

DISPUTE RESOLUTION

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Settling customary land disputes  
in Papua New Guinea

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## A snapshot

### Settling customary land disputes in Papua New Guinea

Land disputes are common to all regions of Papua New Guinea and cause social and economic disruption. Disputes may go back several generations, and settling them is complex. Papua New Guinea's Land Disputes Settlement Act 1975 created a three-tiered structure for settling disputes—mediation, arbitration and appeal—based on a combination of Melanesian customs, principles and practice, and formal law of British origin. However, the system is struggling to operate effectively. Since 2004, and especially following the National Land Summit of 2005, there has been renewed interest in land policy reform and dispute settlement, with major structural and operational changes proposed.

Papua New Guinea's system for settling customary land disputes provides some important lessons.

- » There are benefits from using existing customary norms and institutions as well as emphasising local expertise and decentralising decision making.
- » A land dispute resolution system based on customary norms and institutions requires ongoing review and monitoring and stable ongoing funding to remain operationally effective.

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## The setting

Papua New Guinea is a country with diverse natural environments, and social, cultural and linguistic groups. The country is made up of 19 provinces and the National Capital District. Most Papua New Guineans live on land under customary tenure. Customary land accounts for more than 97 per cent of the total land area. This case study focuses on the dispute settlement procedures that apply to customary land.

### **HISTORICAL AND LEGAL CONTEXT**

Before Papua New Guinea's independence in 1975, several pieces of legislation had been introduced to deal with matters relating to customary land. In 1952 the Native Land Registration Ordinance established the Native Land Commission with authority to determine ownership of customary land if disputes arose during the registration process.

In 1963 the Native Land Commission was replaced by the Land Titles Commission. In its early years the Land Titles Commission had exclusive jurisdiction to hear disputes over customary land and applications for ownership of that land. Appeals from the Land Titles Commission were to the Supreme (now National) Court. The commission was staffed by experienced professionals with legal training and/or long-term field experience. Over time the jurisdiction of the Land Titles Commission has been reduced and for many years it was administered by an Acting Chief Commissioner.

Following a surge in tribal fighting in the early 1970s, the independent Committee to Investigate Tribal Fighting in the Highlands Districts was appointed. That committee's 1973 report argued that most fights were connected with land disputes and that pressures on land, created by population increases and the planting of permanent cash crops (coffee in particular), had produced high levels of anxiety about land and undermined traditional authority (Fingleton 1981, p. 225). The committee concluded that the introduced system of deciding land disputes under the Native Land Commission and later the Land Titles Commission had not worked effectively and it recommended replacing it with a decentralised system of village-based courts with powers to dispense justice based on local customs and sanctions and with the full backing of the government.

### THE COMMISSION OF INQUIRY INTO LAND MATTERS 1973

In the period leading up to independence, land issues were prominent in Papua New Guinea's legislature. Four administration-sponsored land bills had been rejected by the House of Assembly from 1968 to 1972, an action seen by many as a turning point in the nation's history and as an early expression of growing independence. The Commission of Inquiry into Land Matters (CILM) was established by the subsequent House of Assembly (1972–75), which was the first Parliament fully constituted by elected members. CILM was a participatory and consultative inquiry and its members were all Papua New Guinea citizens. It covered all provinces and most districts and it was the most comprehensive commissioned inquiry ever to deal with the subject of land legislation. In its report of October 1973 the commission made numerous recommendations, including recommendations on basic principles of land policy, customary land, rural land, urban land, dispute settlement, land administration, surveying and forestry.

CILM's guiding philosophy was that land policy 'should be an evolution from a customary base, not a sweeping agrarian revolution'. The commission recommended an entirely new system for settling land disputes, based on the principles that:

- » people should settle their own disputes (and not pass that responsibility on to officials)
- » the process of dispute settlement should be brought much closer to the people
- » hearings should not be confined solely to who owns the land, but should also consider the rights of others to use the land and the needs of the parties in dispute.

It recommended that the Land Titles Commission, as an agency for settling disputes over customary land, be abolished and replaced by a three-tiered system of mediation, arbitration and appeal that was a part of the national judiciary and was decentralised to the provinces and the districts.

The current Land Disputes Settlement Act of 1975, drafted in accordance with these recommendations, was one of the earliest pieces of legislation to result from this inquiry.

## Theme and rationale

Land disputes can cause social disruption and sometimes loss of life. They can have a negative impact on the development of land and ultimately on the local and general economy. An efficient and effective system for settling land disputes is an essential element of any country's land administration. It is generally accepted that in kinship-based societies a land dispute settlement system must be locally based, participatory, simple to administer, affordable and likely to receive the general support of village communities. But settling land disputes is complex. There are many basic questions involved, and how these are answered has a major impact on the nature of the system and its effectiveness. Such questions include:

- » Should the emphasis be on restoring peace rather than on determining landownership?
- » Should responsibility be imposed on disputants to resolve their grievances rather than on an outside body?
- » Should the emphasis be on mediation and arbitration rather than adjudication?
- » How binding should dispute settlements be, and on whom?
- » How restrictive should the opportunity for appeal be?
- » Should lawyers be allowed into the process?

Based on CILM's recommendations, the Land Disputes Settlement Act in Papua New Guinea addressed these questions in innovative ways, and important lessons can be gleaned from more than 30 years of the Act's operation.

## The Land Disputes Settlement Act

### MAIN FEATURES OF THE ACT

The Land Disputes Settlement Act sets out three stages for the attempted settlement of disputes over customary land. Stage one is compulsory mediation by a land mediator, an appointed local person—in practice always a male—who the local community agrees possesses the knowledge required. If mediation does not settle the dispute, stage two allows for the dispute to be taken to a Local Land Court for arbitration. A Local Land Court comprises a Local Land Magistrate as chairman and either two or four land mediators. The court has wide powers under the Act to reach a settlement between the parties, but if no agreement can be reached it can impose settlement.

Mediated settlements are evidence of land rights but they do not bind the parties (unless approved by a Local Land Court), whereas arbitrated settlements do bind the parties. The Local Land Court is also authorised to deal with other matters ‘inextricably involved’ with the land dispute before it. In general, disputes cannot be taken further than the Local Land Court, but the Act does allow a limited right of appeal (against a Local Land Court’s decision) to the Provincial Land Court (stage three). Grounds for appeal are confined to errors of jurisdiction, decisions made contrary to natural justice or cases of manifest injustice.

The Act is largely administered by the Provincial Land Disputes Committee for the province concerned, lawyers are in general excluded from appearing in Land Court hearings and the Land Courts are not bound by any laws other than the Act itself or any other Act expressly applied to them. In special circumstances, under Section 4 of the Act the national government may declare that a land dispute should be settled by some means other than those provided by the Act. Such special circumstances include that the dispute is longstanding and previous attempts at mediation have failed, or the dispute has already resulted in serious breaches of the peace. This section of the Act was included as a ‘safety valve’ to help resolve intractable cases. It was not envisaged as a mechanism to facilitate, for example, speedier access by resource companies to customary land (as has recently occurred in a number of cases).

### **FROM 1975 TO 1994—SLOW PROGRESS**

The Land Disputes Settlement Act came into operation and Provincial Land Courts and Local Land Courts were established in mid-1975. The courts were designed to fit within the national judicial system, but be decentralised to the provincial level. The Act was introduced through regional workshops for magistrates and district officers, who were then required to convey what they had learned to their respective provinces and districts. Staff of the Land Titles Commission designed, produced and distributed manuals, registers, forms, flip charts and other publications to help introduce the new Act.

Although the dispute settlement system for customary land was introduced hastily and without adequate training of the major participants in its operation, it nonetheless began to work. Communities across the country gradually became accustomed to it and the system continued to function until the mid-1990s.

Regrettably the first 20 years of independence saw a steady decline in official interest in the fate of Papua New Guinea’s land dispute settlement system, and herein lay a number of important lessons. One of the major lessons was that all systems of regulation and control, however innovative at the time, need to be reviewed regularly. While the Act had a virtual in-built review system via the Provincial Land Disputes Committees, like other elements of the Act these committees tended to atrophy over the years.

## FROM 1995 TO 2004—SYSTEM IN DECLINE

The issue of land dispute settlement was back on the policy agenda briefly in 1995 during the World Bank-funded Land Mobilisation Project in Papua New Guinea. That year, as part of the project, a review of the first 20 years of the Act's operation and mechanisms was commissioned. The review was carried out by Norm Oliver, the principal author of this case study.

The purpose of the review was to examine the existing organisations and mechanisms responsible for resolving land disputes and make recommendations on their rationalisation and possible reinforcement. The review included discussions and interviews across the country with judges, magistrates, district officers, councillors, mediators, clerks of court and others involved in the dispute resolution process.

The review identified major shortcomings in the implementation of the Act and made a number of recommendations to address these issues. However, little official government interest was shown in the way the Land Disputes Settlement Act was working.

## FROM 2004 TO THE PRESENT—GROWING INTEREST IN REFORM

By 2004 there was some evidence of growing interest in reforming Papua New Guinea's land dispute system.

### Justice Ambeng Kandakasi

One example of the growing interest in reform came from Justice Ambeng Kandakasi, who was appointed Judge of the National Court in 2001 and who is currently (2007) Chairman of the Judicial Committee on Alternative Dispute Resolution. Judge Kandakasi has described the Land Disputes Settlement Act as relevant and appropriate to the needs, aspirations, culture and traditions of the people of Papua New Guinea.

In his view, mediation had a longstanding history in Papua New Guinea. At the centre of traditional dispute settlement processes was consultation and consensus, with customary leaders usually representing the disputant groups. The payment of reasonable compensation and the maintenance of existing relationships and the creation of new ones were the usual focus.

Judge Kandakasi identified some weaknesses in the system, training being a major problem. He suggested that better and more frequent training in the mediation and arbitration systems of the Act would create more understanding of the law and procedures and increase their effectiveness. Additionally, he suggested the act could be improved by adding definitions of the words 'mediate', 'mediation', 'custom' and 'customary law'. Without a clear explanation of these terms it is difficult to begin the proceedings of mediation and arbitration (Kandakasi 2003).

### The Magisterial Service Land Court Review 2004

Further interest in reform was evident in the four Regional Land Court Review Workshops held in 2004 for district managers. These workshops identified the major causes of disputes over land and categorised them as either:

- » matters that should be brought under the provisions of the Land Disputes Settlement Act, or
- » matters that were within families or between families so closely related that they required no outside intervention.

A book on land mediation was discussed at the workshops and one is being prepared by the Magisterial Service. Another result of the workshops was the installation of an electronic database to keep track of cases brought before Land Courts.

### The National Land Summit 2005

The largest contributor to the movement for land reform, including the land dispute settlement system, was the National Land Summit held in 2005. The Minister for Lands and Physical Planning, Dr Puka Temu, in August 2005 convened this national forum to identify the current problems with land administration, to help to develop appropriate policies and to advise on the way forward. The summit submitted a report to the National Executive Council. The council created the National Land Development Taskforce and appointed members to its three committees.

### The National Land Development Taskforce 2006

One of the three committees formed by the National Executive Council was the Land Disputes Settlement Committee. It was chaired by the Acting Chief Commissioner of the Land Titles Commission and included senior public servants from the Department of Justice and Attorney General, the Magisterial Service, the Department of Lands and Physical Planning and a representative from the private legal profession. Meetings took place at regular intervals from February to July 2006. The committee submitted its report and recommendations to the Minister for Lands and Physical Planning in October 2006. It identified the following—by now familiar—shortcomings in land dispute settlement.

- » Land dispute settlement organisations were underfunded, understaffed and under-prioritised, resulting in an unacceptable number of outstanding unheard matters.
- » The Magisterial Service gave precedence to hearing criminal and civil cases ahead of land disputes, which contributed to the backlog of unheard cases.
- » The delay in dealing with land disputes had led to social disharmony, inter-tribal and inter-clan fighting, and increased crime rates.
- » Unwarranted delays in hearing land disputes increased the costs of resource developments and slowed development implementation.

- » The national government's continued use of Section 4 of the Land Disputes Settlement Act was contrary to its original intention and showed a lack of confidence in, and respect for, the legislation.
- » Confusion existed over which court or commission has jurisdiction over customary land.

Recommendation No. 48 of the National Land Development Taskforce concerning land dispute settlement simply reads 'That a single Land Court System be established in Papua New Guinea'.

In arriving at this recommendation, the taskforce concluded that having three separate bodies—the Land Titles Commission, National Land Commission and Land Courts—was cumbersome, confusing to the community at large and costly to the nation because of conflict, the waste of resources and delays in development (National Research Institute 2007, p. 84). It noted that the proposal for a single land court system was not new, having been made a number of times since the 1973 Commission of Inquiry into Land Matters.

### Ministry for Justice white paper 2007

The most recent reform initiative arose from the national government's determination that major changes were needed in how institutions within the responsibility of the Ministry for Justice were organised. The National Executive Council asked the Minister for Justice to examine the recommendations of the 2006 National Land Development Taskforce and to prepare a response for its consideration.

The preferred option, set out in a white paper, was to establish a single land court system *within* the Magisterial Service. Other recommendations called for:

- » a specialist Land Division to be established, headed by a Deputy Chief Magistrate and staffed by specialist magistrates dedicated full time to disposing of land dispute matters
- » the Land Titles Commission and the National Land Commission to be abolished, and their jurisdictions transferred to a specialist District Court.

The white paper stated that a structure designed along these lines would be more cost-effective than establishing an entirely new single land court, as proposed by the taskforce.

## Constraints on the system for resolving land disputes

### DESIGN ISSUES IN RELATION TO THE LEGISLATION

Under the Land Disputes Settlement Act a Local Land Court sitting on any case is required to visit the disputed area twice: the first time to see what the nature of the problem is before beginning to hear evidence; the second time on completion of the hearing, to hand down the decision, give the reasons for it and indicate to the parties involved any boundaries decided. This is a necessary but costly and not always easy procedure to comply with because the area may be remote and access to it may require hours of walking over difficult terrain.

The prohibitive costs of accessing Local Land Courts could be seen as a legislative design fault. The introduction of computer and communication technology and the allocation of adequate funding may help to overcome this problem.

### RECORDING OF CUSTOMARY LAW AND CASE DECISIONS

Land customs differ from place to place, and Local Land Courts must attempt to take account of this when disputes are referred to them for arbitration. No official attempt has been made to record customary law in relation to land since the Native Land Registration Ordinance was introduced in 1952. Decisions in arbitration or appeal cases have not been circulated among the courts. The magistrate of a Local Land Court has nothing to refer to for guidance, except to discuss local custom with local land mediators. Provincial Land Magistrates face similar problems when hearing an appeal against a Local Land Court decision based on local customs that relate to land.

### CAPACITY AND FINANCING

The Magisterial Posting List for 2007 shows 103 magistrates posted throughout the country, leaving 52 districts without a magistrate on station. These districts are covered by circuits. The lack of magistrates is a constraint on the prompt hearing of land dispute cases. This situation was exacerbated when the minimum qualifications for appointment to the magistracy were raised to a degree in law plus three years practice. The pool of people available and qualified for appointment as local and provincial Land Court Magistrates is small and becoming smaller. The lack of government housing in provinces and districts limits the number of officials involved in the land dispute settlement system.

Finance remains the biggest constraint on the effective operation of the Land Disputes Settlement Act. Some provincial and community governments have realised that land mediators fill an important role in society by maintaining harmony, peace and stability and allowing peaceful contact and commerce to grow, and have decided to fund their salaries. However, this has not become common throughout the country and has been adopted by only the more prosperous provinces, such as East New Britain.

### **DIVIDED AUTHORITY AND RESPONSIBILITY**

A major complication for funding and staffing the land disputes settlement system is that responsibility for it falls between two departments—Lands and Justice—and neither has taken leadership in resolving this hiatus. The reform efforts under way on land policy generally are expected to address this issue.

## Applicability and transferability to other Pacific nations

### **MELANESIAN PRINCIPLES**

Despite the constraints mentioned, the principles underlying the system for resolving customary land disputes remain popular and legitimate in the eyes of the people of Papua New Guinea. The underlying principles, which include mediation based on familiar custom and tradition, and personal involvement by disputants in a local setting, also have resonance in other parts of Melanesia and the Pacific islands.

### **DECENTRALISED SYSTEM**

Land dispute resolution has been decentralised to fit into Papua New Guinea's system of provincial government. Being administered from the provinces brings the Act closer to the people. Local Land Courts have been established in smaller administrative districts bringing the system even closer to people. Many nations of the South Pacific have similar systems of administrative governance, which lend themselves to such decentralised and localised community involvement in dispute settlement.

## Lessons

### MAKE USE OF EXISTING CULTURAL INSTITUTIONS

#### LESSON 1

A three-tiered system of land dispute resolution involving mediation, arbitration and appeal works well within the context of local Melanesian cultures and is regarded as a legitimate form of intervention.

#### LESSON 2

Mediation is more likely to be successful where procedures take place locally, the disputants personally take part in the resolution process, and local expertise in land and custom is drawn on.

Papua New Guinea's Land Disputes Settlement Act was designed by Melanesians for a Melanesian society. Its structure of mediation, arbitration and appeal is based on a combination of Melanesian customs, principles and practice, and formal law of British origin. The mandatory involvement of the disputing parties in mediation is based on the principle that a resolution by consensus is more permanent than one imposed by authority. The system is decentralised to district level to bring it closer to the community it is designed to serve.

### PROVIDE GOVERNMENT SUPPORT AND ADEQUATE RESOURCES

#### LESSON 3

A land dispute resolution system that makes extensive use of local custom does not require less effort and resources from government and other stakeholders to maintain it. It requires ongoing training and support for administrators (mediators and arbitrators), cost-effective procedures for disputants, clear leadership from bureaucracy, and ongoing financial commitment from government.

#### LESSON 4

To remain relevant and effective, the system for settling land disputes needs regular reviews that are supported by government commitment to implement any major recommendations.

Although Papua New Guinea's dispute settlement system has a number of good features, it is now struggling to operate effectively. The major problems with the system reflect a lack of adequate resources, legislative design flaws, a lack of bureaucratic leadership and failure to maintain a pool of adequately trained people to administer it.

## Appendix: Interviews

- » John Numapo, Chief Magistrate, Magisterial Service
- » Stephen Oli, Deputy Chief Magistrate, Magisterial Service
- » Rodney Togumagoma, Deputy Registrar, Magisterial Service
- » Josepha Kiris, Chief Commissioner, Land Titles Commission
- » Agi Ila, Registrar, Land Titles Commission
- » Micah Pitpit, Commissioner, National Land Commission
- » Oswald Tolopa, Director of Policy, Department of Lands and Physical Planning

### **Phone and correspondence interviews**

- » Justice Ambung Kandakasi, Judge of the National Court of Papua New Guinea
- » Horim Ladi, Deputy Provincial Administrator, Policy, Planning and Evaluation, East New Britain Provincial Administration

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