

# A Critique of Incorporated Land Groups in Papua New Guinea

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## Abstract

Customary land tenure is an inherent feature Papua New Guinea society and culture and its protection is enshrined in the nation's legal framework. It is also highly contentious. Powerful economic interests ensure customary land tenure is always at the forefront of national and local debates about development and wellbeing. These debates often end up focused on Incorporated Land Groups. Although Incorporated Land Groups have been in use in Papua New Guinea for nearly half a century their original intended purpose and limitations are often poorly understood. They are a mechanism which was originally created to allow customary groups to *hold, manage and deal with alienated* land, but have been used much more widely. Their use has also been fraught with controversy and abuse. This Paper aims to help address the collective gap in our knowledge about Incorporated Land Groups and their role by providing a comprehensive review of the existing literature. It provides an overview of Incorporated Land Groups, what they are, why they were created and the purposes for which they have been used. It examines the 2009 reforms, their intent, the extent of their implementation and how far they have achieved their purpose. The Paper concludes by looking at the current uses of Incorporated Land Groups and what these reveal about their strengths, successes and their weaknesses and how their failings have been viewed by the Courts.

Keywords: customary land, incorporated land group, ILG, land alienation, resource extraction.

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## 1 Overview of ILGs

### 1.1 What are ILGs?

In PNG, 97% of land is held as unregistered customary land, which is a form of collective land title in which land is vested in a clan or extended family and is governed by customary law. In PNG, customary land is protected by law. In theory at least, customary land and rights in customary land cannot be sold, leased or otherwise disposed of except to other PNG citizens in accordance with custom (s. 132, *Land Act 1996*). As we will see though, in practice, this protection has not prevented foreign entities acquiring long-term tenure rights to large areas of customary land.

In 1974, the *Land Groups Incorporation Act (ILG Act)* was introduced to enable customary landowners to form themselves into a corporate group “to allow them to hold, manage and deal with land in their customary names”. An incorporated land group (ILG) thus gives a clan legal recognition through which it can do business, make decisions regarding its land and land use, and receive benefits from

those who use its land, such as royalties from forestry, mining, oil and gas.<sup>1</sup>

### 1.2 Why were ILGs created?

The *Land Groups Incorporation Act 1974* was drafted in response to the recommendations of the 1973 Commission of Inquiry into Land Matters (CILM), which was called to investigate, *inter alia*, concerns over the shortage of land and possible ways of registering customary land.

The CILM recommended for legislation to allow the registration of group titles (‘based on typical Papua New Guinean forms of organisation so far as land rights are concerned’). Only after the issue of ownership had been ironed out through the process of the registration of the group title, could the group be legitimized as the land owners. This is the exact opposite of what happens today, under the *Land Groups Incorporation Act*, where the legitimisation of the corporate nature of the group that claims ownership, happens first. This is NOT what the CILM intended or recommended. As Lawrence Kalinoe has written, “it appears the *Land Groups Incorporation Act* is now being used to reverse the process: to

recognise the so called customary land owning group without the group having to show group title to the land that they are claiming to own!”<sup>2</sup>

It is suggested by Kalinoe that the *Land Groups Incorporation Act* is also being ‘abused’ in that the legislation was only originally designed to allow customary groups to create a corporate body to enable them to *hold, manage and deal* with **alienated** land under the plantation redistribution scheme (i.e. not customary land at all).<sup>3</sup>

*“ILGs were neither intended as vehicles for registered group title to customary land nor as vehicles for the adjudication and demarcation of boundaries of customary land. ILGs were however intended to be used as corporate vehicles to hold, manage and deal in land, mainly alienated land but redistributed to traditional landowners under the plantation redistribution scheme”.*<sup>4</sup>

### 1.3 What are ILGs now used for?

Over the past 30 years, ILGs have been used to facilitate landowner involvement in natural resource development. In this regard, ILGs have been extensively used by the State and resource developers for two purposes:

- **Landowner identification in order to obtain the consent of customary landowners** to the use of their land and natural resources (e.g. in forestry, mining, and oil and gas projects, and more recently, telecommunications companies seeking to build transmission towers on customary land); and
- **Benefit-sharing**, such as for the distribution of royalties and rents generated by agreements for land use, and resource extraction royalties from forestry, oil and gas, and mining developments.

Set out below is a brief description of how ILGs are used in the different natural resource sectors in PNG.

#### 1.3.1 Forestry sector

The first natural resource-focused legislation which required landowners to organise themselves into ILGs to facilitate the resource acquisition process was the *Forestry Act 1991*. Under the *Forestry Act*, the Papua New Guinea Forest Authority (**PNGFA**) must first acquire the timber rights from the customary owners under a Forest Management Agreement (**FMA**) before the PNGFA can assign the rights to a logging company to exploit the timber (ss. 55-56, 60). The Act requires customary landowners to form themselves into ILGs for the purpose of granting consent to the FMA, although the Act also provides that where this is impractical, 75% of the adult members of clan groups living on the land can give their written consent (s. 57(2)). The FMA should set out the monetary and other benefits to be received by the customary owners (s. 58). The PNGFA receives payments from the

logging companies, then pays the royalties to the ILGs. FMAs are usually for a 50-year period.

A report by Transparency International in 2011 identified the process of incorporating of land groups and their use as one of the main corruption risks in the forestry sector.<sup>5</sup> The Report found that: “The rights of customary landowners, who are genuinely represented under the Incorporated Land Groups, were found to be compromised due to lack of participation in processes and access to reliable resource information” (p. 4). The Report was written before the 2009 ILG Reforms came into force.

#### 1.3.2 SABLs

ILGs have played a role in the misuse and abuse of Special Agricultural Leases (**SABLs**) over the past 20 years, which have since been widely discredited following the findings in 2013 of the Commission of Inquiry into the Special Agricultural and Business Lease. SABLs were originally intended to allow landowners to participate in economic activities on small parcels of their land, such as establishing small coffee or cocoa plantations. However, in practice, they were often used for large-scale agricultural development, such as plantations for oil palm, cocoa, coffee and rubber, and on occasion were used as a front for logging operations where there was no real plan for subsequent agricultural development.<sup>6</sup>

ILGs are relevant to SABLs in two ways:

1. Firstly, the ILG creates the lease by leasing all or part of its customary land to the State, i.e. the Minister for Lands and Physical Planning, referred to as the head lease (*Land Act 1996*, s. 11).<sup>7</sup> All customary rights in the land are suspended for period of the head lease to the State (s. 11(2)). The Minister then leases the land back to the ILG or to a third party, such as an individual or agricultural developer, for a period of up to 99 years, with the agreement of the customary landowners (s. 102(2), (4), *Land Act*, 1996).
2. Secondly, where the ILG has created the lease, the benefits from the agricultural development or any subsequent rental payments from the lessee are distributed back through the ILG.

#### 1.3.3 Oil and gas projects

The second resource development legislation which assigned land resource ownership rights to ILGs was the *Oil and Gas Act 1998*. Under that Act, ILGs are intended to be the main vehicle for delivering benefits to landowners (both royalties and equity benefits).

Under this Act, an applicant for a petroleum development licence must prepare a full-scale social mapping study (e.g. a listing of clan groups) and a full-scale landowner identification study of customary owners as a precondition to

obtaining a licence, although the Act does not specify how such a study should be done or how landowners will be identified (ss. 47, 49). Based on the results of the social mapping and landowner identification, it is the responsibility of the State (i.e. the Minister for Petroleum and Energy) to identify the ILGs in the project area (ss. 48, 49). The Act provides that this should occur **before** or **during** the development forum in which the development agreement between the State and project area is negotiated (s. 50).

Under the *Oil and Gas Act 1998*, the tenement holder pays royalties to the State (s. 159). These are held in a trust fund which is controlled by the State through the Mineral Resource Development Company (MRDC). ILGs in the project area are beneficiaries of the trust (s. 176).

#### 1.3.4 Mining

The *Mining Act 1992* does not expressly refer to ILGs. Rather, it refers to a “landowner” being a person who is an owner of customary land (s. 2). The tenement holder (mining company) must not enter onto or occupy any land until it has made a compensation agreement with the landowners which it has registered with the Chief Warden (ss. 155 – 156). Compensation for use of or damage to land, and royalties, are paid to landholders (s. 154).

1.3.5 Climate change related projects, including REDD+  
ILGs are also intended to be used in PNG as the main vehicle for obtaining the consent of customary landholders to climate change related projects (including REDD+), and for managing benefit-sharing from those projects.

Climate change related projects or activities, which include REDD+ projects or activities and Voluntary Carbon Offset Projects, are regulated under the *Climate Change (Management) Act 2015 (CCM Act)*.<sup>8</sup> The CCM Act provides that, where a climate change related project is intended to take place on customary land, the title to the land must either be vested in an ILG or be registered as registered clan land (s. 89(1)).<sup>9</sup> The Act states that the “consent of all landholders shall be obtained through a ‘free, prior and informed consent’ process prescribed in Regulation (s. 87). At present (November 2018), there is no regulation in place.<sup>10</sup>

The project agreement must specify the monetary and other benefits, if any, to be received by the landholders (this will be the ILG, where one has been incorporated) (s. 90(1)). The details as to how customary landholders will participate in climate change related projects, and how they will receive benefits will be regulated by Regulation. Again, there is currently no regulation in place (s. 93(3)).

### 1.4 Historical misuses of ILGs

Many cases involving ILGs have come, and continue to come, before both the Supreme and National courts in PNG. A majority of these cases relate to natural resources extraction,

such as oil and gas developments, mining and logging, as well as disputes over SABLs and more recently, transmission towers built by telecommunication companies on customary land.

The issues in dispute can be summarised as follows:<sup>11</sup>

1. ILGs being formed and run without any knowledge, involvement or approval of all the members of a clan or land group named in the ILG’s constitution;
2. Funds paid as royalties or equities, or compensation or rental payments for the use of customary land, which are intended for the whole clan or group, being channelled into ILGs but which are used by those involved in the management of the ILG for their own personal gain without any knowledge or approval by the members of the clan or landowning group;
3. No proper election and appointment of the ILG leaders who appear to have an endless life in the ILG’s management;
4. Failure to conduct proper annual general meetings and/or failing to table any form or report on how the ILG is being managed, such as providing annual statements of assets and liabilities, before lodging them with the ILG Registrar; and
5. Failures to update and keep proper records of the ILGs membership and other business records.

A further, recurring issue is that ILGs, as the main vehicle by which landowner consent is given for natural resource developments, have been used to purport to give consent to land use or developments on customary land but where the educated or elite who control the ILG have failed to properly consult the true customary landowners, thus failing to meet minimum standards of free, prior and informed consent.

## 2 The 2009 ILG Reforms and their current status

### 2.1 Overview of 2009 ILG reforms

Conscious of these widespread misuses, and following the release of the National Land Development Task Force Report in February 2007, the Minister for Justice directed the Constitutional and Law Reform Commission (CLRC) to recommend amendments to the system of incorporation of ILGs in order to improve the manner in which ILGs are formed and to establish more effective and efficient governance and management structures. The PNG Parliament adopted the recommendations of the CLRC and amended the ILG Act in 2009 by passing the *Land Groups (Amendment) Act 2009 (2009 ILG Reforms)*.<sup>12</sup>

The 2009 ILG Reforms are summarised below:<sup>13</sup>

#### **All members of an ILG must now be clearly identified**

In an attempt to reduce the proliferation of ILGs whereby individuals would seek to maximise their benefits through

obtaining membership of more than one ILG, under the 2009 ILG Reforms an application for incorporation must contain a list of all proposed members of the ILG (this was previously optional), and must also include the original birth certificate (or a certified copy) of each person who claims membership of the ILG (s. 5(2) (c)). The group seeking registration must provide a statement that its proposed members are not already members of another ILG (Sch. 1, cl. 5).

### **Land boundaries must now be clearly identified**

The ILG must also identify the land over which it claims ownership by providing a sketch of the boundaries of the land. The map must highlight any areas of dispute (s. 5(2) (e)). This is a significant improvement to the old ILG Act which did not require an ILG to identify its land boundaries, thus giving rise to many disputes. While boundaries must be generally identified in an application to register an ILG under the 2009 ILG Reforms, it is important to note that registration of an ILG does not provide evidence of **who** has rights over a particular piece of land and certainly does not provide any evidence of sole rights or ownership. Identification of who has ownership rights can only be achieved by taking the further voluntary step of registering the customary land under the *Land Registration (Amendment) Act 2009*.

### **Stronger management obligations for ILGs**

The 2009 ILG Reforms imposed stronger duties and clearer fiduciary obligations on the Management Committee of an ILG.

For example, under the 2009 ILG Reforms, a Management Committee must now:

- hold an Annual General Meeting each year
- have between six to ten people on its Management Committee, at least two of whom are women
- have at least 60 percent of members in attendance at meetings to form a quorum in order for business to be transacted, with at least 10 percent present being of the other gender
- keep bank accounts, which must be open to inspection at all times by the Registrar, the dispute-settlement authority, or any ILG member
- maintain an up- to- date register of its members
- comply with a detailed Code of Conduct, which applies to each member of the Management Committee.

Some six years on, how are things working? The Post-Courier has reported that about 2000 or more ILGs have registered under the 2009 ILG Reforms.<sup>14</sup> However, to date, there is only a very limited amount of research available that analyses the effectiveness of the 2009 Reforms. One review was undertaken by Karigawa *et al* in 2016, who compared a pre- and a post-2009 ILG in an urban context, in Lae.<sup>15</sup> Karigawa found that despite the 2009 ILG Reforms, landowners

considered that ILGs were not working well for them. Karigawa found that 89% of landowners thought that the legal framework for ILGs was flawed and was not adequately protecting landowner rights. Landowners also raised serious concerns about corruption in the Department of Land and Physical Planning (**DLPP**). Even in an urban context such as Lae, where the literacy of landowners might be expected to be higher than in rural areas, Karigawa's research found there was a low level of knowledge about the ILG system, including of the 2009 ILG Reforms.

The PNG courts have also ruled on some disputes regarding the 2009 ILG Reforms. While the courts have noted the intention of the 2009 ILG Reforms to improve transparency and accountability, they still raise concerns about the extent to which landowners are fully informed when ILGs are proposed in their area. The courts have thus adopted a relatively strict interpretation of the new provisions in relation to determining whether ILGs have been validly incorporated (for more detail, see the discussion below in sections 3.2 and 3.3).<sup>16</sup>

### **2.2 Registration of clan land**

When Parliament passed the 2009 ILG Reforms, it also passed the *Land Registration (Amendment) Act 2009*.<sup>17</sup> This was complementary legislation which would allow customary landowners to voluntarily register their customary land, to be known as "registered clan land".<sup>18</sup> The main purpose of the 2009 land registration reforms was to enable landowners release certain parts of their customary land for development, with the ILG itself becoming the landowning unit.

Under the *Land Registration (Amendment) Act 2009*, only an ILG can apply for registration. A certificate of title is issued in the name of the ILG. Once the land has been registered, the land ceases to be bound by customary law except for the purpose of inheritance (s. 34N).

### **2.3 Transitional issues**

The 2009 ILG Reforms raise a number of serious transitional issues. This is due to the fact that the *Land Groups (Amendment) Act 2009* provides<sup>19</sup> that all pre-existing ILGs will "automatically cease to exist" five years after the 2009 ILG Reforms come into effect (which was 20 February 2012) unless the pre-existing ILG had applied for reincorporation in accordance with the new process under 2009 ILG Reforms.<sup>20</sup> This means that most old ILGs will have lapsed on 1 March 2017, which was the lapsing date. It is estimated that 2,000 ILGs have been registered under the 2009 ILG Reforms, but that there are about 18,000 old ILGs which were created under the old ILG Act, most of which would appear to have lapsed.<sup>21</sup> To address this problem, the PNG Parliament has reportedly passed legislation in November 2018 to extend the lapsing period from five to ten years, so that old ILGs will now lapse on 28 February 2022 unless they have been reincorporated.<sup>22</sup>

### 3 How ILGs have been used or misused?

Drawing on how ILGs have been used in the various resource sectors, this section identifies some of the dangers, pitfalls and failings of ILGs, and identifies whether, and if so, how, the 2009 ILG Reforms seek to address those failings.<sup>23</sup>

#### 3.1 ILGs have been used as proxy for land and resource ownership

Although the creation of an ILG was never intended, and does not confer, title to land (or to the natural resources on that land), ILGs have nevertheless been widely used to this effect. Lawrence Kalinoe was one of the first commentators to argue that ILGs were never intended to be used as they have been, namely as a kind of proxy or backdoor mechanism to assert or claim ownership over land and the resources on that land.<sup>24</sup> This misapplication of the original purpose of ILGs was made possible over the years by various legislative changes which conferred on ILGs the capacity to give landowner consent to resource use and extraction, such as for forestry and oil and gas development.

For example, through its recognition of ILGs as having the power to enter into an FMA with the PNG Forest Authority (s. 57), the *Forestry Act 1991* implicitly assigns to the ILG the right not only to land ownership, but to ownership of the timber resource on it as well. Kalinoe notes that the maps which are attached to FMAs become a *de facto* mechanism to demarcate the boundaries of customary land which then give rise to ownership claims over the land concerned.<sup>25</sup>

The way in which ILGs became a proxy for land ownership can be explained in part through an examination of the history of the ILG Act. Kalinoe states that: "... ILGs were neither intended as vehicles for registered group title to customary land nor as vehicles for the adjudication and demarcation of boundaries of customary land".<sup>26</sup> Rather, while ILGs were intended to be used as a corporate vehicle for customary landowners to hold, manage and deal in land, this was intended to be mainly for land which had already been alienated which was to be redistributed to traditional landowners under the plantation redistribution scheme, the boundaries of which were already identified. Filer makes a similar point to Kalinoe, namely that the registration of land use agreements between resource developers and ILGs for forestry, oil and gas, create a registry of customary land ownership by 'default', even though no registration of customary land title has taken place.<sup>27</sup>

The 2009 ILG Reforms do not, and were not intended to, address this misuse of ILGs as a proxy for land ownership. Rather, this is a function of how the ILG vehicle has been incorporated into various natural resource legislative schemes over the past few decades. Indeed, the 2009 ILG Reforms are likely to entrench the position that ILGs are a proxy for land

ownership due to the new requirement that a sketch map showing the land over which ownership is claimed be attached to an ILG's application for incorporation.<sup>28</sup>

Notwithstanding these shortcomings, the new requirement for a map is likely to bring some transparency to land management decisions as it will provide more clarity to the areas of land over which an ILG group asserts customary ownership and decision-making authority, an element that was missing from the old ILG Act which lacked any requirement for a map.

#### 3.2 Poor practices for incorporating ILGs

##### 3.2.1 Fragmentation and proliferation of ILGs

Under the old ILG Act, PNG citizens could be a member of more than one ILG, an aspect of the legislation which facilitated the misuse of ILGs over many years. The common use of ILGs as a mechanism to distribute royalties and compensation, a function for which ILGs were never intended, encouraged the fragmentation and proliferation of ILGs.<sup>29</sup> For example, in the forestry sector, Kalinoe noted as early as 2001 that a number of 'spurious' ILGs had emerged in various existing FMA projects, whereby existing ILGs would split into multiple ILGs, although the members were from the same family group. He observed that the splintering of ILGs was apparently due in part to disagreements within the original ILGs, but also appears to have been motivated by the desire of some landowners to claim additional royalties or rent payments by 'double-dipping'.<sup>30</sup>

The 2009 ILG Reforms seek to address this problem by requiring certified copies of birth certificates<sup>31</sup> together with an initial membership list, which must then be kept up to date by the ILG. It remains to be seen whether these reforms will be effective in avoiding fragmentation and proliferation as they will require close supervision and administration by the DLPP when registering new ILGs.

##### 3.2.2 The role of the Department of Land and Physical Planning

While the *Land Groups Incorporation Act 1974* established a very weak process for incorporation, the process for incorporation has also been poorly administered over the years by the Department of Lands and Physical Planning (DLPP), thus enabling ILGs to be misused. Some commentators have noted that the failure of the DLPP to administer the ILG Act has effectively allowed corrupt practices to emerge.<sup>32</sup>

For example, a report by Transparency International in 2011 identified corrupt practices in relation to the creation of ILGs to facilitate the allocation of logging concessions through FMAs as follows:

*"The government has provided few resources to implement the Land Groups Incorporation Act, and its processes are*

*opaque and poorly monitored. This provides opportunities for officials to be manipulated in the allocation of lands to customary groups. For example, officials may be bribed to fast-track procedures or persuade leaders to sign agreements without due process. The consultation of customary landowners about developments on their land is weak; a 2001 review by the World Bank found that 90% of landowners did not understand the implications of belonging to an incorporated land group.”<sup>33</sup>*

Prior to the 2009 ILG Reforms, the registration process was sometimes heavily facilitated by government departments other than the DLPP which themselves had an interest in dealing with the ILGs. In some instances, the PNG Forest Authority/National Forest Service, and even logging companies, assumed responsibility for incorporating ILGs in order for FMAs to be signed because of a lack of capacity within the DLPP to manage the incorporation process.<sup>34</sup>

The 2009 ILG Reforms impose increased administrative responsibilities on the Registrar of ILGs, who works within the DLPP.<sup>35</sup> These include ensuring that proper notice is given to local communities of ILG applications, identifying disputes during the incorporation process, maintaining the register of records of ILGs, and enforcing the offence provisions.<sup>36</sup>

The courts have recently been very critical of the role of the ILG Registrar in registering ILGs. In *Kawira v Bone [2017]* (at para. 38), the Court urged the Office of the ILG Registrar to take a more proactive approach to supervising the incorporation process, stating that:

*“The current practice of the Registrar acting purely on what he is told or is presented with on paper is not helping to achieve the true intent and purpose of the Act... he is allowing for more fraudulent incorporations of ILGs and misuse and abuse of the real landowners’ rights, powers, their funds and other properties. It therefore behoves the Registrar as part of a State and government that should be protecting the interests of the people and safeguard against the kind of offences that are being committed against them to step out of the comforts of his office and do something practical on the ground. I would suggest strongly that the Registrar should take personal interest and be involved in the formation of ILGs strictly in accordance with the spirit and intention of the Act.”<sup>37</sup>*

### 3.2.3 Poor community engagement in incorporation process: inadequate notice provisions

Prior to the 2009 ILG Reforms, ILGs were sometimes misused by the educated and elite in local communities who were able to incorporate ILGs in relative secrecy.<sup>38</sup> This was possible in part because the old ILG Act failed to require ILG applications to be publicised effectively at the village or district level.<sup>39</sup>

The 2009 ILG Reforms seek to address this shortcoming by imposing additional obligations on district administrators and village courts to disseminate notice of applications to incorporate new ILGs. The 2009 ILG Reforms also empower the Registrar to withhold processing or reject an application to register an ILG if it appears there is a dispute relating to the identity of the group’s representatives, officers or membership.<sup>40</sup>

However, the courts remain sceptical as to whether anything has changed. In the recent case of *Kawira v Bone [2017]* PGNC 164, the Court noted (at para. 34):

*“Despite these changes in the law [i.e. the 2009 ILG Reforms], there are still many cases involving ILGs coming to the Courts which suggests, in practice there has been no real change. There might have been some improvement on the law but compliance is still a serious issue with many ILGs being incorporated without the knowledge and involvement and approval of the entire family, sub-clan, clan or tribe as the case might (be). If anything, most of the ILGs are a fraud against sub-clans, clans, tribes or land groups in whose name ILGs have been incorporated.”*

The courts consider the new notice provisions in the 2009 ILG Reforms to be inadequate because they fail to require public meetings to be held within the affected community as an essential and mandatory part of the incorporation process. Indeed, the courts have indicated that they will take a much stricter approach to determining whether an ILG has been validly incorporated which goes beyond the statutory process and which considers instead whether the true landowners’ free and informed consent has actually been sought and obtained.<sup>41</sup>

For example, in *Kawira v Bone [2017]* (at para. 39), the court sets out a detailed process for incorporation which is open and transparent, recommending that a series of four public community meetings be held, starting with an initial meeting to conduct public awareness on incorporation and requiring the personal attendance of the ILG Registrar (or its representative) to verify the integrity of the process at the end.

## 3.3 **ILGs and large resource development projects**

### 3.3.1 The problem

The use of ILGs to obtain landowner consent and distribute benefits in large resource extraction projects over large areas of customary land has been, and remains, problematic, giving rise over the years to many fraudulent ILGs.<sup>42</sup> Difficulties arise due to the complexities involved in incorporating large numbers of ILGs over large and remote land areas, as well as the challenge of mapping large and complex social groupings, many of whom may have different landholder rights. The incorporation process now requires more skills and more resources due to the additional requirements for incorporation imposed by the 2009 ILG Reforms, such as the need for

landowners to provide birth certificates and a sketch map of their customary land boundaries. Landowners in remote areas may be ill-equipped to carry out these tasks themselves, particularly where there are low literacy and numeracy levels. Landowners may not be able to afford the costs of incorporation, including obtaining birth certificates.<sup>43</sup>

The current PNG Liquid Natural Gas (LNG) Project in the PNG highlands shows that the use of ILGs to facilitate landowner engagement in, and payments from, large-scale oil and gas developments can be highly problematic. At an estimated cost of US\$19 billion, the LNG Project is the largest single natural resource project in the history of PNG. The Project Impact Area is extensive with the wellhead areas and onshore gas pipeline through the highlands likely to affect about 34,000 people, living in 117 villages, across 14 major ethnic groups.<sup>44</sup> Royalty payments to landowners over the project's lifetime are estimated to be PNG Kina 5.7 billion.

The PNG LNG Project began exporting gas in April 2014. However, a report by Jubilee Australia in May 2018 found that although an estimated \$300 million in royalties have accrued to landowners since the project commenced, none of the landowners in the highlands Hela Province have received any payments.<sup>45</sup> One of the main causes of this appears to have been the failure of the State to ensure that landowners are properly organised into ILGs – which are likely to number in the hundreds – a process which has yet to be completed.<sup>46</sup>

In a recent case relating to an access road for a logging operation (*Rimbunan Hijau v Enei*, SCA 126 of 2011, delivered on 25 September 2017), the Supreme Court made the following observations regarding landowner identification and the formation of ILGs in the LNG Project area (para. 30):

*“In this project, despite s. 47 of the Oil and Gas Act, both the State and the developers have failed to properly identify the true and correct landowners, properly organising them into ILGs, enable the landowners to fairly and meaningfully enter into negotiations with the developers and the State and for the developers and the State to seek and secure from the true and correct landowners through their duly elected or appointed leaders the landowners free and informed consent and approval and ultimately, their social license to operate.”*

The issue of correctly identifying and organising landowners and organising them into properly incorporated ILGs has affected not only oil and gas projects such as the LNG Project, but other large resource developments, such as SABLs, mining and logging concessions.<sup>47</sup>

The Supreme Court (*Rimbunan Hijau v Enei*, SCA 126 of 2011, SC1605) has described the problem thus (at para. 29):

*“What is happening in most cases is that, developers and the State alike are failing either deliberately or by inadvertence to first ascertain, then properly organise, empower and deal with the properly identified and confirmed customary landowners. Rather than taking this most important first critical step, the State and the developers are entering customary land and are proceeding with their activities and in so doing, choosing to and are indeed dealing with persons who claim to be landowners ... The State to the extent that it is doing nothing about this practice is encouraging this improper and illegal approach by so called developers which in fact is a large-scale fraud committed against the true and correct landowners by the so-called developers with the support of the State and in collaboration with persons claiming to be owners when they are not.”*

### 3.3.2 Who is responsible for organising landowners into ILGs?

The problems with ILGs and large-scale projects raise two important questions:

- Who should bear responsibility for ensuring that landowners are organised into ILGs - the landowners, the State or the proponent? and
- Who should pay?

For large resource development projects, the courts have recently placed the obligation to ensure that landowners are properly organised into ILGs squarely on the State.

However, responsibility does not end there - the courts also state that all persons who wish to carry out development on customary land, whether that be the State, a company or an individual, have an obligation to correctly identify the proper landowners and organise them into ILGs.<sup>48</sup>

The PNG Supreme Court has stated the position thus:<sup>49</sup>

*“The duty is therefore, upon the State or any other person which may include foreign investors or developers who wish to enter any land in PNG and more so customary land, to first make it their business to ascertain who the true and correct owners are. Once they have done that, they would be in a better position to enter into meaningful discussions and negotiations with them and get their free and informed consent or approval before entering, occupying and using their land... the State and any developer have an obligation to properly identify and organise the customary landowning group that owns any land they might be interested in, as part of their obtaining their social license to operate.”*

Importantly, the Supreme Court in *Rimbunan Hijau v Enei* went on to note that it is clearly in the resource developer's best interests to ensure that customary landowners are properly identified as a failure to do so could cast doubt on the

validity of any contracts between the State, the project developer and the landowners.

In this regard, and in the context of the PNG LNG Project, the Court stated (*Rimbunan Hijau v Enei*, at para. 30):

*“The contracts or agreements and the deals the State and developers enter into with persons not properly identified and appointed by the landowning clans, or groups, remain null and void ab initio or void and of no effect from the very beginning. Given that, when the true and correct owners eventually assert their ownership rights and exercise their rights, challenging the contracts or deals with the fraudsters and or thieves, they must give way. Such contracts do not bind the true and correct landowners. If need be, the State and or the developer concerned need to enter into completely new contracts with the true and correct landowners on terms that are fair and reasonable with reasonable compensation being paid for the earlier illegal entry, occupation and conduct of their businesses.”*

The Supreme Court noted (paras. 58 – 59) that **all persons** who wish to enter, occupy or use customary land, whether that be the State, a company or an individual, must carry out their own **due diligence** to correctly identify the customary landowners through a transparent and open process, and then organise the landowners into ILGs in accordance with the ILG Act, so that landowners can properly receive and manage their funds.

### 3.3.3 Who should pay to set up ILGs?

The *Land Groups Incorporation Act 1974* and the *Forestry Act 1991* are silent on the question as to who should pay for the costs of incorporation. However, as the courts have recently indicated that the State and the developer are jointly responsible for ensuring that landowners are properly organised into ILGs,<sup>50</sup> it may be argued that while the State has the primary responsibility to ensure adequate resourcing of the government departments responsible for managing incorporation, the developer should also be prepared to meet the costs of incorporation where the State is unwilling or unable to meet the costs.

There are only two references which address a developer’s obligation to pay for the cost of landowner consultations:

- Under the *Oil and Gas Act 1998*, the project applicant must pay for social mapping and landowner identification, and must also pay the State PNG Kina 250,000 (US\$100,000) towards the cost of the project negotiations between the State and landowners, known as a Development Forum (s. 52A (2)). However, there is no similar obligation under the Act for the project developer to pay for the next step of the cost of properly incorporating ILGs, or to reimburse the State for such costs.

- The REDD+ FPIC guidelines (which may soon be replaced by regulations under the *Climate Change (Management) Act 2015*), provide that where a community proposes to use ILGs, project proponents must assist customary landowners and local communities to prepare their ILGs and that project proponents must meet all costs of ILG preparation and registration.<sup>51</sup>

## 3.4 **ILGs have facilitated the effective alienation of customary land**

One of the most serious examples of the way in which ILGs have been misused over the past 20 years is their role in the SABL-saga. The weak legislative framework for incorporation (before the 2009 ILG Reforms), coupled with poor administrative and regulatory oversight by DLPP of the incorporation process, allowed unrepresentative and sometimes fraudulent ILGs to be created which were then used to grant SABLs.<sup>52</sup>

A SABL can have a term of up to 99 years. During the term of the lease, customary law ceases to apply to the land (*Land Act 1996*, s. 11(2)), thus rendering the land effectively alienated from the local community. This affected large areas of PNG: SABLs were granted over an estimated 12% of customary land in PNG, or more than 5 million hectares, mostly to foreign companies or entities for periods of up to 99 years.<sup>53</sup> Following the findings of the Commission of Inquiry into SABLs, a number of these SABLs have since been declared void by the courts or have been surrendered.

In further response to the 2013 Commission of Inquiry into SABLs, the National Executive Council directed that the provisions of the *Land Act 1996* relating to SABLs be repealed so as to prohibit the Minister from granting any new SABLs.<sup>54</sup> While legislation has been drafted to this effect,<sup>55</sup> this legislation has not yet been passed by Parliament. Meanwhile, SABLs remain on PNG’s legislative books.

In a similar fashion to SABLs, Filer (2014, at p. 82) notes that about 5.5 million hectares of land has been ‘partially alienated’ under Forest Management Agreements to the PNG Forest Authority (which rely on ILGs for landowner consent) as FMAs have a life span of 50 years.

## 3.5 **Poor management and financial accountability of ILGs**

### 3.5.1 Lack of transparency in financial management

ILGs have been widely criticised over many years for their poor management and lack of financial accountability. Complaints have frequently been made that benefits are not distributed fairly within ILGs and that benefits are captured by the educated or elite members of clans, either openly or

through the misappropriation of funds (e.g. by the ILG chairman who usually controls the bank account).

The ILG Act (prior to the 2009 ILG Reforms) was in part to blame for this as it lacked the usual management and accounting obligations which are normally imposed on business entities. This was largely because when the ILG Act was introduced in 1974, ILGs were expected to undertake a further incorporation procedure under the *Business Groups Incorporation Act 1974*, which contained stronger management and fiduciary obligations, before the ILG would conduct business and handle money.<sup>56</sup>

The 2009 ILG Reforms seek to address this as they impose more stringent management provisions on the Management Committee of an ILG, such as requiring annual general meetings to be held, requiring the election of committee members, and requiring at least 60% of ILG members to be present to form a quorum.<sup>57</sup> In terms of financial management, the Management Committee must now prepare annual statements of assets and liabilities, and must open and maintain bank accounts which, if the ILG Registrar so directs, must be made available to all of the ILG members. Failure to do so is an offence.<sup>58</sup>

Despite the 2009 ILG Reforms, financial transparency remains problematic. Writing in the context of ILGs which are used to authorise the creation of SABLs for oil palm development, Hambloch (2018, at p. 30) concluded:

*“ILGs, which represent the landowner groups and receive the benefits from the company, remain a black box in terms of benefit sharing with their group members. Systems need to be put in place that ensure the equitable and fair benefit sharing especially with less powerful members such as women and youth.”*

### 3.5.2 Need to strengthen local institutions and support landowner awareness

In order to ensure greater landowner participation in ILGs, Hambloch (2018, at p. 30) also concludes that capacity building of rights for landowners is required. She notes that there is a need to support and strengthen local institutions, including government departments at local and provincial levels, who could conduct awareness and consultation programs with landowners, and also monitor existing ILGs. Adequate support also needs to be given to the members of ILG Management Committees to assist them to understand and fulfil their new management responsibilities.

## 3.6 **Impacts of ILGs on customary structures**

### 3.6.1 Breakdown of customary structures

ILGs, through their very existence, have the potential to change and breakdown customary social structures. The process of committing expressions of social form to paper will

inevitably reshape those social and political forms as the fixed paper version has the power to shape rights, privileges and responsibilities into the future.<sup>59</sup>

In a recent review of ILGs, SABLs and oil palm, Hambloch (2018, at p. 6) notes that there is ample evidence that land formalisation processes, which include the creation of ILGs, increase conflict within and between communities and individuals. Formalisation can require people to claim rights to land using over-simplified legal classifications such as ‘owner’ and ‘user’ of land, which can have the effect of marginalising vulnerable groups such as women, youth, and other ‘secondary users’. In his review of land use in West New Britain, Guinness (2017, at p. 39) makes a similar observation, noting that by requiring all members of an ILG to be listed and for land boundaries to be identified, the 2009 ILG Reforms “seriously undermines local understandings of landscapes as shared spaces”.

While it remains unclear as to how, and to what extent, the 2009 ILG Reforms will affect customary structures, the following observations can be made:

- **Drawing up of membership lists:** Research by Minnegal *et al* (2015) (undertaken after the 2009 ILG Reforms) found that the way in which clans determine the membership of their ILGs depends on the ultimate purpose for which the ILG will be used.

In 2014, the researchers reviewed the process by which two landowner groups incorporated their ILGs. The one in Haivaro (Gulf Province), where landowners wished to develop their land for tourism or cash cropping, took an *exclusive* approach to drawing up its membership list, with a markedly hierarchical structure grounded in patrilineal descent, as clan leaders recognised that the people listed would become entitled to vote on matters regarding land and land use. In contrast, another community at Suabi (Western Province), whose primary driver for wanting to incorporate an ILG was to secure a share of benefits from the LNG Project, took an *inclusive* approach to membership, listing everybody in the clan (as well as some who were from outside the clan), seeking to ensure that everybody could take a share of the benefits. This concern also encouraged clans to fragment or split into sub-clans to ensure a share of benefits.

In his critique of the 2009 ILG Reforms, PNG lawyer, Peter Donigi (undated), has also been critical of how the membership of ILGs is determined, noting that under the 2009 ILG Reforms the Management Committee has the power to decide who will and will not be admitted as a member once an ILG has been established.<sup>60</sup> Donigi notes that, in practice, it may become difficult to admit new

members once an ILG is incorporated, and that this may promote the division of clans into smaller groups and units.

It is unclear whether the new provision requiring birth certificates will result in some people being excluded from the ILG, particularly older members of communities who may not have birth certificates.

- **Management structures:** In PNG, the customary clan group is the main unit of social organisation where traditionally respect for elders and their leadership is of paramount importance. However, the 2009 ILG Reforms specifies management and voting structures that mandate ‘democratic’ procedures with an essentially ‘flat’ social structure, which may bear little relation to the reality of social worlds in PNG.<sup>61</sup>
- **Application of customary law:** The 2009 ILG Reforms contain conflicting provisions as to whether and to what extent customary law will continue to apply to communities and their land after an ILG has been registered.

The *Land Groups Incorporation (Amendment) Act 2009* contains mandatory provisions which are deemed to apply to every ILG, one of which states that “*The group representatives (i.e. Management Committee) shall ensure that the rights of any person recognized under customary law are safeguarded in so far as that is compatible with the operation of the group*”.<sup>62</sup> However, the proforma constitution for new ILGs contains a contradictory provision, which states: “*The land group shall act in accordance with the customs of the people, but on incorporation, custom ceases to apply.*”<sup>63</sup>

Donigi (undated, pp. 1–2) notes that this later provision may mean that the Management Committee is not bound by customary law when dealing with land matters, particularly in relation to the division or distribution of profit or income for the group. Donigi concludes that the 2009 ILG Reforms, to the extent that they purport to terminate, annul or abrogate the rights to customary land may be unconstitutional as the amendments are in breach of Section 53 of the PNG Constitution which prohibits the unjust deprivation of property.

### 3.6.2 Gender considerations

Other than some passing references in a few academic articles (which are set out below), there is no literature which contains a detailed gender analysis of ILGs, either under the old Act or under the 2009 ILG Reforms.

- **Membership lists:** In the process of drawing up membership lists for new ILGs in Western Province, Minnegal *et al* (2015, at p. 508) note that landowners adopted a patrilineal structure whereby men were routinely

listed as the ‘head of the family’. This was at odds with the past and present practice where people freely gardened and hunted on the land of their mothers’ line. This new emphasis on patrilineal structures was reinforced by comments that ‘under PNG law, only men can own land.’ Minnegal *et al* noted (2015, at p. 510) that in both the Gulf and Western Provinces, the membership of married women was tied to husbands, with only ‘user rights’ being accorded to them rather than the ‘full rights’ accorded to males and unmarried women.

- **Mandatory inclusion of women on Management Committee:** The 2009 ILG Reforms introduced a requirement that on a six-member Management Committee, at least two members must be women.<sup>64</sup> The 2009 ILG Reforms also prohibit general meetings of the ILG membership being held with only one gender present: at least 10% of those attending must be of the other gender.<sup>65</sup> One recent case study from Gulf Province noted that, when confronted with the need to include women on the Management Committee, the men formed a consensus that nominated women would be those known for docilely supporting their husbands.<sup>66</sup>

## 4 Conclusion

For nearly 50 years, Incorporated Land Groups have been used to facilitate landowner consent and benefit-sharing in natural resource and land use projects in Papua New Guinea. They are a well-established part of the legal landscape.

However, this literature review shows that the ILG mechanism was not only poorly designed and implemented but has been widely used as a proxy for land and natural resource ownership. Consequently, ILGs have been widely abused to the detriment of many, many landowners.

Reforms to the *Land Groups Incorporation Act 1974* in 2009 have sought to address some of the shortcomings by imposing more stringent requirements for incorporation and requiring greater transparency in management.

However, many challenges remain, not least in the case of large-scale resource developments where ILG registration can be complex and time-consuming if it is done correctly.

As the courts have recently noted, the success of the 2009 ILG Reforms in ensuring that ILGs become a mechanism which genuinely represents landowner interests in a fair, open and transparent manner will depend in large part on the extent to which the Department of Lands and Physical Planning is supported and committed to fully implementing the Reforms.

The reforms though do not address some of the more fundamental issues that have received less attention than the . fraud, abuse and widespread mismanagement. Even if these

ills are successfully tackled, it is arguable that ILGs will still continue to undermine customary social and governance structures, marginalise women and allow a backdoor route for customary land alienation.

## Bibliography

- Avosa, Michael, and Rungol, Alfred. (2011). *Forest Governance Integrity Baseline Report: Papua New Guinea*, Transparency International.
- Climate Change and Development Authority (CCDA), (2017). *Papua New Guinea: National REDD+ Strategy 2017-2027*, Government of Papua New Guinea.
- Constitutional and Law Reform Commission of Papua New Guinea, (2008). *Review of Incorporated Land Groups & Design of a System of Voluntary Customary Land Registration*, Report 5, May 2008.
- Constitutional and Law Reform Commission of Papua New Guinea, (2012). *Training Manual 1 in Implementation of the Land Group Incorporation (Amendment) Act 2009 and the Land Registration (Amendment) Act 2009*, First edition, 2012.
- Donigi, Peter. *What is wrong with the Land Groups (Incorporation)(Amendment) Act 2009?* undated. Personal views of Peter Donigi, CBE LLB.
- Filer, Colin. (2007). *Local Custom and the Art of Land Group Boundary Maintenance in Papua New Guinea*. Published in 'Customary Land Tenure and Registration in Australia and Papua New Guinea', Edition: 1, Chapter: 8, Publisher: ANU E Press, Editors: James F. Weiner, Katie Glaskin, at pp. 135 – 174.
- Filer, Colin. (2014). *The Double Movement of Immovable Property Rights in Papua New Guinea*, The Journal of Pacific History, 49:1.
- Guinness, Patrick. (2017). *The Unbounded Space and Moral Transgression: Capitalist Expansion in West New Britain*, Anthropological Forum, 28:1, pp. 32-44.
- Hambloch, Caroline. (2018). *Land Formalization Turned Land Rush: The Case of the Palm Oil Industry in Papua New Guinea*, paper prepared for presentation at the 2018 World Bank Conference on Land and Poverty, The World Bank – Washington DC, March 19-23 2018.
- Kalinoe, Lawrence K. (2001). *Incorporated Land Groups in Papua New Guinea*, a paper prepared for the Australasian Law Teachers Association Conference (ALTA), 1-4 July 2001, University of the South Pacific, Emalus Campus, Port Vila, Vanuatu.
- Karigawa, Lepani, Babarinde, Jacob, A. and Holis, Suman, S. (2016). "Sustainability of Land Groups in Papua New Guinea", published in *Land*, MDPI, Basel, Switzerland.
- Koim, Sam, and Howes, Stephen. (2016). "PNG LNG landowner royalties – why so long", published on devpolicy.org devpolicyblog, 16 December 2016.
- Main, Michael, and Fletcher, Luke. (2018). *On Shaky Ground: PNG LNG and the consequences of development failure*, Jubilee Australia Research Centre.
- Minnegal, Monica, Lefort, Sandrine, and Dwyer, Peter D. (2015). *Reshaping the Social: A Comparison of Fasu and Kubo-Febi Approaches to Incorporating Land Groups*, (2015), The Asia Pacific Journal of Anthropology.
- Numapo, John. (2013). *Commission of Inquiry into the Special Agricultural Business Lease – Final Report*, 21 June 2013, Papua New Guinea.
- ODI (2007). *The current legal and institutional framework of the forest sector in Papua New Guinea*, Papua New Guinea Forest Studies 2, prepared by Neil Bird, Adrian Wells, Flip van Helden and Ruth Turia, Overseas Development Institute, London.
- Ogle, Lisa, and Tararia, Almah. (2010). [Incorporated land groups and the registration of customary lands: Recent developments in PNG](#), Tararia, A., and Ogle, L., published in "In Defence of Melanesian Customary Land", Anderson, T., and Lee, G. (eds), published by AID/WATCH, Sydney, Australia.
- Ogle, Lisa., (2014). *Papua New Guinea: Legal Framework for REDD+*, prepared for SPC/GIZ Regional Project, 'Climate Protection through Forest Conservation in Pacific Island Countries'.
- Office of Climate Change and Development (OCCD), (2014). *Final Working Draft Guidelines on FPIC for REDD+ in Papua New Guinea*, Version 4, August 2014.
- Pietras, Joshua. (2014). *An (Indigenous) Rights-Based Approach to Deforestation in Papua New Guinea*, Waikato Law Review, 2014, Vol. 22, pp. 137 – 164.
- Power, Tony. (2008). 'Incorporated Land Groups in Papua New Guinea', published in *Making Land Work: Volume Two, Case Studies on customary land development in the Pacific*, AusAID, Canberra.
- Scheyvens, Henry, and Lopez-Casero, Federico. (2013). *Managing forests as a renewable asset for present and future generations: Verifying legal compliance in forestry in Papua New Guinea*, IGES Policy Report No. 2013-1, Institute for Global Environmental Strategies, Japan.
- Transparency International PNG (2017). *Let's we Forget: A review of 20 unresolved issues of national concern 2010-2017*.

## Legislation

[Business Groups Incorporation Act 1974](#)

[Climate Change \(Management\) Act 2015](#)

[Land Act 1996](#)

[Land Groups Incorporation Act 1974](#)

[Land Groups Incorporation \(Amendment\) Act 2009](#)

[Land Registration \(Amendment\) Act 2009](#)

[Mining Act 1992](#)

[Oil and Gas Act 1998](#)

## Case law

*Akipe v Rimua* [2018] PGNC 295 (25 July 2018)

*Bernard for himself and as P'nyang LNG Project Area Landowner and Ors v Duban*, OS No 756 of 2015, N6299, 27 May 2016

*Kau (Hides PDL 1 Project Area) and Ors v Independent State of PNG*, National Court, OS 358 of 2015, N7010, 19 January 2016

*Kawira v Bone* [2017] PGNC 164; N6802 (5 July 2017)

*Maniwa v Malijivi* [2014] PGNC 25 (4 July 2014)

*Morris v Panfilo*, OS No. 798 of 2016, N6976

*New Britain Palm Oil Ltd v Meloks Land Group Incorporated* [2018] PGNC 308; N7403 (25 June 2018).

*Rimbunan Hijau (PNG) Limited v Ina Enei on his behalf and on behalf of Moga clan of Loupom Island, & Ors*, SCA 126 of 2011, SC1605 (27 April 2015, and 25 September 2017)

## References

<sup>1</sup> *Morris v Panfilo*, National Court, OS No. 798 of 2016, N6976 – considered the legal capacity of a clan. Held: A clan which is has not incorporated as an ILG cannot sue or be sued, or acquire a legal interest in property:

<http://www.paclii.org/pg/cases/PGNC/2017/278.html?stem=&synonyms=&query=Tobatobon>

<sup>2</sup> See Kalinoe, L.K., (2001). *Incorporated Land Groups in Papua New Guinea*, a paper prepared for the Australasian Law Teachers Association Conference (ALTA), 1-4 July 2001, University of the South Pacific, Emalus Campus, Port Vila, Vanuatu.

<sup>3</sup> Kalinoe (2001).

<sup>4</sup> Kalinoe (2001).

<sup>5</sup> Avosa, M., (2011). *Forest Governance Integrity Baseline Report: Papua New Guinea*, Transparency International, PNG.

<sup>6</sup> See Numapo, J., (2013). *Commission of Inquiry into the Special Agricultural Business Lease – Final Report*, at p. 35

<sup>7</sup> Prior to the 2009 ILG Reforms, landowners could choose whether they wished to register an ILG before applying for a SABL – it was discretionary. However, the Chief Commissioner of the Commission of Inquiry has expressed the view that the effect of the 2009 ILG Reforms is that it is now mandatory for landowners to organise themselves into an ILG before applying for a SABL: see Numapo (2013) at p. 21. However, it is not clear whether this is in fact the case. The view of the Chief Commissioner would appear to be based on section 2 of the *Land Groups Incorporation (Amendment) Act 2009* which inserts a new definition of a land “dealing” into the *Land Groups Incorporation Act 1974* which provides that a “dealing” includes a “lease”.

<sup>8</sup> REDD+ is an acronym which refers to policy approaches and positive incentives to Reduce Emissions from Deforestation and forest Degradation.

<sup>9</sup> Where it is impractical to register an ILG or register the land, 85% of adult members resident on the land who are customary landholders can give consent to a climate change project (Climate Change (Management) Act 2015, s. 89(2)).

<sup>10</sup> In August 2014, PNG issued [Guidelines on Free, Prior and Informed Consent for REDD+ in Papua New Guinea](#). The Guidelines state (p 15) that consent to REDD+ programs or activities must be given at the clan level. Landowners can choose to be represented through ILGs, but this is not mandatory – in accordance with international law, landowners may choose their preferred decision-making institutions (p. 64). Where landowners choose to be represented through an ILG, the FPIC Guidelines reinforce the thrust of the 2009 ILG Reforms which seek to ensure that the ILG genuinely represents the local community (p. 15).

<sup>11</sup> These misuses are summarised by Kandakasi, J., in *Kawira v Bone* [2017] PGNC 164, N6802 (5 July 2017), para. 32. They would appear to relate to the periods both before and after the 2009 ILG Reforms.

<sup>12</sup> The ILG amendment Act (No. 29 of 2009) was passed by Parliament on 19 March 2009. The reforms came into force on 1 March 2012 (see PNG National Gazette, 20 February 2012, No. G64, p. 1.). There are a number of potentially serious technical errors in the drafting of the *Land Groups Incorporation*

(*Amendment*) Act 2009. These are identified in an article by the constitutional lawyer, Peter Donigi, entitled “*What is wrong with the Land Groups (Incorporation) (Amendment) Act 2009?*”, undated.

<sup>13</sup> This section has been extracted from: Ogle, L., and Tararia, A. (2010). “[Incorporated land groups and the registration of customary lands: Recent developments in PNG](#)”, in *In Defence of Melanesian Customary Land*, Anderson, Tim., and Lee, G. (eds), published by AID/WATCH, Sydney, Australia, which contains a more extensive description of the 2009 ILG Reforms.

<sup>14</sup> “Parliament Extends Land Group Registration”, *Post Courier*, 22 November 2018.

<sup>15</sup> Karigawa, Lepani, Babarinde, Jacob, A. and Holis, Suman, S. (2016). “Sustainability of Land Groups in Papua New Guinea”, published in Land, MDPI, Basel, Switzerland.

<sup>16</sup> See in particular *Kawira v Bone* [2017] PGNC 164, N6802 (5 July 2017), paras 8 – 47; and also, the comments of the Supreme Court in *Rimbunan Hijau (PNG) Limited v Ina Enei & Ors* SCA 126 of 2011, SC1605 (25 September 2017).

<sup>17</sup> Act No. 21 of 2009, which came into force on the same day as the 2009 ILG Reforms, on 1 March 2012: see PNG National Gazette, No. G64, 20 February 2012.

<sup>18</sup> See Ogle, L., and Tararia, A. (2010). “Incorporated land groups and the registration of customary lands: Recent developments in PNG”, in *In Defence of Melanesian Customary Land*, Anderson, Tim., and Lee, G. (eds), published by AID/WATCH, Sydney, Australia, which contains a more extensive description of the Land Registration (Amendment) Act 2009.

<sup>19</sup> Land Groups Incorporation (Amendment) Act 2009, new section 36 on Savings and Transitional Arrangements.

<sup>20</sup> The timeline is as follows: The ILG amendment Act was passed by Parliament on 19 March 2009. The reforms came into force on 1 March 2012 (see PNG National Gazette, 20 February 2012, No. G64, p. 1.) Existing ILGs which have not applied for reincorporation automatically lapse 5 years later, on 1 March 2017 (see new section 36, ILG Amendment Act).

<sup>21</sup> “Parliament Extends Land Group Registration”, *Post Courier*, 22 November 2018.

<sup>22</sup> “Parliament Extends Land Group Registration”, *Post Courier*, 22 November 2018, reported that the PNG Parliament passed the Land Groups Incorporated (Amendment) Bill 2008 in November 2018, which was approved by the National Executive Council in Decision No 344/2018.

<sup>23</sup> For a review of the failings of ILGs pre-2009 Reforms, see Chapter 3 of the CLRC Report 2009.

<sup>24</sup> See Kalinoe (2001). For more information on the history of the ILG Act 1974, see also the CLRC Report No 5 of 2008, pp. 8-9.

<sup>25</sup> Kalinoe (2001), at p. 6.

<sup>26</sup> Kalinoe (2001), at p. 4.

<sup>27</sup> Filer, Colin. (2014). “The Double Movement of Immovable Property Rights in Papua New Guinea”, in *The Journal of Pacific History*, 49:1. at p. 85.

<sup>28</sup> *Land Groups Incorporation (Amendment) Act 2009*, s. 5(2)(e), and Schedules 1 and 2. The map must clearly show any disputed boundaries and identify the nature of the dispute.

<sup>29</sup> Kalinoe (2001), p. 10.

<sup>30</sup> See Kalinoe (2001). See also CLRC Report 2008, at p. 9.

<sup>31</sup> Under the Civil Registration Act, those applying for a birth certificate must list their parents and grandparents and their respective villages in order to obtain a certificate.

<sup>32</sup> See for example Karigawa *et al.* (2016), at p. 19; and the discussion below on SABLs in section 4.3.

<sup>33</sup> Avosa, Michael. *Forest Governance Integrity Baseline Report: Papua New Guinea*, Transparency International PNG, 2011, p 11.

<sup>34</sup> ODI (2007). *The current legal and institutional framework of the forest sector in Papua New Guinea*, Papua New Guinea Forest Studies 2, prepared by Neil Bird, Adrian Wells, Flip van Helden and Ruth Turia, Overseas Development Institute, London, at p. 17; and Scheyvens, H., and Lopez-Casero, F. (2013). *Managing forests as a renewable asset for present and future generations: Verifying legal compliance in forestry in Papua New Guinea*, IGES Policy Report No. 2013-1, Institute for Global Environmental Strategies, Japan, pp. 39-40.

<sup>35</sup> The Minister appoints the Registrar of Incorporated Land Groups under section 3 of the *Land Groups Incorporation Act 1974*.

<sup>36</sup> These are summarised in the CLRC Training Manual (2012), pp. 25-28.

<sup>37</sup> In the same judgment (*Kawira v Bone* [2017] PGNC 164; N6802 (5 July 2017), at para 46), the National Court further described the situation as follows:

*“The current practice sees the State and the developers leaving it to the ill-equipped, mostly illiterate and (ill)prepared customary landowners to fend for themselves with the Registrar acting only on the information provided by people claiming to be landowners without independently ensuring that the application is genuine and does have the support of all members of the group ... and (that) real opportunity has been given to the people to be informed properly and fully, based on which they have given their free and informed consent.”*

<sup>38</sup> The CLRC Report (2005) (p 24) sets out the shortcomings of the old ILG Act in not requiring adequate publication among landowners in relation to applications to incorporate ILGs in the local area.

<sup>39</sup> The old ILG Act only required the ILG Registrar to publish notice in the National Gazette, and to notify the relevant local-level government and village court (s. 33).

<sup>40</sup> See *Land Groups Incorporation (Amendment) Act 2009*, new sections 5A and 5B. It is also now an offence to fraudulently procure a certificate of incorporation, or to wilfully make any false declarations in relation to any dealing with land under the ILG Act (see new section 29), punishable by a fine of up to K5,000, or six years imprisonment, or both.

<sup>41</sup> See *Kawira v Bone* [2017] PGNC 164, at paras. 34 - 47.

<sup>42</sup> This observation was made recently by the National Court in *Kawira v Bone* [2017] PGNC 164, at para. 40.

<sup>43</sup> For two case studies (in Gulf Province and Western Province) which describe the misunderstanding and misinformation in communities regarding the incorporation process, see Minnegal *et al.* (2015), *Reshaping the Social: A Comparison of Fasu and Kubo-Febi Approaches to Incorporating Land Groups*, pp. 502 – 508.

<sup>44</sup> Main, M., and Fletcher, L., (2018), *On Shaky Ground: PNG LNG and the consequences of development failure*, Jubilee Australia Research Centre. at p. 5.

<sup>45</sup> Main, Michael, and Fletcher, Luke. (2018). *On Shaky Ground: PNG LNG and the consequences of development failure*, Jubilee Australia Research Centre, at p. 5, 11 – 15. Jubilee Australia reports that royalty payments commenced in September 2017 for landowners of the PNG LNG Project near the processing facility in Port Moresby (p. 11).

<sup>46</sup> Main M., and Fletcher, L., (2018), at p. 12; and see *Rimbunan Hijau (PNG) Limited v Ina Enei on his behalf and on behalf of Moga clan of Loupom Island, & Ors*, SCA 126 of 2011, SC1605 (27 April 2015, and 25 September 2017), at para. 30. Under the *Oil and Gas Act 1998*, the proponent is responsible for social mapping and landowner identification of customary owners. Based on these results, under the Act it is the responsibility of the State (i.e. the Minister for Petroleum and Energy) to assist with the incorporation of ILGs in the project area (ss. 48, 49). In *Kawira v Bone* [2017] PGNC 164 (at paras. 42 – 44), the National Court noted that as at July 2017, the proper formation of ILGs for the purpose of distributing benefits from the Project remained outstanding, and that the process had been placed on hold due to the State failing to fund the process to have it completed.

<sup>47</sup> *Kawira v Bone* [2017], PGNC 164, at para. 45.

<sup>48</sup> *Rimbunan Hijau (PNG) Limited v Ina Enei and Ors*, SCA 126 of 2011, SC1605 (27 April 2015, and 25 September 2017). This case was actually about a logging operation in which Rimbunan Hijau and the State had failed to properly identify the correct owners of an access road which the company had used for its logging operations over a period of eight years. The case represents a very authoritative statement on the obligation of the State, companies and individuals, as the Supreme Court is the highest court in PNG.

<sup>49</sup> *Rimbunan Hijau (PNG) Limited v Enei*, SCA 126 of 2011, SC1605 (25 September 2017), para. 27.

<sup>50</sup> *Rimbunan Hijau (PNG) Limited v Ina Enei and Ors*, SCA 126 of 2011, SC1605 (27 April 2015, and 25 September 2017), paras. 27 - 30; and *Kawira v Bone* [2017], PGNC 164, at para. 45.

<sup>51</sup> Office of Climate Change and Development (OCCD), (2014). *Final Working Draft Guidelines on FPIC for REDD+ in Papua New Guinea*, Version 4, August 2014, at p. 37.

<sup>52</sup> See Hambloch (2018), who reviews the ILG/SABL mechanism in detail, in the context of oil palm developments in West New Britain. At p. 25 Hambloch describes a case in August 2016 in which the National Court declared a SABL to be null and void in Kokopo, in which the Court said that the SABL process has been hijacked by a few powerful landowners from specific clans who incorporated an ILG in order to take control of ‘their’ clan’s land; and *Maniwa v Malijwi*, [2014] PGNC 25 (4 July 2014): paras 21 – 24.

<sup>53</sup> Numapo (2013), at p. 12.

<sup>54</sup> National Executive Council, 12 June 2014, Decision No. 184/2014.

<sup>55</sup> See the Land (Amendment) Bill 2016, s. 4.

<sup>56</sup> See CLRC Report (2008), at pp. 8-9, 26. See also the CLRC Training Manual 1, (2012), which describes the history and weaknesses of ILGs at p. 9.

<sup>57</sup> See the *Land Groups Incorporation (Amendment) Act*, new Division 3A – Management of Incorporated Land Groups, ss. 14A-14K.

<sup>58</sup> See the *Land Groups Incorporation (Amendment) Act*, sections 14H – 14K. Misappropriation of property or funds by an ILG Committee Member is now a serious offence punishable by a fine up to K5,000, or six years imprisonment, or both: see new section 29 on Wilful Misconduct.

<sup>59</sup> See the article by Minnegal, M., Lefort, S., and Dwyer, P.D., *Reshaping the Social: A Comparison of Fasu and Kubo-Febi Approaches to Incorporating Land Groups*, (2015), The Asia Pacific Journal of Anthropology.

<sup>60</sup> See Donigi, p. 1; and new Act, Schedule 4 “Provisions which are deemed to be contained in the constitution of every group”, clause 3. The amending Act provides that membership of the ILG is to be determined according to the customs of the area: see Schedule 7, clause 3 on Membership.

<sup>61</sup> Minnegal, *et al.* (2015), at p. 497.

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<sup>62</sup> *Land Groups Incorporation (Amendment) Act 2009*, Schedule 4, clause 12.

<sup>63</sup> *Land Groups Incorporation (Amendment) Act 2009*, Schedule 7, clause 12.

<sup>64</sup> *Land Groups Incorporation (Amendment) Act 2009*, section 14B (2).

<sup>65</sup> *Land Groups Incorporation (Amendment) Act 2009*, section 14D (3).

<sup>66</sup> Minnegal *et al*, (2015) at p. 504