not seek to wind back or undermine native title or land rights” (Howard 2005). There, one might have hoped, was an end to the matter.

However, in June 2005, the NIC released a document entitled “Indigenous Land Tenure Principles.” These principles, while referring to the importance of communal title to indigenous people, included the recommendation that “the consent of the traditional owners should not be unreasonably withheld for requests for individual leasehold interests for contemporary purposes” and that “involuntary measures should not be used except as a last resort and, in the event of any compulsory acquisition, strictly on the existing basis of just terms compensation and, preferably, of subsequent return of the affected land to the original owners.” They went on to recommend that “governments should review and, as necessary, redesign their existing Aboriginal land rights policies and legislation to give effect to these principles” (National Indigenous Council 2005).

These recommendations are worrying for the following reasons:

- The concept of mandatory leasing is discriminatory. It would be unimaginable that the Australian government would require, through the use of “involuntary measures,” a non-indigenous person who jointly owned property with others to lease his or her land.

- One wonders how “just terms” would be calculated in those cases in which the value of communally held land to its owners is spiritual and cultural and the market value of the land is negligible.
- There is no mention of the term of these leases; but if they were for twenty, fifty, or even ninety-nine years, one would question whether land returned after the expiration of, say, a ninety-nine-year lease would be recognisable, either physically or culturally, to the descendants of the original title holders (not to mention the deprivation of use of their lands by the communal owners over several generations).
- The phrase “unreasonable withholding of consent” is most commonly legally applied to property owners who refuse to continue an existing lease. As Bradfield (2005:8) argued, “The NIC’s Principles apparently leave the Commonwealth to define what is ‘unreasonable’ withholding of consent, what is ‘just compensation’ for compulsory acquisition, and whether ‘subsequent return’ of land is possible.”
- A very troubling aspect of the NIC proposal is that the authors of the document recklessly propose giving totally unqualified and undefined “licence” to the government to make wholesale unspecified policy and legislative changes. Nothing in the proposal indicates that NIC has even considered the adequacy of the existing legislative arrangements for leasing on indigenous-owned land.

Land returned to indigenous communities via land rights legislation can be sold in New South Wales and leased in most other jurisdictions, and some of these leases can be mortgaged. In the Northern Territory, aboriginal land is leased to third parties for a range of purposes including tourism, safari hunting, fishing lodges, and infrastructure (Altman *et al.* 2005:22). AustralAsia Railway Corporation’s partial funding of the Alice-Darwin rail link by mortgages over leased aboriginal land shows that commercial lenders may participate in these arrangements (Clarke 2005:1). Native title holders may negotiate Indigenous Land Use Agreements (ILUAs) that allow economic development to take place on their land. These may include profit sharing and employment opportunities for the community (Edmunds and Smith 2005:74).

In our view, there is a very unhealthy and inappropriate preoccupation with privatising indigenous land by some commentators. Proponents argue that privatising communal land would help alleviate indigenous economic inequality.

There is more than one level at which this question may be addressed. The first is on its own terms: would legislation that enabled the alienation and subdivision of communal land produce improved economic outcomes for indigenous Australians? Another is to ask whether improved material conditions would be enough to justify racially discriminatory legislation that allows for the compulsory acquisition of communally owned indigenous land for a private purpose when no other Australian property owner would be subject to this requirement. Is the choice really this stark? Were land rights and native title legislation ever intended to produce economic outcomes? Why is this issue on the agenda at this time?

There are many reasons to think that privatising communally held land would not improve economic or other outcomes for indigenous Australians. Let us consider the economic value of the land that is held under communal titles and the nature of that title. The ALRA(NT) and the *Native Title Act* strictly limit the land that may be available to be claimed by indigenous people. The *Native Title Act* provides that claimable land must have never been subject to freehold title and, where the Crown has granted leases or licences, indigenous rights are extinguished to the extent of the interests granted. In the Northern Territory under the

ALRA(NT), certain reserve Crown lands can be scheduled, and vacant Crown land can be claimed, as well as land where all the rights and interests in that land are held for or on behalf of aboriginal people. Hence, the land that is available for claim under these regimes is precisely the land that in most cases tends to be the least commercially valuable and viable.

It is no easy thing for an indigenous group to mount a successful native title claim. Even when they succeed, indigenous people can expect that their rights in the claimed land will fall well short of freehold. One “major cause of under-development on the indigenous estate is that land has been returned but without property rights or exclusive control of commercially valuable resources” (Altman *et al.* 2005:6). Furthermore, the Productivity Commission noted: “The extent to which Indigenous people can potentially benefit from market based activities on their land depends very much on the location and nature of that land. Remoteness from markets and population centres can add to the costs of delivering products and services from Indigenous communities” (Productivity Commission 2003:310).

There is much evidence to suggest that the average household income in remote Australian indigenous communities is simply not sufficient to service a mortgage. The average household (not individual) income in remote parts of the Northern Territory is approximately \$40,000 a year. If dealing with a mainstream financial institution, this level of income would allow the household to borrow approximately \$160,000 over thirty years to pay for a house at a cost of \$1,110/month in mortgage repayments and total interest payments of \$235,000. Compare this to the \$192 a month that the average remote household pays in rent. Moreover, the cost of building a house in a remote community is between \$225,000 and \$350,000, at least \$100,000 more than a bank would lend a family on an average income; and the rate of depreciation is very high. Finally, the value of land in remote townships of the Northern Territory is between \$4.30 and \$36 per square metre; the value of pastoral lease land is approximately \$13 per hectare (Altman *et al.* 2005:15–16).

Privatisation of communally held Maori lands in New Zealand had the effect of worsening the economic outcomes for Maori people (*ibid.*:25–30), while in Papua New Guinea, agricultural production has expanded steadily under customary tenures and has mostly declined under registered titles (Burke in Fingleton 2005). Empirical economic research commissioned by the International Institute for Environment and Development found that the re-titling of communal lands in sub-Saharan Africa had not worked well as “the costs were high . . . the expected benefits had not materialised and, where family farming prospered, it appeared to do so anyway, on a foundation of customary rights, secured by kinship and social contracts” (Quan in Gilmour 2005:13).

Even if there were good reason to expect great benefits to flow to indigenous Australians from the privatisation of their communal lands, there has been no process of consultation on this issue with those people who would be most affected, the communal title holders. As a World Bank study has noted, “processes of land reform which do not enjoy legitimacy and recognition amongst the peoples they affect have often proven to be highly ineffective” (Deininger 2003:xxiv).

Given that there is little evidence to suggest that privatising indigenous land would improve the economic situation of indigenous Australians, and that there are many reasons to suppose that it would worsen an already desperate situation, there seems to be no justification for proposing racially discriminatory legislation that would see indigenous Australians as the only Australians whose land can be compulsorily acquired for private or nonessential public

purposes. It is deeply worrying that the first piece of publicly known policy advice from the NIC has been to propose a course of action as racist as this.

Even if there were evidence to support the notion that privatising communal lands would benefit indigenous people, it is worth recalling the findings of the Northern Territory government's own enquiry into the ALRA(NT), the 1998 Reeves Review of the *NT Aboriginal Land Rights Act*. This review found that communal title is the form of title most likely to protect the interests of aboriginal people, including future generations, in their traditional lands. It also found that the inalienability of aboriginal freehold title does not significantly restrict the capacity of aboriginal Territorians to raise capital for business ventures. Perhaps most importantly, the review noted that the achievement of aboriginal social and economic advancement through land rights was not an objective of the *Aboriginal Land Rights Act* when it was introduced (Ridgeway 2005:8–9).

The *Native Title Act* and its amendments represent legislative attempts to limit the implications of a High Court decision that overturned the doctrine of terra nullius on which British claims to possession of Australia were based. Far from being designed to achieve economic or social justice outcomes for indigenous Australians, it was designed to protect non-indigenous property interests in Australia. It is illogical to criticise these acts on the basis that they have not achieved something that they were never intended to achieve; that is, produce economic advancement for indigenous Australians.

7. Conclusion

It is pertinent to ask why this issue is on the agenda at all. It has been raised in the context of a fundamental restructuring of indigenous affairs in Australia, which has been described by Minister for Indigenous Affairs Amanda Vanstone as a “quiet revolution” (Vanstone 2005). Grouped under the rubric of “the new arrangements,” these changes have included the abolition of the Aboriginal and Torres Strait Islander Commission, proposed changes to the *Native Title Act* to make it “more workable” for opponents of claims, and a move towards “practical” rather than “symbolic” reconciliation. This restructuring has been administrative rather than legislative — much of it has and will continue to take place behind closed doors.

To conclude, we would like to quote at length from the Australian Human Rights and Equal Opportunities Commission's assessment of the new arrangements in Indigenous Affairs.

With the announcement of the new arrangements, there has been a noticeable shift in emphasis on the role of Shared Responsibility Agreements (or SRAs). The focus is now much more explicitly on the responsibilities of indigenous people in meeting mutual obligation principles. The OIPC [Office of Indigenous Policy Coordination] state that the SRA process is intended to build genuine partnerships with indigenous people at the local level based on the notion of reciprocity or mutual responsibility. An SRA is a two way street where communities identify priorities and longer term objectives for themselves, government listens and they work together to achieve agreed objectives — nothing can progress unless the lead comes from the community.

This presents the acceptance of mutual obligation as voluntary. However, the OIPC have also stated that “Under the new approach, groups will need to offer commitments in return for government funding.” During consultations for this

report, senior bureaucrats have confirmed that the intention is that communities that do not wish to accept mutual obligation will be provided with basic services, but might not receive additional funding or support . . . Consultations for this report have revealed widespread concerns about the potential scope and dominance of mutual obligation requirements. There is concern that SRAs will become less of a community development and capacity building model and more of a punitive funding agreement model which seeks behavioural change. This is particularly so when, as in the Mulan agreement, there is very little connection between the outcome sought by the Government (in this example reducing the incidence of trachoma) and the input provided by the Government (a petrol bowser). There is also widespread concern that the linking of delivery of services to behavioural change through SRAs would be discriminatory. (Calma 2005c 119)

Any attempt to legislate away the recognition of fundamental cultural difference afforded by land rights and native title legislation would be in keeping with the assimilationist thrust of the “new arrangements.” There is no evidence for the proposition that the forced carving up of the indigenous estate would improve the day-to-day lives of Australia’s indigenous people, let alone their descendants. But the issue is more fundamental: the present Australian government must not be permitted to legislate away the traditional, spiritual, and unique connection of indigenous peoples to their lands.

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CHAPTER 11: CUSTOMARY TENURE AND PRODUCTIVITY IN THE PACIFIC

Ron Crocombe

1. Introduction

This chapter reviews developments relating to customary land tenure policies over an extended period within the Pacific and cautions against repeating the mistakes of the past. The chapter makes three points: (1) culture and context matter more than structure; (2) it is easier to start new systems than to keep them going; and (3) customary land tenure is very resistant to radical change.

The chapter begins with a caution against the quick adoption of ideologies in section 2. Section 3 warns against introducing land administration systems that cannot be sustainably administered. Section 4 highlights the importance of culture, values, and social organisations in relation to land tenure reform. Section 5 concludes.

2. Be cautious of ideology

Many land tenure changes in the Pacific have been made on the basis of ideologies that were then popular among people with influence. Reality is complex, so we all look for simple solutions. Experience throughout the region reminds us that jumping on popular bandwagons is usually done with good intentions but sometimes has disastrous results. Those who preach magic solutions do not suffer when they fail; ordinary people do.

More useful and effective adaptation for Pacific nations today is likely to be achieved if it is pragmatic, carefully designed with an intimate knowledge of each situation, and implemented slowly and carefully.

Let us review some of the changes that have been attempted in the Pacific in the past 100 years or so, and see why so many of them did not, and still do not, meet their intended objectives. As with religions, those promoting the changes have always claimed that they are of universal validity. It is a matter of belief and interpretation rather than reality.

The dominant ideologies and practices of the past 200 years in this region have been those of the indigenous people on the one hand and those of European colonial governments and business interests on the other. Europe and its extensions became so powerful that, like imperial systems at any time in history, they assumed their theories, values, and assumptions to be universal and eternal. Many still do. Soon the external ideologies, values, and practices that matter most in this region will be those of East Asian governments and business interests. Sadly, no one is preparing for that reality. A rearguard action to try to perpetuate the past is easier in the short term.

Ideologies in relation to land policy within the Pacific can be grouped into three main groups: (1) Europeans, (2) communal, cooperative, and other group enterprise experiments; and (3) current ideological assumptions.

European-run plantations

The first colonial land policies in the region had two parts. The first was, as Governor Macgregor wrote in Papua in 1898, “above all, to prepare the country for development by Europeans. There is not, and has not been, any other policy” (quoted in Healy 1962:84). Here, as in most of the Pacific, land thought surplus to local people’s needs was allocated to Europeans for large plantations to be worked by Pacific Islanders or Asians — either voluntarily or compulsorily. It made sense to decision-makers then; it does not now. It did raise export productivity, but the benefits went overwhelmingly to a handful of plantation owners, ship owners, and traders. Almost all those plantations, throughout the Pacific, failed completely within a generation or two, many sooner.

Group enterprise experiments

Second came the directive that village people must plant cash crops. Beginning in 1894 in Papua, colonial governments throughout the Pacific passed laws to enforce this. That policy, too, was much less successful than expected.

After World War I (1914–1918), low crop prices meant that few European planters came, so planting by villagers was made compulsory. In Papua, the cash crops (including coconut, rubber, cotton, coffee, cocoa, oil palm, and rice) were to be planted in one communal plantation for each village or cluster of villages, because it was assumed that native people were naturally communal. The income was to be shared equally between the villagers and the government. Every man had to work sixty days a year on the communal plantation or face three months gaol (Crocombe 1964b). Despite exceedingly low productivity from this experiment, government commitment to the false ideology forced its continuation for nearly forty years.

In the 1950s and 1960s, the new idea was cooperative farming, with varying degrees of individual and cooperative input. Some of the initiative came from the government, some from foreign churches. Many of you will remember the Christian Cooperative Movement in Eastern Papua in the 1950s and 1960s, mainly to produce copra and rice. Men worked together on Mondays and Tuesdays, and income was to be shared equally. These experiments, and many others, were economic and social disasters, producing little but conflict and disillusionment.

In the 1940s and 1950s an ideological battle was fought between the Department of Native Affairs and missionaries on the one hand and the Department of Agriculture on the other. The Agriculture Department had changed its approach and now promoted cash cropping by individuals or families. By the mid-1950s, its view won out and the emphasis moved to promoting family farms for Islanders and plantations for Europeans.

In the 1960s, this author did a study of all forms of introduced communal and cooperative farming, state farming, and various corporate experiments in farming throughout the Pacific region (Crocombe 1971). The main lesson learned from it was that false assumptions backed by ideological convictions can last a long time. The French governor in New Caledonia decided in 1868 that land in New Caledonia was held collectively by tribes. That false assumption remained the basis of French colonial policy for over 100 years. Only recently has it been rethought.

Current ideological assumptions

One of the most popular assumptions, illustrated by the work of de Soto (1989, 2000) and promoted by the World Bank and other international development agencies, is that legally binding individual land titles that can be mortgaged and sold cause dramatic increases in prosperity. Like all the other assumptions, it contains some truth in some situations at some times. The critical question is how effectively it or other systems will work, in which situations in Papua New Guinea, now and for the foreseeable future.

de Soto's views are not new to the Pacific. Similar assumptions about legal individual titles were the basis of New Zealand's colonial policy in the Pacific Islands over 100 years ago — and of several other colonial powers, including Germany (1886–1914) and Japan (1914–1945) in Micronesia. In the Cook Islands, New Zealand set up a land court to decide ownership and issue titles to individuals or small groups. Sale was not permitted, but 99-year leases were (Crocombe 1964a).

Productivity rose after that, but mainly because refrigerated shipping was introduced, allowing Cook Islands fruit to be exported to New Zealand. Many of the bananas, the main crop, were grown on steep customary land that the court had not issued title to. Some Europeans acquired 99-year leases and developed plantations. Few succeeded, and by the 1960s all had been abandoned as agricultural enterprises. Agricultural productivity today is very low — largely but not only for reasons other than land tenure.

In Samoa, New Zealand administrators decided that converting customary land to individual titles would bring prosperity, but in fact it caused the Mau rebellion. The policy was never implemented, although aspects of it could have been useful if introduced carefully in selected locations where people wanted it. There are many similar examples in the Pacific.

The lesson is that it is not wise to introduce policies that are likely to cause extensive violence and not be implemented anyway, however well such policies may work in other contexts or at other times. Yet that has been done in Papua New Guinea several times in recent decades.

3. Keep changes within the capacity to administer them

It should be obvious that it is necessary to keep changes within the capacity to administer them, but in fact over the past 100 years in the Pacific, few tenure changes have had the intended result because the finance, skills, or integrity to administer them has not been maintained. Land registration has almost always taken many times longer than expected. Today the technical aspects, such as survey equipment and computer mapping, reduce the time needed, but the human aspects, in terms of court hearings and title determinations, are taking vastly longer and are much more expensive because lawyers, politicians, and the media (none of whom were involved until this generation) all gain by lengthening the process.

With any change, it is essential to plan realistically, not only for money costs, training, and so forth, but also to make a realistic assessment of the probability of the system running effectively ten to thirty years later. Few tenure systems in the Pacific Islands, customary or introduced, are running efficiently.

One trend that has surprised observers in the Pacific, including this author, is that customary land tenures have adapted more quickly than formal land tenures. That is not to suggest that customary land systems are best, but to caution against simplistic solutions. For example, although the attempted legal changes to Samoan land tenure failed with disastrous results, Samoan customary tenure has evolved tremendously and continues to do so (O'Meara 1990). The Cook Islands laws, introduced in 1902 with the intention of replacing a complex customary land tenure system with a simple formal one, have caused in practice a much more complicated and expensive quasi-legal system to emerge that constrains productivity and encourages out-migration.

One might ask why they do not change the law, but politicians value their own political survival more than they value improvements to land tenure, and they know that any tenure change gives whoever is in opposition ammunition to undermine whoever is in charge. Attachment to territory is one of the most basic animal emotions, embedded in the lower brain stem, and can raise fear, anger, and aggression with amazing ease — more so if they are seen as promoted by foreign governments, institutions, or consultants, as has been seen in Papua New Guinea.

The lesson is that it pays to choose laws carefully — in practice they are very difficult to change. And small adaptive changes are easier than big ones. Therefore, for a nation as diverse as Papua New Guinea, with over 800 languages and cultures and a very diverse environment undergoing rapid change, the need is for more niche solutions to particular problems. Several examples can demonstrate this point.

Incorporated land groups and the lease-leaseback system

When it began, this author believed the system was unlikely to work because it is cumbersome and expensive, but it seems to have been very useful for some large-scale enterprises. Still, it seems to be a niche provision, effective only in special circumstances.

Land tenure conversion

The land tenure conversion process in Papua New Guinea has been found useful by a small number of landowners and has potential if carefully used. But as noted below, there can be unforeseen obstacles, too.

The Sepik experiment

The Sepik experiment (Fingleton 1991; Power 1991) seemed to have potential but was unfortunately never allowed to get established. Part of the problem may have been the attempt to tie it to a national system, thus inviting reaction.

East New Britain's recording system

The East New Britain recording system initiated by Commissioner Syd Smith in the 1950s with the local government council seems to have moved in a positive direction, perhaps partly because of its independence from central government. Indeed, some other provincial governments may provide a better basis for recording land rights than central government. In Solomon Islands, the people of Malaita began over twenty years ago to supplement memory records with written records of customary rights (Maenu'u 1979a, 1979b; Totorea 1979). A

tremendous amount of work has been done at no cost to the government. If and when some of them decide to integrate their records into a provincial or national system, they will provide a useful basis for doing so.

Occupation rights

The occupation right is a simple mechanism used in the Cook Islands, Niue, and French Polynesia. It is a legal document confirming a customary allocation, stating that when a land-owning group gives an occupation right to one of its members, the land belongs to that individual and to his or her direct descendants in perpetuity. But if they abandon the land for seven years, it reverts to the group as a whole. The land cannot be sold. Occupation rights have been used mainly for housing and small-scale agricultural credit. They have been useful, again for a particular niche, although some of the most productive farmers use land to which they have no legal rights.

The occupation rights legislation required one paragraph and was drafted by a non-lawyer one night in 1946.²⁸ It worked well. Lawyers were not then allowed in the Land Court. In today's approach, teams of consultants would be hired at great expense and laws of many pages and sections would be drafted and adopted, ensuring lots of work for lawyers (and poverty for local landowners) for as long as the law survived.

4. Recognise the importance of culture, values, and social organisation

It is often said that productivity correlates with security of tenure. In some situations it is true, but in others it is not. The highest agricultural productivity in French Polynesia for over a century came from Chinese farmers with very insecure tenure, while Tahitians with secure tenure were much less productive. One sees the same in Fiji today, with highly productive Chinese farmers with no security out-producing, many times over, Fijians with secure tenure. In the Northern Marianas, too, Asian immigrants with little security far out-produce local people with secure tenure. There are many similar examples.

In the 1850s, Hawaiians were promised that if they adopted what some now call de Soto's plan, individualised their land, took legal titles, and accepted mortgages, the free market ideology would make them wealthy. Instead it made them poor and landless. The theory worked for immigrant Europeans and Asians, but the Hawaiians lost their land and are still marginalised 150 years later. Are Australian Aborigines better off because individual titles and mortgages and credit have been in place for 200 years?

In Solomon Islands, the land in the capital, Honiara, was purchased by the government, which leases it to those who need it. At least that is the theory, and for some decades was the practice; but in the past few years, almost all the top-quality sites have been acquired by Chinese, who constitute about 0.1 percent of the national population. This is already leading to strong, ethnically loaded resentment. Land prices have soared, and Solomon Islanders have to rent from Chinese entrepreneurs.

²⁸ The drafting was done by the land court judge, Jack Morgan, who was not a lawyer. Morgan told this author how he came to do it.

Papua New Guineans should be very cautious about opening their land to unrestricted sale, whether of freehold or of leases, or they risk losing it. Systems of land transfer need careful thought and adaptation to local cultural and political values.

To this author's knowledge, no communal or cooperative farming enterprise in the Pacific Islands has succeeded. That does not mean that communal or cooperative farming cannot work well. Both can work extremely well. In United States and Canada, the Hutterites have lived by communal farming very successfully for more than 100 years, as have the Amish with a cooperative system. These two communities are Christian; while in Israel, Jewish communes and cooperative farms have been highly productive. The lesson is much depends on beliefs, values, and context.

Few Pacific Islanders ever farmed communally or cooperatively. With few exceptions, farming was a family matter or, as Pospisil (1965) has shown for the Kapauku/Duma highlanders, individualised even within the nuclear family. Then why be cautious about registering individual titles to land? There are probably good reasons to register in some situations involving heavy investment or intensive land use, but equally good reasons not to do so where the subsistence component is high, mobility is high, and recording and enforcement systems are inadequate. The state of land records in Papua New Guinea today is an unfortunate example.

Land management is very expensive, especially when done by governments. The great majority of land by area in Papua New Guinea is managed by local families and communities at no cost to government. And it is much more flexible than government systems. It is unwise to bring land into the government system except when the monetary and other benefits are likely to outweigh the costs — as they usually will in towns, mines, and other areas of high-intensity usage, but not much beyond unless people want it. If they do, it has a good chance of working. If they do not, it has little chance.

No matter what the law says, if it is not reasonably compatible with local culture and values, it is not likely to work. Much depends on the extent of obligations to relatives and community members and how much emphasis the culture places on sharing or consumption as against saving. Simply changing the law does not have the effect that is often claimed. We have evidence for that throughout the Pacific as elsewhere.

Many will remember the resettlement schemes set up in many parts of Papua New Guinea in the 1950s and 1960s. They seemed to be sensible, allowing people from overcrowded areas to resettle in areas with apparently surplus land. The government bought the land, and the settlers received individual titles, credit, and extension services. But the key factor no one (including this author) thought of was, how will the settlers be accepted by the descendants of the people who sold the land on which they settled? As is widely known, within one generation those in many of the settlements were violently evicted, with awful suffering. What was lacking was social integration, carefully thought through and carried out. The planners thought in terms of Western culture and did not involve people of the cultures concerned nearly enough.

Another instructive case is the voluntary resettlement of the Phoenix Islands by people from the over-populated South Gilbert Islands (Kiribati). Only volunteers were accepted. Harry Maude, the British colonial officer in charge of the resettlement, insisted on Kiribati people making all decisions (Maude 1938, 1942; Woodburn 2003:125–51; personal interviews with

Maude). When those who wanted to go were ready, he wanted to rush them onto the ship and sail because the ship was on charter and costing a lot of money. But the Kiribati people said that it was essential to first compose a song. They spent days debating what words and music were needed. Maude was frantic about wasting money on the ship charter while they composed the song. But in later years, he said, whenever the going got tough, and some people wanted to give up, someone started singing the song, and all would join in and renew their will to stay.²⁹ The song had become their legitimating charter, like a paper title is for many town dwellers. The lesson was that people from outside a culture know little of what is important within it. Like the Christian Hutterites or the Orthodox Jews on communes, some things that made no sense to people outside were the key to success.

In Kiribati, the British colonial government introduced land registration. Kiribati must be the easiest country in the world in which to register land because the islands are small, narrow, and flat, and in Kiribati custom, land is allocated in strips from the lagoon across the land to the ocean side — only a few hundred metres. Yet, a small study this author did for the South Pacific Commission revealed that within a decade almost every household was using some land belonging to other people, and some of its land was likewise being used by others (Crocombe 1968). The same was shown in Morawetz's (1967) study of individualised legal titles issued in Oro Province in the 1960s. Within a short time, some other people were using some of their land and they were using some of other people's. Why, when all the land was so similar? I expect it is because when one is living largely by subsistence and without government social security, one strengthens one's security by a diversity of mutual commitments through land and other activities. Whatever the reasons, it happens in many situations in the Pacific.

As mentioned above, European plantations had a life of one to three generations, after which all the assumptions on which they had been built had collapsed and the Europeans left the land. However, after about a generation, plantation agriculture has begun to come back, owned this time by East Asians, rather than Europeans or Islanders.

It is true that, in the Pacific as elsewhere, productivity on registered land is higher on average than on unregistered land. But to what extent that is due to registration, and what form of registration, is a moot point. The registered land is mostly in urban and peri-urban areas, or has the best soils or minerals or the best access to ports and markets. The 97 percent myth in Papua New Guinea and the 90 percent myth in Fiji and equivalents elsewhere in the Pacific Islands region are dangerous misrepresentations.³⁰ Measuring land by area is similar to implying that coins are more valuable than banknotes because coins are heavier. The area of land is irrelevant except for politically loaded rhetoric. What matters is its value by various criteria. Customary lands include most of the mountains, infertile soils, and remote locations that are of low value by almost any criteria. Despite the myth about 97 percent of the land in Papua New Guinea being unregistered and customary, this author expects that much of the most valuable land is registered and held in tenures other than customary tenure. Likewise, although no statistics exist, despite the myth about Fijians having 90 percent of the land in Fiji, this author expects that the most valuable land is controlled by non-Fijians.

²⁹ Eventually, a drought caused the abandonment of the settlement and their resettlement in Solomon Islands.

³⁰ This is related to the agreed view that 97 percent of the land in Papua New Guinea and 90 percent in Fiji are held under customary tenure.

5. Conclusion

This chapter has three main messages. First, culture and context matter more than structure. In other words, systems may work well in one situation but badly in another. This has been demonstrated across the Pacific and the world for more than a century. So this author suggests Papua New Guinea avoid excessive reliance on ideology (even when it claims legitimacy by calling itself called theory) and focus on what is likely to work best in which parts of the country, for what purpose, for the coming generation.

Second, it is easier to start new systems than to keep them going. It is usually easy to get money and enthusiasm to install new systems, but maintaining them in working order is much more difficult. That, too, has been demonstrated throughout the Pacific. It is unwise to expand faster or further than the capacity to keep the system effective, or if the government's land institutions lack integrity and public confidence (as is apparent in Papua New Guinea at this time).

Third, land tenure is very resistant to radical change. Some aspects of life change quickly and easily, others slowly and with difficulty. Radical changes in land tenure anywhere require extreme concentrations of power. For example, the diverse reforms imposed on Japan by the US military after World War II, on Taiwan by the invading Chinese army, and by communist governments in China, Russia, and Vietnam all used extreme power, including considerable killing in most cases. The only similar example in the Pacific was in Tonga in the mid 1800s when a Tongan chief won a bloody civil war, made himself king, took total power to himself, and individualised the land in law. Even so, it took nearly 100 years in that small country before much of that change was implemented in the late 1950s. Today, the king no longer has such power, nor does any other government in the Pacific.

Finally, appropriate forms of land title in and around urban areas and other areas of high-intensity use are needed, although they have been available in most places for decades. The useful innovations here and across the Pacific have been those designed for particular places, cultures, and purposes, and implemented with long-term commitment. Without that, any change is a waste of money and time and, most of all, of confidence. But with them, there is the potential for steady increases in productivity, confidence, and quality of life.

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