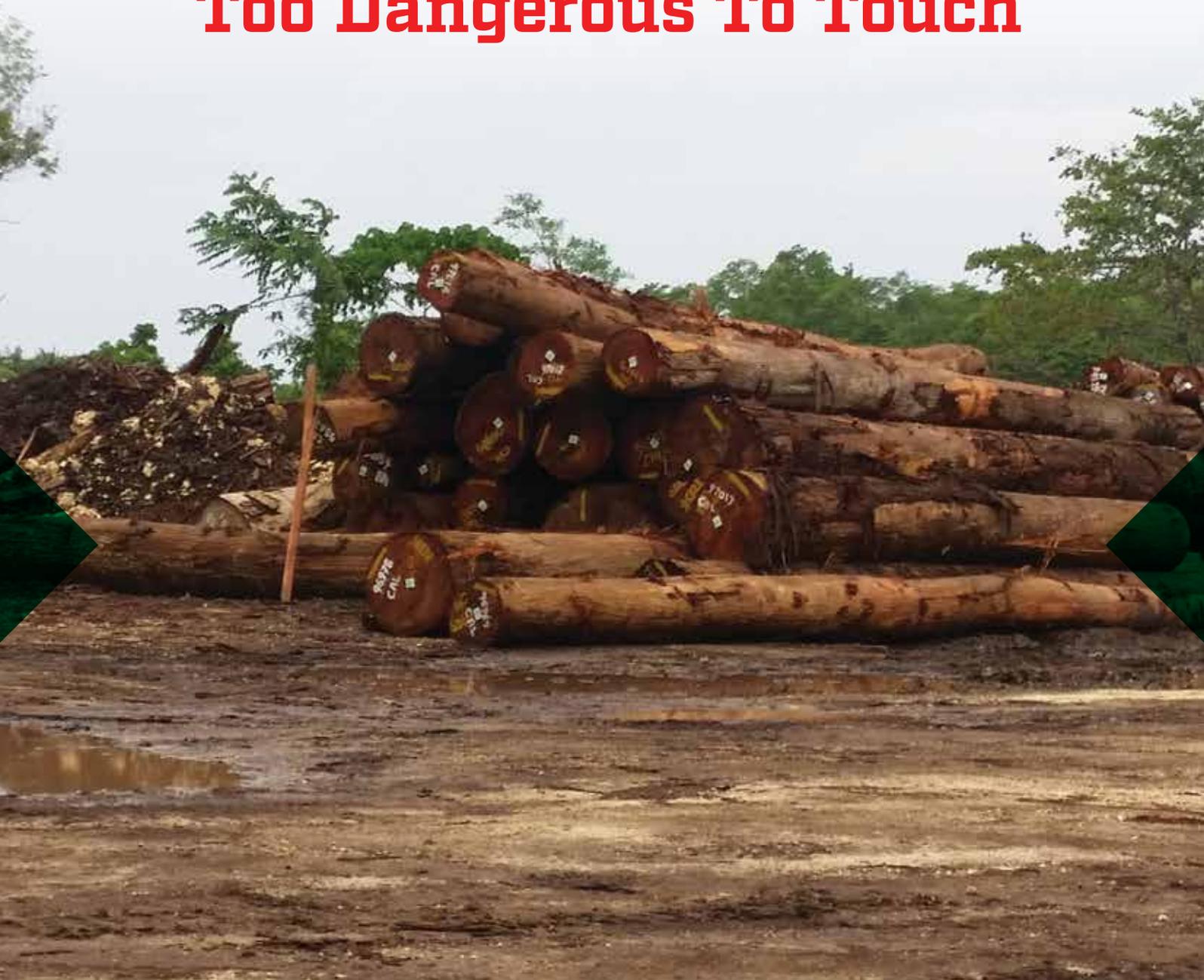




CUSTOMARY LAND REGISTRATION:

Too Dangerous To Touch



Land Registration Paper 2017



WHAT IS CUSTOMARY LAND REGISTRATION AND HOW WE RISK LOSING CONTROL OF OUR LAND

SUMMARY

Most people¹ in Papua New Guinea still live on their own clan land. This land is central to their whole identity and culture as well as being a vital economic resource on which families and communities rely for their survival.

While clan control over their own land is recognised and protected in the Constitution and Land Laws, there have been repeated efforts by government to introduce systems of land registration so land can be commoditised and traded.

Land registration and the issuing of titles often leads to dispossession as people are excluded from their own land and rights are given to outsiders. Once disposed people can no longer rely on their land to provide the necessities of life and are forced to become dependent on money and they start to lose their culture and identity.

Attempts by government to move people off their land and give control to outsiders is ideologically driven and supported by the mistaken belief land needs to be 'freed up' and given over to large-scale projects in order to bring 'development'. These agriculture, forestry and mining projects have a long-history in PNG of failing to deliver meaningful benefits to landholders; while research shows land is more productive and profitable if left in local hands.

Rather than focusing on land registration, the best pathway for improving the lives of people in PNG is to ensure the protection of customary land and for the needs and self-determination of local peoples to be at the forefront of development and economic policy.

BACKGROUND:

Land is the basis of life for many indigenous societies and this is especially true in Melanesia. Melanesians

relationship with land is complex, multi-layered and has a long-history. Land is integral to subsistence lifestyles, cultural management, social cohesion, food security and provides cash incomes but its also so much more as it embodies the whole Melanesian identity and culture. In Papua New Guinea 97% of the land is customary land, held under a collective and unalienable title which provides communal benefits over successive generations. Customary land supports perhaps as much as 85% of the population; more than 7 million people.

Land registration is a process that, by defining the title to the land and making it available for commercial transactions, puts people's whole lives and their communities' futures at risk.

Those who argue for the privatisation of land through registration, claim customary land is an obstacle to development. However, this argument is completely unproven and undervalues or disregards the current use and importance of customary land to people, communities and our whole Melanesian way of life. The titling of traditional land can lead to its permanent loss with devastating social and environmental consequences. Already we have seen control over 10% of customary land (more than 5 million hectares) taken from local people through fraudulent agricultural (SABL) leases.

LAND IN PAPUA NEW GUINEA:

In Papua New Guinea we have a very unique system of land tenure where 97% of our land is recognised as Customary Land.

Customary Land is communally held, with all members of the clan having all manner of different rights over the land. The land is held by clans or groups of clans (communities) in trust for future generations and custom governs all aspects of land dealings and disputes. Boundaries between

¹ As many as 85% of the total population

WHY IS LAND REGISTRATION DANGEROUS?

1. Land registration defeats all the National Goals in our Constitution:

- Land registration undermines the First National Goal on integral human development
- Land registration defeats the Second National Goal on equality and participation
- Land registration contravenes the Third National Goal on Sovereignty and Self-Reliance
- Land registration defeats the Fourth National Goal on the environment and sustainable use
- Land registration undermines the Fifth National Goal on Our PNG Ways

2. Customary Land registration does not make economic sense for local people

3. Land Registration will exacerbate land shortages amidst a rapidly growing rural population

4. Land registration destroys our rich culture

5. Land Registration has already led to corruption and mismanagement

providing a social safety net in the modern cash economy.

Land was seen as a critical issue in the lead up to Independence and the development of Papua New Guinea's Constitution. The consultations by the Constitutional Planning Committee (CPC) prior to the drafting and adoption of the Constitution were the most extensive in our nation's history. The CPC report explains the views and intentions of our people at that point in our history, in relation to land:

1. It is important to protect ancient or customary land rights to help build an egalitarian, (equal/fair) society; and
2. Land rights and use of natural resources should be about TRUSTEESHIP rather than OWNERSHIP; and
3. The use of land should be "strictly controlled" with only some very limited leasehold interest allowed for foreign citizens.

Subsequently, the protection of Customary Land (and indeed, all land) was guaranteed in the Constitution.²

WHAT IS LAND REGISTRATION?

Governments and corporations see customary land as a valuable commodity that is underutilised and which, under their control, could generate commercial profits. They also see customary land as a barrier to bringing people into the market economy where they are dependent on money and store bought food and products. Taking land away from people removes their independence and freedom.

Land registration is the process facilitated by governments to convert customary land into a commodity, or an alienated commercial instrument, so that it can be traded and corporations can profit from it and eventually, force people off their land. This sits within a framework where government policy sees foreign direct investment and economic growth as aims without considering who benefits and who losses out.

Land Registration first fixes the boundaries between clan lands, which historically were often fluid and subject to change, it then takes the private information on where those boundaries are and makes it public. This is done through a process of

surveying and mapping.

The process then goes further to identify the current custodians of the land, and records those details and also makes them publicly available.

Once land is registered it can be traded because the boundaries of the land, and the ownership become public knowledge and, in the registration process, a few nominated people are given the right to make decisions that bind the whole group. The land is still 'customary land' but the historical protections are removed and this can be exploited by outsiders to remove the rights of the customary landholders or to move them off the land completely. The State suddenly takes a position of power over its people. It may even levy taxes on the land.

Once land is registered any dealings and disputes are subject to written laws, not customary law. This further disempowers local people by moving dispute settlement into the formal court process, far from local communities and with paid lawyers and laws written in a 'foreign language'.

Land registration also opens the door to corruption and illegal land deals, which are huge problems currently in our country. The Department of Lands has been described by its own Minister as the

most corrupt and there are numerous examples of collusion between public servants and corporations to grant unlawful access to both urban and rural land.

The most egregious example is the SABL land grab involving more than 5 million hectares of customary land.

Once land is registered, it creates the concept of "OUTRIGHT OWNERSHIP"³ by one person or group whereas with customary land we traditionally only have the concept of CUSTODIANSHIP OR 'CUSTODIAN OWNERSHIP' for the collective benefit of present and future generations.

By the State defining boundaries, identifying the custodians, making the information public, introducing the concept of ownership and applying the common law, land registration makes customary land susceptible to permanent alienation and the dispossession of traditional landholders.

Because of these dangers the Constitutional Planning Committee (CPC) favored 'registration' only in very particular circumstances, where it would allow customary landowners to take back control of alienated plantation land or collectively organise and work their own land.



3 The Constitutional Planning Committee were against the concept of "ownership"

2 PNG Constitution, Section 53

THE HISTORY OF LAND REGISTRATION

International

Land registration has been used around the world to disenfranchise and impoverish indigenous communities. On the African continent, European colonialists used land registration to access indigenous land. In Australia the colonialists introduced the Torrens Title system of land registration to defeat all indigenous claims to land. Land registration laws implemented in New Zealand

after the Treaty of Waitangi resulted in alienation of 83% of traditional Maori Land. Ironically, some of the greatest colonialists, the British monarchy and its Lords and other gentry, have successfully resisted the registration of their own land in the United Kingdom.

Papua New Guinea

Registration of customary land is not a new issue in PNG. The debate about it has raged on since before Independence, with outsiders constantly using the argument registration is necessary to allow

FIRST 60,000 YEARS: As far as we can know, customary systems developed a superior form of sustainable land management, through community regulated 'custodian ownership'. Land was held by communities in trust for future generations and custom governed all aspects of land management and dispute resolution. Land was cherished and protected and provided for all the people's needs, spiritual and physical.

6-7,000 years ago: Papua New Guinea is one of the first places to begin practicing organised agriculture and crop cultivation. Irrigation systems in the Eastern Highlands are the oldest known advanced agriculture anywhere in the world.

1850s: The British in Australia create 'Torrens Title' specifically to 'extinguish' native (indigenous) claims for traditional ownership of land

1870: First colonialists arrive in PNG and start 'taking' land for plantations, gold mining and settlements in exchange for basic tools and other 'gifts'

1963: Land Tenure Conversion Act 1963 allowed for conversion of customary land to private freehold land, resulting in permanent alienation. Land Titles Commission was responsible for this process.

1973: Commission of Inquiry into Land Matters (CILM). The Commission findings formed the basis for the protection of customary land in the Constitution and the development of our National Goals.

1987: Land Tenure Conversion Act 1963 amended to allow ILGs to apply for registration of customary land

1991: Land Act 1991 provides for the administration of all land in PNG through the Department of Land and Physical Planning (DLPP). It does not provide for customary land registration.

1995: World Bank re-introduced Land Registration as a condition to its structural adjustment program resulting in

protests by University students and widespread community opposition. It was thereafter abandoned.

2005: National Land Summit in Lae, Morobe Province¹ One of 3 recommendations of the summit was to 'develop a framework for maximizing the development potential of land held under customary tenure'.

2006: National Land Development Taskforce (NLDT) Report released.² The NLDT was formed to implement the recommendations of the National Land Summit. The Report contained 54 recommendations and led, in 2009, to amendments to the Land Registration Act and the Land Groups Incorporation Act.

2008 (May): PNG Constitutional & Law Reform Commission Report containing recommendations and draft legislation aimed at a better process for registering ILGs and managing them for purposes of registering customary land.

2008 (November): NGO response to the National Land Development Taskforce Report released³. The NLDT Report was criticized for failing to include an analysis of the impact land registration would have on women and its failure to include an economic analysis which showed landholders would benefit economically from land registration.

2009: Land Registration (Customary Land) (Amendment) Act 2007 and the Land Groups Incorporation (Amendment) Act, 2007 passed by Parliament⁴, with very little debate or public consultation, to promote the registration of customary land through ILGs. The intention is not for an ILG to register the whole of their customary land, but only those individual land parcels which are suitable for 'development'

2015: Tim Andersen's book "Land and Livelihoods in Papua New Guinea" demonstrates that 'rural hybrid livelihoods' based on customary land have far greater economic potential than any of the formal rural sector options based on land registration schemes. This directly contradicts World Bank claims and the NLDT report discussed above.



Papua New Guineans to participate in economic development to try and take control of land away from local people.

Here is a brief look at the timeline:

CURRENT SITUATION:

Voluntary land registration under the Land Registration (Customary Land) Act 2007, provides a third alternative to the other two options for land registration previously available;

- i. registration under the Land Tenure Conversion Act, 1963 (which leads to permanent alienation),
- ii. the lease-lease back arrangements⁴ through the Special Agriculture Business Leases (SABL),

WHY IS LAND REGISTRATION DANGEROUS?

Land Registration is driven by the desire for access to land to trade and make profits from. Advocates want land to be registered so it can be used by outsiders. Taking control of land away from local people also makes them subservient, easier to

control and dependent on imported and store goods. It forces people to enter the global economy at the expense of our PNG Ways. You can already start to see why this is dangerous.

1. Land registration defeats all the National Goals in our Constitution:

- **Land Registration** undermines the First National Goal on integral human development as people lose their subsistence, and it undermines their culture and social identity when land becomes a commodity that can be traded.
- **Land Registration** defeats the Second National Goal on equality and participation as when land is registered people lose their right to be involved in decision-making and we create inequality between those who have and those who do not have land.
- **Land Registration** contravenes the Third National Goal on Sovereignty and Self-Reliance as outsiders take control of the land and resources and people are no longer independent, self-reliant and lose their safety net. At a local level, people become

1 National Land Development Taskforce Report (2007), pp 1-4

2 Key focus of this Report was on how to access customary land 'for development purposes' – but whose development?

3 The NGO response was prepared by various NGOs and published by AID/WATCH. It is available at <http://aidwatch.org/publications/papua-new-guinea-ngo-response-to-the-land-development-taskforce>

4 See Ogle,L, Tararia.A , (2010) Incorporated Land Groups and the registration of Customary Land: Recent Developments in PNG,p25

4 Lease-Lease back is a scheme in which the State acquires a small block of customary land, converts it into a State Lease, and then leases it back to its 'custodian owners', for agricultural business purposes. This arrangement is intended to protect customary land from permanent alienation while still proving a secure title. These schemes have been grossly abused in the recent past with leases granted over large areas of land ending up in the hands of foreign corporations.

dependent on imported store goods for all the necessities of life. People are forced to work in slave-like conditions on their own land and inequality grows. Land Registration also undermines our National political and economic sovereignty and self reliance as foreigners take control of land and start making decisions and dictating policies to government.

- **Land Registration** defeats the Fourth National Goal as the environment is no longer well-managed by those who live and depend upon it and resources are not replenished as mechanized and industrial-scale exploitation are introduced to maximize financial returns.
- **Land Registration** undermines the Fifth National Goal on Our PNG Ways, which are lost when we do not have our land to sustain our culture, our societies and our way of life and there is nothing for us to pass on to our future generations

In summary, Land Registration defeats the National Goals in our Constitution by, impoverishing our people, making us weak and dependent, and increases inequality and gender and social division while destroying our environment, culture and identity.

2. Customary Land registration does not make economic sense for local people

- (i) Land registration fails to recognise the importance and value of the informal sector to the majority of our people. Rural livelihoods and the local economy largely depend on selling crops such as garden produce and cash crops planted on traditional land. Academic research⁵ on the valuation of PNG land, published in the book *Land and Livelihoods in PNG (2015)* calculates the actual productive value of customary land at up to K40,000 per hectare per year.⁶

In contrast when land is 'registered' and rented out for logging or oil palm the rents payable range from zero to as little as K100.

People do not need to register their land and give it to foreigners to increase their incomes or

improve their lives. What people need are decent government services and good transport and infrastructure links. These could all be provided if we got rid of the corruption and mismanagement in our government departments and decentralized spending and decision making to the local, district and provincial levels.

- (ii) 'Custodian owners' cannot 'capitalise' on their land without the risk of losing it.
- (iii) Advocates of land registration argue the only 'productive agents' are those who exclude communities from their land. They are openly anti-social and fail to acknowledge or understand the strength and intricate values of custodian ownership and local economic systems.



3. Land Registration will exacerbate land shortages amidst a rapidly growing rural population

Papua New Guinea's population has already doubled to 8 million since Independence and is projected to reach 10 million by 2030.⁷ Already this is creating stress on the land and communities and increasing levels of conflict and violence⁸ as people need more land for farming to feed themselves and there is more competition for resources.⁹ Population growth makes safe guarding customary land even more important for food security and the well being of communities.

4. Land registration destroys our rich culture

As explained earlier, there are very strong cultural and spiritual bonds that exist between people and their land. Our whole culture which can be expressed as 'Melanesian Ways' or 'PNG Ways' is entrenched and depends on our relationship with our land and nature. By severing the link between people and their land, land registration undermines our whole culture and spirituality.

⁷ <http://www.worldometers.info/world-population/papua-new-guinea-population/>
⁸ <http://www.irinnews.org/report/94512/papua-new-guinea-population-growth-fuels-conflict>
⁹ <http://www.abc.net.au/news/2016-12-29/png-village-facing-food-crisis-amid-rising-population/7958264>

5. Land Registration has led to corruption and mismanagement.

It is well documented how big a problem corruption is in PNG. This corruption extends into the Department of Lands and land administration. The SABL land grab and the various scandals around the national housing stock and the allocation of state leases together with the ongoing problems in the forestry sector and around the administration and allocation of mining and petroleum and gas revenues, show very clearly that the State cannot effectively manage its 3% share of land in the country or those areas subject to logging or mining. Government and government departments cannot be trusted to administer Customary Land unless and until corruption is under control.



⁵ cited 27 times in the academic literature
⁶ This approach to land valuation was notably cited in the British Government's 2008 report on climate change (Mayanne Greig-Gran (2008) *The Cost of Avoiding Deforestation: update of the report prepared for the Stern Review on the Economics of Climate Change*, (International Institute for Environment and Development (IIED), London, p.13)

THE WAY FORWARD ON LAND

The best pathway for improving the lives of people in PNG is not to alienate their right to land and destroy the way of life that is attached to this relationship. At the heart of development and economic policy must be the needs and self-determination of local peoples of PNG. Any development policy that sees dispossession as a necessary and unavoidable process is fundamentally opposed to the rights of people and the preservation of our own unique culture.

There is no “scarcity” of land for development. Communities do not need to ‘free up their land’ or register their land in order to improve their lives. There is no need for land registration.¹⁰

Instead, the most pressing land issue that needs to be dealt with is the problem of maladministration, fraud and corruption in the existing management of State land and natural resources.

The Government must:

1. Make the National Goals and Directive Principles in The Constitution justiciable. This was proposed in 1985 in the General Constitutional Review, but subsequently buried.
2. Repeal the Land Act and the Land Registration (Customary Land) Act and dissolve the Department of Lands so we can start again to build a modern, effective system of land administration.
3. Recognise informal or customary leases which embody customary values and are often used where schools or churches are established on customary land. These are a better alternative to formal ‘western-style’ leases, which are often as bad as tenure conversion and sale.

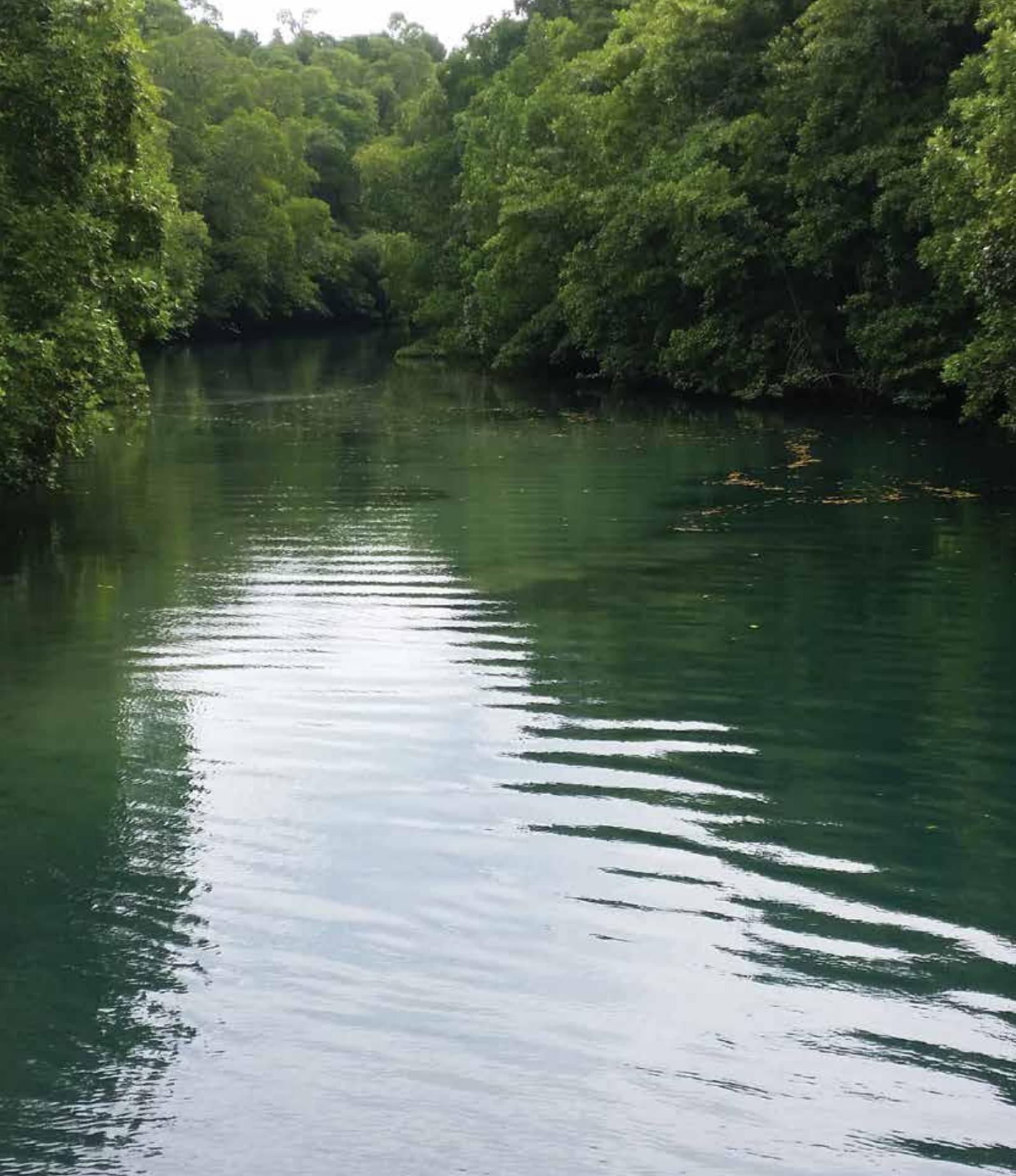
4. Enact new legislation that:
 - confirms customary land cannot be alienated;
 - completely decentralizes all land administration and front-line adjudication to the Provinces and ensures the provincial offices are properly resourced;
5. Adequately resource Customary land adjudication by:
 - Establishing a single hierarchy of land, resources and environment courts from the village to the Supreme court, with specialist divisions in the superior courts
 - Clearing the back-log of land cases at the district and provincial level
 - Ensure all provincial land dispute committees to meet regularly
 - Strengthening the enforcement of customary land orders.
 - Recruit and house, supervising customary land magistrates for each district with their own support staff and resources.
6. Abolish all Special Agriculture Business Leases except the few exceptions found by the Commission of Inquiry to be legitimate.¹¹
7. Deal with the gross mismanagement in the National Housing Commission¹² by abolishing both the National Housing Commission and the National Housing Estates Limited. Establish a new, transparent and publicly accountable body set up to manage state housing and other State land and land assets.



¹⁰ Except possibly in very special circumstances and on a very small scale in urban areas

¹¹ This should include setting a scale of compensation limited to cases where genuine aggrieved parties innocently incurred costs, and can show there was a wrongful inducement, and it was reasonable to expend monies in the circumstances. Specifically, the new laws should ban compensation for loss of future profit or loss of opportunity costs.

¹² <https://pngexposed.wordpress.com/2016/09/05/oneills-housing-amnesia-strikes-again/>



www.actnowpng.org