



Papua New Guinea

CONSTITUTIONAL & LAW REFORM COMMISSION

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

REPORT

**REPORT 5
May 2008**

Published in Port Moresby by:

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

Telephone: (675) 325 2862

(675) 325 2840

Website: www.clrc.gov.pg

Fax: (675) 325 3375

Email: lawrence_kalinoe@clrc.gov.pg

ISBN: 9980-9900-5-8

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INDEPENDENT STATE OF PAPUA NEW GUINEA
CONSTITUTIONAL AND LAW REFORM COMMISSION

P.O. BOX 3439
BOROKO
National Capital District
PAPUA NEW GUINEA
Office: L1 BSP Building, Boroko

TELEPHONE: (675) 3252840
(675) 325 2862
FACSIMILE: (675)325 3375

Date: 4th July, 2008
Reference:
Action Officer:
Designation:

The Hon. Dr. Allan Marat D.Phil., MP
Attorney-General & Minister for Justice
Department of Justice & Attorney General
Sir Buri Kidu House, Waigani
National Capital District

Dear Attorney-General and Minister;

**REVIEW OF INCORPORATED LAND GROUPS & DESIGN OF A SYSTEM
OF VOLUNTARY CUSTOMARY LAND REGISTRATION**

On 4th July, 2007, your predecessor, Hon. Bire Kimisopa, the former Minister for Justice, issued a reference to the CLRC to review the laws and processes dealing with incorporated land groups and to design a system of Voluntary Customary Land Registration utilizing incorporated land groups as a corporate vehicle based on the recommendations from the National Land Development Task Force Report in 2007.

On behalf of the members of the Working Committee and the research staff of the CLRC who worked on this reference, we are happy to present to you this Report.

Yours sincerely,



HON. JOE MEK TEINE LLB MP

Chairman



PROFESSOR BETTY LOVAI

Commissioner



GERHARD LINGE

Deputy Chairman



TOM ANAYABERE

Commissioner

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

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

- the recommendations of the National Land Development Task Force published in 2007 as National Research Institute Monograph 39 which recommended, *inter alia*, for a system of Voluntary Customary Land Registration in a fair and equitable manner by utilizing incorporated land groups to obtain group title under the land owning social unit at customary law; and
- the various concerns which have been raised concerning abuse of the system of incorporated land groups;

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

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

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

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

HON. BIRE KIMISOPA, MP
Minister for Justice

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Executive Summary

Background

This Reference was issued following the release of the National Land Development Task Force Report that was published as National Research Institute Monograph 39 in February 2007. The National Land Development Task Force was established by a decision of the National Executive Council in December, 2005 following the National Land Summit that was held in August 2005 at the PNG University of Technology, Lae.

There were three sub-committees constituted within the National Land Development Task Force to progress the work of the task force. The three sub-committees looked at the following specific areas of their respective concern:

- land administration;
- land dispute settlement; and
- customary land development.

These specific areas, generated a lot of concerns at the National Land Summit (August 2005) hence the approach taken. In total, 54 recommendations were made by the National Land Development Task Force for remedial action to be taken by appropriate government agency.

The Constitutional and Law Reform Commission (CLRC) has taken on the responsibility, upon the issuance of this Reference by the then Minister for Justice, Hon. Bire Kimisopa, to implement specific recommendations 49-54 of the task force report. These are recommendations made by the Sub-committee on Customary Land Development – essentially relating to and concerning a review of the *Land Groups Incorporation Act* and a design of a system of voluntary customary land registration. Essentially therefore, there are two main components to this report:

- a review of the law, processes and procedure governing incorporated land groups (ILGs) with specific recommendations to address problems and issues of concern; and
- a review of laws, processes and procedure relating to the registration of land to provide a mechanism to register customary land through the ILG as a corporate person on a purely voluntary basis by those citizen Papua New Guineans who, through their respective land owning social units, own customary land.

This Report marks one of the first small step towards reforms in customary land tenure – primarily as a measure to empower customary landowners in Papua New Guinea to realize the now locked up economic potential which their customary land has. The recommended changes in this report are designed to enable Papua New Guineans to be in control through their respective land owning social unit via their ILG and then develop their customary land in a fair and equitable manner which would not disadvantage any member of their land owning social unit. We are convinced that currently, the access and use of customary land is not all that fair and equitable where the economically and physically weaker members do not enjoy benefits derived from their collective customary land equitably.

Apart from the above driving reason, at a wider societal level, reforms in customary land tenure as recommended in this Report are necessary because of the massive social changes which are spontaneously occurring in our societies throughout Papua New Guinea, brought about by the onslaught of modernity and the cash economy in particular. Consequently traditional customary land use (which mostly involved short-term-slush-and burn shifting agriculture) are now changing to longer term, semi-permanent land use – of course resulting in land use related disputes and general law and order problems between fellow members of the one and the same land owning social unit. Hence, we are now increasingly seeing relatives, cousins or even brothers killing each other over disputes over their use of their customary land. The National Government has a responsibility to ensure that it makes the necessary intervention to ensure that the social and economic changes that are spontaneously occurring do not bring disunity and other social problems but rather peace and prosperity to all. The reforms recommended in this Report are also intended to achieve this objective.

Reforming Incorporated Land Groups Law

The recommendations in this Report for reforms in customary land tenure recommends two distinct processes:

- first is the incorporation of land groups to put a ‘cloak of incorporation’ around the existing landowning group firmly grounded on identifiable customary land which the group owns at customary law with the necessary transparency, accountability and management mechanisms to ensure that it acts in the best interest of its members at all times; and

- secondly, the registration of *portions only* of customary land which the group owns and wishes to deal in (that piece of land) with the rest of the world of course for economic development or wealth creation purposes for the collective benefit of all its members – where the ILG becomes the land owning unit with the ability to issue leases to anyone who it wishes to do business with. Hence, it is important that the title which the ILG has over its land upon registration must be a title that is equivalent to a state lease whereby the rest of the world can comfortably and confidently seek out and do business on but at the same time ensuring that the ILG remains in control of and benefits from such land either through initial transaction or subsequent transactions in the secondary property market.

There is no doubt that if this recommended reforms are to succeed, the management, accountability and supervision of ILGs must be strengthened. A great majority of the recommendations for law reform proposed in Chapter 3 of this Report are intended to achieve those key objectives and inject greater transparency into the management of ILGs by imposing strong duties and responsibilities on the Management Committee. Provision is also made for at least two elected female person to be on the Management Committee.

Furthermore, a Code of Conduct, imposing strong fiduciary obligations on the Management Committee to act, at all times, in the best interest of the ILG is also recommended as a subsidiary legislation to the *Land Groups Incorporation Act*. There are also offences with criminal sanction recommended in instances where duties are imposed on the Management Committee and there is failure in compliance. This approach is necessary to protect and safeguard the future wellbeing of ILGs and its properties particularly when one realizes that the ILG will be the land and other property owning unit and that in the event that its land is registered, it will be issuing leases and would be receiving a steady income for and behalf of its members through the development of its land.

Apart from the above, the reforms recommended in this Report are also intended to inject integrity and restore credibility and genuineness to the process of incorporation of ILGs by ensuring that those persons named on the list of membership when lodging the application for incorporation to the Registrar of ILGs, are actually citizen members (warm bodies!) by linking the names on the list of membership to formal Birth Certificates obtained under the *Civil Registration Act*. Since all automatic citizen Papua New Guineans are born into one clan or such other social unit, it is the intention behind this reforms to ensure that multiple membership to ILGs is restricted

hence the requirement for a formal birth certificate which in itself is also a inbuilt mechanism to trace genealogy at least back by three generation by utilizing the existing birth registration process utilizing the existing forms and process under the *Civil Registration Act*.

Voluntary Registration of Customary Land

Under the recommendations made in this Report, the incorporation of an ILG is a prerequisite to registration of portion(s) of customary land which the ILG intends to put to economic use or wealth creation enterprise. The rationale behind these recommendations and the recommended processes and procedures are set out in detail in Chapters 4 and 5 of this Report.

After careful consideration, and particularly so in order not to cause any fear, anxiety or suspicions about the nature of the title which ILG will be obtaining upon registration of their land, and propose to deal with the world at large, it is recommended in this Report that land registration and issuance of title should be executed by causing an amendment to the existing *Land Registration Act*. This will therefore be achieved by introducing a new Part IIIA to the Act. It is recommended that a Director of Customary Land Registration should be appointed to oversee and manage the registration process mainly to verify the registration plan which will be submitted by the applicant ILG by liaising with the District Administrator concerned and the Surveyor General before submitting a final Registration Plan to the Registrar of Title to issue the title.

Participants

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

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

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

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

List of Recommendations

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

3. Customary Land Development Proposals 1: Reform ILGs

- 3-1 (a) delete paras (c), (d) and (e) of s.5(2) of the *Land Groups Incorporation Act* and insert – “and the applicant shall supply –
- (c) a list of all members of the group;
 - (d) further information as stated in Schedule 1 being such certified information required in the application form;
 - (e) a sketch of the boundaries of the land to which the applicants claim ownership;
 - (f) such further information as the Registrar requires.”
- 3-2 Insert a new s.5A thus: If it appears to the Registrar of ILGs that there are internal disputes either as to the identity of the group’s representatives, officers or membership; the Registrar shall determine whether to –
- (a) reject the application, or
 - (b) withhold the processing of the application until the Registrar is satisfied, based on subsequent evidence that the internal dispute has been settled, and then proceed to incorporate the applicants.
- 3-3 Insert a new (s.5B)
- (1) The Registrar of ILG shall,
 - (a) cause notice of all applications for recognition made under Section 5 to be published in the National Gazette and forwarded to the District Administrator in whose area the group or any of the property claimed on behalf of the group is situated, and to the Village Court within

whose jurisdiction members of the land group reside; and

- (b) the District Administrator or the Village Courts shall further disseminate notice of the application and particulars in such manner they think most likely to ensure that it is generally known to person having a knowledge of or an interest in the affairs of the land group or its members.

- (2) The Registrar of ILG shall not issue a Certificate of Incorporation unless he receives from the District Administrator a confirmation notice of receipt of the documentation referred to in Subsection (1) and that he has complied with Subsection (1)(a) above.

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

3-5 Division 3A: Meetings of Members: Insert new Section 14A – General Meetings:

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

3-6 Insert “Special General Meetings”

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

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

Insert Section 14C – Convening meetings

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

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

Insert Section 14D – Conduct of meetings

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

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

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

Insert Section 14F – Changes in membership of Management Committee

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

Insert Section 14G – Disqualification from office

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

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

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

The Management Committee shall –

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

Insert as Section 14I – Statements of assets and liabilities

The Committee shall –

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

Insert as Section 14J – Financial Instructions

- (1) The Registrar may direct that accounts and records of some or all of the affairs of a land group be kept in such manner as he thinks proper.
- (2) Where the Registrar gives a direction under Subsection (1)
 - (a) the Registrar, the dispute-settlement authority or any member is entitled at all times to inspect the accounts and records; and
 - (b) the Registrar may direct that copies of the accounts and records be given to him to be kept in the register of land groups.
- (1) Insert as Section 14K - Offences: Failure to comply with Sections 14H or 14I is an offence and makes each Committee Member liable to be

prosecuted and on conviction to pay a fine not exceeding K500 or imprisonment for a term not exceeding 6 months, or both.

- (2) Failure to comply with the Registrar's direction under Section 14J, is an offence and makes each Committee Member liable on prosecution and conviction to a fine not exceeding K1,000 or imprisonment for a term not exceeding 12 months, or both.

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

s. 29 Willful Misconduct

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

shall on conviction be liable to a fine of up to K2,000 and or imprisonment for 5 years.

- 3-10 Add a new Subsection:
- s. 28(2) “Any person may inspect at the office of the Registrar of ILG, the register and any document relating to any group lodged under this Act with the Registrar, and may obtain from the registrar a copy of or an extract from such register or document.”
- 3-11 Add a new Subsection as Section 28(3) thus:
- “The Management of the ILG shall:
- (a) maintain a register of its members in such manner as the Registrar of ILG may require, or as may be prescribed, containing the name of each member, the date he qualified for membership;
 - (b) deliver to the Registrar at his request a current register of members.”
- 3-12 Add a new Subsection as Section 28(4) thus:
- “The Management of the ILG shall make available for inspection of its members or the Registrar or any person authorized by him in writing, at all reasonable time –
- (a) its books of accounts, and all documents relating thereto; and
 - (b) a list of the members.”
- Add a new Subsection as Section 28(5) thus:
- “Failure by the Management Committee to comply with Subsections (1); (3) and (4) is an offence punishable with a fine of K2,000 or imprisonment for a term of 5 years.
- 3-13 Formalities of Group Action
- Repeal Subsection (2) of Section 14 of the *LGI Act* and replace it with the following Subsection –
- (2) “The *Statute of Frauds and Limitations Act, 1988* applies to or in relation to –
 - (a) an agreement under Section 13(2)(c); or
 - (b) an agreement entered into by an incorporated land group affecting its land.”

3-14 Add a new Subsection (3) to Section 14, thus:

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

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

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

5-1 Appointment of Director

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

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

(1) The Director shall –

(a) be responsible for dealing with applications for customary land registration;

(b) perform such powers, functions duties and responsibilities as are specified and prescribed in this Act.

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

(a) require any person to produce any document in his possession or control relating to any land or dealing in land;

(b) summon any person to appear before him to given information or explanation relating to any land or dealing in land;

(c) refuse to approve for registration any land or dealing in land where a document required under paragraph (a) is not produced or an information or explanation required under paragraph (b) is not given to his satisfaction or if any other act, matter

or thing required under this Act to be done is not done.

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

is guilty of an offence.

5-3 Duties of Deputy Director

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

5-4 Application for Registration

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

5-5 Verification

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

customary groups as are necessary to verify the identify and the boundaries of the land or parcels of land claimed by such customary group as stated in the registration plan.

5-6 Authorisation of plan for publication

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

5-7 Publication of Registration Plan

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

interest in the land or parcels of land the subject of the Registration Plan.

5-8 Adjusted Registration Plan

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

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

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

5-9 Objections to Registration Plan

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

5-10 Final Registration Plan

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

5-11 Registration of Ownership

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

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

5-12 Issue of Certificate of Title

- (1) Where –
 - (a) a customary group has been incorporated under the *Land Group Incorporation Act* (Chapter 147); and

- (b) the customary group has been registered as the owner of land,

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

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

5-13 Effect of Registration

- (1) An entry in the Register –

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

- (2) Registration of ownership which is inconsistent with –

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

shall be ineffective to the extent of the inconsistency.

5-14 Customs

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

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

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

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

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

- Background: land tenure law and policy, with particular concern being given to unalienated land, the purpose of and attempts at reforms, and their shortcomings;
- The current state of the law to access/acquire customary land and significant legal developments;
- The customary land development proposals on reforming ILGs;
- Establishing a voluntary system of customary land registration;

- Transition from incorporating ILGs to land title registration; and
- The impact of the reform proposals on the law and practice.

Land Tenure Law: Duality of Law and Policy

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

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

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

The alternative policy of individualizing the tenure system that was proposed by the Colonial administration in the 1960s, with further proposals for its implementation made by SR Simpson in 1969, were rejected. In their place, piecemeal devices such as the lease- leaseback and

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

clan lands agreements were tried in order to secure loans for development. These were without success for the process was slow and cumbersome and they failed to gain universal acceptance, though by the process of tenure conversion which survived the colonial administration's 1960s reforms, in very restricted circumstances, citizens may and still do acquire freehold titles to portions of their clan's land.

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

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

Customary Land Tenure Reforms

Transformation policy of the 1960s

The colonial administration in the 60s articulated the first policy on transformation of customary land tenure. This involved the substitution of individual registered title for traditional communal forms of landholding, and replacing customary land tenure law by the common law. The specific commitments were stated to be:

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

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

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

The Simpson’s proposals of the seventies

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

Land Adjudication, Demarcation etc

The standard processes of implementing a tenure conversion scheme were ‘systematic adjudication’, ‘consolidation and demarcation’, and ‘conversion and registration’. The Land Adjudication Bill was designed both to clarify “cloudy titles” and to bring all land – both State and privately owned - into the register. At the appropriate time

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

the Minister would declare an “adjudication area” in which all titles, rights and interests in land will be finally and authoritatively ascertained. These areas will be divided up into more manageable sized sections, each with one or more adjudication teams. Claims based on certificates of registrable titles and consensus of the owners will be accepted almost without question, and conflictual claims would be adjudicated. Of equal importance as adjudicating and recording land claims, would be the ascertainment of ancillary rights and demarcation of the land on a parcel demarcation map.

Registration of titles/interests

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

Land Control

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

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

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

Land Mobilisation of the eighties and nineties

Fingleton’s model of land registration

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

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

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

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

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

Principles of Land Registration

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

The main goals of the *Customary Land Registration Act* were stated by Dr. Fingleton as being, to provide procedures for the formal recognition of group ownership of customary land; and facilitate the adaptation of customary land tenure to emerging land use requirements in the province, in particular those identified in the Land Mobilisation Program.

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

The process was:

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

Freehold conversion by kinship and descent groups

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

Henaos Lawyers Draft Customary Land Registration Bill

Whilst the Fingleton proposal is provincial, Henaos Lawyers were instructed by government in 1995 to draft a national legislation for the registration of customary land. This law firm was qualified to accomplish

this important task. It submitted a draft amendment bill to the *Land Registration Act*. It defined the purpose of the amendment and the objective of the program as being

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

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

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

Incorporated Land Group

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

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

“The ILG as a corporate vehicle, has statutory limitations by the operation of section 13(2) of the Act; where its powers and sphere of operation is restricted to the holding and dealing in land: both

customary land and alienated land. It has no power or jurisdiction to conduct business To that extent, business groups incorporated under the *Business Groups Incorporation Act* provides the corporate vehicle”.³

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

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

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

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

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

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

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

Limitations on the land reform programs

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

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

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

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

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

Chapter 2. Current Law in Accessing/Acquiring Customary Land

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Introduction

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

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

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

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

Freehold land tenure

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

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

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

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

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

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

Only Citizens can own Freehold

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

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

Lease Lease-Back System

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

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

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

Land Corporation

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

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

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

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

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

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

The Underlying law

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

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

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

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

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

² Ibid at p.14.

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

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

Chapter 3. Customary Land Development Proposals 1: Reforming ILGs

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Introduction

As we discussed above despite the extensive search for appropriate models of land reform to realize better customary land use and development, and even though as many as 30 years have elapsed following independence,

there has been no meaningful changes. Land reform has therefore been referred to by many researchers as a “failed policy initiative”. There have been lots of policies and proposals for reforming the law, but no implementation. A fresh start was made with the holding of a Land Summit convened by the National Research Institute in 2005, which brought together many with expertise in customary land tenure. The summit recommended the establishment of a Task Force to take the problem in hand and this was duly done by the appointment by the NEC of the “National Land Development Task Force” with the responsibility to identify the problems and issues relating to “land administration”, “customary land development” and “customary land disputes settlement”. The Task Force agreed on a modus operandi of giving priority to issues of land administration, disputes settlement mechanism and land tenure reform. It proceeded to establish three appropriate committees, to study and report on its area of responsibility. The Customary Land Development Committee (CLDC) being tasked with reforming the land tenure and related topics.

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

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

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

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

This discussion considers in Chapter 5, the process of progressing from incorporation of the ILG to registration of its title to land. Whilst overall responsibility for incorporation is that of the Registrar of Incorporated Land Group, land registration process is mainly through the creation of a new functionary (the Director of customary land registration who is) charged with the responsibility to manage the process “customary land registration”. What is important to note, however, is that proposals for customary land reform cannot be made with finality without considering the proposals for land administration and disputes resolution.

Proposed Reforms

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

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

- their authenticity on incorporation;
- their effective management, and the accountability of their executives.

Related matters discussed include,

- recognition of the members’ rights to information and inspection;
- principles of law and equity in the affairs of ILGs.
- the application of provisions of the *Frauds and Limitation Act* which require written evidence of dealings in their land; and
- a registration of documents system in order to make public land transactions.

The Authenticity of the ILG

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

“The group/clan name, group/clan lineage, and birth certificates of all the named persons, for purposes of the membership to the ILG.... The land to be registered, or land registered, including recognized survey papers by a registered surveyor; and witness

and/ or identification statements from the local – level governments and district administrators.”- rec 50(g).

Section 5 of the *Land Groups Incorporation Act* requires an application for incorporation to be made on a prescribed form. The Registrar is empowered to require from the applicant “such further information as (he) the Registrar requires”, para 5(2)(d). This provision enables him to demand the information listed above. There is, however, an advantage in making explicit that which is implicit and this can be done by amending either the application form or Section 5 accordingly.

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

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

(Note: The Schedules appended to the Act will provide for: Schedule 1 to prescribe the required information under s.5(2) and Schedule 2 to provide for the sketch map of the boundaries including a requirement for the boundary under dispute to be acknowledged by the elders of the applicants on the one part and the elders of the other clan(s) disputing the boundaries.)

The premise upon which Recommendation 3-1(above) is made is to ensure that a citizen should only belong to one ILG as is the case where he or she belongs to one clan or such other customary land holding unit. Since Papua New Guineans by birth are born into a one and the same social unit (clan, sub-clan etc) that own customary land, and the land group incorporation process is aimed at giving corporate status to an existing social unit that owns customary land, it is only plausible that a PNG citizen cannot belong to more than one ILG.

Under the current system, PNG citizens are allowed membership to more than one ILGs and this has been one of the root causes of the abuse of the ILG process and the system. Because of the absence of restriction on membership to more than one ILG, there are multiplicity of ILGs based on

the same customary land and usually out of the same land holding social unit. This has given rise to the issue of spurious ILGs in PNG today and abuse of the ILG system.

The requirement for the submission of certified copies of birth certificates together with the list of membership is a control mechanism to ensure that: (1) the name on the list is authenticated by the corresponding birth certificate and to address the problem of ghost names; (2) citizenship through the identification of parents and grand parents and their respective villages is authenticated through such formal process; (3) superstitious names and spurious ILGs are not incorporated out of the one and same customary land; and (4) generally control the growth of spurious ILGs and the abuse of the ILG system.

Submissions and Consultation

At the consultation seminar we held in collaboration with the National Research Institute and the PNG Law Society at the Granville Motel, NCD, on 30th November, 2007, Secretary for Lands and Physical Planning, Mr Pepi Kimas, speaking personally for himself as a citizen objected to the notion of “one citizen, one ILG” and stated that apart from acquiring land ownership rights from his father’s clan, if his mother does not have surviving brothers, then as the eldest son, he could acquire ownership rights through his mother’s line. Mr Melvin Yalapan, a respected mining lawyer who has previously served as Company Secretary and Legal Counsel to MRDC, generally supported Mr Kimas and warned against rigidity - that there must be some flexibility. His Excellency Ambassador Babani Maraga responded to Messrs Kimas and Yalapan and stated that there appears to be some misunderstanding between the issue of ownership and use rights over land which one does not own but only enjoys usufructuary rights. Mr Elias Masta, from the Office of the Urbanisation commented that apart from list of members of the group, a detailed genealogy survey and documentation should also be submitted together with the other documentations as application for incorporation. Mr Masta followed through with a subsequent written submission emphasising the need for detailed genealogy study through a government funded social mapping service at the incorporation stage of ILGs and also made the case for flexibility and made the following point:

“- it is evidently correct under the custom in most or all ethnic groups in PNG, that a single person may have more than one ownership rights over land. They are firstly, the mainstream or major ownership rights which are obviously inherited from the

father or mother lines. There are also the minor rights to ownership rights of land which may not necessarily come under family ties. Some of these transferred rights of ownership to land include land given as present for caring of some one, war compensation, customary obligations, gift of good friendship, etc.’

CLRC Views

The CLRC is convinced that the rationale for the above recommendation as stated above is sound. As Ambassador Babani Maraga points out, there is some confusion between “ownership of customary land” and rights to the exercise of “usufructuary rights” in that customary land owned by the land holding social unit such as a clan or sub-clan in perpetuity and individuals merely enjoy usufructuary rights. It is very well established at customary land law that individuals do not own customary land and therefore cannot validly transfer customary land to another without the consent of the land owning social unit. An individual can only lawfully grant permissive use of a portion of customary land but not transfer ownership such as in the circumstances described above by Mr Masta. Individual members of the clan etc belong to such a unit and it is by virtue of their membership of the clan etc. that they enjoy corporate and collective ownership rights over customary land. It is therefore conceptually sound and proper to require Papua New Guinean citizens, if they so wish to, to belong to one ILG that would inturn own all the customary land through their respective one and the same landowning clan or such other land owning social unit.

As Kathy Whimp correctly pointed out way back in 1998: “The idea of incorporated land groups is not to form a new body. Rather, the idea is to put a ‘cloak of incroproation’ around a group that already exists.”¹

The recommendations presented above to amend Section 5(2) of the *Land Groups Incorporated Act* are intended to inject integrity and enable the incorporation of the actual and genuine customary land owning social unit (clans, sub-clans etc) firmly planted on actual customary land which such a group owns and taking full account of actual warm bodies who are living as human beings with sufficient genealogical grounding through the requirements that one must meet before obtaining a birth certificate under the *Civil Registration Act*.

¹ Kathy Whimp (Unpublished) Some Issues of Law and Policy Relating to Landowners Organisation and Representation Mechanisims, Paper presented at ILG Workshop Granville Motel, Port Moresby, September 1998

We are however of the view that it may be too cumbersome and somewhat unnecessary to legislatively require the conduct of full and complete genealogies even tracing to an apical ancestor as is suggested by Mr Masta in his submission. The requirements that one is required to meet when applying for a birth certificate under the *Civil Registration Act* whereby he or she is required to name all the parents and grand parents and their respective villages to establish some evidence of citizenship is sufficient.

Evidence of Ownership and Boundaries of Land

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

Resolution of disputes

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

Submissions and Consultation

At the consultation seminar which we held to discuss the Draft Report at the Granville Motel, NCD, on 30th November, 2007, there were strong points made that, it would not be wise to press on with the incorporation process if there are internal disputes between and amongst the members as this may in turn seriously undermine the unity and future operations of the ILG. Messrs Tony Power and George Muroa made strong written submissions with the former saying that it would be “highly undesirable” to incorporate an ILG knowingly when there are internal disputes and Mr Muroa stating:

“... the words “but the certificate of incorporation shall not be issued until the dispute is resolved” be inserted after the word “applicants” [at the end of paragraph (c)]”

Alternatively, Mr Muroa submitted that the proposed paragraph (b) should be deleted and substituted with “(b) withhold the processing of the application until the Registrar is satisfied that the internal dispute has been settled.”

CLRC Views

We accept the concerns raised. We must ensure that there should not be any existing disputes amongst and between the proposed ILG members as this would be a sure seed for disharmony and conflict. In our view, the alternative recommendation by Mr Muroa is a sound one – that where there are evidence of internal disputes, the Registrar of ILG should withhold incorporation until there is evidence to his satisfaction that the dispute has been resolved. Hence the following recommendation:

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

- (a) reject the application, or**
- (b) withhold the processing of the application until the Registrar is satisfied, based on subsequent evidence, that the internal dispute has been settled, and then proceed to incorporate the applicants. “**

Procedure for Incorporation

The procedure to incorporate a land group is by application in a prescribed form to the Registrar of Incorporated Land Group. This must be accompanied by; (a) such documentation, stated above at Recommendation 3-2, required to establish the authenticity of the application, and (b) the *Constitution* of the proposed ILG, which includes *inter alia* the management committee, and evidence of rights to land including a sketch map of the customary land which the group owners under customary land tenure – in the event that there disputes over the boundaries of such land, the extent of the disputed boundaries at all fronts are to be clearly marked on the sketch and acknowledged by at least two clans, etc., leaders of all the disputing parties merely as evidence of the extent of the dispute.

Publicity of Application

One of the main reasons cited by many for the uncontrolled growth of ILGs sometimes overlaid on the same customary land concerned and out of the same clan or land holding social unit, has been attributed to the lack of transparency arising from the lack of effective publicity given to the application particularly at the village or district level concerned. There has clearly been a lack of publicity both at the village and district level and at the national level resulting in the allegation that many of the past ILGs have been incorporated in secrecy. It is therefore important that under these reforms we inject sufficient levels of transparency by legislatively imposing certain requirements to inject sufficient publicity measures.

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

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

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

The consultation seminar we held at the Granville Motel, NCD, on 30th November, 2007 and all submissions we received (Mr Muroa in particular) supported the injection of the above recommended provisions.

Powers of Incorporated Land Groups

Subsection (3) of Section 13 of the *Land Groups Incorporation Act* states that: “No right or interest in or in relation to land that is given by an incorporated land group to a person who is a member of the group is registrable under any law relating to the registration of land or an interest in land.” This provision conflicts with the proposal to give the ILG power to convert customary rights to derivative interests on registration and is better addressed in the Chapter dealing with registration. It is therefore necessary that this provision be repealed. Hence we recommend accordingly.

Recommendation 3-4. Delete subsection (3) of Section 13.

Management and Accountability

Under traditional law and custom, the leaders act as trustees in the management and control of land, but their duties stop short of those of trustees in the received legal system. For example a junior member could not call on an elder to account. This has largely been the cause of the unsatisfactory results of reforms based on the trusteeship model of landholding. Crocombe observed with reference to Niue reforms:

“History is full of examples....where they have looked after their own personal interests and these are often contrary to the interests of the people-”²

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

“The Nigerian experience with the trustee model is not reassuring. In the first few years of introducing the system there was need for a number of Commissions of Inquiry to look into breaches and abuses of power by trustees. Everywhere the Commissioners

² ‘The Niue Alternative’ in P Sack, *Problem of Choice: Land in Papua New Guinea Future*.

found that trustees were most irresponsible and frittered away the funds of the Trust in merriment and the entertainment of friends.”³

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

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

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

Most of the submissions we received supported these proposals. Most of the participants at the seminar we organized in collaboration with the National Research Institute and the PNG Law Society on 30th November, 2007 at the Granville Motel, NCD, also supported these proposals. Tony Power, in particular, in his submission has cautioned that whilst he supports

³ James R. W. *Land Law and Policy in Papua New Guinea* (Law Reform Commission Monograph No. 5, (LRC: Port Moresby 1985) at p.49.

the various management and compliance mechanisms proposed herein, there must be some allowances made for consensus and compromise.

CLRC Views

We are convinced that the proposed management and accountability measures are necessary to inject the required management and accountability/supervision and oversight so that ILGs can be managed better and transparently in the overall interest of the members. Hence we recommend as follows:

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

Insert new Section 14A – Annual General Meetings:

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

Recommendation 3-6: Insert “Special General Meetings”

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

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

Insert “Section 14C – Convening meetings”

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

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

Insert “Section 14D – Conduct of Meetings”

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

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

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

Insert section 14F – Changes in membership of Management Committee

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

Insert section 14G – Disqualification from office

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

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

Finance

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

important sections, which could with advantage be incorporated into the *Land Groups Incorporation Act*. These are:

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

We recommend that these obligations on finance be introduced in a new Division 3C of the *Incorporated Land Groups Act* as follows:

Recommendation 3-8: Insert after section 14G of Division of 3B, Division 3C: Finances, Section 14H – Bank Accounts

The Management Committee shall -

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

Insert as Section 14I – Statements of assets and liabilities

The Management Committee shall –

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

Insert as Section 14J – Financial Instructions

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

Insert as Section 14K - Offences

1. Failure to comply with Sections 14H or 14I is an offence and makes each Committee Member liable to be prosecuted and on conviction to pay a fine not exceeding K500 or imprisonment for a term not exceeding 6 months, or both.
2. Failure to comply with the Registrar's direction under Section 14J is an offence and makes each Committee Member liable on prosecution and conviction to a fine not exceeding K1,000.00 or imprisonment for a term not exceeding 12 months, or both.

Sanctions for Misrepresentation and Misconduct.

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

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

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

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

shall on conviction be liable to a fine of up to K2,000 and or imprisonment for 5 years.

Information and Inspection

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

Currently Section 28 of the *Land Groups Incorporation Act* merely provides for the Registrar of ILGs or members of the dispute settlement authority to seek and obtain information from an ILG. We are of the view that this section should be expanded to enable any person, moreso any member of the ILG concerned, to seek and obtain relevant information from the Management Committee of the ILG.

The proposed amendments are necessary to inject more transparency and accountability into the management and administration of ILGs. Most of the submissions and comments we received during and after the seminar we held at the Granville Motel, NCD, on 20th November, 2007 to discuss and workshop the Draft Report were generally in support of these proposals. Accordingly, we recommend as follows:

Recommendation 3-10. Add a new subsection as Section 28(2):

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

Recommendation 3-11 Add a new Subsection as Section 28(3)

The Management Committee of the ILG shall:

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

Recommendation 3-12 Add a new Subsection as Section 28(4):

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

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

Add a new Subsection as Section 28(5):

Failure by the Management Committee to comply with Subsections (1); (3) and (4) is an offence punishable with a fine of K2,000 or imprisonment for a term of 5 years.

Principles of Law and Equity

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

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

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

Transparency to be evidenced by writing

In order to ensure transparency of dealings with the land, it is necessary, following incorporation, for provisions of Part 1 of the *Frauds and Limitations Act*, 1988 to apply to dealings with ILG in land matters. Those provisions require a land transaction to be evidenced in writing, failure of

which, the transaction becomes void and unenforceable. However, the law is not inflexible and the court ensures that the provision is not used as a cloak for fraud. For example, an oral agreement for short-term leases which take effect in possession, or the existence of an act of part performance of the agreement would, under the *Walsh v Lonsdale principle*, be enforceable: *Wine v Giglmai* [1990] PNGLR 462.

Recommendation 3-13. Formalities of Group Action.

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

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

Most of the submissions and comments we received during the Consultation Seminar to discuss the Draft Report at Granville Motel, NCD on 30th November, 2007 and after this Seminar were all in support by the above recommendation.

Registration of instruments

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

Recommendation 3-14. Add a new Subsection (3) to Section 14 – Formalities of Group Action: A certified copy of all documents purporting to deal with an interest in land of an ILG shall on incorporation be lodged with the Registrar of incorporated land groups;

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

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

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Introduction

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

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

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

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

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

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

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

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

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

Classes of rights in registered land system

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

Registrable interests

The following interests are by virtue of the LRA registrable:

Freehold , a lease for a term exceeding three years (s49); state leases (ss. 35 and 36); a lease for a term of three years or less may be registered (s.49 (2)). These estates and interests when registered are evidenced by certificates of title prepared and registered by the registrar, and a copy is given to the

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

interest holder. The registrar's duplicate copy is (i) evidence of the particulars it specifies, and (ii) is conclusive evidence of the title of the registered proprietor (ss 10, 11, *ibid*).

Conversion Procedure

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

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

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

Overriding interests

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

- A lease, licence or other authority granted by the Head of State or a Minister in respect of which no provision for registration is made.
- Any right of way or other easement created or existing on the land.
- Unpaid rates, taxes, or other money which, without reference to registration under the Act, are expressly declared by law to be a charge on land in favor of the State or Department or officer of the State or a public corporate body.

Minor interests

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

Registration gives a State Guaranteed interest

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

Registration and Indefeasibility

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

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

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

Chapter 5. From Incorporation of ILG to Registration of Title

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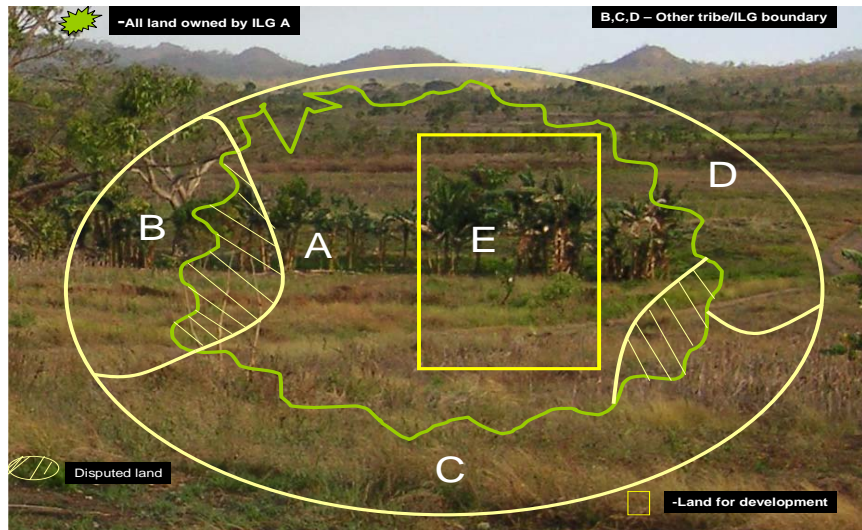
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Introduction

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

To avoid ambiguity, it is important to emphasize that under this proposed system of voluntary customary land registration, it is only portion or portions of customary land which the people (through their respective ILGs) wish to deal in will be registered. It is not the intention under these voluntary customary land registration exercise to register all the customary land which the customary landowners own. To do so would be both futile and uneconomical.

The illustration below is given to bring home the point. You will note from the illustration below that the portion of land to be registered is E which is part only of the total land that A owns which has been identified in the first instance for purposes of incorporation of their ILG. You will further note that there are portions of land that A claims which are disputed and have been marked earlier at the ILG incorporation stage.



After careful consideration, it was decided that rather than introducing a new legislation, it would be wise to introduce the proposed system of voluntary customary land registration by inserting a part to the current *Land Registration Act* so that the leases obtained under this process are not treated with any suspicions by the market.

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

Procedure for Customary Land Registration

Appointment, powers and functions of the Director of Customary Land Registration.

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

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

i. the structure of a single land court system to replace:

the land courts established by the *Land Dispute Settlement Act*, the National Lands Commission established by the *National Land Registration Act*, and the Lands Titles Commission, established by the *Lands Titles Commission Act*.

ii the repeal of the legislations, and

iii. transferring their remaining functions to the DLPP including reallocation of their personnel and resources.]

The Director of Customary Land Registration will be the key Government official responsible for the administration, management, and the efficient functioning of the system of voluntary customary land registration. It is therefore important that the appointee will be sufficiently qualified and experienced in land administration and should be appointed initially through the Public Service Merit based appointment process. At the Consultation Seminar on 30th November, 2007, Granville Motel, NCD, these concerns were raised and we concur.

Recommendation 5-1. *Appointment of Director.*

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

Powers and Functions of the Director of Customary Land

To enable the Director to effectively and efficiently discharge the duties, roles and responsibilities of this office, we recommend the following powers and functions:

Recommendation 5-2. Powers and Functions of Director of Customary Land Registration.

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

Commits an offence, punishable with a term of imprisonment of 2 years or fine of K2.000 or both.

Recommendation 5-3. Duties of Deputy Director

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

Decentralisation of Functions

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

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

Application for Registration

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

Recommendation 5-4. Application for Registration

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

Upon receiving the application, the Director's role in essence is to assess, verify and ensure compliance with the various formal/statutory requirements before progressing the application further. It is important to note that the Director does not play any role in the initial stages of the preparation of the registration plan etc. The application for registration which includes the survey and documentation of the registration plan is to be completed by the proponents – the respective ILGs who are applying for registration of their customary land.

Recommendation 5-5. *Verification*

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

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

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

Recommendation 5-7. *Publication of Registration Plan*

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

Recommendation 5-8. *Adjusted Registration Plan*

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

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

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

Note that the preparation of an Adjusted Registration Plan by the Surveyor General is only necessary if he makes any adjustments to the original Registration Plan. If there are no adjustments, then the Surveyor General would only need to endorse the original Registration Plan.

Recommendation 5-9. *Objections to Registration Plan*

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

Recommendation 5-10. *Final Registration Plan*

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

Land Adjudication and Demarcation

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

Land adjudication resolves (1) doubts about titles and (2) boundary disputes. In some countries a simple Land Adjudication of Rights and Interests Act is enacted which could be invoked preliminarily to first registration. Suitable precedents already exist in Part III of the *Land Titles Commission Act (ss 17 – 25)*. The arrangement under that Act is for responsibility for both adjudication and boundary demarcation to vest in the Land Titles Commission, consequently, it was thought that the processes for freehold conversion and customary land registration were being unduly delayed. The National Land Development Task Force after careful discussion opted for a model of self sufficiency by the applicants, the Director’s role being one of verification of the Registration plan they submitted.

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

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

Land Registration (Administration)

The *Land Registration Act* provides for three component elements for the administration of the land registration system: the appointment of a Registrar of Titles and Deputy Registrars of Titles. (These are functionaries

responsible to administer the land registry). (ii) The establishment of a land registry for storing and recording documents, land transactions and duplicate certificate of title; and (iii) physical components, viz the land register, registry map; index of properties, etc. The task of reviewing the system of land administration has been given to the Land Administration Committee.

First Registration of Clan Ownership

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

Recommendation 5-11. *Registration of Ownership*

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

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

Recommendation 5-12 *Issue of Certificate of Title*

(1) Where -

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

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

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

Recommendation 5-13 *Effect of Registration*

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

Application of Customs Cease

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

Recommendation 5-14 *Customs*

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

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

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Introduction

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

Empowerment

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

Transfers Prohibited

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

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

Leases

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

The following conditions are implied in leases -

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

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

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

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

Other Land Transactions

These include licences, sub-leases and mortgages. These are usually from agreements freely entered into and protected by their terms. The mortgage transaction is affected by land policies which are protective of the mortgagor and impact negatively on the mortgagee's remedies. On the one hand there could be incorporated in the mortgage transaction those statutory limitations in ss 26 and 26A of the *Land (Tenure Conversion) Act*, 1963. These provide that on the exercise of the mortgagee's remedies of possession and sale, if the mortgagor defaults, it (the mortgagee) is not permitted to take possession for more than 25 years; or to lease the land to a third party for more than 25 years; or to foreclose the right of the mortgagor or chargor to redeem the mortgaged or charged land, and, the land could not to be taken under a writ or execution. The Minister of Lands is given a discretion to remove the restrictions in appropriate cases. These provisions can form a section in Part IIIA of the LRA: Clan Land Registration.

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

Rationalising Land Tenure System

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

The Radical Title

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

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

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

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

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

Freeholds

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

Protection of Clan Land.

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

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

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

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

**Appendix 1 Draft Land Groups Incorporation (Amendment) Act
2007**

INDEPENDENT STATE OF PAPUA NEW GUINEA.

A BILL

for

AN ACT

entitled

Land Groups Incorporation (Amendment) Act 2007

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

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

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

1. COMPLIANCE WITH CONSTITUTIONAL REQUIREMENTS

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

- (a) the freedom from arbitrary search and entry conferred by Section 44 of the *Constitution*; and
- (b) the right to privacy conferred by Section 49 of the *Constitution*; and
- (c) the right to freedom of movement conferred by Section 52 of the *Constitution*; and
- (d) the right to freedom of assembly and association conferred by Section 47 of the *Constitution*.

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

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

2. INTERPRETATION.

In this Part, unless the contrary intention appears -

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

"Court" means the National Court;

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

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

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

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

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

"interest" or "interest in land" means -

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

"land" includes an interest in land;

3. AMENDMENT TO SECTION 5

(1) Section 5(2) of the principal *Act* is repealed and replaces as follows:

“The application shall –

- (a) be in the prescribed form;
- (b) be accompanied by a copy of the proposed *Constitution*;
- (c) be accompanied by a list of all members of the group;
- (d) contain further information as stated in Schedule 1 being such certified information required in the application form;
- (e) be accompanied by a sketch of the boundaries of the land to which the applicant claim ownership, including clearly marked areas of disputed boundaries if any, to which the applicants claims ownership as required under Schedule 2; and
- (f) such other information as the Registrar requires.”

(2) Sub-sections (3) and (5) of Section 5 are repealed.

(3) Subsections (4), (6), (7), (8), (9), (10) of the principal *Act* are re-numbered in sequential order to read as Sub-Sections 3, 4, 5, 6, 7, 8, 9 respectively.

4. INSERT A NEW “SECTION 5A

If it appears to the Registrar of ILGs that there are internal disputes either as to the identity of the group’s representatives, officers or membership; the Registrar shall determine whether to –

- (a) reject the application; or
- (b) withhold the processing of the application until the Registrar is satisfied, based on subsequent evidence, that the internal dispute has been settled and then proceed to incorporate the applicants."

5. INSERT A NEW “SECTION 5B

(1) In addition to the powers given under Section 33, the Registrar of ILG shall,

(a) cause notice of all applications for recognition made under section 5 to be published in the National Gazette and forwarded to the District Administrator in whose area the land group or any of the property claimed on behalf of the land group is situated, and to the Village Court within whose jurisdiction members of the group reside; and

(b) the District Administrator or the Village Courts shall further disseminate notice of the application and particulars in such manner they think most likely to ensure that it is widely known to person having knowledge of or an interest in the affairs of the land group or its members.

(2) The Registrar of ILG shall not issue a Certificate of Incorporation unless he receives from the District Administrator a confirmation notice of receipt of the documentation referred to in Subsection (1) and that he has complied with Subsection (1)(b) above.”

6. AMEND SECTION 13

Subsection (3) of Section 13 is repealed.

7. INSERT DIVISION 111A

“Division IIIA – Management of Incorporated Land Groups – “is inserted at the end of Section 14 of the principal *Act* and the following provisions as Section 14A – 14K comprise this new Division.”

8. INSERT “14A – ANNUAL GENERAL MEETING

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

(2) The purpose of the AGM are:

(a) to appoint the management committee and other officers of the association if there is a vacancy;

(b) appoint members to the Dispute Settlement Authority if there is a vacancy;

(c) receive and consider the chairman’s annual report and a financial report;

(d) consider such matters referred to the meeting by the Registry.”

9. INSERT "14B – MEETING TO ELECT MANAGEMENT COMMITTEE

- (1) Members of the ILG shall meet at a specific time and place, in the area where the members of the ILG reside to elect not more than ten and not less than six persons to form a management committee in accordance with the *Constitution*;
- (2) The Management Committee shall include the Chairperson of the ILG, deputy chairperson, secretary, treasurer and two female persons elected by the members of the ILG;
- (3) All members of the Management Committee upon assumption of office are automatically subject to the Code of Conduct stipulated in the Seventh Schedule 6."

10. INSERT "14C – CONVENING MEETINGS

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

so request

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

11. INSERT "14D – CONDUCT OF MEETINGS

- (1) All members of an incorporated land group shall be entitled to attend the meetings of the group and vote.
- (2) A member under a disability enjoys rights under this Act as all members but no right to vote at meetings of members, except through his Guardian, or to hold offices.
- (3) No business shall be transacted at a meeting of the members unless at least sixty percent of the members of the group is present at the meetings out of which at least 10% are of the other gender.
- (4) A resolution at a meeting of the members, supported by votes of not less than sixty percent of the members of the group present at the meeting shall be treated as the decision of the group, but for removal of a member or members of the Management Committee the vote of 70 percent of the members present at the meeting is required."

12. INSERT "14E – POWERS OF MANAGEMENT COMMITTEE

The Management Committee has powers subject to the *Constitution* and the Act to run the affairs of the ILG."

13. INSERT “14F – CHANGES IN MEMBERSHIP OF MANAGEMENT COMMITTEE

- (1) Where a member of the Management Committee dies, becomes incapacitated or wishes to retire he may be replaced by resolution of the members of the ILG.
- (2) A member of the Management Committee may be removed or replaced by a resolution of the members of the ILG at a General Meeting or a Special General Meeting.
- (3) On change of membership of the Management Committee, the Registrar of ILG shall amend the register accordingly.”

14. INSERT “14G – DISQUALIFICATION FROM OFFICE

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

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

15. INSERT “14H – BANK ACCOUNTS

The Management Committee shall –

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

16. INSERT “14I – STATEMENT OF ASSETS AND LIABILITIES

The Management Committee shall –

- (a) cause to be prepared, in a form approved by the Registrar of ILGs a statement of the assets and liabilities of the ILG for each period of 12 months of the operations of the ILG or for such longer period as the Registrar approves; and

- (b) lodge the statement with the Registrar not more than three months after the end of the period to which the statement relates.”

17. INSERT “14J - FINANCIAL INSTRUCTIONS

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

18. INSERT “14K – OFFENCES

- (1) Failure to comply with Sections 14H or 14I is an offence and makes each Committee Member liable to be prosecuted and on summary conviction to pay a fine not exceeding K500 or imprisonment for a term not exceeding 6 months, or both.
- (2) Failure to comply with the Registrar’s direction under Section 14J is an summary offence and makes each Committee Member liable on prosecution and conviction to a fine not exceeding K1,000.00 or imprisonment for a term not exceeding 12 months, or both.”

19. REPEAL AND REPLACEMENT OF SECTION 29

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

“s.29. Wilfull Misconduct

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

(g) occupying a fiduciary relationship misappropriates any funds or property belonging to the ILG,

shall on summary conviction be liable to a fine of up to K5,000 or imprisonment for 6 years.

20. AMENDMENT TO SECTION 28

Section 28 of the principal *Act* is amended by adding the following:

Sub-Section 2:

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

Sub-Section 3:

“The Management Committee of the ILG shall:

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

Sub-Section 4:

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

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

Sub-Section 5:

“Failure by the Management Committee to comply with Subsections (1); (3) and (4) is a summary offence punishable with a fine of K2,000 or imprisonment for a term of 5 years.”

21. AMENDMENTS TO SECTION 14

(1) Subsection 2 of Section 14 of the principal *Act* is repealed and replaced with the following:

“(2) *The State of Frauds and Limitations Act* 1988 applies to or in relation to –

- (a) an agreement under Section 13(2)(c); or
- (b) an agreement entered into by an incorporated land group affecting its land”

- (2) Add a new Sub-Section 3 to Section 14 of the principal Act as follows:

“(3) A certified copy of all documents purporting to deal with an interest in land of an ILG shall on incorporation be lodged with the Registrar of incorporated land groups and the Registrar shall record each document by a reference number and the date the document is filed and the name and address of the person lodging the document.”

22. SAVINGS AND TRANSITIONAL ARRANGEMENTS

“(1) From the coming into effect of this amending Act, all current and existing incorporated land groups under the previous provisions shall be allowed to continue for a transitional period of 5 years only and that such incorporated land groups shall automatically cease to exist at the fifth anniversary from the date of effect of the amending Act.

- (2) Within the 5 years transitional period referred to above, all existing incorporated land groups may apply for re-incorporation in full compliance of all the requirements of this amending Act.”

23. RELOCATION OF SCHEDULE 1 – PROVISIONS RELATING TO WINDING UP

The entire current Schedule 1 of the Act is vacated and relocated as “EIGHTH SCHEDULE – PROVISIONS RELATING TO WINDING UP.”

LIST OF SCHEDULES

1. First Schedule – Prescribed Material be provided in the application for incorporation of a land group.
2. Second Schedule – Sketch, Drawing or Plan of land with reference to which the incorporation of a Land Group is sought.
3. Third Schedule – Matters to be provided for in the Constitution of every Land Group.
4. Fourth Schedule – Provisions which are deemed to be contained in the Constitution of every group.
5. Fifth Schedule – Provisions which are deemed to be contained in the Constitution of every group, unless specifically excluded or modified.
6. Sixth Schedule – Code of Conduct.
7. Seventh Schedule – Constitution (Proforma)

FIRST SCHEDULE**Sec. 5(2)****PRESCRIBED MATERIAL TO BE PROVIDED IN THE APPLICATION FOR INCORPORATION OF A LAND GROUP.**

1. The proposed name of the Land Group.
2. A true and complete list of its members including the qualification of each listed member.
3. Where a member is under a disability, the name and qualification of his Guardian.
4. The original or in its absence a certified copy of the birth certificate of each person who claims membership of the group.
5. The qualification of the group seeking recognition as an incorporated land group stating they are not members of another ILG.
6. A description of the land and the nature of the interest therein to which the group claims an entitlement, including a plan, if available, or sketch map or drawing of the land over which the applicants claim ownership or an interest therein, with reference to which they seek to be incorporated, in a manner specified in the Second Schedule.
7. A certified copy of the Constitution of the Land Group.
8. A list of members of the Management Committee and other officers of the Land Group.
9. The proposed dispute settlement authority of the Land Group.

SECOND SCHEDULE**Sec. 5(2)****SKETCH, DRAWING OR PLAN OF LAND WITH REFERENCE TO WHICH THE INCORPORATION OF A LAND GROUP IS SOUGHT.**

1. An application to the Registrar for the incorporation of a Land Group shall be accompanied by a sketch, drawing or plan of the land and contain a general description of the land including:
 - (a) its size and location,
 - (b) use,
 - (c) boundaries, and
 - (d) the names of the Village and clan;
2. If there is any dispute over the boundary or boundaries, the exact location of the disputed boundary or boundaries must be identified and the nature of the dispute noted on the document;
3. The document shall be signed by the Chairman or Vice Chairman of the land group and dated;
4. The existence of a boundary dispute should be acknowledged by the relevant neighbor(s), or in his absence or refusal, Village Court Official or Councilor/Ward Member, countersigning the document.

THIRD SCHEDULE**Sec. 8; Sec. 5****MATTERS TO BE PROVIDED FOR IN THE CONSTITUTION OF EVERY LAND GROUP.**

1. The name of the group.
2. A description of the area, being the land in or over which the group has, under recognized customary law, exercised rights recorded under Schedule Two of the Incorporated Land Groups Act.
3. The persons who are the original members of the group.
4. The persons to whom membership is open.
5. The titles of group representatives (Management Committee) officers and auditors and their terms of office, method of election, appointment, dismissal and suspension.
6. The composition of committees (if any) of the group, the term of office of members of such committees, the method of their election, appointment, dismissal and suspension.
7. The authority for and the method of filling vacancies occurring amongst the officers of the group, and on committees, not in a manner inconsistent with the Act.
8. The frequency, quorums, method of calling and dates of the annual general meeting, referred to *in* section 14 A, 14 B, 14 C, 14D and 14F.
9. The custody, and investment of the funds and property of the group, and the designation of the persons responsible for them.
10. The purposes for which the funds and property of the group may be used.
11. The maintenance and inspection of books of account, the register of members and the record of interests, by any member or officer of the group, and by or on the order of the registrar referred to in Section 14H and 14I.
12. The periodic audit of accounts.
13. The manner of making rules of the Association.
14. The manner of amending the name, constitution or rules of the Association.
15. The manner of the dissolution of the Association and the disposal of its property on dissolution.

FOURTH SCHEDULE**Sec. 5; Sec. 8****PROVISIONS WHICH ARE DEEMED TO BE CONTAINED IN THE CONSTITUTION OF EVERY GROUP**

1. This constitution relates to the area of the land determined as being in the ownership of the group, or in respect of which that group has an interest, and therein described in the sketch plan.
2. All persons who are recorded as having an interest in the group land shall be entitled to become members of the group.
3. If he is not recorded in the register as a member of the group, no person shall be admitted to membership of the group unless-
 - (a) that person has inherited an interest from a person who was recorded on that register; or
 - (b) (i) the group representatives (Management Committee)all agree; and
(ii) the representatives' decision is confirmed at an annual general meeting of the group; or
 - (c) a court so orders.
4. The rights of membership shall extend to all members regardless of how membership was obtained.
5. Every member shall have a right to reside free of charge on the group land together with his family and dependants.
6. Every member shall be entitled to permit any other person to reside with him on the group land unless the group representatives decide otherwise in any particular case.
7. Every member shall be entitled to the use of the land, water rights, machinery, credit facilities, veterinary services, marketing arrangements, transport and other assets in the group ownership subject to such conditions as may from time to time be imposed in accordance with this constitution, which may include the levy of access, fees or other charges.
8. Every member shall be entitled to attend, to speak and to be heard, and to vote at all general meetings of the group.
9. The obligations of membership shall extend to all members regardless of how membership was obtained.
10. No disposition of any of the group land, or any interest therein, may be made by the Group Representatives unless approved by the members.
11. The group representatives shall inform the members of the group of the activities carried on in the preceding period at each general meeting.

12. The group representatives shall ensure that the rights of any person under recognized customary law are safeguarded in so far as that is compatible with the operations of the group.
13. The group representatives elected at the general meeting held in accordance with section 14 A of the Incorporation Land Groups Act at which this constitution was adopted shall be the first group representatives of the group.
14. A group representative shall hold office until-
 - (a) he is replaced by a resolution of the group in general meeting;
 - (b) he is convicted of a crime involving fraud or dishonesty;
 - (c) he becomes incapable of performing the functions of his office, whether arising from illness or any other cause; or
 - (d) he retires.
15. The secretary shall be responsible for the conduct of all correspondence on behalf of the group, for the maintenance of proper records of such correspondence, registers, minutes and of all other documents relating to the group's activities, except for those for which the treasurer is responsible.
16. The treasurer shall be responsible for the maintenance of proper books of account containing details of all moneys received and payments made by him on behalf of the group, and of records of all the group's assets and liabilities of all kinds, and for the safe custody of all such records and of the group's funds or other valuables.
- 17.If-
 - (a) the Registrar of Incorporated Land Groups;
 - (b) a majority of the group representatives;
 - (c) one-half of the group members;
 - (d) any person who considers that the affairs of the group are being conducted in a manner oppressive to some part of the members and who has obtained the written consent of the Registrar of Group Incorporation - so requests, the Chairman (or in his absence the Vice-Chairman, Secretary or the Registrar of Group Incorporation) shall convene a general meeting of the group **within fourteen days** after the date the request was made to discuss the matter and take appropriate decisions.

FIFTH SCHEDULE**Sec. 5; Sec. 8, Sec. 14A-14J****PROVISIONS WHICH ARE DEEMED TO BE CONTAINED IN
THE CONSTITUTION OF EVERY GROUP, UNLESS
SPECIFICALLY EXCLUDED OR MODIFIED**

1. There shall be not more than ten and not less than five members of the management committee (group representatives) elected from among the members of the group in a general meeting, by a majority representing not less than sixty per cent of the votes of all the members present at the meeting.
2. If at any time there are less than five group representatives a general meeting shall be convened for the purpose of holding new elections to appoint them.
3. The group representatives shall consult the members of the group in a general meeting before disposing of any land held by the group or any interest in such land.
4. The group representatives shall meet whenever required and not less than once in every six months. Unless otherwise required by the Act or these rules the group representatives may establish their own procedure provided that no business shall be transacted at any meeting unless three group representatives are in person.
5. The group shall in each year hold a general meeting as its annual general meeting in addition to any other meetings in that year, and shall be specified the meeting as such in the notices calling it.
6. Notice of the dates on which any general meeting of the group is to be held shall be given to all members not less than two weeks in advance.
7. The Chairman of the Management Committee, (or in his absence, the Vice Chairman) shall preside at any general meeting of the group subsequent to the meeting held in accordance with section 14 A of the *Incorporated Land Groups Act*.
8. The person presiding at a meeting may if not quorum is not present, adjourn the meeting from time to time, and from place to place:

Provided that, if a meeting at which a quorum is not present is adjourned, notice of the adjourned meeting shall be given in the same way as notice of the original meeting.
9. The quorum for a general meeting of the group shall be not less than sixty per cent of the total number of members of the group.

10. The accidental omission to give notice of a meeting to, or the non-receipt of a notice by, any person entitled to receive notice shall not invalidate the proceedings at that meeting.
11. At any general meeting a resolution put to the vote of the meeting shall be decided on a show of hands unless not less than sixty per cent of the members present agree to a demand for a ballot.
12. Unless a ballot be demanded, a declaration by the Chairman of the meeting that a resolution has on a show of hands been carried, or lost, and an entry to that effect in the book containing the minutes of the proceedings shall be conclusive evidence of the fact.
13. In the case of an equality of votes, whether on a show of hands or on a ballot, the chairman of the meeting shall be entitled to a second or casting vote.
14. No member shall be entitled to vote at any general meeting otherwise than in person unless he is recorded in the register of members as being under disability. The guardian a member of a member under a disability may vote on his behalf.
15. Except with the approval of the Registrar, nominations for office under the *Constitution* of the group shall be of members only, and may be made and seconded by members only.
16. The Management Committee of the group shall consist of a Chairman, Vice Chairman, Secretary, Treasurer, and three other members, of whom not less than two shall be elected from amongst the group members of the other gender.
17. All the members of the committee shall be elected by open ballot at the group's annual general meeting, or at any subsequent general meeting convened for that purpose, and shall hold office for two years unless otherwise removed.
18. At the end of his period of office any member of the Committee shall be eligible for re-election.
19. In the event of a member of the committee being convicted of a crime involving fraud or dishonesty, he becomes disqualified to hold office, or if an office holder fails to carry out his duties satisfactorily, the Committee may suspend such office-holder until the next general meeting and such person shall then be deemed to have retired.

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20. Any vacancy arising in the membership of the committee whether by reason of the suspension of a member or otherwise may be filled by a nominee appointed by the committee until such time as the office is filled by election at a general meeting.
 21. The Committee shall meet not less frequently than once every three months.
 22. The Committee shall have power to co-opt suitable persons for such periods as they think fit but such persons shall not have the right to vote.
 23. The Chairman shall bear overall responsibility for the conduct of all business by the committee on behalf of the group.
 24. The vice-chairman shall assist the chairman and shall deputize for him in his absence.
 25. A member shall be entitled to pledge his own private property, including stock, as security for any loan. The group, the group representatives and the committee shall not in any circumstances be responsible for anything to do with such a loan.
 26. The Committee shall be responsible for conducting the affairs of the group with a view to achieving the greatest practicable social and economic benefit for the members.
 27. The Committee shall be empowered to raise credit and to hold and use moneys for the benefit of members.
 28. The Committee shall be responsible for preparing a plan for the registration and development of the land and for the implementation of that plan. In the preparation of that plan the committee consult with the the registrar and to the group in general meeting for approval.
 29. The Committee may issue instructions to members and may make rules for the purpose of the working of the operations of the group.
 30. he Committee shall conform to any instructions received from a majority of the group representatives in any matters relating to membership.
 31. Every member shall accept and comply with the decisions of the Committee regarding membership of the group and the rights and obligations of any person in matters relating to the use of the group land and other assets.

32. The Committee shall be responsible –
- (1) for maintaining-
 - (a) a register of all members of the group;
 - (b) full and accurate minutes of all general meetings of the group, and of all meetings of the committee,
 - (c) a full and accurate account of the income and expenditure and of the assets and liabilities of the group; and
 - (2) for presenting such accounts within three months of the end of the financial year to the registrar for approval.
33. The provisions of the Constitution, other than those which may from time to time be prescribed, may be altered, repealed or added to by a resolution passed by a sixty per cent majority of the members of the group present in person or by proxy at a special general meeting convened for that purpose and of which due notice has been given.

SIXTH SCHEDULE**Sec. 14B(3)**

CODE OF CONDUCT (for members of the Management Committee)

1. There is hereby established a Code of Conduct being the body of rules contained below.
2. The provisions of this Code are in addition to and not in derogation of provisions in the principal act, the *Criminal Code Act* or any other rule of law or equity.
- 3 A member of the Committee
 - (a) Shall keep separate the ILG's property, in particular its funds, from his personal property, and there can be no self dealings, i.e. he must not borrow from the ILG's fund;
 - (b) In order to buy ILG's assets or sell his own to the ILG or make loans to it, he must first get the approval of the members through the AGM or a Special Meeting;
 - (c) He should not make any profit by virtue of his position, and he must account for any profit received and generally he must not allow the pursuit of his private interest to conflict with his duties to the members;
 - (d) He is personally responsible for the exercise of his judgments and the performance of his duties and cannot escape responsibility by leaving to another person the exercise of that judgment or the performance of that duty even if that other person his a co fiduciary, nor should he allow other ordinary member to participate in the management and control of the association's property;
 - (e) His responsibility is to treat all members equally and there should be no discrimination between the membership;
 - (f) He should furnish to the members on demand information on transactions over the land and must keep an accurate record of the group's land and other assets and allow a member to inspect the record.
 - (g) In his management of the land he should exercise the same diligence and prudence as an ordinary prudent man of business would exercise in conducting his own business.

- (h) He should be honest in dealing with the ILG's assets and in particular avoid dissipating the funds in speculative or unnecessary ventures or activities.
 - (i) When acting on behalf of the ILG he should minimize "administrative expenses" and avoid charging personal expenses or debts to trust funds.
 - (j) In investing the ILG's funds he shall be guided by the constitution and be prudent in his choice of investments
4. Any person who is in breach of any provision of the Code of Conduct shall be liable, on summary conviction, to a fine of K5,000.00 and or imprisonment for a period of six years.

SEVENTH SCHEDULE

Sec. 5(2)(b); Sec. 8

CONSTITUTION (PROFORMA)
of the
<<ILGName>> LAND GROUP (INCORPORATED)

1. NAME

1. The name of the group is the “**<<ILGName>> Land Group (Incorporated)**.” In the rest of this Constitution it will be referred to as “the land group”.

2. LAND(s)

A description of the land and interests of the land group is contained in Form 1 that is attached to the ‘application for incorporation’ of the land group.

3. MEMBERSHIP

- (1) Membership of the land owning group is determined according to the customs of the area.
- (2) The qualification for membership of the land group is that a person recognises himself or herself, and is recognised in accordance with Custom by other legitimate customary clan members from <<name of Village>, as being a member of the <<group seeking incorporation.

4. RECORDING MEMBERSHIP

- (1) It shall be a primary function of the Land Group Management Committee to maintain an up-to-date record of its members as recognised by the customs of the clan.
- (2) The record of members shall be updated by the Committee not less than once every year and shall remain in the custody of the Committee.
- (3) Except for future membership upon birth, before any addition to or amendment of the record of members shall be made by the Committee, such amendment should first be approved by the

members at two separate meetings held at least one (1) month and not more than three (3) months apart.

- (4) Immediately following the decision of the land group to adopt any changes to the membership of the land group, the Committee shall:-
- (a) Record the names of the persons to be added to or deleted from the list of clan members, and
 - (b) Record the date of the decision of the land group to adopt the change of membership of the clan, and
 - (c) Certify the changes to be made by signing in their own handwriting their respective signatures to each record of change of membership, and date such certificate on the date such changes were so recorded.

4. MANAGEMENT COMMITTEE

- (1) The controlling body of the land group is:-
- (a) titled the <<ILGName>> **Land Group Management Committee** referred to in the rest of this Constitution as the “the committee”.
 - (b) The composition of the Committee is not less than 6 and not more than 10 members, including the following:
 - (Chairperson)
 - (V/Chairperson)
 - (Treasurer)
 - (Secretary)
 - Committee Member
 - Female Committee Member
- (2) All Officers of the land group are to be elected by open ballot at the Group’s general meeting and a Committee Member shall not take up office unless and until he subscribes to the Code of Conduct.
- (3) A person ceases to be a member of the Committee if he is removed by a resolution of the group in a general meeting, or
- (a) he becomes unable to perform the functions of his office, whether through illness or any other cause; or

-
- (b) he retires;
 - (c) Or is disqualified by virtue of being convicted for a crime involving fraud or dishonesty,
 - (4) The Committee is responsible for the efficient conduct of the affairs of the land group and in particular shall:-
 - (a) call meetings of the members sufficiently often to keep them well informed of the affairs of the group; and
 - (b) make sure that suitable records of the meeting and other affairs of the land group are kept and looked after.
 - (5) Any member of the committee may be removed by the members of the group at a meeting duly convened in accordance with the provisions of this constitution and the *Land Groups Incorporation Act* (thereafter, the Act).
 - (6) A vacancy arising in the membership of the Committee whether by reason of suspension of a member or otherwise may be filled by a nominee appointed by the committee to last for such time until the office is filled by election at a general meeting.

5. MANNER IN WHICH THE GROUP ACTS

- (1) The land group acts in the following manner:-
 - (a) Before taking any important decision affecting the association or its property, the Committee shall convene a meeting and give notice to the members stating:-
 - (i) when and where the land group will meet; and
 - (ii) the nature of the matter to be dealt with at the meeting.
 - (b) Notice given under paragraph (a) must be sufficient to allow the members of the land group resident in <<village>> village to attend the meeting, and normally should not be less than seven (7) days in advance.
 - (c) The matter on which the land group proposes to act shall be fully discussed at the meeting, and a decision reached on the matter by the requisite majority of vote as stated under this *Constitution* or the Act.
 - (d) A decision reached in accordance with paragraphs (a), (b) and (c) shall not be invalidated by reason of the absence from the

meeting of any individual member or members of the land group, provided however that the necessary quorum as required under the Act has been met.

- (e) When a decision is reached in the above manner, that decision is the decision of the land group, and is sufficient authority for the Committee to act on behalf of the land group.
- (2) The acts of the land group are evidenced by the members of the committee completing and signing the certificate in the schedule to this Constitution.

6. MEETINGS GENERALLY

TIMING

- (1) The group shall in each year hold a general meeting as its annual general meeting in addition of any other meetings in that year, and shall specify the meeting as such in the notices calling it.
- (2) Not more than fifteen months shall elapse between the date of one annual general meeting of the group and the next.
- (3) Notice of the dates on which any general meeting of the group is to be held shall be given to all members not less than two weeks in advance.
- (4) The chairman of the committee, (or in his absence, the vice chairman) shall preside at all meetings of the group subsequent to the meeting at which this constitution was adopted.
- (5) The accidental omission to give notice of a meeting to, or the non-receipt of a notice by, any person entitled to receive it shall not invalidate the proceedings at the meeting.

QUORUM

- (1) The quorum for a general meeting of the group shall be not less than sixty per cent of the total number of members of the group.
- (2) The person presiding at a meeting may, whether or not a quorum is present, adjourn the meeting from time to time, and from place to place: Provided that, if a meeting at which a quorum is not present is adjourned, notice of the adjourned meeting shall be given in the same way as notice of the original meeting.

RESOLUTIONS

- (1) At a general meeting a resolution put to the vote of the meeting shall be decided on a show of hands unless not less than sixty per cent of the members present agree to a demand for a ballot.
- (2) Unless a ballot be demanded, a declaration by the chairman of the meeting that a resolution on a show of hands is carried, or lost, and an entry to that effect in the book containing the minutes of the proceedings shall be conclusive evidence of the fact.
- (3) In the case of an equality of votes, whether on a show of hands or on a ballot, the chairman of the meeting shall be entitled to a second or casting vote

RIGHT TO VOTE

- (1) No member shall be entitled to vote at any general meeting otherwise than in person unless he is recorded in the register of members as being under disability. A proxy for a member under a disability need not be a member of the group.
- (2) Except with the approval of the registrar, nominations for office under the constitution of the group shall be of members only, and may be made and seconded by members only, and no member may nominate or second a nomination of himself.

7. POWERS

- (1) The land group has all the powers conferred by the *Land Group Incorporation Act* Chapter No. 147. The land group shall not dispose of the absolute ownership of the group land, except on dissolution.
- (2) The powers referred to above are those in Section 13 of the Act, which are that the land group can:-
 - (a) acquire, hold, and dispose of customary land in a customary manner;
 - (b) register its land in accordance with the provisions in the *Land Registration (Customary Land) (Amendment) Act, 2008*;
 - (c) acquire, hold, and dispose of rights in non customary land;
 - (d) use and manage its land, or enter into agreements for its use or management;
 - (e) borrow money for its land development; and

- (f) distribute or apply any products, profits or income from its land to its members.
- (3) The land group is entitled to establish and maintain a fund determined from time to time by its members as being sufficient for –
 - (a) management of the property;
 - (b) capital improvements;
 - (c) investments, and
 - (d) discharge of other obligations.
- (4) The power to receive, distribute or apply any products, profits or income from the group's land or any other income accruing to the land group by virtue of its being a land group, can be exercised only by the Committee in accordance with this constitution, and any attempt by an individual member or members of the land group to exercise these powers shall be invalid. Any loss, damage or deprivation of any money or property or the use thereof caused by or arising from the actions of any individual member or members acting invalidly shall be actionable by such members suffering such loss, damage or deprivation against the perpetrators of such invalid action in the court in Papua New Guinea.
- (5) The land group's power to lease land owned by it, or enter into a similar agreement disposing of the use of such land, or to enter into an agreement for the use of such land, or to enter into an agreement for the management of such land, is subject to the condition that the terms of any such lease or agreement have been set out in a written document which has been approved by a decision of the land group reached in accordance with the requirements of Clause 5 of this Constitution.
- (6) Upon the adoption of this constitution by the clan members all members are deemed to subject themselves to the full jurisdiction of the laws of Papua New Guinea, and without limiting the generality of the foregoing, it shall not be necessary for any court of law to enquire as to whether any member appearing before it consented to the jurisdiction of the court.

8. CUSTOM WHICH APPLIES

The land group shall act in accordance with the customs of the people, but on incorporation, custom ceases to apply.

9. DISPUTE SETTLEMENT AUTHORITY

- (1) The Dispute Settlement Authority of the land group is made up of the appointees from the land groups of <<Village>> Village. The appointee of the <<ILGName>> Land Group (Incorporated) is:-
- (2) In accordance with <<Tribe>> custom the dispute settlement authority will consult with elders from <<Village>> village, in the course of their deliberations.

10. ADDRESS FOR SERVICE

The address for service of documents on the land group is:-

The Secretary

<<ILGName>> Land Group (Incorporated)

<<Village>> Village

<<District>> District

<<Province>> Province

PAPUA NEW GUINEA

11. ACTS OF LAND GROUP BINDING ON ALL MEMBERS

Any acts taken by the Land Group and or the Management Committee in accordance with this Constitution are binding on all members of the Land Group.

12. RULE MAKING POWER

- (1) The Committee may make rules applying to the internal affairs of the group.
- (2) Any rules made under Sub-Clause (1) shall:-
 - (a) be in writing; and
 - (b) be in the <<Group>> language; and a rule shall only take effect if it has been approved by a decision of the land group reached in accordance with the requirements of this Constitution.
- (3) A rule which is inconsistent with this Constitution is invalid.

13. ADOPTION OF THIS CONSTITUTION

- (1) A meeting shall be duly convened by the members of the land group at a time and place to be nominated by the Committee members
 - (2) If agreed to the provisions of the Constitution they shall adopt the constitution.
 - (3) The Committee shall be duly authorised to certify the adoption of the Constitution on behalf of the Members and are required to annex such certification to the constitution including a record of the consensus decision taken at the meeting called for the purpose of adoption of the constitution, whereupon the constitution shall be adopted.
-

LIST OF FORMS

1. Form 1 - Certification;
2. Form 2 - Record of Meeting Decisions;
3. Form 3 - Submission of Application for Incorporation;
4. Form 4 - Notice of Lodgment of an Application for Recognition as an Incorporated Land Group to District Administrator;
5. Form 5 - Dissemination of Notice of Incorporation

FORM 1

Sec. 5

CERTIFICATION

- 1. Adoption of Constitution;
- 2. Record of meetings

Land Group (Incorporated)

This is to certify that, at a meeting of the Land Group held on

The..... day of.....200_ the following

Decision was taken:-

- 1. The <<ILGname>> Clan shall incorporate under the Lands Group Incorporation Act.
- 2. The <<ILGName>> Clan hereby adopts this Constitution
- 3. The <<ILGName>> Clan hereby adopts the attached list of members and their respective birth certificates as an accurate record of the present living clan members.

Under the *Constitution* of the Land Group, this decision is a decision of the Land Group, and is binding on all members of the Land Group.

Dated thisday of 200_

Signed:-

<<Chairman>>
(Chairman)

<<Vice Chairman>>
(V/Chairman)

<<Treasurer>>
(Treasurer)

<< Secretary>>
(Secretary)

Form 2

Sec. 14A-14D

RECORD OF MEETING DECISION

This is to certify that, at a meeting of the land group held on the day of, 2....., where adult members of the group were present, the following decision was taken:

.....
.....
.....
.....
.....
.....

Under the *Constitution* of the land group, this decision is a decision of the land group, and is binding on all members of the land group.

The Committee

Signed:)
.....)
.....)
.....)
.....)
.....)

Form 3**Sec. 5****SUBMISSION ON APPLICATION FOR INCORPORATION**

1. <<Secretary>> of <<Village>> Village, <<Province>> Province, being the person(s) authorised by the members of the land group to make the application on their behalf for their recognition as an incorporated land group to be known by the name of:-

<<ILGName>> Land Group (Incorporated)

hereby submit the application for incorporation.

2. The group has the following qualifications for recognition as an incorporated land group:-

- (1) The group is entirely made up of the members of <<Village>> Village clans which have been in existence for generations, and which has common customs and shared interests in customary land.

The members of the group reside in the <<District>> Local Level Government area.

The accompanying list of members include their particulars, viz Name, Date of Birth, place of birth, capacity (full member, guardian), current address.

Certified copies of their birth certificates should be submitted with the list of members.

- (2) The group enjoy varying interests according to <<Tribe>> custom to the following properties as specified in the attached list.

3. The Management Committee comprises:

Chairman

..... Vice Chairman

.....Treasurer

.....Secretary

..... Committee Member

.....Female Comm. Member

4. The proposed dispute settlement authority of the group is the <<Village>> Village Dispute Settlement Authority.

Attachment 1: **LIST OF MEMBERS**

Name Date of Birth Capacity Current address
with Birth Certificates

NAME	DATE OF BIRTH	ADDRESS

Attachment 2: **LIST OF PROPERTY**

<<**ILGName**>> Clan

Information:-

<<**Village**>> Village

Date:

Form 4**Sec. 5(2); Sec. 33**

**NOTICE OF LODGEMENT OF AN APPLICATION FOR
RECOGNITION AS AN INCORPORATED LAND GROUP TO
DISTRICT ADMINISTRATOR**

Pursuant to Sections 5(2) and Section 33 of the *Land Groups Incorporation Act* of 1974, notice is hereby given that I have receive an Application for recognition of a customary group pf persons as an incorporated land group to be known by the name of:-

>>ILGName>> **Land Group Inc.**

The said group claims the following qualifications for recognition as an incorporated Land Group:-

- (1) Its members belong to the <<Clan>> clan
- (2) Its members regard themselves and are regarded by other members of the said clans as bound by common customs and beliefs.
- (3) it owns customary land in the <<District>> District of the <<Province>> Province

Dated this _____ day of _____,
20

Registrar of Incorporated Land Groups

Form 5**Sec. 5(2); Sec. 33****DISEMINATION OF NOTICE OF INCORPORATION**

Dept. of Lands & Physical Planning

Registrar of Titles Office

P. O. Box 5665

BOROKO

Telephone:

Dear Sir,

RE: <<ILGName>> Land Group Inco.

Under the Land Groups Incorporation Act of Chapter 147, I am obliged to notify people who may be concerned when I receive an application for recognition of a land group.

I have recently received an application concerning a land group in the <<LLGCensus>> Census Division, of the <<Province>> Province and would therefore appreciate your assistance to enable the following message to be broadcast at a time when and in such a manner that it would be most likely to be heard by people in that area.

“The Registrar of Incorporated Land Groups would like the people of the <<LLGCensus>> Local Government Council Area of <<Province>> Province to know that he has receive an application to recognise a customary group of people by the name of <<ILGName>>.”

“The member of the land group belong to the <<Clan>> clan.”

“The members of the group regard themselves and are regarded by other members of the clans as bound by common customs and beliefs””.

“The land group owns customary land in the <<LLGCensus>> Census Division of the <<Province>> province and proposes to be incorporated.”

“Should anyone wish to comment on the application or object to the Registrar ‘Registering’ the land group, they should contact the officer in charge of the <<District>> District office and ask him to let the Registrar know about their comments or objections”.

“Comment and objections may also be sent direct to the Registrar of Incorporated Land Groups at P. O. Box 5665, Boroko”.

“Comments and objections must reach the Registrar before the expiry of two (2) months from the date of the broadcast of this notice to be considered or silence in Law will apply and approval deemed given.

Following the broadcasting of the notice, which I request be on two occasions, please, I would appreciate it if you would advise me of the dates on which the broadcasts take place. The receipt of your advice is one of the essential elements to enable a Certificate of Recognition for the land group to be issued.

Yours faithfully,

Registrar of Incorporated Land

**Appendix 2 Draft Land Registration (Customary Land)
(Amendment) Act 2007**

INDEPENDENT STATE OF PAPUA NEW GUINEA.

A BILL

for

AN ACT

entitled

Land Registration (Customary Land) (Amendment) Act 2007

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

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

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

1. INSERTION OF NEW PART IIIA

(1) The principal Act is amended by inserting a new “**PART IIIA. - REGISTRATION OF CUSTOMARY LAND.**”

2. COMPLIANCE WITH CONSTITUTIONAL REQUIREMENTS

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

(a) the freedom from arbitrary search and entry conferred by Section 44 of the *Constitution*; and

(b) the right to privacy conferred by Section 49 of the *Constitution*; and

(c) the right to freedom of movement conferred by Section 52 of the *Constitution*.

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

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

3. INTERPRETATION (AMENDMENT OF SECTION 2)

Section 2 of the principal Act is amended by inserting the following definitions in their respective alphabetical order:

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

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

"Court" means the Land Court;

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

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

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

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

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

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

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

"interest" or "interest in land" means -

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

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

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

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

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

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

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

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

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

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

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

4. APPLICATION

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

5. NEW SECTION 34A

The principal *Act* is amended by adding the following new Section after Section 34:-

"34A APPOINTMENT OF DIRECTOR OF CUSTOMARY LAND REGISTRATION

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

6. NEW SECTION 34B

The principal *Act* is amended by adding the following new Section after Section 34:-

"34B POWERS AND FUNCTIONS OF THE DIRECTOR OF CUSTOMARY LAND REGISTRATION.

- (1) The Director shall -
 - (a) be responsible for dealing with applications for customary land registration.
- (2) In addition to any other powers given to him under this Act, the Director may -
 - (a) require any person to produce any document in his possession or control relating to any land or dealing in land; and

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

7. NEW SECTION 34B

The principal *Act* is amended by adding the following new Section after Section 34:-

“34C DUTIES, ETC., OF DEPUTY DIRECTOR.

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

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

8. NEW SECTION 34D

The principal *Act* is amended by adding the following new Section after Section 34:-

“34D APPLICATION FOR REGISTRATION

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

9. NEW SECTION 34E

The principal *Act* is amended by adding the following new Section after Section 34:-

“34E VERIFICATION

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

10. NEW SECTION 34F

The principal *Act* is amended by adding the following new Section after Section 34:-

“34F VERIFICATION OF REGISTRATION PLAN.

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

11. NEW SECTION 34G

The principal *Act* is amended by adding the following new Section after Section 34:-

“34G PUBLICATION OF REGISTRATION PLAN.

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

12. NEW SECTION 34H

The new principal *Act* is amended by adding the following new Section after Section 34:-

“34H ADJUSTED REGISTRATION PLAN.

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

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

13. NEW SECTION 34I

The principal *Act* is amended by the following new Section after Section 34:-

“34I OBJECTIONS TO REGISTRATION PLAN.

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

14. NEW SECTION 34j

The principal *Act* is amended by adding the following Section after Section 34:-

“34J FINAL REGISTRATION PLAN.

- (1) Subject to Subsection (3), where, in respect of a Registration Plan -

- (a) the period specified in 11, 1 (b)(iii) has expired; and
 - (b) the Registered Plan has been adjusted, where necessary, by the Regional Surveyor, the Director shall, as soon as practicable, prepare the Final Registration Plan.
- (2) In preparing the Final Registration Plan, the Director shall take into consideration-
- (a) the Registration Plan prepared under section 8 and
 - (b) the Adjusted Registered Plan prepared under 12; and
 - (c) any objection made pursuant to 13.
- (3) Where any objection made under 13 conflicts with the Registration Plan or the Adjusted Registration Plan or both, the Director shall hear and determine the matter and shall not proceed with the preparation of the Final Registration Plan until the objection has been settled.”

15. NEW SECTION 34K

The principal *Act* is amended by adding the following Section after Section 34:-

“34K REGISTRATION OF CLAN LAND

The application for registration on behalf of the ILG shall-

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

16. NEW SECTION 34L

The principal *Act* is amended by adding the following Section after Section 34:-

“34L ISSUE OF CERTIFICATE OF TITLE

- (1) Where -
 - (i) the customary group has been registered as the owner of land;
 - (ii) the Registrar of Titles shall, upon payment of a prescribed fee, prepare and issue a Certificate of Title in the prescribed form in the name of the group.

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

17. NEW SECTION 34M

The principal *Act* is amended by adding the following Section after Section 34:-

“34M EFFECT OF REGISTRATION.

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

18. NEW SECTION 34N

The principal *Act* is amended by adding the following Section after Section 34:-

“34N CUSTOM

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

19. NEW SECTION 34O

The principal *Act* is amended by adding the following Section after Section 34:-

“34O LAND TRANSACTIONS

- (1) An ILG registered as owner of clan land has power to grant derivative rights and interests in the land or portions to itself, any land group, unincorporated or incorporated, an individual or any entity on payment of a rent or rent free in such manner as provided in Part VI of the Principal Act;
- (2) Land transactions, unless provided to the contrary, are deemed to be on such terms and conditions provided for in Parts VI, VII and IX of the Principal Act;
- (3) The transfer of allodial title in clan land is prohibited.”

20. NEW SECTION 34P

The principal *Act* is amended by adding the following Section after Section 34:-

“34P CONTROLLING LAND TRANSACTIONS

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

21. NEW SECTION 34Q

The principal *Act* is amended by adding the following Section after Section 34:-

“34Q UNLAWFUL OCCUPATION OF CLAN LAND

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

WRITTEN SUBMISSIONS WERE RECEIVED FROM THE FOLLOWING

1. Mr George Muroa, Senior Lecturer in Law, School of Law, University of Papua New Guinea;
2. Mr Brian Aldrich, AKT & Associates Ltd;
3. Mr Tony Power;
4. Mr Elias Masta, Office of Urbanisation;
5. Mr Andrew Wasima, Private Lawyer;
6. Mr Dick Steven, Heritage Services Ltd;
7. Dr. Thomas Webster, Director, National Research Institute & Chairman, National Land Development Task Force;
8. Mr Peter Sandrey.
9. Mr Fred Winn Hera, Rigo, Central Province

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