



Incorporated land groups and the registration of customary land: Recent developments in PNG

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Photo by Lara Daley

Papua New Guinea (PNG) has one of the highest levels of customary land ownership in the world, estimated at about 97 percent. However, in practice, this apparently high level of local control has not always been reflected in effective control over land or natural resources. This has been due in large part to the use of incorporated land groups (ILGs) as the main vehicle for facilitating landowner representation and benefit sharing from natural resource development, as ILGs have generally lacked accountability and transparency for the landowners they are intended to represent.

In 2007, the Government of PNG introduced sweeping legislative reforms intended to remedy the defects in the manner in which ILGs are registered and managed.¹ At the same time, legislation was passed establishing a new procedure by which ILGs can voluntarily register the title to their customary land, thus releasing it for development.²

These policy changes bring both opportunities and risks for landowners within the current development context of PNG. Customary landowners are under increasing pressure, both from within their own communities and from external sources, to make their land available for development. These pressures are many: urban expansion, industrial logging, oil palm development, mining and

¹ *Land Groups Incorporation (Amendment) Act 2007.*

² *Land Registration (Customary Land) (Amendment) Act 2007.*

more recently, carbon sequestration.³ Indeed, the National Land Development Taskforce, which recommended that changes be made to the ILG and land registration system, had as its key focus the issue of how to release land for such development purposes.⁴ Yet serious concerns remain that land registration should not compromise the ability of local communities to continue to access their customary land: almost 85 percent of Papua New Guineans depend on customary tenure for food, water and shelter for survival.⁵

This article describes how these recent policy changes will affect ILGs and land registration, and concludes by identifying some of the preconditions for their ultimate success.

Historical context of ILGs

Since 1974, landowners in PNG have been able to form a corporate body under the *Land Groups Incorporation Act 1974* (Land Groups Act). Although the intended purpose of the Land Groups Act was to allow ILGs to manage their own customary land, ILGs have not generally been used for this purpose, partly because complementary land registration legislation was not enacted at the same time.

Rather, ILGs have largely been used as a “short cut” to obtain landowner consent for resource exploitation, such as for industrial logging, and have also been used as a mechanism to distribute benefits to landowners from forestry, oil and mining projects, although there are frequently complaints that benefits are not distributed fairly.⁶ These uses may in part explain the enormous proliferation and fragmentation of ILGs. One commentator estimates that in 2004 there were over 10,000 ILGs registered, with 10 to 15 new applications being received daily.⁷ Given that, from a population of about six million people in PNG, there are about 850 language groups (clans or *wontoks*), the proliferation of ILGs would appear to indicate a widespread opportunistic use of the ILG mechanism.⁸

The Land Groups Act 1974 established a very lax process for incorporation, and the incorporation process itself has been very poorly administered by the Department of Lands and Physical Planning, which has been severely understaffed. The consequence of this is that the ILG mechanism has been widely misused, to the detriment of those landowners who may have been excluded from the incorporated group or who fail to receive any benefits.⁹

Incorporated Land Groups

Recent legislative changes have attempted to remedy some of the problems involved in incorporating and managing ILGs, through the *Land Groups Incorporation (Amendment) Act 2007* which was passed by the National Parliament on 19 March 2009.¹⁰

The amendments have introduced two major changes to the ILG process: one is to tighten the requirements for incorporation; the other is to improve the manner in which ILGs must be managed – each of which are discussed below.

New requirements for incorporation

The *Land Groups Incorporation (Amendment) Act 2007* imposes much stricter requirements on membership. For example, it will no longer be possible for a person to be a member of more than one ILG – indeed members must provide a declaration stating that they are not members of another ILG.¹¹ In this regard, an application for incorporation must now contain a list of all proposed members of the ILG (which was previously optional), and must include the original birth certificate (or a certified copy) of each person who claims membership of the group.¹² However, as noted by some non-government organisations in PNG, this requirement may be unrealistic and may encourage the fabrication of birth certificates given that hardly any births in remote areas are registered and many elderly citizens do not have one.¹³

³ The mechanism for paying governments and landowners carbon credits for retaining forests which might otherwise have been logged, thus releasing carbon, is known as Reducing Emissions from Deforestation and Forest Degradation (or “REDD”) credits. REDD payments can also be described as Payments for Environmental Services. The Government of PNG is currently developing its policy and legislative framework for REDD.

⁴ National Research Institute (2007) *The National Land Development Taskforce Report: Land Administration, Land Dispute Settlement, and Customary Land Use Development*, NRI Monograph 39, p. xv.

⁵ *National Land Development Taskforce Report: NGO Response*, November 2008, p. 8.

⁶ See Filer, C. (2007) Local Custom and the Art of Land Group Boundary Maintenance in Papua New Guinea, in Weiner, J. F. and Glaskin, K. (eds) *Customary Land Tenure and Registration in Australia and Papua New Guinea: Anthropological Perspectives*, ANU, E-Press, p. 135.

⁷ Fingleton, J. (2007) A Legal Regime for Issuing Group Titles to Customary Land: Lessons from the East Sepik, in Weiner, J. F. and Glaskin, K. (eds) *Customary Land Tenure and Registration in Australia and Papua New Guinea: Anthropological Perspectives*, p. 31.

⁸ Cammack, D. (2008) *Chronic Poverty in Papua New Guinea: Background Paper for the Chronic Poverty Report 2008-2009*, Chronic Poverty Research Centre, p. 6, online at: www.chronicpoverty.org

⁹ See Filer, C. (2007) Local Custom and the Art of Land Group Boundary Maintenance in Papua New Guinea, in Weiner J. F. and Glaskin K (eds) *Customary Land Tenure and Registration in Australia and Papua New Guinea: Anthropological Perspectives*, ANU, E-Press.

¹⁰ *The Land Registration (Customary Land) (Amendment) Act 2007* was passed on the same day. Note: as at 30 January 2010, neither of these Acts were in force as their commencement date has not yet been published in the National Gazette. Copies of the Acts as passed are not yet publicly available and have therefore not been sighted by the authors who have relied upon the drafts of the two Bills in Appendices 1 and 2 of the Report by the Constitutional & Law Reform Commission, May 2008. As at 31 January 2009, the *Land Groups Incorporation (Amendment) Act 2007* was not yet in force as it is still awaiting certification. The authors have only cited the version of the Bill contained in Appendix 1 of the Constitutional & Law Reform Commission’s Report dated May 2008.

¹¹ *Land Groups Incorporation (Amendment) Act 2007*, new s 5(2), First Schedule, cl 5.

¹² *Land Groups Incorporation (Amendment) Act 2007*, new s 5(2)(c), First Schedule, cl 4.

¹³ *National Land Development Taskforce Report: NGO Response*, November 2008, p. 22.

The ILG must also declare all the land over which it claims ownership by providing a sketch of the boundaries of the land (not previously required), which must highlight any areas of dispute.¹⁴ This is a significant improvement on the previous arrangements which did not require an ILG to identify its land boundaries, thus giving rise to many disputes. It is important to note, however, that while boundaries must be generally identified in an application, the creation of a new ILG does not result in the registration of land title, which is a separate and voluntary process (see section on land registration below).

New management obligations for ILGs

ILGs are to be managed by management committees. One reason for the poor performance of ILGs to date has been the absence of clear guidelines for management of ILGs under the *Incorporated Land Groups Act 1974*, coupled with a lack of training and support for the executive officers of ILGs.¹⁵

The recent amendments to the *Land Groups Incorporation Act 1974* introduced many improvements to the way in which ILGs must be governed, including:

- The obligation to hold an Annual General Meeting each year;
- The requirement for each Management Committee to have between six to 10 people, at least two of whom must be women;
- The requirement for a quorum of at least 60 percent attendance at meetings in order for business to be transacted, with at least 10 percent present being of the other gender;
- A requirement that the Management Committee keep bank accounts, which must be open to inspection at all times by the Registrar, the dispute-settlement authority, or any ILG member;
- A requirement that the Management Committee maintain an up to date register of its members; and
- A detailed Code of Conduct for members of the Management Committee, which expressly prohibits “self dealings”.¹⁶

These provisions will give much needed guidance to the management committees of ILGs, but to be effective they will require a program of education and training in order for

the people on the committees to fully understand their new corporate obligations.

Finally, the *Land Groups Incorporation (Amendment) Act 2007* contains transitional provisions which stipulate that all existing ILGs will automatically cease to exist five years after the amending Act comes into force.¹⁷ During the five year transitional period, existing ILGs can choose to reapply for incorporation, but must do so in accordance with the new provisions. Clearly it will be necessary for the government to adequately resource and train staff within the Department of Lands and Physical Planning so that it is able to meet its new administrative obligations under the new Act.

Land registration

Protection of customary land

Customary land enjoys special protection under Papua New Guinea law. It cannot be sold, leased, mortgaged or disposed of except in accordance with custom.¹⁸

The rationale for prohibiting dealings in customary land is described in the recent *Report of the Constitutional & Law Reform Commission (2008)*:

“...the [customary land] system gives the members of the community self-sufficiency and security, and unites them as a unit. Under existing law, customary landowners are protected from losing their land or becoming a landless class.”¹⁹

Land registration: the historical context

The issue of land registration has a long history in PNG. Since the 1960s, customary land owners have been able to convert their customary land to private freehold under the *Land (Tenure Conversion) Act 1963* by applying to the Land Titles Commission. In 1987 the Act was amended so that ILGs and other customary groups could apply for registration of their land.²⁰

However, in practice, very little land has been registered. Landowners have generally been reluctant to convert their customary titles to freehold for a range of reasons, one being that registration removes the statutory protection over the land thus allowing it to be sold, leased, mortgaged or subdivided. Upon registration, custom ceases to apply to the land which becomes permanently

¹⁴ *Land Groups Incorporation (Amendment) Act 2007*, new s 5(2)(e), First Schedule, cl 6.

¹⁵ These new provisions are in Division IIIA – “Management of Incorporated Land Groups” of the *Land Groups Incorporation (Amendment) Act 2007*.

¹⁶ *Land Groups Incorporation (Amendment) Act 2007*, new s 14B, and Sixth Schedule.

¹⁷ *Land Groups Incorporation (Amendment) Act 2007*, s 22.

¹⁸ Customary land gains its protection from section 132 of the *Land Act 1996*, which provides as follows:

“Subject to Sections 10 [State acquisition] and 11 [lease leaseback], a customary landowner has no power to sell, lease or otherwise dispose of customary land or customary rights otherwise than to citizens in accordance with custom, and a contract or agreement made by him to do so is void.”

¹⁹ Constitutional & Law Reform Commission (2008) *Review of Incorporated Land Groups & Design of a System of Voluntary Customary Land Registration*, Report No 5, May, p 2.

²⁰ *Land (Tenure Conversion) Act 1963*, s 4 definition of “citizen” includes a land group, and s 7.

alienated.²¹ Conversion to freehold is thus potentially very destructive of the traditional system of land ownership.

Another reason for the low level of registration is the poor administration by the Land Titles Commission of the registration process and the titles which are issued. The procedure for registering titles is largely inaccessible to landowners because of the cost and the extensive delays within the Land Titles Commission which deals with applications.²² The prevalence of fraud and corruption within the land administration system means that titles can

be easily issued, tampered with, or destroyed, through poor file management or fraud.²³ These problems are amply demonstrated by the Collingwood Bay case (see case study below), in which the customary landowners were compelled to bring a lengthy and expensive court case to establish that their customary land had been leased without their consent before the state agencies involved (the Registrar of Land Titles and the PNG Forest Authority) would cancel the invalid titles and return the land to the customary landowners.

Case study: Collingwood Bay case (1999 - 2002)

*Ben Ifoki & Ors v The State, Registrar of Land Titles, Keroro Development Corporation Ltd, and Deegold (PNG) Ltd [1999] OS 313 of 1999, & OS 556 of 1999**

The Maisin-Wanigela people of Collingwood Bay in the Oro Province of Papua New Guinea own over 200,000 hectares of customary land. They have long rejected the use of their land for large-scale industrial logging or agricultural development.

However, in early June 1999, to the surprise of many customary landowners, barges began to arrive on the beaches near Collingwood Bay carrying bulldozers and other industrial logging equipment. After making inquiries, the Maisin people soon discovered that a few local people had incorporated a land group, the Keroro Development Corporation Ltd (landowner company), which had purported to lease 36,000 hectares of Maisin land to the state as a special state agricultural lease under the lease-lease-back procedures under the Land Act 1996. The lease was for a period of 50 years. The landowner company then sub-leased the land to a Malaysian logging company, Deegold (PNG) Ltd (Deegold) which in turn had applied to the PNG Forest Authority for a timber authority for agricultural land use clearance with the apparent intention of clearing the timber from the land and converting it to an oil palm plantation.

Upon discovering this arrangement, a group of about 43 Maisin landowners obtained an urgent injunction from the PNG National Court in mid-June 1999. The Court ordered a temporary stop to all logging activities on the land until the Court could decide whether the lease-lease-back arrangement was legal. The next day, the Lands Department cancelled the special agricultural lease between the State and the landowner company, but this still left the sub-lease to the logging company on foot.

The customary landowners argued that the land had been leased by the landowner company without their consent, and in May 2002, after a lengthy and expensive court case, the National Court declared the lease and leaseback to void. The Court also ordered the Registrar of Lands to amend the Register of Titles, thus restoring the land to its customary title. Finally, the Court issued a permanent injunction restraining the landowner company and Deegold from dealing or attempting to deal with the land and prohibited the PNG Forest Authority from issuing any timber authority, permit or licence to harvest forest products in respect of that area.

The Maisin customary landowners were represented in this case by the Environmental Law Centre in Port Moresby.

* Note: The judge in the Collingwood Bay case failed to give a written judgment in the matter. The authors have therefore relied on the following public reports of the case: "Collingwood Bay landowners reclaim land", Peter Maime, Independent, 23 June 1999; "Collingwood's landmark ruling", Eric Kone, Post Courier, Friday, 10 May 2002, p 3; Diwai, April 1999, Issue No 3, p 1 and 6; Diwai June-July 1999, Issue No 4, p 2 and 7; "The current legal and institutional framework of the forest sector in Papua New Guinea", Overseas Development Institute, January 2007, p 4.

In 1995 the World Bank triggered a revival of the debate on customary land registration when it imposed a condition that PNG undertake land reform as part of the Bank's structural adjustment program.²⁴ Subsequent attempts at land reform were abandoned due to strong community opposition until the debate gained momentum again with the National Land Summit at Lae in August 2005.²⁵

The next major policy initiative was the release of the *National Land Development Taskforce (NLDT) Report* in February 2007 which had as its key focus the issue of how to access customary land for development purposes. The NLDT Report has been criticised by NGOs in PNG for a range of reasons, including its failure to include a gender analysis identifying the potential impacts on women of land registration, and its failure to include an economic analysis which demonstrates that landowners (and not just multinational corporations) will be better off economically if they pursue land registration.²⁶

The NLDT Report was quickly followed in May 2008 by the Report of the PNG Constitutional & Law Reform Commission (CLRC) which contained detailed recommendations and draft legislation to improve the process for incorporating and managing ILGs, and for the land registration process.

New law for registering customary land

In accordance with the CLRC recommendations, the Somare Government introduced the *Land Registration (Customary Land) (Amendment) Act 2007* (Customary Land Act), which was passed by the National Parliament on 19 March 2009.²⁷ Given the earlier controversy surrounding land reform, the Act passed with surprisingly little debate.²⁸

The purpose of the Customary Land Act is to facilitate the voluntary registration of customary land to make land available for development through the use of ILGs.²⁹ Such land will be known as "registered clan land".³⁰ The intention is not for an ILG to register the whole of their customary land, but only those individual land parcels which are suitable for development. For landowners who wish to develop their land, this will provide an alternative to two options which are currently available: registration under the *Land (Tenure Conversion) Act 1963* (which results in permanent alienation), or a lease-lease-back arrangement.³¹

Applications for registration of clan land are made by representatives of an ILG to the newly created Director of Customary Land Registration.³² Upon registration, a certificate of title is issued in the name of the ILG and the ILG can then lease or mortgage the land to raise funds for development. Customary law ceases to apply to the land, with the one exception that customary laws of inheritance will continue to apply to the members of the ILG (and thus the right to own the land, which is held by the ILG).³³

It is not clear whether registered clan land can be sold or not, and this will remain unclear until such time as a copy of the Customary Land Act as passed by Parliament is made available to the public. The Report by the Constitutional & Law Reform Commission contains a clear recommendation that the *Land Registration Act* should be amended to prohibit clan land from being sold.³⁴ However, this provision seems to have been omitted from the draft Customary Land Bill which appears in Appendix 2 of the CLRC Report – thus omitting a critical safeguard which will prevent the permanent loss of registered clan land through sale.

²¹ *Land (Tenure Conversion) Act 1963*, s 16.

²² The *Land Development Taskforce Report (2007)* notes that the Land Titles Commission had only one employee – the Chief Commissioner – who had no time to process the applications because she was fully occupied resolving land disputes concerning major project development sites (p 14).

²³ For a detailed review of the problems affecting land administration in PNG, see the *Report of the Committee on Land Administration* which forms Part 2 of the *National Land Development Taskforce Report (2007)*.

²⁴ For a history of the land reform debate in PNG, see the *National Land Development Taskforce Report (2007)*, pp 1 – 4.

²⁵ A report of the Summit was made to the Minister for Lands and Physical Planning, the Hon Dr Puka Temu, and sent to the National Executive Council, subsequently published as Webster, T. (ed.) (2006) *The National Land Summit: A Report on the Presentations and Recommendations*, , Special Publication No 39, available from the PNG National Research Institute.

²⁶ *National Land Development Taskforce Report: NGO Response*, November 2008, pages 14 and 16. The NGO Response was prepared by various local NGOs in PNG, and was published by AID/WATCH on 4 February 2009. It is available at: <http://www.aidwatch.org.au/publications/papua-new-guinea-ngo-response-to-the-national-land-development-taskforce>.

²⁷ The *Land Groups Incorporation (Amendment) Act 2007* was passed on the same day. Note: as at 30 January 2010, neither of these Acts were in force as their commencement date has not yet been published in the National Gazette. Copies of the Acts as passed are not yet publicly available and have therefore not been sighted by the authors who have relied upon the drafts of the two Bills in Appendices 1 and 2 of the *Report by the Constitutional & Law Reform Commission*, May 2008.

²⁸ Pers. Comm: Dr Tim Anderson.

²⁹ A range of NGOs in PNG have criticised this approach, and argue that no justification has been given as to why the land registration process should take place through the ILG method: see the *National Land Development Taskforce Report: NGO Response*, November 2008, p 23.

³⁰ *Land Registration (Customary Land) (Amendment) Act 2007*: Objectives.

³¹ Under the lease-lease back arrangement, customary land can be released for development if landowners lease the land to the government, who then leases it back to the landowners. The landowners can then sublet the land to a third party: *Land Act 1996*, s 11. This arrangement is mainly used in PNG to facilitate oil palm development.

³² *Land Registration (Customary Land) Amendment Act 2007*, new s 34D(1). Note: it is not clear from the legislation whether the representatives must be elected representatives or whether they could be external people appointed by the ILG.

³³ *Land Registration (Customary Land) (Amendment) Act 2007*, new s 34N.

³⁴ CLRC Report, p 13, and p 50 (Recommendation 6-1).

Changes to registration process

The Customary Land Act introduces two main changes to the land registration process. The first is that upon receiving an application, the Director must independently verify the membership of the ILG and make a preliminary check of the proposed boundaries to make sure that it is a legitimate application.³⁵

The second improvement is that, once the Director has accepted an application on a preliminary basis, there is a more thorough process to identify any boundary disputes or competing interests over the land before registration occurs. For example, the Director must place the proposed registration plan on public exhibition for up to 90 days, and must call for and resolve any objections before a Certificate of Title can be issued.³⁶

The Director of Customary Land Registration will clearly exercise a great deal of control over the whole registration process, and it will therefore be crucial that the Director operates in a transparent and open manner. Landowners already lack confidence in the Land Titles Commission to properly manage land titles, as files are often lost or misplaced, or the registration process may be subject to fraud or corruption.

The Somare Government has supported these legislative reforms by introducing changes to the system of land administration and the court system. A designated section for customary lands has been established within the Department of Lands and Physical Planning. To improve the system of dispute resolution in relation to land, and in accordance with a key recommendation of the National Land Development Taskforce, a single Land Court System is being established within the Magisterial Service to hear all land disputes in PNG.³⁷

Conclusion

The ILG mechanism and land registration have been beset with difficulties for many years in PNG. The Somare Government has recently embarked on an ambitious program of legislative reform intended to address these problems. With ILGs now being encouraged to register their customary land, the success of the land registration regime is directly linked to the ability of ILGs to operate openly and transparently. If the ILG process fails, the integrity of the land registration process will fail too.

Despite the more stringent provisions contained in the new laws, the success of the reforms for both ILGs and land registration will both depend in large part on the same factors, namely, the ability and commitment of the government to administer and enforce the new laws. Landowners are already reluctant to engage in land registration of their customary land under the existing system and are likely to remain so until the state can demonstrate that it has improved its system of land administration.³⁸

³⁵ *Land Registration (Customary Land) Amendment Act 2007*, new s 34E.

³⁶ *Land Registration (Customary Land) (Amendment) Act 2007*, new s 34E - L.

³⁷ *National Land Development Taskforce Report (2007)*, pp 86 – 87.

³⁸ This issue was identified in discussions at the National Land Summit in 2005: see Land Development Taskforce Report, p 4. See the extensive list of recommendations for improving the system of land administration made by the Committee on Land Administration in Part 1 (pp 4-14) and Part 2 of the *National Land Development Taskforce Report (2007)*.

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