

Chapter 9

Lands Policy

Tony Power and Oswald Tolopa

Defining the field

Policy making may be initiated by politicians, bureaucrats, the private sector, or a combination of these. Policies may evolve through a formal system or be driven by interest groups who bring about changes in administrative practice that become de facto policy. Frequently, actual practice is not enshrined in any defined policy statement; on the other hand intended policies may be restated year after year but never see the light of day. It seems that for policy commitments to be put into practice there must be a synergy between active individuals in the bureaucracy and committed politicians who have a shared vision and trust with their bureaucrats. These conditions do not seem to have existed at the national level in matters related to land management for many years.

Colonial inheritance

In 1952 a Native Land Registration Ordinance was enacted, but it was repealed eleven years later. In 1963–1964 four acts were passed: the *Land Act*, the *Land Titles Commission Ordinance*, the *Land Registration (Communally Owned Land) Ordinance* and the *Land (Tenure Conversion) Ordinance*. In 1969, as a result of a report by S. Rowton Simpson, the 1963 legislation was reviewed and two years later new legislation was presented to the House of Assembly, comprising: the Registered Land Bill, Customary Land Adjudication Bill, Land Control Bill, and Land Titles Commission (Papua New Guinea) Bill:

There was strong local opposition to an attempt to legislate on such a sensitive subject [land registration], so close to Independence, and the authorities threw in the towel, leaving it to an incoming Papua New Guinea government to handle. So, after self-government, the CILM [Commission of Inquiry into Land Matters] was set up by Somare in 1973, to recommend on land policies across the board (personal communication, J.S. Fingleton 2001).

One can see from the nature of these legislative initiatives, especially registration and tenure conversion, that the main drive in the colonial period was to free up

land from customary tenure in order to pursue 'development'. Papua New Guineans resisted this trend.

Policies at independence

The Commission of Inquiry into Land Matters (CILM) established the policies at independence. Its recommendations proposed clear guidelines for management of customary land that should have guided the nation for the next twenty-five years and beyond (see CILM 1973). The government's response to the CILM was stated:

The Department [of Lands Surveys and Mines] has...created a new Division responsible for Policy and Research to ensure implementation of the recommendations and to review lands policy in the light of changing circumstances. Land tenure systems are important not only in the obvious economic sense but socially in Papua New Guinea. The Department controls all land registration but is trying to replace the existing highly complex and legalistic systems with simplified administrative procedures and to ensure greater decision-making authority at the local level.

The Department exercises its powers over the granting of land and the sale of land to ensure a greater role for Papua New Guinean people in the economy.... (PNG 1974, 73).

Policy making since independence

Strategies for Nationhood (PNG 1974) and the Papua New Guinea constitution of 1975 summarized Eight Aims and Five Directive Principles for development. Most of these could only come about if there were efficient management of customary land. Dr Jim Fingleton's tenure as an adviser to the Lands Department bridges the gap from pre-independence to post-independence; he recalls:

My main job from 1974–1978 was to bring forward the CILM's recommendations for government decision-making – the results being the four Acts of 1974 (including the *Land Groups Incorporation Act*; the *Lands Acquisition Act*; the *Land Redistribution Act*; and the *Land Trespass Act*), the *Land Disputes Settlement Act* in 1975, and inputs to the constitution, and the *National Land Registration Act* of 1977. In 1978 we put proposals before Cabinet for reform of all the remaining colonial land legislation – the *Land Act*, the *Land Titles Commission Act*, *Land (Tenure Conversion) Act*, and new laws for customary land registration. There were four NEC submissions (which I drafted) and a comprehensive set of Drafting Instructions (which Joe Lynch drafted). All proposals were based on the CILM report. There was not, however, any draft legislation

(that is only prepared after policy clearance) (J.S. Fingleton, personal communication 2001).

Differences in cabinet between Prime Minister Somare on the one hand and Iambakey Okuk and Lands Minister Thomas Kavali, on the other, led to the latter two being sacked from cabinet. A series of Lands ministers followed, including Michael Somare, Boyamo Sali and Jack Genia. The initiatives faltered. With the demise of the Kavali/Fingleton combination there was no competent driving force for legislative reform.

Early in the 1980s the Institute of National Affairs (INA), a private sector lobby group, focused attention on the need for land reform for development. Its principal interest was to remove land from customary tenure to facilitate development. In September 1980 INA commissioned consultants Knetsch and Trebilcock to report on land policy for development. Their report (Knetsch and Trebilcock 1981) stressed the need for reform and cautioned that incremental changes were more likely to succeed than grand, unworkable changes; they saw the recommendations of the CILM as being in the latter category. The following year INA organized a public seminar on 'Land Policy and Economic Development in Papua New Guinea'; again, excellent discussions provided grist for government policy makers had they chosen to mill it.

A Land Task Force chaired by Kere Moi delivered a report to the Lands minister, Bebes Korowaro, in April 1983. The Task Force supported the recommendations of the CILM, and made a series of proposals concerning registration of customary land, the formalization of direct dealings in customary land, and the establishment of a Rural Development Agency (see Papua New Guinea 1983).

Specific proposals included: protection against outright alienation; focus on communal title and lack of compulsion; land registration; and use of the *Land Groups Incorporation Act* and the *Land Disputes Settlement Act*. There was recognition that the Lands Department was a total failure in dealing with customary land, and several alternatives were promoted.

In 1983 the Department of Lands prepared drafting instructions for land registration legislation but in January 1985 a World Bank consultant, Raymond Noronha, produced a very critical report on the drafting instructions, which effectively stymied further progress for some time. Noronha's bias against Melanesian customary tenure could not be rebutted by personnel in the Lands Department. Lack of commitment by the Department of Lands, and the failure of the state to provide essential resources, throws doubt on the political support for the mobilization of customary land through registration.

In the following years a massive World Bank-funded program on land mobilization was developed and executed. It began with the Land Evaluation

and Demarcation Project (LEAD) and developed into the Land Mobilization Project (LMP). The latter title came from the East Sepik provincial government's initiatives on land registration. Between 1984 and 1987 the East Sepik Province pursued a land registration policy and enacted legislation. During this time there was much interaction between the East Sepik provincial government and the Department of Lands and their World Bank consultants and program managers. The East Sepik provincial government constantly emphasized the fact that customary tenure is a genuine form of tenure and argued that development objectives must be pursued within this context or not at all.

The implementation completion report on the LMP listed indecision on tenurial reform as a major factor limiting the success of the program. The World Bank was apparently not convinced that customary tenure can underpin development: 'The Project envisaged a major breakthrough in transforming the traditional customary land tenure system into a modernized market oriented land tenure system' (Wichramarachchi 1992). It is not clear, however, whether the failure of the Papua New Guinea government to embrace tenurial reform indicated a bias against altering custom or a lack of commitment to doing anything at all.

The World Bank program was ambitious and expensive, and once financial constraints affected the Papua New Guinea government its financial contribution to the program faltered and vital initiatives stalled. The funding of the East Sepik land registration legislation as a pilot project was recommended, but coming at a time when national politicians were trying to reduce the power of provincial governments, it was allowed to lapse.

The INA again made a significant contribution to the ongoing discussion on customary land issues with the visit of Professor Robert Cooter in 1988. An earlier INA consultant, Michael Trebilcock, had interested Cooter in Papua New Guinea when he spent two months in the country, including a month in the East Sepik observing the work being done on customary land registration. Cooter produced a very insightful publication comprising five essays and a series of recommendations on land registration (Cooter 1989). It used a number of case studies from land court hearings to demonstrate a methodology for development of a 'common law' of customary land.

One outcome of the East Sepik initiative was that the World Bank, in conjunction with the Department of Lands and Physical Planning (DLPP), hired the East Sepik land legislation legal draftsman, Jim Fingleton, to advise on national framework legislation for customary land registration. His report discussed the fundamental questions that had been thrashed out in the East Sepik before approval for land registration could take place; these included inalienability of land, group title, use of the *Land Groups Incorporation Act*, systematic project-oriented registration, and lending agencies. Fingleton hailed

the *East Sepik Land Registration Act* as ‘the only important land registration law to be introduced in the Pacific, since island states began achieving independence in the early 1960’s’ (Fingleton 1988). Clearly the government did realize that something had to be done about customary land mobilization.

In 1992 Val Haynes was hired to draft a manual on the lease leaseback system, ironically since the inadequacy of this option was one of the considerations which led East Sepik opting for registration legislation.

In 1993, as a result of recommendations by a committee headed by former professor of law at University of Papua New Guinea, Rudi James, the Lands Department produced draft legislation purporting to be framework legislation along the lines that would logically flow from Fingleton’s advice. However, the legislation provided a mechanism for land to be individuated and alienated, leading to the very things that the East Sepik legislation and Fingleton’s advice sought to avoid. The draft proposed a national act and a model provincial act to be adopted by provincial governments. This initiative seems to have died out without debate.

Two years later, the Department of Lands once again retained a consultant to prepare draft legislation for land registration. Loani Henao came up with a draft act, being an amendment to the *Land Registration Act* (Chapter 191), adding a new section on registration of customary land. Henao stated that:

In 1988 a report was prepared proposing the national framework legislation. That legislation has been reviewed by the present consultants and the proposals now put forward follow the consultant’s recommended changes (Henao 1995).

It was assumed that Henao’s reference to ‘that legislation’ referred to Rudi James’s draft. Henao did not review the East Sepik draft, and the provisions for securing the inalienability of land in the East Sepik legislation were lacking. Introductory rhetoric to the contrary, there was no watertight provision to prevent alienation of land.

Henao’s draft was released at a time when the Chan government was busy pushing through amendments to the Organic Law on Provincial Government, which amongst other things aimed to severely reduce the legislative powers of the provincial governments, and Henao completely dismissed provincial government’s involvement in land registration.

About this time, opponents of the government and the World Bank’s Structural Adjustment Programme (SAP) attacked its proposals for land registration, in terms of ‘attempts to take over our land’. But students and NGO protests generated more heat than light and failed to generate informed debate. The Department of Lands was equally responsible because it did not sponsor a

coherent discussion of Henao's draft legislation. Such a forum could have facilitated a proper assessment of Henao's proposals.

In 1995 Norm Oliver, a very experienced former land titles commissioner, was hired to contribute to 'General Institution Building' for both DLPP and the Attorney General's Department. He gave excellent advice, which, however, does not seem to have had any real impact. Henao re-presented his draft legislation at a seminar on land matters held by Divine Word University in Madang in 2001, but had not taken into account the wise recommendations of Oliver, particularly those concerning outstanding land disputes attributed to lack of manpower and funding resources, and the role of provincial governments. Oliver concluded:

In order to create a single body incorporating all the functions of the present organizations it will be necessary to amend and repeal the following legislation (i) *Land Dispute Settlement Act*, (ii) *Land Titles Commission Act*, (iii) *National Land Registration Act*, (iv) *Land Tenure Conversion Act*, (v) *Land Act* (Oliver 1995).

In October 2000 Brian Aldrich presented a paper to a Special Parliamentary Committee on Urbanization and Social Development. This paper approached the problems of customary land management from the point of view of someone promoting development for the customary landowners. It suggests that the difficulties were immense, given the almost total lack of governance in the relevant areas (Aldrich 2000).

In 2001 the student body at UPNG once again went on strike and took to the streets, linking a so-called 'Land Mobilization Programme' with the World Bank's Structural Adjustment Programme attached to loans to Papua New Guinea. The prime minister shamelessly denied that the government had a land mobilization program. The crisis was handled badly, and ended up in an armed clash at the university campus, where four activists, three of them university students, were fatally shot by out-of-town mobile squad police.

In June that year the Divine Word University held a conference on land matters, titled 'Culture versus Progress'. This was a further effort to focus political leadership on urgent issues relating to customary land management. Once again Henao presented his draft legislation with a short covering paper (Henao 2001). One contributor commented that the Henao bill had no watertight provision safeguarding clan land from alienation, and that, under the bill 'it certainly becomes possible to dispose of registered customary land' (Irara 2001).

Policy implementation

In relation to land, it seems that Papua New Guinea has had, on the one hand, well-articulated policies that have been reiterated year after year but never activated, and, on the other hand, ongoing practices that have no well-articulated

policies. The history of attempts to achieve progress in mobilization of customary land for development over the last twenty-six years demonstrates that there is a wealth of experience and good advice available, and indeed the government and bilateral donors have made some progress in land administration within the DLPP. However, despite expenditure (and borrowing) of millions of kina, virtually no progress has been made in customary land management. Rather, the function of the Register of Title for Incorporated Land Groups has been in total disarray. Programmes have not been brought to a successful conclusion for a variety of reasons, particularly the failure of government to make the necessary financial commitment, and its failure to take the hard policy decisions when faced with a constant stream of advice that customary land tenure is a hindrance for development.

Despite constant demands from the petroleum, forestry, and to a lesser extent mining industries, the government lacks the capability to implement the two most important acts that affect customary land management — the *Land Disputes Settlement Act* and the *Land Groups Incorporation Act*. Although Prime Minister Morauta, in the face of student unrest, said that his government had no land mobilization program, the DLPP in fact retained Henao lawyers to draft a land registration bill — an example of practice without policy.

On the other hand, there has been no articulation by any government (other than the East Sepik provincial government) since the failure of the Kavali-led initiative in 1978, of any clear policy for the management of customary land where customary land tenure is the basis of development and not a barrier to development. This is the case, despite the fact that several officers within DLPP and many other government departments have a clear understanding that development must be based on recognition and management of customary tenure and not tenure conversion.

Why is there such an apparent lack of political will? Essentially, the interests of politicians are elsewhere; they seem to believe that the road to development lies in unmodified Western capitalism, when clearly, after following this model for almost three decades, Papua New Guinea has become less developed and further in debt. Perhaps, in fact, politicians are too busy trying to make capitalism work for themselves personally, to the neglect of the development of the country as a whole. As Power has argued elsewhere:

In spite of everything to the contrary in the last 25 years, we still have in Papua New Guinea today a situation where land is communally owned by customary groups. Labour is privately owned. All development in Papua New Guinea, no matter how it is ultimately defined, will depend on reconciliation of these two regimes and creatively finding ways to realize their potential for the benefit of all. ...the state of Papua New Guinea has failed to develop legitimacy with its citizens because it has

failed to empower the citizens. It has failed to empower the citizens because it has failed to recognize them as members of landowning groups. For the last 25 years the state has adopted a Western image of itself thereby denying a fundamental Melanesian reality and thereby stifling development (Power 2000).

The problem is systemic, in that there does not seem to be a mechanism to harness the views of many thinking Papua New Guineans on the need to creatively develop customary land management as the basis for a Melanesian capitalism and translate these views into government action.

Conclusion

In 2003 The Department of Lands was dealing with compensation awards, made by the commissioner under the *National Land Registration Act*, which amounted to over K70 million; many more claims have been lodged with the National Lands Commission. An alternative means of dealing with the outstanding claims should be identified. There is a need for broad discussion which takes into account the various proposals already put forward by land experts that highlight the practical aspects of this sensitive issue, including the involvement of (former) landowners.

Norm Oliver provides a critical analysis of the direct role that the Department of Justice must play in facilitating customary land management, suggesting that there must be a cooperative effort by at least two departments to establish mechanisms to serve the land groups which own 97 per cent of the country.

Until some strong individuals are able to articulate a concept of Melanesian capitalism, based on well-managed customary land tenure by empowered incorporated land groups, there will not be the political will to make a change. Without political will in matters of land reform, as De Soto (2000) points out, nothing good will happen. In the meantime, the state legitimacy and good governance are diminished, and orderly development for the rural masses and urban displaced persons becomes more remote.

Political will is required to ensure the availability of the necessary funds for specific functions. A number of recommendations have been accepted over the years, but have not been implemented. The Department of Lands is yet to address the need for a 'customary land unit' to coordinate the implementation of functions relating to customary land, and the unit responsible for registering incorporated land group needs to be rationalized to ensure that it is responsive to the demand for proper registration and management.

Until Papua New Guinea is able to address these problems of customary land management, the downward spiral so evident in recent decades will continue.

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