

Chapter Two

A Legal Regime for Issuing Group Titles to Customary Land: Lessons from the East Sepik¹

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Recently, there has been renewed interest in the subject of customary land reform in Papua New Guinea (PNG). Although it was never really off the agenda, the protests, riots and police killings in Port Moresby which accompanied the World Bank's attempt to promote customary land registration in 2001 meant that land tenure reform moved to the margins of the political debate. But the subject is too important for it to remain marginal for long, and customary land registration was placed on the agenda for a high-level 'land summit' held in PNG in August 2005. In preparation for that meeting, I wrote four articles on customary land registration that were published in the *PNG Post-Courier* during March 2005,² leading to lively debate there over the desirability of land tenure reform.

Meanwhile, another debate was running in Australia, over the direction of aid policy in PNG and the Pacific Islands generally, and on the use of development aid to promote land tenure reform. On one side, the economist Helen Hughes from the libertarian Sydney-based Centre for Independent Studies called for aid to be tied to the privatisation of customary tenures (Hughes 2004), while others with extensive practical experience in PNG and elsewhere defended customary land tenures as a viable basis for development (Fingleton 2004, 2005). Again, the question was raised whether customary land tenures are an impassable barrier to growth and sustainable development. For those who take the view that they are not, the challenge is to show how development strategies based on customary land tenures would work in practice. In responding to that challenge, attention must be given to the role of customary groups in the ownership and management of their customary land.

As other contributors to this volume have pointed out, attempts to identify indigenous groups and give them legal recognition are part of a two-way process,

¹ The author is grateful to Tony Power, James Weiner and Martha Macintyre for their comments on an earlier draft of this chapter.

² The articles appeared in the *Post-Courier* on 9, 15, 22 and 29 March 2005.

whereby 'laws, practices and customs of both the Western nation state and indigenous people embedded in it, are developing and evolving out of each other' (Sahlins 1976). In this chapter I present information on a 'scheme of legislation'³ for customary land registration introduced almost two decades ago in the East Sepik, one of the provinces of PNG. The main components of that scheme of legislation were: the *East Sepik Land Act* of 1987, which set out the law applying generally to land in the province, and the regulation of dealings in land; the *East Sepik Customary Land Registration Act* of 1987, which set out a process for the selective registration of group titles in customary land in the province and provided for the legal effects of such registrations; and PNG's *Land Groups Incorporation Act (LGIA)* of 1974,⁴ which is a national law providing for the legal recognition of customary landowning groups and their operations with regard to land.

A study of that scheme of legislation — its origins, aims, processes and results — can provide useful information on what is involved in issuing titles to customary groups in their customary land, and where the problems lie. I lived in PNG and worked as a government lawyer specialising in land matters from 1970 to 1978, and returned in 1987 to draft the East Sepik land legislation, so I can comment personally on the origins, aims and processes of the legislation being studied here. As for their results, while I have some personal experience I must rely mainly on the accounts of others.

In what follows, each law will be outlined first, before examination of their results. My personal involvement in the preparation of the above laws means that, while I cannot claim complete impartiality, at the same time I do have an insight into the legislation and can document what the laws were attempting, and how they were intended to operate.⁵ This is not well understood today, and that detracts from the important lessons which can be learnt from the experience under that scheme of legislation.

The three Acts mentioned above were designed to work together as a 'scheme', interacting with each other. I will first examine the East Sepik land legislation of 1987, and then the national law for the legal recognition of customary landowning groups. That law came into operation in 1974, and was invoked by the East Sepik legislation to provide for the bodies that would be issued with land titles and authorised to carry out dealings in registered customary land.

³ The term 'scheme of legislation' is used by lawyers to denote a number of separate Acts intended to operate together in a co-ordinated way, as part of a 'scheme' to implement a policy goal.

⁴ Enacted in 1974 as the *Land Groups Act* No 64 of 1974, the law was re-named after Independence in 1975.

⁵ My own involvement should not be overstated. Many individuals have an impact on the final form of legislation including: policy-makers and planners (Tony Power, in the case of the East Sepik laws); members of drafting committees (Nick O'Neill, Rudi James and Abdul Paliwala in the case of the national land legislation); legislative draftsmen (Joe Lynch, in the case of the land groups legislation), in addition to members of the legislatures themselves.

The period under consideration for present purposes mainly relates to PNG's post-Independence period after 1975, but a brief account of previous developments in land legislation and customary group recognition will be given as necessary background to what followed.

East Sepik Land Legislation of 1987

The East Sepik land legislation was an exceptional body of law, but it was not unprecedented. When writing about the legislation in 1991, I said:

Those Acts, with their supporting Regulations, represent the most significant breakthrough in the field of customary land tenure reform, not only in PNG but in the South West Pacific generally, since the current period of independent nationhood began (Fingleton 1991: 147).

The inability of governments in the Pacific to pass legislative reforms affecting land tenure means that my comment still holds true today, over a decade later. Most Pacific Island nations are still operating under land legislation from their colonial period. In PNG, this means that the land registration laws comprise remnants of a scheme of legislation introduced by the Australian Administration in the mid-1960s.

One of those laws was the *Land Registration (Communally Owned Land) Ordinance 1962*.⁶ This law, based on Fijian precedents,⁷ provided for the registration of customary land in declared areas as either individually owned or communally owned.⁸ A Register of Communally Owned Land was established, in which those persons or groups found to be the owners of land would be registered. Land entered in the Register remained subject to custom, but an entry in the Register was conclusive evidence of the stated ownership, as at the date of the finding. The law made no provision, however, for dealings in the registered land, or for the legal recognition and operation of the landowning groups.

The other main land law introduced by the Australian Administration in the mid-1960s was the *Land (Tenure Conversion) Ordinance* of 1963. In contrast to the previous law, this legislation expressly provided that the individual freehold titles in customary land registered under its provisions would thereafter be free from custom, and all customary interests in the land and controls over it would be extinguished. Both this law and the previous one were administered by a special body, the Land Titles Commission, made up mainly of experienced senior field officers from the Administration.

⁶ The operation of the 1962 law was suspended in 1970, and the law was subsequently repealed.

⁷ The 1962 law replaced the *Native Land Registration Ordinance 1952*, which drew directly from the *Fijian Native Lands Ordinance 1905*.

⁸ For a criticism of the term 'communal' with respect to customary land tenures, see Fingleton (2005: 3–4).

In the early 1970s the Australian Administration proposed another major scheme of land legislation, but introduction of such reforms on the eve of Independence was controversial, and in the face of strong opposition the proposed laws were withdrawn. After the 1972 national election, the coalition government led by Michael Somare set up a Commission of Inquiry to make recommendations for reform of land policies, laws and administration in preparation for Independence. The Commission of Inquiry into Land Matters (CILM) made comprehensive recommendations for reform in its 1973 report, its guiding principle being that land policy 'should be an evolution from a customary base not a sweeping agrarian revolution; collective and individualistic extremes should be avoided' (GoPNG 1973: 15). The CILM based this principle on the Government's 'Eight Point Programme', the forerunner of the National Goals and Directive Principles of the PNG Constitution, one of which (Section 5) calls for development to be achieved 'primarily through the use of Papua New Guinean forms of social, political and economic organisation'.

Recommendations were made by the CILM for a new system of land dispute settlement, for dealing with problems over alienated lands (such as plantations), for land resettlement and other land matters. With respect to customary land, the CILM's main views were that:

- the previous emphasis on individualisation of titles was not appropriate;
- new legislation for customary land registration should be introduced, but that it should be used sparingly, and only where there was a clear demand from the landowners concerned and a real need to replace customary tenures;
- the 'basic pattern' should be to register group titles, and provide for the group to grant registrable occupation rights (to group members) or leases (to non-members);
- the landowning groups should be incorporated, with a constitution defining their membership, powers and decision-making processes;
- the system of using 'representatives' to make decisions on a group's behalf should be abandoned;
- the main controls on dealings in registered land should be through restrictions on the titles themselves — titles would not be fully negotiable, and limits would apply to grants of occupation rights and leases, while mortgages would only be available to secure loans from approved lending bodies (GoPNG 1973: 17–44).

The CILM Report became the basis for land policy making and legislative reform during the 1970s, including notably for present purposes passage of the *Land Groups Act* (later renamed the *Land Groups Incorporation Act*) of 1974, and the *Land Disputes Settlement Act* of 1975. By the end of the 1970s, however, the Somare-led coalition government was experiencing political instability. In 1978 the National Executive Council approved policy submissions that would have

implemented reform in the main outstanding areas of the CILM report, including for the registration of group titles in customary land. But bureaucratic delays during 1979 and a change of government following a no-confidence vote in 1980 meant that no laws to implement the National Executive Council decisions were ever drafted. There has been no important change in PNG's land legislation at the national level since then.

Meanwhile, a number of provincial governments were becoming frustrated by the failure at the national level to provide new legislation for customary land registration. The existing legislation, providing for conversion of customary land tenures to individual freehold titles, had been discredited by the CILM report, and the Land Titles Commission was in the process of being replaced by the new land dispute settlement machinery. The East Sepik leadership was firmly committed to basing economic development on customary tenures and Melanesian forms of organisation as called for by the PNG Constitution. When a World Bank consultant's criticism of Port Moresby's latest proposals for land law reform led to their being shelved, the East Sepik Provincial Government decided to invoke its legislative powers under the *Organic Law on Provincial Government* and proceed with its own land legislation.⁹ In 1987, this resulted in passage by the East Sepik Provincial Assembly of the *East Sepik Land Act* and *Customary Land Registration Act*. The two laws were prepared on the basis of the CILM's recommendations.¹⁰

East Sepik Land Act 1987

The *East Sepik Land Act* sets out the general principles of land tenure in the province, providing in particular, that all land is either held under the State (alienated from customary ownership) or owned by customary groups under customary tenure.¹¹ Custom applies to all land in the province, except to the extent that it has been removed or modified by legislation. Land can only be removed from customary tenure by government acquisition. The Act also made provision for three kinds of dealing with customary land — sales, leases and charges.¹²

With respect to sales, the Act provides that customary land could only be sold to the National or Provincial Government, or to another customary group. Leases of customary land could be granted to a wide list of persons and bodies,

⁹ I have written previously on the lead-up to this ground-breaking initiative (Fingleton 1991: 147–53).

¹⁰ I drafted both these Acts, and their supporting Regulations, as a consultant engaged by the Australian International Development Assistance Bureau (AIDAB — the predecessor of AusAID) to work with the national and provincial authorities in drafting the necessary provincial legislation.

¹¹ Much of the *East Sepik Land Act* was concerned with the administration of leases over State-owned land in the province, which does not concern us here.

¹² The East Sepik Provincial Government decided to subsume occupation rights — recommended by the CILM for members of the landowning group — under leases. 'Charge' is the generic term for such things as mortgages.

including incorporated land groups and business groups, local and registered foreign enterprises, citizens and non-citizens resident in the province. Both sales of customary land to customary groups and leases of customary land are 'controlled dealings', requiring approval from either the Provincial Land Management Committee (for all sales and some leases) or the Local Land Management Committee for the area concerned, depending on the nature of the parties. Charges over customary land could only be made to secure a debt to prescribed lending bodies, and restrictions were imposed on the lender's ability to foreclose and exercise a power of sale.

East Sepik Customary Land Registration Act 1987

The *East Sepik Customary Land Registration Act* provides for registration of customary land at two levels: registration of full ownership, and registration of interests which are less than full ownership.

The other basic dichotomy drawn by the Act is between registration in declared Customary Land Registration Areas (CLRAs), and registration outside such areas. CLRAs were those parts of the East Sepik Province officially identified as having a priority for registration — based on criteria of local need and demand, and the availability of administrative resources necessary to carry out and maintain the registration of land titles. In CLRAs, the group ownership of land would be systematically investigated and registered. In addition, subordinate rights (for leases and so forth) granted by landowning groups to individual members or others could — subject to the requirements of the *East Sepik Land Act* outlined above — also be registered upon application. Within CLRAs, a registration was conclusive evidence of title.

Outside CLRAs, people could also apply for registration of their rights in customary land, either in full group ownership or as subordinate right holders. Because they would *not* be preceded by systematic investigations, the effect of these registrations was to confer only *prima facie* evidence of title. In effect, this was not much more than an official recording service, providing documentation of interests in land but no statutory protection for them.

The legislation specified that customary land registered under its provisions would remain subject to custom, although a claim based on custom could not defeat a registered title in a CLRA. Landowning groups were required to incorporate under the *Land Groups Incorporation Act* before they could be issued with a certificate of title and start entering into dealings with their land.

Key features of the East Sepik land legislation are:

1. All land in the province is either owned by the State, or is owned by customary groups under customary tenure (that is, customary land cannot be held in absolute individual ownership).

2. Custom applies to all land in the province, except to the extent that its application has been excluded or modified by legislation.
3. Subject to specified controls, three kinds of dealings could be entered into over customary land — sales, leases and charges (for mortgages and such).
4. Registration of titles in customary land would be introduced selectively, in CLRAs identified by reference to the criteria of: general support from the local landowners; genuine need for registration of titles; and availability of administrative resources.
5. In CLRAs, the group ownership of all land would be systematically investigated and registered.
6. Group titles issued in CLRAs would be indefeasible — that is, given statutory protection from competing claims.
7. Groups could enter into dealings with their titles, but first they had to incorporate under the *LGIA*.
8. Outside CLRAs, a service was available for recording interests in customary land, but such interests would be given no statutory protection.
9. Transfers (to other customary groups), leases and mortgages entered into by incorporated land groups (ILGs) could also be registered, and in CLRAs the titles so gained would also be indefeasible.
10. Registered customary land would remain subject to custom, but a claim based on custom could not defeat a registered title in a CLRA.

The East Sepik land legislation was an attempt to balance the economic need for greater certainty of interests in land with the desire, for social and cultural reasons, to retain customary tenures. The East Sepik Provincial Government of the day was committed to village-based development and the retention of traditional communities, and the legislation was designed to cause minimal interference with customary tenures. Registration would only be introduced selectively, where customary tenures were unable by themselves to adapt to changing circumstances. Even in such cases, the application of custom would only be removed to the extent necessary to meet the changing circumstances. Customary groups would remain the key actors under the province's land reform, holding ownership of the registered land and having the power to enter into dealings with the land. The legislation was a statement of belief in the continued viability of customary groups.

Results of the East Sepik Land Legislation

What was the result of this vote of confidence in customary groups? As with so many of PNG's attempts at land tenure reform, the tangible results were negligible. The East Sepik Provincial Assembly passed the two Acts by early March 1987, and they were brought into force on 19 May 1987. Later in that year I returned to East Sepik Province to draft the implementing regulations — the *Land Regulation* and *Customary Land Registration Regulation*, both of which

were approved by the Provincial Executive Council in November 1988.¹³ They prescribed the forms and procedures to be used in application of the two Acts. I also prepared a detailed Manual of Laws and Procedures, to assist officials in performing their land administration duties under the land legislation. Many anthropologists, linguists, geographers and other social scientists have conducted fieldwork in the East Sepik Province, and I prepared a Background Paper explaining the new legislation and a Land Tenure Questionnaire, which was sent to them seeking data for use in applying the new laws. Information Papers on the new regime were prepared for banks, financial bodies and others.

Meanwhile, at the national level, the World Bank was becoming increasingly involved in land affairs. In 1986 a World Bank Project Identification Mission visited PNG, following which the PNG Government approved preparation of the Land Evaluation and Demarcation (LEAD) Project. The Australian Government agreed to fund a feasibility study for the proposed project, the main objective of which was to create more favourable conditions for the implementation of agricultural and forest development projects (GoPNG 1988: 8). The Project Preparation Report proposed a project with a number of components, one of which was for a two-year trial of East Sepik's *Customary Land Registration Act*. Based on this trial, consideration would be given to national legislation for customary land registration.

But this was too tardy progress for some provinces whose governments, encouraged by East Sepik's example, also decided to go ahead with their own provincial land legislation. My assistance was sought, but the national authorities, worried about losing the initiative, arranged in 1988 for the World Bank to fund me to prepare Drafting Instructions for national 'framework' legislation for customary land registration. This approach would have allowed provinces to have their own legislation like that of the East Sepik, but within the 'framework' of a national law which would lay down the basic requirements to be met by provincial laws. In this way, it was hoped to ensure consistency and coordination across the country on this important subject.

In 1989, a World Bank loan to PNG was approved for the Land Mobilisation Project (LMP), based on the LEAD Project feasibility study. Under the LMP there was some support given to the East Sepik legislation, but not enough to produce any registrations. A land titles consultant was engaged in 1989 to review the legislation. His report (Levy 1989) supported its general thrust,¹⁴ and made recommendations on the form and contents of the Customary Land Register under the new law. Despite this endorsement, the Department of Lands and Physical Planning delayed putting in train the necessary legislative,

¹³ My follow-up work on the activities mentioned in this paragraph was also conducted in my capacity as an ADAB consultant.

¹⁴ Levy did suggest some minor refinements.

administrative and financial arrangements to allow the East Sepik legislation to come into operation. In 1995, when the provincial government system was substantially re-organised, the legislative powers of provincial governments were greatly reduced. The East Sepik land legislation never came into effective operation, and as it was not 're-enacted' under the new provincial government arrangements it has now lost its legal status.¹⁵

One of the requirements of the East Sepik legislation was that, before a customary group could be issued with a registered title in its land, it had to be incorporated under the *LGIA*. The rationale for this requirement was the need for customary groups to be set up for effective decision making before being issued with a title and entering into dealings. The requirement provided protection both for the landowning group and persons dealing with the group. As it was a major component of the East Sepik's scheme of legislation, that law will now be examined.

National Legislation for Land Group Incorporation

The *Land Groups Incorporation Act*, passed by PNG's House of Assembly in 1974,¹⁶ was another exceptional law, like the East Sepik land legislation which followed it over a decade later. In 1998, in a review of laws for the recognition of indigenous groups published by the United Nations Food and Agriculture Organization (FAO), I described the Act as 'one of the most innovative laws on the general subject of group recognition' (Fingleton 1998: 11). As previously mentioned, the Commission of Inquiry into Land Matters in PNG recommended in 1973 that, for purposes of the registration of titles in customary land, landowning groups should be incorporated, with a constitution defining their membership, powers and decision-making processes. The person who drafted the legislation to give effect to these proposals was C.J. (Joe) Lynch, then PNG's Chief Legislative Draftsman.

As it happened, Lynch had already been considering the general subject of legal recognition of customary institutions for some years. It was clearly a subject which interested him, both intellectually and professionally. From the mid-1960s until his death in the late 1980s he wrote prodigiously on subjects ranging from the recognition and enforcement of custom (including deliberations by 'grass-roots' courts) to the question of how legal provision could be made for traditional leadership — sometimes writing about a particular country and sometimes comparing the approaches taken to these matters across the Pacific Islands. Not only did he prepare the legislation passed by the law-making bodies of Pacific countries, he frequently produced papers debating the issues or

¹⁵ Under the new arrangements, the Governor of East Sepik, Sir Michael Somare, failed to move for the re-enactment of the land legislation by the Provincial Assembly within the 60 days provided (personal communication, Tony Power, 2005).

¹⁶ The House of Assembly became the National Parliament upon Independence in 1975.

commenting on the outcomes. He drafted PNG's Constitution in the mid-1970s, and was engaged in the early 1980s as Legislative Counsel in both Marshall Islands and Kiribati, shortly after their Independence.

Lynch's (1969) paper on 'Legal Aspects of Economic Organization in the Customary Context in Papua and New Guinea and Related Matters' dealt with four interrelated subjects, one of which was 'Community Landholding'.¹⁷ The paper starts with an introductory part where Lynch outlines the purpose and scope of his endeavours:

The theme of the whole paper is simply that for too long we have all acted on the theory that indigenous forms of organization are not apt for 'Westernized' economic development and that the latter must wait on a long period of 'Westernizing' economic education. In my view, it is high time that we asked 'Why not?' and tried to find remedies for specific deficiencies in the indigenous system. It is hoped that this paper may furnish a starting-point at least in the field of statutory requirements (Lynch 1969: 3).

In arguing for the adaptation of indigenous forms, Lynch's approach was radical for the time — especially for a lawyer. PNG was only just emerging from what has recently been termed the 'replacement paradigm', where development was seen as requiring replacement of customary institutions with their Western counterparts.¹⁸ Paul Hasluck's influential reign as Australia's Minister for Territories (1951–63) was not long over, and his views on land reform saw no future for customary tenures (Hasluck 1976: 126). The Derham Report of 1960 advising on the administration of justice in PNG also saw no place for a village-based system of courts applying custom (Oram 1979: 61–4). Even the then Public Solicitor, W.A. (Peter) Lalor, a champion of indigenous rights and often a thorn in the Administration's side, was a legal conservative when it came to embracing customary institutions.

Among the sources for his own paper, Lynch mentions publications by the New Guinea Research Unit of The Australian National University dealing with indigenous business enterprises (Lynch 1969: 4). He also set out the 'propositions' on which he based his approach,¹⁹ including the 'undesirability of unnecessarily interfering with custom by forcing it into an artificial legal framework', and the 'need for simplicity and flexibility and for leaving alternatives open' (ibid: 2).

¹⁷ The other three topics were group businesses, the use of customary land as security for loans and taxing customary land.

¹⁸ Movement away from the 'replacement paradigm' towards the 'adaptation paradigm' in land tenure reform is discussed in FAO (2002: 223).

¹⁹ Some of the quotes which follow are from the part of Lynch's paper dealing with group businesses, but he made it clear that his views also applied to land groups (Lynch 1969: 8).

In discussing the particular requirements of a land groups' law, Lynch notes that the need for a legal form for landholding by customary groups arises from 'external factors'.

The needs of people dealing with the land-holding group ... the general (though not necessarily individual) need for overall land registration in some form, the need to have some recognized authority who can be made legally responsible in legal matters affecting the land, and so on ... [the need to] interfere with the internal structure and working [of land groups] to the minimum, even allowing for the fact that the observer does influence the observed and the mere description of a custom may affect it either immediately or in relation to its development ... [the need for] the utmost flexibility in our requirements as to the constitution and powers of our corporate body ... [and the need to recognise] that we are not dealing with social organizations which have been worked out ad hoc, but with highly developed organizations with existing implications for many fundamental aspects of community life (Lynch 1969: 9–10).

His conclusion was that 'we should not *impose* a structure, but should concentrate on *describing* one' (ibid: 9, emphasis in the original), and he proposed a simple method to recognise and give corporate legal status to existing customary groups (ibid: 8), and then to regulate their external dealings — 'and even in this to interfere as little as possible' (ibid: 6).

Lynch recognised that what was being undertaken was 'attempting to fit a non-English institution into the framework of English law' (Lynch 1969: 12),²⁰ and he acknowledged that he was approaching the task as a lawyer, recommending that the views of anthropologists should be sought on his proposals.²¹ He attached to his paper a preliminary draft bill for a 'Group Land Ordinance', which included the procedure for recognition of land groups and the requirements for a land group's constitution (ibid: 58–70).²² Apart from enabling customary groups to own and deal with land in their own right, Lynch saw that his proposed legislation would also do away with the existing provision for the use of agents in land dealings (ibid: 15), and — in what, with hindsight, might now be seen as an inopportune prediction — he saw it as providing a method for making payments under mining and forestry legislation 'in safety' (ibid: 15–16).

²⁰ Here he was referring to the concept of land ownership, but his comment applies also to group recognition.

²¹ In fact, it seems from a copy of Lynch's paper in my possession that he received comments from the lawyer-anthropologist A.L. (Bill) Epstein on his completed paper.

²² Proposed laws are called 'bills' before they are passed by the legislature. Before self-government (1973), the principal legislation in PNG were Ordinances. They became Acts after self-government.

Notable features of the above views are Lynch's regard for customary institutions, his belief that they could be adapted to meet modern needs, and his perceptions that the law's task was to recognise the corporate nature of groups already existing under custom rather than create corporate bodies *de novo*. Legal recognition was mainly for the benefit of outsiders; groups did not require much internal regulation and the goal was minimum interference by the legislation in the group's internal affairs. At the same time, he clearly understood that even such minimal interference would affect the groups, and 'mere description of a custom may affect it either immediately or in relation to its development' (Lynch 1969: 9).

In 1974, the task began of bringing forward recommendations of the CILM for government consideration.²³ Most pressing were the problems of claims to alienated lands, mainly foreign-owned plantations which in some areas were contributing to pressures on land and racial conflict. The Plantation Redistribution Scheme, adopted in 1974, was underpinned by a scheme of four laws, one of which was the *LGIA*.²⁴ The CILM had called for such a law to enable the vesting of land titles in customary groups, but the Act was brought in initially to allow the vesting of registered titles in redistributed plantations.

As PNG's Chief Legislative Draftsman, Joe Lynch drafted the Act, but it was more than just a dusting-off of his 1969 preliminary draft of the Group Land Ordinance.²⁵ Two of the CILM's small support staff of advisers were the anthropologist Professor Ron Crocombe, then Professor of Pacific Studies at the University of the South Pacific in Fiji, and Dr Alan Ward, then a Senior Lecturer in History at La Trobe University in Melbourne and an authority on Maori land affairs. They lent their authority to the CILM's recommendation that landowning groups should be incorporated with a constitution defining their membership, powers and decision-making processes. Furthermore, a drafting committee of government officials and lawyers from the University of Papua New Guinea participated in the drafting of the new Act during 1974.²⁶ But the approach taken in the *LGIA* of 1974 followed the main views and proposals formulated by Joe Lynch in his 1969 paper, and he is, therefore, entitled to be regarded as the true 'architect' of that innovative piece of legislation.

²³ From 1974 to 1978 I was employed in the PNG Department of Lands (under its different names), with responsibility for advising the PNG Government on land policy and legislation.

²⁴ The other laws were the *Land Acquisition Act*, *Land Redistribution Act* and *Land Trespass Act*.

²⁵ In the scheme of land reform legislation prepared in 1971, provision was made for customary groups to be registered as the owners of land, but the legislative machinery provided for the 'incorporation of landowning groups' was rudimentary and fell back on the use of 'group representatives' — a practice not favoured by the CILM (GoPNG 1973: 30).

²⁶ I chaired the drafting committee in my capacity as a government lawyer seconded to the Department of Lands to assist in implementing the CILM report.

Land Groups Incorporation Act 1974

The preamble to the *LGIA* states that it is a law 'to recognize the corporate nature of customary groups and to allow them to hold, manage and deal with land in their customary names'. The following treatment will first spell out the main provisions of the Act, then list its key features.

The Act provides a simple process for the incorporation of land groups, which begins with preparation of the group's constitution. This document must set out:

- the name of the group;
- the qualifications for (and any disqualifications from) membership of the group;
- the title, composition and manner of appointment of the committee or other controlling body of the group;
- the way in which the group acts, and its acts are evidenced;
- the name of the custom under which the group acts;
- details of the group's dispute-settlement authority;
- any limitations or conditions on the exercise of powers conferred on the group under the Act; and
- any rules applicable to the conduct of the group's affairs.

A group applies to the Registrar of Incorporated Land Groups for incorporation, sending in its constitution. The application is given publicity in the area concerned, and checks are carried out on the group's suitability for incorporation. After considering comments received and any objections, the Registrar can issue a certificate of recognition, whereupon the group becomes legally incorporated, gaining legal status as a corporation with perpetual succession and the capacity to sue and be sued, and do other things a corporation can do.

Upon incorporation, the rights and liabilities of the customary group become rights and liabilities of the ILG. The powers of the ILG relate only to land, its use and management, and they must be exercised in accordance with the group's constitution and the relevant custom as nominated in the ILG's constitution. Subject to these requirements, an ILG may acquire, hold and dispose of customary land, enter into agreements for its use and management, and distribute any product or profits from the land. Evidentiary provisions protect persons who enter into transactions with ILGs which are in formal compliance with the provisions of its constitution.

Each ILG must have a dispute-settlement authority, for dealing with disputes between group members or between the ILG and a member, including disputes over entitlement to membership. The dispute-settlement authority may be a person or persons specified by name or position, or determined in the manner

specified in the ILG's constitution. Dispute-settlement authorities are required to do 'substantial justice' between all interested persons, in accordance with the Act, the ILG's constitution and any relevant custom.

Provision is made for the dissolution of an ILG, in cases where it has ceased to function as such, or its affairs are being conducted in an oppressive or unfair manner, or for some other reason 'it is just and equitable that the affairs be wound up'. In general, customary land belonging to an ILG which has been dissolved reverts to the persons who would be its customary owners if the ILG had never been recognised.

Key features of the *Land Groups Incorporation Act* are:

1. It is a process for the recognition of existing groups — that is, bodies which already have a corporate identity under custom.
2. Groups have considerable freedom in preparing their constitutions. The Act prescribes certain matters upon which rules must be made (on membership, the way the ILG acts and its acts are evidenced), but it does not dictate the content of those rules.
3. ILGs remain subject to custom. They are required to identify in their constitution the custom under which they operate, but this may be done by simply naming it. There is no requirement for the custom to be written down.
4. The powers of ILGs are confined to their land — its ownership, use and management, and the distribution of its product and profits. An ILG may place limits or conditions on the exercise of those powers in its constitution.
5. Upon incorporation, the assets and liabilities of a customary group are transferred to the ILG. Upon dissolution, the ILG's customary land is vested back in its customary owners.
6. Protection is given to outsiders dealing with an ILG. They are entitled to rely on its constitution, and if the ILG has entered into a dealing — other than a transaction disposing of its land²⁷ — in accordance with the formal requirements set out in its constitution, that is generally conclusive as to its power to enter into the dealing.
7. Special machinery is provided for settlement of internal disputes within ILGs.

Results of the National Legislation for Land Group Incorporation

The *LGIA* was passed in 1974, but for many years there was virtually no action taken to use its provisions. This was partly because the Act was initially introduced as a component of the Plantation Redistribution Scheme, and when

²⁷ An ILG's power to dispose of its land would have to be proved under the normal rules of evidence.

that measure started to experience delays (Fingleton 1981), the immediate need for the Act declined. A second reason was the division of responsibility for land group incorporations between the Registrar-General (responsible for incorporations) under the Ministry of Justice, and the Ministry of Lands (responsible for land administration). A capacity for carrying out the special responsibilities involved in supervising the incorporation of customary land groups was never developed.

The third and main reason, as explained above, was that the national legislation for registration of titles in customary lands did not eventuate. The main purpose of the *LGIA* was to enable customary groups to hold, manage and deal with their customary land in their own names. The most important legal device to facilitate the management of land — affording security of tenure for its owners and for those entering into dealings with its owners — is a registered title. It was anticipated that, once the customary land registration law was in place, ILGs would be the bodies in which the group titles would be vested.²⁸ That was the clear intention of the *CILM*.

In 1988 I was engaged as a consultant, under the UNDP-funded Urban Settlement Planning Project in PNG, to design the land tenure arrangements for provision of low- and medium-cost housing to persons occupying customary lands at two sites — Buko settlement (40 ha) near Butibam village on the edge of Lae, and Kreer settlement (131 ha) within the Wewak town boundary. The arrangements were approved after extensive consultations with the customary owners of both sites and the people already occupying much of the land (so-called ‘squatters’ — nearly 500 households at Buko and over 400 at Kreer). A meeting was also held with the main commercial banks operating in PNG, whose managers agreed in principle that the proposed land tenure arrangements would provide acceptable collateral for lending to the settlers for their house construction and improvement. One aspect of the arrangements was for the customary groups which owned the land in question (six clans for the Buko site and two clans for the Kreer site) to be incorporated under the *LGIA*.

This was my first ‘hands-on’ experience of the Act I had been involved in drafting in 1974. My inquiries showed that only a handful of incorporations had been carried out by 1988 — 14 years after the Act was passed. During the period 1988–90, I visited the two sites on a number of occasions, holding village meetings and collecting data for the preparation of clan genealogies. Based on that information I drafted constitutions for the proposed ILGs, setting out their membership rules, decision-making processes, dispute-settlement authorities and so on, as required by the Act. Applications for incorporation were prepared

²⁸ Although Section 13(3) of the Act provides that the grant of an interest in land to a group member could not be registered under existing registration laws, this was only a temporary provision until the appropriate arrangements for customary land registration were in place.

and sent to the Registrar of Incorporated Land Groups and, after lengthy delays,²⁹ the ILGs were incorporated. The next step was for the ILGs to re-incorporate as companies under the *Companies Act* — one company made up of the six ILGs for Buko and another company made up of the two ILGs for Kreer. The companies would then be authorised to manage the settlement sites on behalf of the ILGs under management agreements, which included the granting of leases to the individual settlers.

Although by 1991 all the legal arrangements were in place, and house block surveys and the provisions for power, water and sewerage infrastructure had reached an advanced stage at the two sites, the project became a victim of PNG's financial crisis following the Bougainville rebellion. Negotiations were held with the World Bank, but the project was not included for funding under the Structural Adjustment Program or the Special Interventions Project, possibly partly because of the Bank's aversion at the time to working with customary land groups. Funding dried up, and the land tenure arrangements were never completed by the grant of leases to the settlers.

In 1992, I had my only other 'hands-on' experience of land group incorporation. That year I was engaged by Chevron Niugini Limited (CNGL), together with an anthropologist Dr Tom Ernst, to advise on the incorporation of customary groups within the Kutubu oilfields of the Southern Highlands Province. Tony Power, who had been the moving force behind the East Sepik land legislation in the 1980s, was now working for CNGL as their Business and Community Development Manager, and he drew on the East Sepik experience in conceptualising how ILGs could be used to improve participation by customary landowners in the benefits of the project. After a field trip with Ernst and Power to the area and some brief village meetings, I prepared the 'Manual of Laws and Procedures for Incorporation of Customary Landowning Groups', drawing on my previous experience in incorporating the eight ILGs for the Urban Settlement Planning Project. This manual was then used by CNGL staff to incorporate ILGs in the project area for the purposes of royalty distribution and participation in 'spin-off' business opportunities.

Mention must now be made of two developments which were to have major significance for administration of the *LGIA*. In 1992, the new *Forestry Act* of 1991 came into operation. One goal of the Act was to improve the arrangements for gaining access to PNG's forest resource, almost all of which stood on customary land. For this purpose, the Act provided that, as a general rule, the timber rights in customary land could only be acquired if the title to the land

²⁹ I had to chase up the Registrar more than once to carry out his registration functions — a sign that there was no routine in place for ILG incorporation.

was vested in land groups incorporated under the *LGIA*.³⁰ This requirement threw open the gates for a stream of ILG applications. In anticipation, the PNG Forest Authority adopted my CNGL manual prepared for the petroleum project at Kutubu as the model for its Manual on Land Group Incorporation (GoPNG 1995). Then, in 1998, a new *Oil and Gas Act* was passed. By one of its provisions (Section 169), payments of landowner entitlements had to be made to ILGs. What had begun as the brainchild of Tony Power, to facilitate involvement of customary landowners in the Kutubu petroleum project, had now become a statutory requirement for all forestry and petroleum projects across the country.³¹ And the same basic manual, which I prepared privately for CNGL, was now being used for the purposes of all forestry and petroleum projects in PNG.

The result was that, after almost two decades of negligible activity under the *LGIA*, the last decade had seen a flood of ILG incorporations. In March 2004 I interviewed the Titles Officer (ILGs) in the Department of Lands and Physical Planning in Port Moresby, who informed me that a total of over 10,000 ILGs had been incorporated by then, and that between 10 and 15 applications for new incorporations were being processed daily. All the duties of checking the suitability of new incorporations, as well as the oversight of existing ILGs, had fallen on the shoulders of this one officer. He had no special training, and was manifestly unable to carry out the statutory responsibilities in anything other than a perfunctory fashion. Most of the applications for incorporation related to forestry and petroleum projects,³² and it is apparent that the manuals were being slavishly followed without regard to local variations in custom. It was a situation where breakdown in the operation of ILGs was inevitable.

When to this was added the fact that the great majority of ILGs were being incorporated *not* for the main purpose for which they were designed — holding and managing land — but for the subsidiary purpose of receiving and distributing royalties from their land, then problems were even more to be expected. Management of a group's money was fertile ground for disputes everywhere: the greatest problems with ILGs in PNG arose from royalty distribution.

Issues Raised by the Legal Recognition of Customary Groups and Their Land Titles

I have been considering legislation which had two main aims — the legal recognition of customary landowning groups, and the registration of land titles in the names of such customary groups. Two main findings from the above

³⁰ Section 57 of the *Forestry Act* was originally headed 'Verification of tenure of customary owners'. This was later changed to 'Obtaining consent of customary owners to Forest Management Agreement'.

³¹ But not, apparently, for mining projects. The *Mining Act* of 1992 has no similar requirement for ILGs.

³² A newspaper advertisement early in 2004 referred to 599 ILGs in one Forest Management Area in the Gulf Province.

account are that a great many customary groups were recognised as ILGs, but no land titles were ever issued to them.³³

In these circumstances, most of the critical comment has been on the problems of group recognition and organisation, but some critics have also attacked the attempt to vest registered titles in customary groups. I have not carried out a systematic review of the literature, but sufficient, I think, to give a representative account of the main problems being encountered by ILGs. These can be divided into two main kinds — problems with the way the legislation is implemented, and problems with the legislation itself. A clear-cut division is not possible, but for purposes of analysis — in particular, for identifying the lessons to be learnt in the final part of this paper — I will consider the problems raised in the literature under those two headings, and then give a brief response to the criticisms.

Problems in Implementing the Legislation

As mentioned above, only the *LGIA* was implemented, so only the problems in implementing that legislation can be considered. It is worth repeating that the great majority of ILGs were incorporated for the purposes of forestry and petroleum projects, not for the vesting of land titles. Indeed, the anthropologist Colin Filer, who was much involved in developing the methodology for improving landowner participation in resource projects, describes how the *LGIA* was captured by the ‘heavy’ industries — oil and gas, mining, timber and palm oil — for their purposes (Filer, this volume). Another much-involved anthropologist, James Weiner, makes a similar point about CNG’s ‘managerial approach’ to the landholding groups in the Kutubu oil project area (Weiner, this volume).

A very good account is given by Samuel Koyama, an officer of the PNG Department of Petroleum and Energy, of problems which have arisen in the petroleum sector, in using ILGs as a mechanism for the distribution of royalties and other benefits. He discusses the main problems under the following headings:

- leadership struggles;
- unlawful and unfair sharing of benefits;
- complaints about leaders misusing ILG funds;
- lack of representation and responsibility of ILG leaders;
- lack of accountability and transparency;
- inability of ILGs to solve their problems internally;
- political alliances as a means of facilitating rent-seeking;

³³ To be quite accurate, I should say ‘no land ownership titles’ were ever issued to ILGs. Under the ‘lease-lease back’ system used mainly for oil palm development, landowners leased customary land to the State, which then leased the land back to ILGs made up of the customary landowners, who then subleased the land to an oil palm company.

- bribery and corruption within ILGs;
- failed landowner business enterprises (Koyama 2004: 23–8).

Koyama concludes that these are ‘mostly principal-agent problems arising from the poor design and lack of oversight of the ILGs — effectively, a failure of the government after it approved of these new institutions through legislation’ (ibid: 20).³⁴ Taylor and Whimp made a similar finding in their report on land issues for PNG’s Department of Mining and Petroleum. Although they had their reservations about aspects of the *LGIA*, they noted that ‘there are almost no government facilities for the proper management of ILG incorporation processes, and little support for ongoing maintenance outside that offered by developers’ (Taylor and Whimp 1997: 12).

The academic David Lea, in his recent study of the forest industry and the role of incorporated entities, concludes that ‘ILGs have been less than successful in resolving problems besetting the forestry industry’ (2005: 169). Having mentioned the requirement under the new *Forestry Act* for landowners to form ILGs for logging projects, he continues:

In most cases, however, it seems that, when landowners proceed to associate with the logging company, they persist in setting up so called landowner companies in particular to receive financial benefits which accrue to the landowners under the terms and conditions of the Timber Permit (2003/2004 Review Team 2004: 29). This is generally promoted by the PNG Forest Authority and the logging companies because it is easier to deal with a single entity than a large number of individual incorporated land groups (ILGs) (ibid).

Although Lea does make some important criticisms of the ILG concept, the problems he refers to are mainly caused by inadequate administration of the legislation — indeed, in this case, not just the *LGIA* but also the *Companies Act*.

Problems with the Legislation Itself

The criticism of the scheme of legislation in PNG for recognition of customary groups and registration of titles in their customary land generally takes the approach that what was being attempted was misconceived. Some critics take the view that ILGs are inappropriate entities to be involved in benefit sharing, while others challenge the legitimacy of attempts by ‘Western’ legislation to reconcile ‘traditional’ custom with development. Anthropologists in particular are concerned by what they see as attempts to ‘reify’ or ‘entify’ custom (Ernst 1999)³⁵ and perpetuate an ‘ideology’ of landownership (Filer 1997).

³⁴ I take Koyama to be referring here to the Government’s ‘approval’ for the incorporation of the particular ILGs, not approval of the ILG concept.

³⁵ ‘Entify’ is defined as meaning to make an entity, or to attribute objective existence to something.

For David Lea, ILGs have been unsuccessful actors in forestry operations because they are based on social relationships rather than on trust, and because they are essentially 'wealth-distributing' rather than 'wealth-creating' bodies (Lea 2005: 171–3). For him, the solution lies in abandoning ILGs and installing in their place companies created on a voluntary basis (ibid: 173).

James Weiner (this volume) asserts that the whole purpose of the *LGIA* is misconceived.

[It] is based on a quite erroneous assumption of the communal nature of landholding and transmission within the Melanesian 'clan', and of its essentially 'collective' interest ...

There is thus a fundamental conflict at the heart of the ILG mechanism, which crops up constantly. This conflict can be stated as follows: the *Land Groups Incorporation Act* of 1974 was purportedly designed to enshrine the *traditional landowning group as a legal landowning corporation*. The purpose of this was to give *legislative protection* to the traditional landowning units in any given area of PNG ...

The conclusion we must face is that *traditional custom cannot be protected by an Act of legislation* [my emphasis]. The legislation is composed and empowered by a cultural and legal system very much at odds with the way local 'traditional custom' arises and is implemented.

Weiner seems to be making two different points here — the *LGIA* has wrongly understood the nature of Melanesian customary tenures, and in any case, legislation cannot be used to protect custom — but his fundamental criticism is that Western-style legislation cannot faithfully capture customary institutions, values and processes. Colin Filer (this volume) represents this as an argument that there is 'no way of reconciling custom with development, either in theory or in practice'. His own argument is that 'Melanesian custom does not really exist in a form which would allow us to ask how it could or should be recognised in modern national law, because it was actually born out of the armpit of Australian colonial law'.

A Response

There is no doubt that the scheme of legislation for land group recognition and the registration of group titles has been dogged by problems of implementation. In many cases it is clear that the breakdown in ILG operations can be attributed to failure to follow the Act's requirements in setting up ILGs and supervising their operations, not to the Act itself. In commenting elsewhere on Koyama's list of problems above, I have made the further point that it 'is no coincidence that these are precisely the problems facing the PNG State, in its grappling with the new responsibilities of nationhood' (Fingleton 2004: 101). One can hardly

blame the ILG concept for 'leadership struggles' and lack of leadership responsibility, misuse of funds, political alliances being formed to maximise benefits, bribery and corruption, and the failure of 'spin-off' business enterprises.

To the extent that malfunctions are due to poor administration, the way forward lies in putting in place a suitable administrative structure, with adequate staff, trained to carry out their functions and provided with the funds and facilities to do so. Without the necessary capacity for a law to be properly implemented, it cannot be given a fair trial. Only when a law has been properly implemented can a true impression be gained of how well the law is suited to achieve its purposes. As with any new legislation, it is important to keep its operations under review, and be prepared to make amendments and other adjustments where the need arises. Acts usually require implementing regulations, to carry them more fully and effectively into operation. There is a basic *Land Groups Incorporation Regulation* providing the forms and procedures for incorporation, but no provision has been made for distribution of benefits, for example — an obvious area for better regulation when the Act was being mainly used for that purpose.

As for the arguments that the legislation is fundamentally misconceived, I would first of all point out that the views of some commentators seem to be based on some basic misunderstandings. It is not the purpose of the legislation to codify custom. The *LGIA* is a measure which is based on custom and which applies custom, but it does not seek to set out custom. Nor, as some people seem to think, was the Act intended to record land boundaries and the ownership of land. That is the function of a customary land registration system — the missing element in implementing the reforms based on the CILM report of 1973. Unfortunately, many commentators seem to base their views of the legislation on how it has been applied — or, too often, misapplied. One main purpose of this paper is to provide a better information base, so that the legislation can be more constructively analysed.

The biggest concern is the view that to legislate for the legal recognition of customary landowning groups was attempting the impossible. Taken to its full extent, this would mean that the legislatures of countries which have adopted constitutional democracies and the rule of law can never bring that law to the aid of their traditional systems of social, political and economic organisation. Such a result approaches the prescriptions of critics like Helen Hughes (see Weiner and Glaskin, this volume), who see no ongoing role for customary tenures, but only their replacement by Western-style freeholds. The same sort of dismissal of custom lay behind the objections of the colonial judges and legal officers, which delayed the introduction of Village Courts in PNG for three decades (Oram 1979: 58–64). Such was emphatically not the view of the framers of PNG's National Constitution, which makes custom part of the nation's underlying law,

which lays down as a National Goal that development should be achieved 'primarily through the use of Papua New Guinean forms of social, political and economic organisation' (Section 5), and which requires all governmental bodies (including the National Parliament) to apply and give effect to such National Goals (Section 25(2)).

Conclusion

The underlying purpose of the East Sepik land legislation was to give effect to the National Goals of PNG's Constitution as they relate to customary land in the province, in particular for development to take place primarily through the use of Papua New Guinean forms of organisation, and for traditional communities to remain as viable units of society. What prompted the laws was a new 'reality' — modern demands being put on people's customary land³⁶ — and the laws are an attempt to channel the response to that new reality. As observed by Nigel Oram, the aim of such laws is 'to bring about a synthesis of the modern with the traditional systems' and 'attempt to close the gap between Western and indigenous systems, which are products of different cultural milieux' (Oram 1979: 71).

Are the critics saying that these attempts by elected legislatures in PNG to adapt to new realities and further the National Goals are never valid? If so, then they invite the response which the pioneer Pacific anthropologist Bronislaw Malinowski gave in 1930 to the dismissive views of the British authorities on African systems of land and property law. Weiner himself quotes Malinowski's response:

It is absurd to say that such a system 'cannot be reconciled with the institutions or the legal ideas of civilised society'. To reconcile the two is precisely the task of Colonial statesmanship (cited in Weiner 2000: 124).

The aim of the legislative recognition of custom, customary tenures and customary groups is to provide a legal process which maintains their basic character and dynamism, and enables them to adapt to new demands. ILGs in PNG are not meant to be the actual clans or other indigenous groups, but their legal representation.³⁷ Weiner calls the results 'legal transformations' (ibid: 3), but then judges them according to their sameness. The important question is not 'Are they the same?', for they are not meant to be, but 'How will they work?' In other words, the attention should be on *how* to recognise custom, not on

³⁶ Weiner (this volume) acknowledges the new 'reality' among the customary landowners in the Kutubu project area, that the land was now valuable 'in a way that traditional land was not'.

³⁷ It should be noted that, upon the dissolution of an ILG, ownership of its customary land reverts to the customary owners. The implication is that the indigenous group continues to exist, and is not replaced by the ILG.

whether to recognise it. As the accounts of abuses by the leaders of ILGs show, this is a challenging task, but it should not be regarded as impossible.

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