The environmental law aspects of forestry resource development in Papua New Guinea: A critique

Eric Lokai Kwa

University of Wollongong

Recommended Citation

NOTE

This online version of the thesis may have different page formatting and pagination from the paper copy held in the University of Wollongong Library.

UNIVERSITY OF WOLLONGONG

COPYRIGHT WARNING

You may print or download ONE copy of this document for the purpose of your own research or study. The University does not authorise you to copy, communicate or otherwise make available electronically to any other person any copyright material contained on this site. You are reminded of the following:

Copyright owners are entitled to take legal action against persons who infringe their copyright. A reproduction of material that is protected by copyright may be a copyright infringement. A court may impose penalties and award damages in relation to offences and infringements relating to copyright material. Higher penalties may apply, and higher damages may be awarded, for offences and infringements involving the conversion of material into digital or electronic form.
THE ENVIRONMENTAL LAW ASPECTS OF
FORESTRY RESOURCE DEVELOPMENT IN
PAPUA NEW GUINEA: A CRITIQUE

A thesis submitted for the fulfilment of the requirements for the award of the
degree of

Master of Laws (Honours) (Environmental Law)

FROM

THE UNIVERSITY OF WOLLONGONG

UNIVERSITY OF WOLLONGONG
LAW LIBRARY

BY

ERIC LOKAI KWA (LLB (Hons) UPNG)

Faculty of Law

Centre for Natural Resources Law and Policy

December 1994
ACKNOWLEDGMENT

This thesis would not have been possible without the help of many people and organisations.

I wish to convey my sincere thanks and gratitude to my supervisors, Professor Martin Tsamenyi and Professor David Farrier. I began my studies as an inexperienced researcher and analyst. I hope that the thesis will be a reflection of the high standards upheld by them. Professor Tsamenyi has been a persistent encourager and in many ways an inspiration to me. I cannot thank him and Professor Farrier enough for their contribution in the formulation and outcome of this thesis.

A person, whose love and care has always been the source of my strength is my God and Lord, Jesus Christ. I thank him, for his love and faithfulness.

I also wish to thank my sponsor, the Australian International Development Assistance Bureau (AIDAB) for sponsoring my study through the John Crawford Scholarship Scheme. Without their financial assistance, I would not have undertaken this program.

More importantly, I want to thank my family (Kwa family) and Ms Enaha, K.P. Henao, for their unending support and encouragement during my two years of study. My family has and will always be the footstool for my aspirations in life. I want to thank God for my family.

I also wish to thank the following individuals and organisations for their contribution towards my research: Professor John Nonggorr of the University of Papua New Guinea Law Faculty, for his useful comments on Chapter 4 of the thesis; Damien Considine of the Wollongong University Law Faculty, for his guidance in the formulation of Chapter 4 of the thesis; Ms. Tahereh
Nadarajah of the National Research Institute, Dr. Brian Brunton, the Director of Individual and Community Rights and Advocacy Forum (ICRAF); Dr. Philip Siaguru of the Papua New Guinea University of Technology Forestry Department; and David Mossop of the New South Wales Environmental Defenders Office for their helpful comments on the forestry sector of PNG; the Dean and staff of the Law Faculty of Wollongong University for making my study environment a memorable one; the Wau Ecology Institute for sponsoring my research in the Morobe Province between 13 and 25 June, 1994 under the Gressitt Scholarship Program; the Papua New Guinea Law Reform Commission; the National Research Institute; the Office of the Speaker of the National Parliament; the National Archives of Papua New Guinea and the Department of Environment and Conservation.

A special thanks to Transform Aqorau, Doctorate of Philosophy at the Wollongong University Law Faculty for proof-reading the final text of the thesis.

Finally, it is proper that I acknowledge the contribution of many of my friends and relatives who have helped me in their own small way in this research.
TABLE OF CONTENTS

Certification i
Acknowledgement ii
Abbreviations vii
Table of Statutes viii
Table of Cases xi

Introduction

1. Land Tenure in Papua New Guinea and its Implications on Forestry Ownership

   Introduction 9
   Customary Land Tenure 9
   Alienated Land 26
   Land Tenure and Forestry Ownership 28
   Summary 31

2. Forestry Policy and Law in Papua and New Guinea

   Introduction 32
   Colonial Forestry Policy 32
   Colonial Forestry Law 37
   Summary 49

3. Post Independence Forestry

   Introduction 50
   The Forestry Policy of 1979 50
   The Commission of Inquiry Into
   Aspects of the Forestry Industry 51
   Tropical Forest Action Plan - PNG (TFAP) 54
   The Forestry Policy of 1991 56
   The Forestry Law 57
   Summary 66
4. The Forest Management Agreement (FMA): Is it a Fallacy?

Introduction 67
The Timber Rights Purchase Agreement:
Origin and Purpose 67
Contracts made through the Timber Rights Purchase Process 75
Problems with the Timber Rights Purchase Process 80
The Timber Rights Purchase Process under the Forestry Act 1991 80
Customary Rights under the Forestry Act 1991 85
Summary 88

5. The Development of Forestry Resources under the Forestry Act 1991

Introduction 89
Registered Forestry Industry Participant 89
The Timber Permit Process 91
The Timber Authority Process 97
The Licence Process 106
The Timber Supply Area 108
Summary 110

6. The Environmental Law and its Impact on Forestry

Introduction 112
The Environmental Policy of PNG 113
The Primary Environmental Statutes 115
Summary 123
7. The Principles of Environmental Impact Statement and Their Implications on Forestry Resources Projects

Introduction 124
The Environmental Impact Statement Concept 124
The Environmental Impact Statement in the PNG Context 128
The Effect of Environmental Impact Statement in Forestry Resource Development Projects 138
Summary 141

Conclusion 142

Bibliography 146
ABBREVIATIONS

AIDAB  Australian International Development Bureau
ALJR  Australian Law Journal Reports
Cap  Chapter
CILM  Commission of Inquiry into Land Matters
CPC  Constitutional Planning Committee
EIA  Environmental Impact Assessment
EIS  Environmental Impact Statement
EPLJ  Environmental Planning Law Journal
FMA  Forest Management Agreement
IASER  Institute of Applied Social and Economic Research
IPA  Investment Promotion Authority
ITTO  International Tropical Timber Organisation
MLJ  Melanesian Law Journal
NEC  National Executive Council
NGO  Non Governmental Organisations
NIDA  National Investment Promotion Authority
NRI  National Research Institute
PNG  Papua New Guinea
PNGFRA  Papua New Guinea Forest Resources Association
PNGLR  Papua New Guinea Law Reports
QUTLJ  Queensland University of Technology Law Journal
SCR  Supreme Court Reference
TFAP  Tropical Forest Action Plan
TRP  Timber Rights Purchase
TSA  Timber Supply Area
UPNG  University of Papua New Guinea
# TABLE OF STATUTES

**Papua New Guinea**

<table>
<thead>
<tr>
<th>Act/Ordinance</th>
<th>Chapter</th>
</tr>
</thead>
<tbody>
<tr>
<td>Business Groups Incorporation Act</td>
<td>144</td>
</tr>
<tr>
<td>Claims By and Against the State Act</td>
<td>30</td>
</tr>
<tr>
<td>Companies Act</td>
<td>146</td>
</tr>
<tr>
<td>Constitution of Papua New Guinea Act</td>
<td>1</td>
</tr>
<tr>
<td>District Courts Act</td>
<td>40</td>
</tr>
<tr>
<td>Environmental Contaminants Act</td>
<td>368</td>
</tr>
<tr>
<td>Environmental Contaminants (Amendment) Act</td>
<td>1994</td>
</tr>
<tr>
<td>Environmental Planning Act</td>
<td>370</td>
</tr>
<tr>
<td>Forest Industries Council Act</td>
<td>215</td>
</tr>
<tr>
<td>Forestry (Amendment) Act</td>
<td>1993</td>
</tr>
<tr>
<td>Forestry (Private Dealings) Act</td>
<td>217</td>
</tr>
<tr>
<td>Forestry Act 1991</td>
<td>216</td>
</tr>
<tr>
<td>Forestry Act 1991</td>
<td></td>
</tr>
<tr>
<td>Income Tax Act 1959 (as Amended)</td>
<td></td>
</tr>
<tr>
<td>Investment Promotion Act</td>
<td>1991</td>
</tr>
<tr>
<td>Land (Tenure Conversion) Act</td>
<td>1964</td>
</tr>
<tr>
<td>Land (Tenure Conversion) (Amendment) Act</td>
<td>1987</td>
</tr>
<tr>
<td>Land Acquisition Act</td>
<td>192</td>
</tr>
<tr>
<td>Land Act Chapter 185</td>
<td></td>
</tr>
<tr>
<td>Land Groups Incorporation Act</td>
<td>147</td>
</tr>
<tr>
<td>Land Registration Act</td>
<td>191</td>
</tr>
<tr>
<td>Laws Repeal Act</td>
<td>1975</td>
</tr>
<tr>
<td>Mining (Ok Tedi Agreement) Act</td>
<td>1976</td>
</tr>
<tr>
<td>Mining (Bougainville Copper Agreement) Act</td>
<td>1967</td>
</tr>
<tr>
<td>Mining Act 1992</td>
<td></td>
</tr>
<tr>
<td>Native Land Registration Ordinance 1952</td>
<td></td>
</tr>
<tr>
<td>Organic Law on Provincial Governments Act</td>
<td>2</td>
</tr>
<tr>
<td>Papua and New Guinea Act</td>
<td>1949</td>
</tr>
<tr>
<td>Petroleum (Gulf of Papua Agreements) Act</td>
<td></td>
</tr>
<tr>
<td>Petroleum Act 198</td>
<td>198</td>
</tr>
<tr>
<td>Statute Law (Transfer of Powers) Act</td>
<td>1976</td>
</tr>
<tr>
<td>Statute Laws Revision (Amalgamation of Laws) Act</td>
<td>1973</td>
</tr>
<tr>
<td>Water Resources Act</td>
<td>205</td>
</tr>
</tbody>
</table>
Territory of Papua

Crown Grants Ordinance 1889
Forestry (Papua) Ordinance 1950
Forestry (Papua) Ordinance 1951
Indigenous Timber Ordinance 1892
Land Regulation Ordinance 1888
Real Property Ordinance 1889
Sandalwood and Rubber Ordinance 1907
Timber Ordinance (Consolidated) 1909
Timber Ordinance 1903
Timber Ordinance 1908
Timber Ordinance 1990 - 1917
Timber Ordinance 1909 - 1920

Territory of New Guinea

Forestry (New Guinea) (Amendment) Act 1971
Laws Repeal and Adopting Ordinance 1921-1939
Native Administration Regulations 1924
Timber (Amendment) Ordinance 1922
Timber Ordinance 1922
Timber Ordinance 1922 - 1926
Timber Ordinance 1936 - 1937

Provincial Statutes

East New Britain Provincial Forestry Operations Control Act 1992
East Sepik Provincial Customary Land Registration Act 1987
East Sepik Provincial Land Act 1987
Manus Provincial Forest Management Act 1987 - 1989

Commonwealth (Australia)

New Guinea Timber Agreement Act 1952
Papua New Guinea Independence Act 1975

Queensland

Real Property Act 1861 - 1877
Germany
Imperial Ordinance 1899

United States of America
National Environmental Policy Act 1969
# TABLE OF CASES


Blomley v. Ryan (1956) 99 C.L.R. 362

Central Pomio Logging Corporation Pty Ltd v. The State [1992] PNGLR 20

Jaha Development Corporation Pty Ltd v. Gei Ilagi, Secretary for the Department of Manus (1990) (Unreported) Appeal No.242 of 1989


Minister for Lands v. Frame [1980] PNGLR 433

Oyekan v. Adele (1957) W.L.R. 860


Rainbow Holdings Pty Ltd v. Central Province Forest Industries Pty Ltd [1983] PNGLR 34

Re Sanga (Deceased) [1983] PNGLR 142

SCR No 2; Re Organic Law [1982] PNGLR 214

SCR No 3 of 1989; Re Forestry Act [1990] PNGLR 222


The Administration of Papua New Guinea v. Edward Iorive; Ex parte Sabusa Sawmilling Co. Pty Ltd (1971) (Unreported, SC 658)

Tijani v. Secretary for Southern Nigeria (1921) 2 A.C. 399

INTRODUCTION

Papua New Guinea (PNG) has a total land area of 463,000 km$^2$ and a population of just over 4 million people. Seventy seven percent of its land mass is covered by tropical rainforest which represents about 1.5% of the world's tropical rainforests.\textsuperscript{1} The forest consists of more than 2,000 species of trees of which 400 species are of commercial value.\textsuperscript{2} In 1979, it was estimated that 15 million hectares of forest was accessible and viable for commercial development.\textsuperscript{3} A recent study in 1992 by the Australian International Development Assistance Bureau (AIDAB), estimates that only 7 million hectares is available for commercial utilisation.\textsuperscript{4}

This thesis analyses the historical development of forestry legislation and policy in PNG. The analysis will show that resource owners have been the main losers both economically and environmentally in the exploitation of the forests. The authors of past and present forestry legislation and policies claimed that these instruments were geared towards the equitable distribution of benefits from the development of the forestry resources. However, in real terms, only a handful of people and multinational companies have benefited from the utilisation of forestry resources.

It will be argued that the forestry resources in PNG have not been managed with the view to achieving sustainable utilisation of the forestry resources for the benefit of present and future generations. The thesis calls for a rethink of current forestry legislation and policies.

The contemporary exploitation of forest resources in PNG is recorded as early as 1884 when Europeans settled in PNG. The economic

\textsuperscript{1} CSIRO A Blueprint for Sustainable Use of PNG's Forests : Definition and Indicators of Progress, Canberra : CSIRO, 1992, p.3
\textsuperscript{2} Ibid.
utilisation of forests in the early period of colonisation was slow and generally restricted to meeting domestic needs. It was not until the 1930s that timber production soared as a result of mining activities in the Wau-Bulolo areas.\(^5\)

Over the years the forestry sector has contributed its share of revenue to the economy. Exports of forest products expanded from A$257,000 in 1951-52 to K36,400,000 in 1979.\(^6\) Royalties collected from timber operations rose from K208,000 in 1958-59 to K2,500,000 in 1979.\(^7\) By 1990, export earnings reached K62 million\(^8\) and by 1992, it reached K100 million, ranking third after minerals and agricultural produce.\(^9\)

In the past, the traditional market for PNG timber was Australia. Over the years the market has expanded and now includes Japan, South Korea, Taiwan and India. Today, more timber is exported to these countries than Australia and New Zealand. For instance, in 1991, 61% of log exports went to Japan, 31% to South Korea, and the remainder to Taiwan and India.\(^10\)

The development of the forestry resources involves four groups. These are: the national Government, the Provincial Governments, resource owners (customary owners) and the developers. Their participation in the development of the forestry resources are distinctively clear. The customary owners are the owners of the resources as highlighted in Chapter 1; the Government (and the Provincial Governments) are the custodian of the resources, and the developers are responsible for their utilisation. In the past, the forest industry consisted mostly of Australian companies. Today, it is comprised mostly of Malaysian and Japanese companies. In 1993, in a stunning revelation, it

\(^5\) See generally Lane-Poole, C. E *A Report of the Goldfields of New Guinea: Together with Recommendations regarding a Forest Policy for the Whole of the Territory*, Sydney: RNB Agriculture Series (S1), 1935.


\(^7\) Ibid.


\(^9\) Note 1 at p.1.

\(^10\) Thompson, n.8, *op. cit.*, p.9.
was estimated that Malaysian logging companies held about 80% of the concessions in the country.\textsuperscript{11}

These four main players are brought together by the \textit{Forest Management Agreement} process which was previously known as the \textit{Timber Rights Purchase} agreement process. The procedures pertaining to the \textit{Forest Management Agreement} is provided for in the \textit{Forestry Act 1991}.\textsuperscript{12} The origin and purpose of the \textit{Timber Rights Purchase} system is examined in Chapter 4. The \textit{Timber Rights Purchase} system guaranteed "fair" distribution of revenue from the development of timber products among these four groups. Its objective was to guarantee that the benefits flowed to the customary owners so as to increase their standard of living. This was to be achieved through:\textsuperscript{13} (1) royalties from log exports, (2) ownership of the timber permit and price sharing through their land owner companies, (3) premiums payable to the land owner companies, (4) business and economic development projects, (5) local processing, and (6) employment opportunities.

The distribution of royalties was shared in the following manner: customary owners - 25%, Provincial Government - 50% and the national Government - 25%.\textsuperscript{14} The Commission of Inquiry Into Aspects of the Forestry Industry (herein after referred to as the Barnett Inquiry), established in 1987, was very critical of the \textit{Timber Rights Purchase} arrangement.\textsuperscript{15} Barnett discovered that customary owners were being cheated and to use his own words "the share received by the customary owners is in fact ridiculously low."\textsuperscript{16}

The Government has also lost out on revenue because of transfer pricing. Transfer pricing was rampant in the years preceding the Barnett

\textsuperscript{11} \textit{The Times} of Papua New Guinea, 3 March, 1993.
\textsuperscript{12} No.30 of 1991
\textsuperscript{15} This has been particularly highlighted in Volume 1 of the Final Report of the Commission; Barnett, T. E \textit{Report of the Commission of Inquiry Into Aspects of the Forestry Industry}, Port Moresby : Commission of Inquiry (7 Interim Reports and Final Report), 1987-1989; The background of the Barnett Inquiry is discussed in Chapter 3.
\textsuperscript{16} Barnett Inquiry, \textit{op. cit.}, Vol 1, p.27
Inquiry. Although the problem was identified by the PNG Law Reform Commission as early as 1981\(^7\), not much was done to contain the problem. It was not until 1986 that profits from log exports were declared in the industry.\(^8\) The main defaulters were Japanese logging companies. For example, the Stettin Bay Lumber Company which is a subsidiary of *Nissho Iwai*, made its owner a hidden profit of over US$3 million between 1986 and 1987.\(^9\) It was estimated by the Barnett Inquiry that:

> transfer pricing on logs during 1986 and 1987 averaged US$5-10 per cubic meter, causing the loss of up to US$27,500,000 in foreign exchange earnings. In the same period the Government lost up to US$4,270,000 in company tax on hidden profits.\(^{10}\)

The country lost about 15\% of their respective earnings from the industry.\(^{21}\)

Another problem discovered by the Barnett Inquiry was the misdeclaration of log species. High value species were declared to be less valuable, or classified under the catch-all mixed species.\(^{22}\) For instance, in 1986 alone United Timbers, a subsidiary of Mitsubishi, made US$300,00 through the misdeclaration of timber species.\(^{23}\) The Barnett Inquiry found that Japanese companies wrote species gradings in Japanese. As few Forestry Officers are acquainted with the Japanese language, they often accepted the export declarations in good faith.\(^{24}\) This problem continues to prevail today. In 1992, I conducted a research into the Umboi Timber Project on Umboi Island in the Morobe Province. I interviewed an officer of the customary owners company responsible for supervising the grading of logs. The officer said that on numerous occasions he had to recheck the log gradings because he did not trust the Malaysian log graders. He began to recheck the logs after he realised the company was misdeclaring log species.

---


\(^9\) Note 13 at p.6

\(^10\) *Id.*, p.15.


\(^12\) Marshall, n.18, supra

\(^13\) *Ibid*

\(^14\) Note 13 at p.17
The development of the forestry resources also has adverse environmental consequences in and around the development projects. Not one company was able to prove that its operation was not adversely affecting the environment. This issue is further discusses in Chapter 6 and 7.

There is no doubt that forestry is a big contributor to the national economy. It is also obvious that the main losers in the forestry industry are the customary owners, the Provincial Governments and the national Government. How can this situation be rectified? The Government has introduced certain mechanisms which are aimed at curtailing many of the problems associated with the forestry industry and help maintain the viability of the industry into the year 2000 and beyond. These post-Barnett Inquiry mechanisms are identified and discussed throughout this thesis.

If these new measures are to be successfully implemented, the concept of "sustainable development" must be applied to forestry management. Sustainable development has been described as, development which "meets the needs of the present generation without compromising the ability of the future generations to meet their own needs." The aim of sustainable development is to ensure the well-being of all people and of nature, and requires a holistic world view that brings together social, economic and environmental concerns.

The International Tropical Timber Organisation has described sustainability of forests as "the regeneration of the forests that has been depleted by such utilisation." The application of this concept to forest management has been described as the locking of forest after it has been clear-felled in a monocyclic system; that is, having fifty to seventy years between harvests.

25 The definition was given by the World Commission on Environment and Development. It has been cited by Nadarajah, T in her paper Forest Policy and Conservation of Papua New Guinea's Forests: A Critique, Port Moresby: NRI (Discussion Paper No. 70), 1993, p.2


27 ITTO Tropical Forest Update, (Newsletter, Volume 4, No 2), Canberra: ITTO, 1994, p.2

28 The opposite of monocyclic system is the polycyclic system, where only selected trees are felled.

How then should sustainable management of forests be achieved? Nadarajah suggests that sustainability of forestry resources can be achieved if some action is taken on the following: (1) forestry research status, (2) legislation (forestry and environmental), (3) forestry standards and harvesting practices, and (4) monitoring practices.

A new forestry legislation was enacted in PNG in 1991. It facilitates sustainability of forest through the *Forest Management Agreement* process. A new forestry guideline has also been introduced to complement the *National Forest Policy* and the *Forestry Act 1991*. The guidelines encourage sustainable use of the forestry resource.

In the area of monitoring, the Government through the PNG Forest Authority (Forest Authority) has introduced two new devices. First, it has engaged the services of a Swiss company, the SGS, which will be solely responsible for the monitoring of log exports from PNG. The company will monitor, train, inspect and carry out surveillance of the timber industry. The Government is convinced that SGS will clean up the timber industry and maximise revenue to the Government. This arrangement is for 18 months and will cost the Government K5 million. This is a very expensive exercise and shows the seriousness of the Government in cleaning up the timber industry. However, it is also a slap in the face of the Forest Authority, and clearly indicates the weakness of the Forest Authority in policing the industry.

The second devise is the placing of Forestry Officers in "hot spot" areas of the forestry industry. The Forest Authority has purchased portable houses which will accommodate Forestry Officers in "hot spot" areas to conduct surveillance of forestry projects situated in these areas. Currently the targeted "hot spot" areas are the East and West New Britain Provinces, and New Ireland and Manus Provinces. The project has been applauded as a good start in the right direction.

---

30 *Id*, p.8
31 See Chapter 4, *supra*
32 *The PNG daily newspaper, Post Courier*, 16 May, 1994
33 *Ibid*
34 *The Times*, 5 May, 1994
35 *Ibid*
In an effort to foster the sustainability of forestry resource the Government has introduced the National Forestry Development Guidelines (hereafter referred to as "the Guidelines") which direct the developers of forestry resource to pursue sustainable harvesting methods. The Guidelines contain the forestry standards and guidelines for harvesting practices.

During the 20th Waigani Seminar, the participants of the Seminar called on the Government to ban the export of raw logs and encourage down-stream processing. To this end, the participants called on the Government to impose a total ban on issuance of timber permits and the review of existing timber projects. In response to these calls, the Government has decided to review all timber permits which were issued since 1990. The Government is also working towards down-stream processing and the banning of all log exports by the year 2000.

Under the Guidelines, developers are required to use sustainable methods of production in order that the Forest Management Agreement "areas will be managed to maintain and improve the forest's capacity to produce timber and other commercial forest products." The Forest Authority is also required to collaborate with the forestry industry to conduct reforestation and afforestation programs which are aimed at maintaining the continuous supply of timber for the industry to the year 2000 and beyond.

To encourage the industry to effectively implement this policy the Government has introduced a new concept which will give security and better economic returns to the developers. The new concept is the Timber Supply Area. For our present purpose, it suffices to note that the Timber Supply Area covers large tracts of forest areas and is aimed at supplying a

---

36 See the discussions on the Guidelines in Chapter 3, supra
37 Note 26 at p.19
38 Post Courier, 30 August, 1993
39 Note 4 at p.52
40 Ibid; This is in line with the ITTO directive asking its members to phase out export of raw timber by the year 2000
42 Id, pp.14-15
43 The concept is discussed further in Chapter 5
continuous flow of timber. Its objectives are: (1) to encourage down-stream processing, and (2) to give security to the developer.

The Government hopes that through the implementation of the Timber Supply Area concept, it will achieve its policy of down-stream processing and phasing out log exports by the year 2000. But, as will be seen later in Chapter 5, this concept does not encourage the sustainability of forestry resources.

The Government is at the cross-roads of choosing between rapid economic development and sustainable development. Should the Government choose the former or latter? Or should it embrace both? These are the crucial issues that the Government has to bear in mind when introducing natural resources policies and legislation. It will be shown in the thesis that as regards the forestry sector, the Government has opted to follow the road of sustainable development. What is the major stumbling block in the forestry sector as in the other areas of Government activity is, putting political rhetoric into action.

44 Personal communication with Alan Ross (an officer with the Forest Authority), 26 June, 1994
CHAPTER 1
LAND TENURE IN PAPUA NEW GUINEA AND ITS IMPLICATIONS ON FORESTRY OWNERSHIP

"I am the Lord, who brought you out of Ur in Babylonia, to give you this land as your own" (Holy Bible, Genesis 15: 7)

Introduction

The issue of land tenure is crucial to an understanding and appreciation of the use and management of natural resources in PNG. The determination of forestry resources utilisation is really a question of land use. It is therefore fair to start the thesis by discussing the issue of land ownership and use rights.

The purpose of this Chapter is to examine the policies and pertinent legislation relating to land tenure in PNG. I will examine the issue of land ownership before and after independence, and establish its implications on forestry ownership. Through this process I will look at the background of the two different land tenures and attempt to establish State ownership of land and its uses and discuss customary land ownership and the rights and obligations attached to land ownership. An attempt will be made to relate land ownership to forestry ownership with the proposition that customary owners have exclusive ownership to forestry resources located on their land.

Customary Land Tenure

Land tenure in PNG is complex and for the most part difficult to mobilise and use for economic and other related purposes. The basic reason is that there are two land tenure systems, namely, customary land tenure and alienated land.

Customary land is governed by custom while alienated land is subject to the control of legislation. Land policies and legislation were

---

1 Such as national parks, conservation and amusement areas which may be declared under the National Parks Act, Conservation Areas Act and the Fauna (Protection and Control) Act.
introduced and changed by successive Governments (both colonial and post-independence) to mobilise customary land and this continues to be the objective of the Government.

Customary land has been defined as land still occupied and used in accordance with the body of local customs built up since time immemorial. The rules and principles of customary land tenure are sometimes complex and contingent. However, viewed from the perspective of customary owners, customary land tenure is not as complex as it appears. As will be seen later, the problem is not the complexity of customary land tenure, but the imposition of western concepts of land ownership and control over customary land.

The importance of land to the people of PNG has been described as:

Land is the only thing worth living for
Land is the only thing worth working for
Land is the only thing worth fighting for
Land is the only thing worth dying for
For land is the only thing that lasts forever and ever.

Land is the source of life, and is also the resting place of the dead. To give up land ownership and control means death, to hold on to land means life. There can be no better way of describing the importance of land to the people of PNG.

Customary Land Ownership

Customary land is communally owned but is used by individuals. No land was terra nullius under custom. In the past it constituted the only security system. A man without land "has no home, no name, no status." Land

---


4 Ibid.

5 In some parts of the country such as in the North Solomons Province and some parts of the New Ireland Province land rights are vested in the female line. For the purposes of this part of the Chapter I will make reference only of the male gender.

and other fixed resources form a territorial domain. Territorial rights are vested in the community as a whole and maintained by force of arms from infringement by outsiders. An individual cultivates a certain plot of land on the basis of his membership of the clan group that controls it. The individual also has other rights to the land such as, hunting for wild animals and birds, collecting fruits, nuts and cutting trees for building purposes.

In some areas of the country, an individual has rights to land belonging to both his paternal and matrilineal relatives. For instance, in Siassi, in the Morobe Province, rights to matrilineal land is only possible after an individual has dispensed with some form of compensation to his mother's relatives (usually a pig, clay pots and wooden bowls). The rights acquired are limited to "use" and not "ownership".

The produce from an individual's garden is usually consumed by the individual and his family. Occasionally the produce ends up in huge feasts and at other times in exchanges.

Land is sacredly guarded against outside interferences. Clan land boundaries are clearly demarcated and known by the members. Some of the land boundaries include perennial crops, trees, mounds, drains, plants and stones. These land marks are conclusive evidence of land ownership.

Succession to the land is mainly by way of membership of the clan. Membership of a clan is usually by descent. However, membership may sometimes depend on residence and participation in common activities.

__Papua New Guinea's Future__, Canberra: Australian University Press, 1974, p.134


9 Ibid.

10 I'm originally from Siassi. Matters relating to Siassi Island are therefore based on my personal knowledge and experiences.

11 In the traditional society it related to the barter of goods. In today's modern economy, it means exchanges for cash. Nonetheless, in many parts of the country, barter is still practised.

12 The land marks of the Papua New Guinea highlanders as described by Brown is also true for the other areas of the country; Brown, P _Highland Peoples of New Guinea_, Cambridge: Cambridge University Press, 1978, pp.121-123
As the land is owned by the group, a person can only inherit his father's rights to the land. These rights include the ownership of the deceased's house, personal belongings, garden produce, fruit trees\(^\text{13}\) which the deceased planted and in today's economy - cash crops (if his father had any). Fruit trees which grow wild, trees and plants which grow naturally on the clan land, belong to all the clan members.\(^\text{14}\)

**Dealings in Customary Land**

Dealings in customary land are governed by customary rules and principles. Each society has its own rules and norms which set out the requirements to be satisfied in order to have access to land. Societies in PNG are divided into clans and sub-clans. These clans have their own defined authority system. For example in Siassi the ultimate power to determine any dealings in land is vested in the elders of the clan.\(^\text{15}\) The power structure is illustrated below in Figure 1.

![Power Structure in the Siassi Society](image)

The leader, who is the most senior member of the clan, usually holds the land in trust for the rest of the clan members. In inter-clan matters the leader acts as the spokesperson for the group. In all land and tribal warfare matters the leader's decisions are subject to the approval of the elders and the members. The elders, who are the senior members of the clan, act as the leader's advisers.\(^\text{16}\) The clan members have a right to

\(^{13}\) Such as mango and bread fruit trees.


\(^{15}\) This practice continues today.

\(^{16}\) See Morris, J "Finschaffen Area : Morobe Province" in Scaglion, G, n.14, *op. cit.*, p.55
discuss who would use a certain plot of land. An individual wishing to use a plot of land for a specific purpose usually approaches one of the elders who informs the leader of the member's intentions. The clan leader then makes his determination either by himself or on the advice of the elders. In most cases the leader makes the decision himself and then informs the elders of his decision accordingly.

**Alienation of Customary Land**

Land alienation to persons from outside the clan or society\(^{17}\) under custom is rare or uncommon.\(^{18}\) In Siassi title to land can be alienated to an outsider in only one instance. Land alienation occurs where an outsider saves the life of a member of another clan or society, who could have died if it was not for the help of the outsider. The relatives of the rescued person can transfer ownership of a parcel of land to the outsider. The transfer could include ownership of the forest (if any), fruit trees and if a river passes through the land, the right to use of the waterway. This transaction binds the present and future generations forever.\(^ {19}\)

If a portion of land is transferred to an outsider in breach of customary rules, the transaction would be regarded by the clan members as void and of no effect. In the past, the outsider would be killed and the transferor (usually the leader) removed from his position and replaced by one of the elders who was second in seniority to the leader.

Arrangements\(^ {20}\) could be made between clans from the same society for the use of each others' land either for short or longer periods. Where an arrangement is in place between two clans of the same society for the transfer of land, the members are required to utilise the land only for the purposes specified by the arrangement.\(^ {21}\) The nature of these

\(^{17}\) Land alienation to individuals within the same clan or society was unknown because the land was communal property.

\(^{18}\) Due to the flexibility of custom and the introduction of the monetary economy in PNG, customary land near the cities and towns are being sold outright to outsiders for cash. This is particularly evident in the Highlands; C. E. P. Val Haynes "The Land Mobilisation Program and Customary Land", paper presented at the Seminar on *Customs at the Crossroads: The Future of Customary Law in Papua New Guinea* (October 29-30, 1992) organised by the PNG Law Society and the UPNG Law Faculty.

\(^{19}\) The Lou Islanders of the Manus Province have a similar custom; See Pitpit, F "Lou Island: Manus Province" in Scaglion, G, n.14, *op. cit.*, p.60

\(^{20}\) That is oral agreements.

\(^{21}\) Under custom transfer of use means that, other members of a clan would use the land belonging
arrangements are very volatile and as such, if the land is used for unspecified purposes, the agreement can be terminated.

As an example, we will look at a case involving my clan (Sal) and another clan (Tali) which illustrates the situation. Sal had an agreement with Tali from the next village that we could use their land (2 parcels of land which put together, comprised the size of 2 football fields), located near my village and they could use our land (which is quite a large area), located near their village. It was also agreed that both parties had the right of first refusal in any future land dealing in the other party’s land. In 1991, without our notice, the Tali clan leader sold a portion of one of the 2 parcels of land to a man from my village for K600.00. This was a private arrangement which the Tali clan members, and my clan members had no knowledge of. We only became aware of the contract when we saw the man clearing the plot to build his house. We got together and agreed to terminate the agreement with the Tali clan. When we told the Tali clan members about our decision, they were furious with their leader. They requested negotiations but we refused. We have now relinquished our rights to use their land and we advised them to do the same.

In this case, it is obvious that Sal had a right to consent to the arrangement between the Tali leader and the man from my village. The Tali leader failed to consult us and therefore he breached the agreement. The contract was therefore terminated. The land transfer was also void under our customary law.

The question of whether custom has changed with time so that it now allows outright sale of customary land by one indigenous person to another person is examined below, in the light of the sale of forest rights to the State under the Timber Rights Purchase agreement.

---

to another clan of the same society, for instance, gardening for a specific period without claiming title to the land. This is different from alienation. Alienation of land means that land title and other rights attached to the land are surrendered to the person or clan the land is transferred to.

22 This arrangement was concluded by our forefathers.

23 The transfer has now been declared null and void by the Tali clan. They have, however, agreed to allow the man to build his house without giving him title to the land. But see n.8, where Haynes notes that similar arrangements in the Highlands are no longer void under custom.
*Customary Land Dispute Settlement*

Land dispute settlement is basically influenced by two factors: (1) the relationship of the disputants, and (2) the land in question. In resolving a land dispute the clan leaders look at the relationship of the disputants and the land in question. If the dispute is between two members of the same clan, the dispute is resolved by the clan leader, often with the help of the elders. Sometimes where the dispute involves members of two different clans the two clan leaders, with the help of the clan elders, negotiate. Where negotiations fail the matter is referred to the land court.24

Customary land dispute settlements are regulated under the *Land Dispute Settlement Act.*25 The Act establishes a four-level land dispute settlement process. First is mediation by the Local Land Mediators, the second is arbitration by the Local Land Court and the third is the District Land Court. Where the dispute is not resolved by the mediator and the two courts, a right of final appeal to the Provincial Land Court can then be exercised by a dissatisfied disputant.26

*Recognition of Customary Land Tenure*

Under this section an attempt will be made to ascertain the recognition of customary land tenure during the colonial period in the Territory of Papua and New Guinea. It will be shown that customary land tenure was more readily recognised in Papua than in New Guinea.

*Customary Land Tenure in Papua*

The first formal recognition of customary land tenure in PNG was in Commodore Erskine’s Proclamation in 1884.27 Under the Proclamation,
the Crown promised to protect the lives, land and properties of the indigenous people of British New Guinea. The Crown assured the Papuans that it would protect their lands from acquisition and settlement.

Erskine's Proclamation can be described as paternalistic, because under British common law a colony was not settled and therefore all land in the colony was Crown land. James argues that the proper view on such matters is that "annexation or cession gave the Crown political 'sovereignty' and not 'proprietary ownership' in the land". It is clear from James' argument that Erskine was implying that, the Crown being the political sovereign of the colony, would ensure that the indigenous peoples' proprietary ownership in the land was to be protected by the Crown. This view is supported by the fact that post - 1888 land statutes were aimed at “protecting” customary land from unscrupulous purchase by foreigners.

The first land legislation introduced in the colony was the Land Regulation Ordinance 1888. This legislation prohibited the purchasing and acquisition of any interest in the land and made such transactions null and void. It also authorised the Administrator to buy or lease customary land, on behalf of the Crown. Disposition of customary land by indigenous people to non-indigenous persons was prohibited under the Ordinance. This prohibition still remains in force.

In 1889, the Real Property Ordinance 1889 was enacted. This legislation basically adopted the Real Property Act of 1861-1877 as in force in the Colony of Queensland on 4th September, 1888. This legislation provided for: (1) the regularisation of land acquired by private persons prior to annexation, (2) registration and recording of acquired Crown titles, and waste and vacant land possessed by the Crown, (3)

28 British New Guinea was a Protectorate from 1884 to 1888. In 1888 to 1905 it was a Crown Possession. It became the Territory of Papua from 1905 to 1963
29 The assertion was based on the concept of "Act of State": See Oyekan v. Adele (1957) W.L.R. 860
30 James, R. W Land Law and Policy in Papua New Guinea, Port Moresby : PNG Law Reform Commission (Monograph No.5), 1985, p.65; This proposition is founded on the Nigerian case of Amodu Tijani v. Secretary for Southern Nigeria (1921) 2 A.C. 399
31 Lalor, n.27, supra
32 s.72, Land Act (Cap.185)
33 Lalor, n.27, supra
alienation of land in fee simple, (4) leases of Crown land, and (5) reservation of all gold and silver under leased Crown land to the Crown.

In the same year, the *Crown Grants Ordinance* 1889 was also enacted. It authorised the Administrator to issue grants of Crown land\(^{34}\) in fee simple to interested individuals. It has been argued that grants made pursuant to this legislation which confirmed private purchases made by non-indigenous people before September 1888, were void on the basis that, the traditional landowners lacked the capacity to transfer land to outsiders.\(^{35}\) Crown purchases were nevertheless declared valid by the High Court of Australia in the *Newtown Case*.\(^{36}\) James argues that:

\[
\text{their Honours in that case did not pronounce on the validity of private purchases, but conceded that the Erskine pledge clearly related to acquisition by persons other than the Crown.}\(^{37}\)
\]

In other words the High Court held (by obiter) that private purchases made prior to 1888 were valid. Following James’ argument, it is my view that the High Court erred in fact and common law by deciding that private purchases made prior to 1888 were valid. The essential issue is how could customary owners transfer their land titles to outsiders when such a concept was foreign to them?

From 1890 onwards, there followed a systematic flow of land statutes aimed at regulating alienated land. In the early period of British and (later Australian) colonisation, customary land tenure remained, to a large extent, intact. As will be seen below, it was only after the 1950s that attempts were made to convert customary land into alienated land.

**Customary Land Tenure in New Guinea**

The situation in German New Guinea was different. Under the *Imperial Ordinance* of 1899, the German New Guinea Kompagine was conferred

---

\(^{34}\) Crown Land was composed of all land acquired from the indigenous people, and land possessed by the Administration through the waste and vacant land declarations

\(^{35}\) James, n.30, *op. cit.*, p.114; This rationale is based on contract law. One of the vital components of a valid contract is the capacity of both parties to enter into a contract. In this instance the indigenous people were incapacitated by lack of knowledge and information to enable the valid transfer of land. These contracts were also not written and therefore breached the provisions of the *Statutes of Frauds and Limitations* and the *Real Property Act 1845* (U.K.)

\(^{36}\) [1973] 47 A. J. R 621

\(^{37}\) James, n.30, *op. cit.*, p.115
power to acquire, dispose of vacant land and negotiate with the indigenous people to acquire land. The German New Guinea Kompagine viewed the land in German New Guinea as *allodial* land. Using this concept as a curtain, certain lands which were "ownerless", came under the control of the company, and later the German Government. In fact by the time the Australians took over the administration of the Territory, it was discovered that "there were practically 600,000 acres of freehold land in private ownership together with existing alienated German Administration lands." No real attempt was made to register customary titles.

Although there was *de facto* recognition of customary land tenure by the German Administration, it was only after the First World War that formal recognition of customary land tenure was given in New Guinea under the *Laws Repeal and Adopting Ordinance 1921-1939* and the *Native Administration Regulations 1924*. The purpose of the *Laws Repeal and Adopting Ordinance* was twofold. First, it spelt out the administration of land which were purchased, leased and possessed by way of waste and vacant land declarations or which were compulsorily acquired. Second, it statutorily encouraged the continuance of customary institutions, usages and their recognition in the indigenous courts.

This position remained until 1949 when the two Territories eventually came under a single Administration.

---

38 s.1, *Imperial Ordinance 1899*
39 Under customary law land is never ownerless.
40 When German New Guinea was declared a German Protectorate in 1884, the Imperial Government gave the German New Guinea Kompagine the exclusive right to administer the Protectorate solely for economic purposes.
41 The German Imperial Government took over the control of the colony from the German New Guinea Kompagine in 1904; Amankwah, H. A "Eminent Domain and Land Use Control in West Africa (Ghana and Nigeria) and Papua New Guinea: The Political and Social Implications" (1988)16 MLJ 58.
42 Lalor, n.27, *op. cit.*, p. 145
43 s.6
The recognition of customary land tenure in post-independent PNG begins with the Constitution. The Constitution expressly calls for the protection and maintenance of the customary land tenure system in its preamble. The specific provisions are Goal 5 of the National Goals and Directive Principles and section 53.

Goal 5 calls for the respect and use of PNG forms of social, political and economic organisation to achieve development. These forms of PNG political and socio-economic organisation include customary law and customary forms of organisation. It is my view that as customary law is recognised by the Constitution, it follows that the Constitution does recognise customary forms of land ownership and management. Moreover, because the Constitution recognises customary ownership of land and the rights attached to it, it is imperative that all Government (and private) bodies must respect, apply and give effect to customary ownership of land and the rights embedded in customary land.

The protection of property, especially the land rights of the citizens was one of the fundamental concerns of the Constitutional Planning Committee (CPC). The Constitution therefore contains provisions which seek to protect private property. The pertinent provision of the Constitution is section 53. It states:

(1) Subject to section 54 (special provision in relation to certain lands) and except as permitted by this section, possession may not be compulsorily taken of any property, and no interest in or right over property may be compulsorily acquired, except in accordance with an Organic Law or an Act of the Parliament, and unless-

(a) the property is required for -
   (i) a public purpose; or
   (ii) a reason that is reasonably justified in a

45 The National Goals and Directive Principles are non-justiciable.
46 Schedule 2.1 of the Constitution explicitly states that custom is to be adopted, applied and enforced in so far as it is not inconsistent with a Constitutional law, a statute or repugnant to general principles of humanity.
47 s.25 of the Constitution imposes an obligation on all Government bodies to apply and give effect to the National Goals and Directive Principles as far as possible.
48 The Constitutional Planning Committee was established by the House of Assembly to draft the Constitution.
democratic society that has a proper regard for the
rights and dignity of mankind,
that is so declared and so described, for the purposes of this section,
in an Organic Law or an Act of Parliament.

Section 53 is a qualified right of citizens. It prohibits the possession of
any property, interest or right over property through compulsory means,
except in special circumstances. And subsection (2) of the same section
stipulates that where property is compulsorily acquired

just compensation must be made on just terms by the expropriating authority,
giving full weight to the National Goals and Directive Principles and having full
regard to the national interest and to the expression of that interest by the
Parliament, as well as to the person affected.

An Organic Law or Act of Parliament may provide for the
compulsory acquisition of property and that such an acquisition must be
accompanied by just compensation.49

It may be argued that customary land is not a private property and
therefore does not qualify under section 53 of the Constitution. However,
it has been strongly suggested by a World Bank Study Group50 that,
communal (or common as they put it) property is actually private
property for a group. The study concluded that, the common property
regime has similar attributes to private property except that unlike
individual private property, it is a corporate group property. It has also
been suggested by MacWilliams that customary rights to land in PNG are
forms of private property.51 It therefore follows that customary land
ownership is a form of private property which does qualify under section
53 of the Constitution. As will be shown below, this proposition finds
support under the Land Act and the Land Groups Incorporation Act.52

For our present purposes, the relevant Acts of Parliament which
give effect to section 53 of the Constitution are the Land Groups
Incorporation Act and the Land Act. Sections 15, 16 and 17 of the Land

49 The definition and quantum of compensation has now been established by the Supreme Court in

50 Bromley, D. W and Cernea, M. M The Management of Common Property Natural Resources:

51 MacWilliams, S "Small Holder Production, The State and Land Tenure" in Larmour, P, ed,
Customary Land Tenure: Registration and Decentralisation in Papua New Guinea, Port
Moresby: IASER (Monograph 29), 1991, p.9

52 No. 64 of 1974.
Act provide the procedures for the State to acquire customary land. Sections 16 and 17 prescribe the procedures for compulsory acquisition of customary land. Section 16 restrains the State from compulsorily acquiring customary land unless the Head of State has caused a notice to be served on the customary owners, informing the customary owners of the State's intention. The customary owners are then required to serve on the Minister for Lands, a notice to treat. After conducting diligent enquiries an agreement is concluded between the State and the customary owners for the sale of the customary land to the State. Section 17 requires that the customary owners must be paid a just compensation by the State.

The relevant provision of the Land Act which may be utilised by the customary owners is section 15. It enables the customary owners to sell their customary land to the State without the State exercising the compulsory acquisition process in sections 16 and 17. The vital element of section 15 is that, the customary owners must be "willing" to sell their land to the State.

The Land Groups Incorporation Act was (and still is) part of a group of statutes introduced before independence which were geared toward mobilising customary land. This Act purports to mobilise customary owners into land groups which could then be registered and encouraged to deal in their customary land as a corporate body. Fingelton correctly points out that:

The importance of this law cannot be overstated, for it means that the legal system of PNG recognises the corporate nature of that social unit which exists at the intermediate level between the State and the individual.53

It can therefore be concluded that the PNG legal system which begins with the Constitution recognises the corporate nature of customary ownership of land.

The objective of the Land Groups Incorporation Act and the process embodied in sections 15, 16 and 17 of the Land Act bring out two truths. First, these statutes acknowledge and respect customary land titles and the rights associated with these titles. Second, they recognise that

customary land is corporate private property which is protected by section 53 of the Constitution.

The other statute which recognises customary land tenure is the *Land (Tenure Conversion) Act*. This Act encourages individual ownership of customary land through the process of conversion and registration. It was anticipated that, by converting and registering customary land, the application of customary law and customary rights over these converted land would cease. However, in *Re Sanga (Deceased)*, the Supreme Court held that custom did apply to converted land where the deceased owner died intestate. In 1985, a World Bank consultant recommended that the *Land (Tenure Conversion) Act* be amended to speed up the conversion process. Consequently in 1987, the *Land (Tenure Conversion) (Amendment) Act* was enacted. The amendment accommodates the application of custom over converted land.

**Mobilisation of Customary Land**

Acknowledging the fact that almost all land in PNG was customary land, the Colonial Administration made various attempts during the short history of PNG to assimilate this vast tract of land into the western system for economic utilisation. The Colonial Administration introduced legislation designed to achieve this purpose but these legislation were not very successful. These attempts became notable as early as 1952. Methods such as tenure conversion and registration of titles to customary land were initiated to "introduce a single system of individual registered titles to land." But by 1960, "only 270 titles had been issued, and no single registration had been effected of communally owned land."

Larmour identified 9 methods which were introduced since 1952 to mobilise and register customary land. He concluded that only three are in

---

54 No. 15 of 1964; The Act was later amended in 1967, (*Land (Tenure Conversion) Act* 1967)
55 Haynes, n.18, *op. cit.*, p.6
56 [1983] PNGLR 142
57 MacWilliam, n.51, *op. cit.*, p.11
58 Haynes, n.18, *supra*, at p.6
59 Such as the *Native Land Registration Ordinance 1952*
60 Fingelton, n.2, *supra*
61 *Id.*, p.107
effect today.\textsuperscript{62} These are the: (1) customary land tenure conversion under the \textit{Land (Tenure Conversion) Act}; (2) lease-lease-back scheme which was started in the 1970s; and (3) Provincial land mobilisation scheme which was started in the East Sepik in 1987.\textsuperscript{63} The reason for the failure of these and other customary land mobilisation schemes has been attributed to the lack of understanding of the complexity of customary land tenure and the appreciation of the fact that "western concepts" cannot be easily transplanted into PNG society.\textsuperscript{64}

In the 1950s and the early 1970s, the Colonial Administration introduced land legislation to lure the customary owners to convert their customary land into alienated land. These were the \textit{Native Land Registration Act 1952, Land Groups Incorporation Act, Land (Tenure Conversion Act)} and the \textit{Business Groups Incorporation Act 1974}.

The \textit{Native Land Registration Act 1952} was the first of a string of land statutes aimed at mobilising customary land. Its primary focus was to introduce a comprehensive register of all customary land. It was a very ambitious piece of legislation. The Act, as mentioned earlier, did not appeal to the customary owners, and as such was not very successful. The \textit{Land Groups Incorporation Act} introduced a device which allows customary land groups to organise as a corporate body which would have the power to acquire, manage and deal with customary land. The \textit{Land (Tenure Conversion) Act} "allowed tenure conversion orders to be made in favour of customary groups incorporated under the \textit{Land Groups Incorporation Act} and the \textit{Business Groups Incorporation Act} of 1974."\textsuperscript{65} The \textit{Land Groups Incorporation Act} has not been very successful. James argues that the Act's lack of success is attributed to "the Registrar's reluctance to incorporate land groups due to its multi-purposeness" nature.\textsuperscript{66}

Post-independent Governments of PNG have not abandoned the Colonial Administration's policy of alienating customary land for

\textsuperscript{62} Larmour has made a very careful analysis of these methods and records his findings in Larmour, P "Registration of Customary Land: 1952-1987" in Larmour, n.51, \textit{op. cit.}, p.51

\textsuperscript{63} \textit{Ibid.}

\textsuperscript{64} This problem was pointed out by Justice Kerr in 1968; Kerr, J. R "Law in Papua New Guinea." Speech delivered on November 27, 1968 at the University College, Pimlico: (Townsville) Queensland.

\textsuperscript{65} Banda, n.44, \textit{op. cit.}, p.8; These statutes are still in force.

\textsuperscript{66} James, n.30, \textit{op. cit.}, p.132
economic purposes.67 However, the problems which besetted the Colonial Administration, continue to haunt the Government today.68

In the late 1980s, the Department of Lands and Physical Planning, acknowledging these problems, introduced a very comprehensive plan known as the Land Mobilisation Program. The overall objective of the plan was: 

to contribute to economic growth through the more productive use of land resources throughout Papua New Guinea (with equity, employment, landowner participation and social stability)69

The component of the Land Mobilisation Program relating to customary land basically resolved that "the best way to cater for the development of customary land was to maintain and strengthen existing methods of registering customary land,"70 viz. tenure conversion. To strengthen the existing methods the "Land Mobilisation Program was to provide research and technical resources to put in place institutional and staffing arrangements in the Provinces in the medium term."71 The success of this ambitious program remains to be seen.

Another method aimed at inducing the mobilisation of customary land is, the lease-leaseback process, which was initiated in the early 1970s. The prime objective of this process is that, the State leases customary land from customary owners for a specified period and later leases the land back to individual customary owners, a customary land group or a business group registered under the Business Groups Incorporation Act. The lease is a legal title which can be mortgaged to banks and other lending institutions for loans.

The difference between the lease-leaseback concept and the tenure conversion process is that, unlike tenure conversion which gives a perpetual freehold title, the lease-leaseback process is only

68 This was clearly highlighted by Haynes, supra, n.18 at pp. 5-7
69 Turtle, C "Administrative Reform and Land Mobilisation" in Larmour, ed, op. cit., p.92
70 Haynes, n.18, supra at p.5
71 Ibid.
Apart from the national Government's efforts to mobilise customary land, two Provincial Governments have taken the task upon themselves to develop their own method of mobilising customary land within their respective Provinces. The two Provincial Governments are the East Sepik Provincial Government and the East New Britain Provincial Government. In 1987, the East Sepik Provincial Government introduced two detailed Provincial land statutes relating to alienated land and the registration of customary land within the province. Jim Fingelton (who drafted these statutes) declared that the East Sepik Provincial Government's initiative is "the most significant breakthrough in the field of customary land tenure reform, not only in Papua New Guinea but in the South West Pacific generally." In fact it was a bold move by the East Sepik Provincial Government because it lacked the expertise and the necessary funds to successfully implement the legislation. At its initial stages the national Government did guarantee support for the implementation of the program, but over the years this support has dwindled due to lack of finance, technical and manpower resources. There is also the issue of the constitutionality of the legislation. These and other myriad problems pointed out by Haynes have prevented the implementation of what is otherwise a very challenging piece of legislation.

---

72 Haynes, n. 18, supra
73 These were the East Sepik Provincial Land Act 1987 and the Customary Land Registration Act 1987
74 Fingelton, J "The East Sepik Legislation" in Larmour, ed, op. cit., p. 147
75 Id, p. 160-161
76 The possibility of inconsistency between the East Sepik Provincial statutes and the national law has been examined to a great extent by Kathy Whimp in her essay "Inconsistency Between Provincial and National Laws" in Larmour, ed, op. cit., pp. 163-176. She discusses the various tests for inconsistency but does not conclude whether the East Sepik Provincial land statutes are null and void on the grounds of their inconsistency to the national land law. Fingelton holds the view that the East Sepik Provincial statutes are not inconsistent with the national land law; Supra: This mater has now been resolved by the Supreme Court in the case SCR No 7 of 1992; Re Forestry Act 1991 [1992] PNGLR 514. The Supreme Court adopted the "cover the field test" as applied in Australia. This case is discussed further in Chapter 5.
77 Haynes, n. 18, supra at pp 7-8; The legislation is still in force. With the support and encouragement of the Department of Lands and Physical Planning and the resolution of the problems highlighted above it is anticipated that the East Sepik Provincial Government's initiative should prove very successful.
In East New Britain Province, the Provincial Government took a different approach. Instead of enacting land statutes for implementation it began a program of identification and demarcation of customary land boundaries before registration. It started a pilot project on a small scale, involving the village of Rakunai in 1990. The East New Britain Provincial Government hopes to convert plots of customary land into alienated land which could then be used for economic purposes. At its inception, the project has been plagued with a lot of problems ranging from limited funding and support from Department of Lands and Physical Planning to technical constraints.

There is currently a draft national Land Bill in circulation for comment from all sectors of the community. The proposed Bill is revolutionary in that it intends to amalgamate many of the current land statutes and also introduce fundamental changes into the system. The Bill was circulated for comments in 1993. Unfortunately, the response received by the Department of Lands and Physical Planning has been very poor.

Alienated Land

On 15 September, 1975, PNG became an independent sovereign state. According to the normal rules of state succession under international law it acquired all the public property of the Colonial Administration. The act of state succession was formalised by the *Laws Repeal Act* which severed all legal ties between Australia and PNG. All pre-Independence statutes and sub-ordinate legislation applying in the territory of Papua and New Guinea prior to 15 September, 1975 were repealed by the *Laws Repeal Act*. They were, however, re-enacted by virtue of Schedule 2.6 of the *Constitution*. It is therefore submitted that

---

78 See Haynes, n.18, supra
81 On the same token the Commonwealth Parliament passed the *Papua New Guinea Independence Act* 1975 (No. 98 of 1975), withdrawing its sovereignty and control over PNG.
82 Schedule 2.6(2) of the *Constitution* enables all pre-Independence laws and subordinate legislative enactments to be adopted as Acts of the Parliament. The only precondition being that they must conform to the Constitutional requirements.
all land held by the Colonial Administration prior to independence became vested in the Independent State of PNG on 16 September, 1975.

Section 4 of the *Land Act* states that "all land other than customary land is the property of the State." It would therefore follow that the State owns only 1% of the land in the country. Much of this land comprises "the most cultivable and agriculturally productive land." Ironically most of the land statutes focus on 1% of the land.

The State can expand its ownership of the land by acquiring alienated, unalienated and customary land. It can grant leases over Government land for agricultural, pastoral, business and residential purposes and reserve land for public purposes.

The *Land Act* expressly sets out the procedure and types of leases the Government can issue over State land. Section 5 which is found under Part 1 of the Act provides for the alienation of Government land. Part 6 (which comprises sections 29 to 66) provides for the procedure in granting State leases to individuals and companies. A State lease does not exceed 99 years. The lessee is vested with proprietary rights and is allowed to develop the land only for the purpose for which the lease was granted.

Other land legislation worth mentioning are the *Land Acquisition Act* and the *Land Registration Act*.

The *Land Acquisition Act* empowered the Government to acquire plantations owned by non-citizens and to re-distribute them under the *Land Redistribution Act*. This exercise was in direct response to the recommendations of the Commission of Inquiry into Land Matters (CILM)

---

83 Only 1% of the land in PNG is alienated.
84 Amankwah, n.41, *op. cit.*, 59.
85 s. 17, *Land Act* (Cap.185)
86 Id., s.15
87 See Part 5 of the Act.
88 See Part 4 of the Act.
89 No. 66 of 1974.
90 No. 49 of 1977.
91 No. 62 of 1974. This Act enabled the government to purchase plantations owned by non-citizens and hand them over to the customary landowners.
92 The Commission of Inquiry into Land Matters (CILM) was established in February 1973
which recommended that, land acquired from customary land owners should be returned to them and compensation paid to those who would lose their title.\textsuperscript{93}

The \textit{Land Registration Act} introduced in 1977, provided the mechanism for the registration of dealings in State land. It empowered the Minister for Lands and Physical Planning to declare and register Government land used for public purposes. It maintained the concept of indefeasible title.\textsuperscript{94}

The most utilised legislations are perhaps the \textit{Land Act} and the \textit{Land Registration Act} which are regarded as the primary land statutes in PNG.

\textbf{Land Tenure and Forestry Ownership}

Of PNG's total land area of 46.2 million hectares, some 78\% (36.2 million hectares) is covered by tropical rainforest. Around 15 million hectares were deemed suitable for commercial forestry.\textsuperscript{95} The question is, who owns these forestry resources and what is the basis of this ownership? This thesis argues that, it is the customary land owners who own the forestry resources.

The dictum \textit{cujus est solum ejus est usque ad coelum}, (his whose is the soil, his is also the heavens) is very much a reality in PNG.\textsuperscript{96} The position that the customary land owners are the true owners of the forestry resources is generally accepted. In a workshop organised in 1990 to investigate and research into land matters and make recommendations on land reform and administration. It presented its report on October 26, 1973 and taken note by the House of Assembly on November 12, 1973

\textsuperscript{93} Amankwah, n.41, \textit{op. cit.}, 66.
\textsuperscript{95} Melanesian Institute for Pastoral and Socio-Economic Services. Catalyst: \textit{Development and the Environment in PNG}, Goroka: Melanesian Institute (Special Issue: The Steinberg Report), 1990; The figure of 15 million hectares has now been declared obsolete. Recent estimates put the figure at 7 million hectares of operable forests, Nadarajah, T "Now What? Proposed Forestry Guidelines for Papua New Guinea" (1993) \textit{2 Pacific Economic Bulletin} 53
\textsuperscript{96} Artihulawa describes the situation with reference to the Siane, "whatever grows above and below the land belongs to the owner of the land"; Artihulawa, F "Siane: Simbu " in Scaglion, \textit{op. cit.}, p.39-37; Carson, C. L \textit{Forestry and Forestry Policy in Papua New Guinea}, Port Moresby : Department of Forestry, 1974, p.2
by the PNG Law Reform Commission, it was unanimously agreed by the participants that the customary owners are the true owners of the natural resources and therefore their participation in the successful development of these resources is crucial. This was reaffirmed three years later at the 20th Waigani Seminar in 1993.

The role of forests to the people of PNG, especially those in the rural areas is vital. To these rural communities the forest has an intrinsic value. It is an important source of food, fruits, building materials, herbal medicines, wild animals and birds. Brown described the relationship of the PNG Highlanders to their forest as follows:

[T]he New Guinea highlanders know and appreciate the resources of their locality. Forest and bush is never wasted.

This is also true for the other areas of the country. Transfer of the forest and its resources were unknown under custom. The rationale is that what grows on the land is a part and parcel of the land. Land and forest were inseparable. And as land was unalienable so was the forest and its resources.

The difficulty of separating forest ownership from customary land was clearly observed by the Colonial Administration. This was evident in the first forestry legislation which was introduced in British New Guinea in 1892. The Indigenous Timber Ordinance 1892 recognised and maintained the status quo.

In 1909, the Colonial Administration, in an attempt to free forest resources from the hold of customary owners, introduced the Timber

---

97 PNG Law Reform Commission New Directions in Resource Management For Papua New Guinea, Boroko : Law Reform Commission (Occasional Paper No. 20), 1990, pp.5-10
98 Department of Environmental Science - UPNG Stretim Nau Bilong Tumora : National Sustainable Development Strategy & 20th Waigani Seminar Recommendations, Port Moresby: Department of Environmental Science - UPNG, 1993, pp.16-21
99 See the discussion on the use of forest by Pokanas, M "The Value of Trees in Manus Province" in Morauta, M, Pernatta, J and Heaney, W, ed. Traditional Conservation in Papua New Guinea : Implications For Today (Boroko : IASER (Monograph No.16), 1980) 169; Also see Kube, R Tropical Lowland Rainforests: Some Possibilities for their Utilisation with Particular Reference to Guinea and with Special Emphasis on Agriculture, Wau : Wau Ecology Institute, (Papua New Guinea Environmental Series No.2), 1990, pp.24-28
100 See n.12 at p.113
101 I use the past tense here because as will be seen later this may no longer be the situation.
Rights Purchase process which was aimed at wresting forest ownership from the customary owners. Essentially the device allowed the Administration to purchase, as the name suggests, timber rights from the customary owners. The acquisition of these rights enabled the Administration, through its agents (timber permit holders) to harvest the timber located on customary land. A trade mark of the Timber Rights Purchase arrangement was that customary owners were never involved in the negotiations for the sale of their timber rights.

The Timber Rights Purchase devise has proved very successful in transferring the timber rights of the customary owners to the Colonial Administration (and now the State). The rate of its success was such that successive Governments have proudly nourished and cherished it even after 19 years of independence.

There were two problems with the Timber Rights Purchase process. First and foremost is that, it was (and to a certain extent still is) void under custom. This proposition is based on the premise that under custom, transfer of forest ownership or rights were unknown at that time. It may be contended that such transfers were (and are) valid because of the flexibility of custom to change with new political and socio-economic values.102 Robert Cooter equates custom to something which has life by stating that custom is "alive."103 It is my view that the real issue is whether customary rules and principles are changing simultaneously with the political and socio-economic changes in a given period. The crucial factor is the timing of the change in customary law. Thus the question is, was customary law compatible with the western socio-economic values at the time the Timber Rights Purchase concept was introduced? The answer lies in the analogy which can be drawn from the mammoth task of mobilising customary land during the 1950s to this day, where different methods were introduced to free customary land from the ambit of customary law. These experiences have shown that even after 30 years of unrelentless attempts to alienate customary land, custom has to a large extent been unable to marry these methods because they were not compatible. Instances of land alienation identified by some authors104 are comparatively few and occur mostly in the urban areas. It would be

102 Larmour, n.62, supra.
103 Cooter, R "Kin Groups and the Common Law Process" in Larmour, ed, op. cit., p.38
104 Haynes, n.18, supra
premature to make a general assumption that custom has already assimilated the western form of land alienation. For the majority of the people who live in the rural areas, alienation of land and for that matter forest rights under their custom is still foreign.

The second problem which will be highlighted throughout this thesis is that the Timber Rights Purchase process operated to the detriment of the forest resource owners. The general assumption is that the Timber Rights Purchase process was the catalyst to bring more and better development and benefits to the forest resource owners and their area. Unfortunately, as will be shown in this thesis, the contrary seems to be the order of the day.

Summary

This Chapter has shown that most of the land in PNG is customary land which is communally owned. Forestry resources which are situated on customary land are therefore owned by the customary owners. These forestry resources were not alienable under the existing customary law. A unique precedent had been set in the PNG legal system. Unlike other countries, PNG law acknowledges and protects customary land ownership and customary rights to land including forests and forestry resources. Government agencies are even called upon to respect and apply customary principles in the implementation of their duties.

The urge to exploit the forestry resources which are located on customary land was realised as early as 1892. The difficulty of transferring forestry ownership from the customary owners to the Administration, for economic utilisation led the Colonial Administration to develop in the forestry law the Timber Rights Purchase device which has enabled the Government to easily exploit the forestry resources whilst at the same time preserving customary ownership of land.

---

105 In the countries of Asia all natural resources belong to the State. For instance in Thailand the customary owners only have use rights to the forest whilst the Crown has title. See Lynch, O. J "Securing Community-Based Tenurial Rights in the Tropical Forests in Asia: An Overview of Current and Prospective Strategies" in Warner, K and Wood, H, ed, Policy and Legislation in Community Forestry: Proceedings of a Workshop held in Bangkok, Jan 27-29, 1993 (Bangkok: RECOFT Report: 11, 1993) 27
CHAPTER 2

FORESTRY POLICY AND LAW IN PAPUA AND NEW GUINEA

Introduction

The contemporary forestry policy and law in PNG is a legacy of the colonial period. To appreciate the complexities and problems facing modern day forestry management in PNG, it is necessary to briefly outline the situation during the colonial period.

Colonial Forestry Policy

Forestry is a long-term activity and needs unusual vision to determine over-all policies in advance of the pressure of events. This is particularly so in an underdeveloped country where basic information is lacking, machinery for implementing policy is non-existent or inadequate, and short term needs are given priority.¹

This statement has a direct bearing on development of forestry policy in PNG. The utilisation of the forestry resources in PNG has a long history. The same however cannot be said of its forestry policy.

Colonial forestry policy as applied in the two Territories from the periods 1884 to 1948 and 1949 to 1974 will be reviewed. It will be shown that in the early period of colonisation, the forestry sector in both territories lacked policy directive. It was only in 1951 that an attempt was made to introduce a semi-formal forestry policy in the two Territories.

Papua: 1884-1948

Although forestry legislation was introduced in the Territory of Papua as early as 1892², it operated on its own. Attempts were made to assess the forest potential of the Territory initially in 1908 and later in 1923³, but no concrete measures were taken by the Colonial Administration. During this

---

² This was the Indigenous Timber Ordinance of 1892.
³ Department of Territories Forestry: Papua New Guinea, Canberra: Department of Territories, 1961, p.1
period the forestry legislation underwent a lot of amendments but these changes lacked policy initiative.

In 1948 the first Director of Forests for the Territory got some proposals approved by the Administrator for:

1. forest resource survey,
2. program of forest reservation,
3. program for research,
4. management and working plans,
5. training of staff

These proposals can be said to be the first rudimentary forest policy in the Territory. The limited scope of the proposals signalled the size, the lack of expertise and manpower of the Forest Service. It was not until 1951 that a formal forestry policy was introduced in the two Territories.

**New Guinea: 1885-1948**

When New Guinea was declared a Protectorate of Germany in 1884, the administration of the Protectorate was handed over to the German New Guinea Kompagine. Under the "Reichstag memorandum on German Protectorates it was clearly stated that the basic idea of German colonial policy was that the Imperial power was there to serve the needs of German commercial interests." The German New Guinea Kompagine therefore, acted as an instrument to achieve this Imperial colonial policy in German New Guinea. Consequently, there were no specific policies for individual resources. Rather all resources were to be exploited to attain the highest economic returns for the German New Guinea Kompagine.

When the Imperial Government took over the administration of the Territory in 1906, it continued to maintain the status quo; and when Australia took over the Territory in 1921 it also failed to introduce any forestry policy in the Territory even though the production of timber was

---

4 The first in 1903, then in 1908, 1909, 1917 and again in 1920.
5 Carson, C. L. *Forestry and Forestry Policy in Papua New Guinea*, Port Moresby: Department of Forests, 1974, p.2
6 The two Territories came under a single administration, under a provisional arrangement in 1945. This arrangement was eventually formalised in 1949 under the *Papua and New Guinea Act 1949*
already in progress. A formal forestry policy was introduced only after the Territory was amalgamated with Papua in 1949.

The absence of any forestry policy in the Territory during this period may be attributed to two factors: (1) the instability of government in the Territory and, (2) the low priority the three different Administrations gave to forestry because of the lack of data on the viability of different species of timber.

Papua and New Guinea: 1949-1974

In 1949, the Territory of Papua and New Guinea were brought together under a single Administration under the *Papua and New Guinea Act* 1949. In 1951 the Minister for External Territories, the Honourable P. C. Spencer, made a forest statement to the House of Representatives to:

(1) locate, assess and regulate availability of natural forest resources to bring them within reach of development,
(2) encouragement for investment of private capital for development of these resources,
(3) ensure native participation in development.

This was the first attempt by Australia to introduce any kind of formal forestry policy in Papua and New Guinea.

The main emphasis of the Colonial Government "was on the provision of sufficient local timber for construction and expansion by developing a timber industry." This policy was to be "achieved by concentrating activity in areas of major European development and where timber lands were to be cleared for agricultural development, again, by Europeans." The introduction of this policy was complemented by legislative changes (which are discussed below).

In 1957, the then Minister for Territories, Mr. Hasluck made a further policy statement which can be summarised as follows:

(1) Acquisition and reservation of an adequate permanent forest estate of 4 million acres (1.6m hectares) of dedicated forest within 10

---

8 Carson, n.5, *op. cit.* , pp.2-3
9 Note 1 at p.453
10 Ibid.
(2) Establishment of a forest training centre.
(3) Establishment of a forest research institute.
(4) Re-afforestation program including expenditure in the Highlands for grassland reclamation.
(5) Timber utilisation research into natural durability and preservative treatments.
(6) Botanical collections and identifications.
(7) Encouragement of a timber industry.

In response to this policy (1) the forestry statutes were amended to accommodate these new initiatives; (2) a new forestry college was established at Bulolo in 1962 and; (3) a research institute was also established in Lae.

In his report to the national Government in 1974, Carson declared that "it was this policy statement, and its subsequent implementation through the five-year program of 1968-1973, that provided the basis on which development has taken place"\(^{11}\) in the forestry sector.

In 1973, the Government of Michael Somare (then Chief Minister), introduced its own forestry policy. The emphasis of the policy was on protecting and managing the forest estate as a national asset. It was aimed at establishing permanent forest processing industries, effective schemes of reafforestation, full local participation and protection of the environment.\(^{12}\) This forestry policy was really a translation of the Coalition Government's Eight Point Plan.\(^{13}\) The Eight Point Plan can be summarised as follows:

1. increase opportunities for local participation,
2. greater share in benefits from resources development projects,
3. rural industrialisation,
4. creation of opportunities for local business participation,
5. promotion of locally produced goods,
6. improvement in revenue collection from resources development,
7. increase participation of women in development, and
8. formulation of policies and legislation relating to natural resources for the benefit of the present and future generations.

\(^{11}\) Carson, n. 5, supra
\(^{12}\) Mossop, D "Taming the Robber Barons? The Reform of Forestry Legislation in Papua New Guinea" (1992) 8 Q.U.T.L.J 113 at 115
Carson identified seven major objectives of the policy. These objectives were: (1) declaration of forests as national asset; (2) reforestation of forests; (3) forests conservation; (4) development of permanent industries and customary owner participation; (5) forest research; (6) training; and (7) effective regulation of the forestry sector.

This policy had profound effects on the forestry sector. It encouraged the rapid depletion of viable timber stands, and almost a total lack of reafforestation or otherwise follow-up land use; industry domination by large foreign enterprises with every incentive for transfer pricing; excessive wastage in timber processing; and conflicting national development objectives surrounding the industry.

The national forestry policy also failed to take into account the reality of the Forestry (Private Dealings) Act and the growing log export industry because as Mossop pointed out these matters were "too distasteful for the professional Foresters who drafted the policy to mention." These and other problems relating to the forestry policy were clearly envisaged by Carson and therefore he insisted that to fully implement the national forestry policy, what was required was a draft White Paper setting out the Forestry Policy and the directives required to implement it. But as Commissioner Barnett found out:

[D]espite the known urgency of the situation the expected White Paper never materialised and despite critical comments and express directives from the National Executive Council, the forestry legislation has still not been revised.

When assessing the Government's forestry policy, Barnett sadly concluded that:

There is no clear written statement of policy in any single document and a study of all available documents, in an endeavour to piece together a sort of composite or aggregate policy, has not produced a satisfactory result.

---

14 Carson, n.5, op. cit., pp.3-4
16 Mossop, n.12, supra
17 Barnett Inquiry, n.13 at p.41
18 Id, p.46
19 Id, p.17
What had purportedly been the Government's forestry policy was actually no policy per se.

**Colonial Forestry Law**

This section will examine the forestry law as applied in the two Territories. It will be shown that the forestry law as applied during the colonial period in the Territory of New Guinea was based on the colonial forestry law of the Territory of Papua.

**Forestry Law in Papua: 1884-1949**

The move to develop and manage the forestry resources of PNG has a long history which begun in the early part of the 1900. A Royal Commission had been set up by the Imperial Government a few years earlier to investigate and report on the peoples and their cultures of the Western Pacific. In the case of British New Guinea, the Commission found that the indigenous people cultivated their land and were very jealous of their proprietary rights. There was, however, no inventory of the timber resources in the Territory at that stage. When the first forestry legislation was introduced in British New Guinea in 1892, it lacked substance. The legislation, the *Indigenous Timber Ordinance*, was short and contained only 14 sections. The primary aim of the Ordinance was "to regulate the cutting of indigenous timber." Customary owners were allowed to cut and sell timber on their land. They were, however, not allowed to harvest protected timber. Customary owners could also supply timber growing on their land to any persons, provided they entered into a contract with those persons and that the contract was approved by a Timber Inspector. It was ironic that the customary owners were required to enter into a contract of sale in order to supply timber to any person of

---

20 The Royal Commission was appointed by the Imperial Government in 1884.  
22 No.7 of 1892  
23 Preamble to the Ordinance.  
24 s.11  
26 s.12
their choosing. As James rightly pointed out, at that time customary owners were incapable of concluding a valid contract.27

The requirement that indigenous Papuans must enter into a contract in order to sell their timber has remained ever since. Over the years it has taken on different names. The two most notable being Native Timber Authority28 and Timber Authority.29 The Native Timber Authority concept has been very manipulative and destructive to the customary owners and their environment.30 This grim scenario has been attributed to the lack of management control with greater emphasis on the quantity of timber that was to be purchased.31

The Indigenous Timber Ordinance was not enforced effectively as there was no Forest Service in place to implement it at that stage.

Aside from its shortfalls, the Indigenous Timber Ordinance did make one important contribution to the forestry industry. The Ordinance laid the foundation for three fundamental practices which have now become synonymous with the forestry sector. These are: (1) the declaration of Protected Areas, (2) the declaration of protected species of timber, and (3) the recognition of customary ownership of forestry resources.

Protected Areas could be declared on any land whether it was customary, freehold or Crown land. Later forestry statutes specifically stipulated that Protected Areas could only be declared on Crown land.32 Logging of timber in these areas was prohibited. Only two areas were declared as Protected Areas: one in 1905 and the other in 1920. These

28 reg.17-18, *Forestry Regulation* 1974
29 ss.87-90, *Forestry Act* 1991
30 In *Rainbow Holdings Ltd v. Central Province Forest Industries Pty Ltd* [1983] PNGLR 34 at p36, Bredmeyer J., stated that "[T]he aim of the *Forestry Regulation*, regs. 16 to 18 is to prevent customary owners being exploited." But it was exposed by the Barnett Inquiry a few years later that this was not the case.
31 Carson, n.5, *op. cit.*, pp.6-8
32 s.6 of the *Timber Ordinance* 1909-1920, s.10 of the *Forestry Ordinance* 1936; s.6 of the *Forestry Act* 1974; and s. 3 of the *Forestry Act* 1991.
were the township of Port Moresby\textsuperscript{33} and the vicinity of Sapphire Creek and Laloki River.\textsuperscript{34}

The first initiative to assess the timber potentials of the Territory was taken in 1908. In that year, the Papuan Administration engaged the services of Gilbert Burnett, the District Forest Inspector of Queensland, to conduct an assessment of the timber potentials of the Territory.\textsuperscript{35} Although the assessment was not very successful due to the lack of transport facilities,\textsuperscript{36} Burnett's visit resulted in the passing of the *Timber Ordinance (Consolidated)* of 1909.\textsuperscript{37}

In 1903 the *Indigenous Timber Ordinance* was repealed and replaced by the *Timber Ordinance* of 1903. This 1903 Ordinance was in turn amended in 1908 by the *Timber Ordinance* of 1908.\textsuperscript{38} In 1909, the Legislative Council enacted the *Timber Ordinance (Consolidated)* which came in force on 6 October in the same year. It was aimed at encouraging timber utilisation. Timber utilisation was to be achieved through the infamous *Timber Rights Purchase* process.\textsuperscript{39} The Ordinance also introduced a new provision on the declaration of Timber Reserves. Timber Reserves could be declared on Crown land and land which was the subject of a *Timber Rights Purchase* agreement.\textsuperscript{40} Timber in Reserved Areas could only be harvested by permit and licence holders. The number of Timber Reserves and their locality are shown in Table 1.

Apart from Suloga Bay (Woodlark Island) and Wonai Bay (Misima Island) the rest of the Timber Reserve areas were located in, and near the township of Port Moresby. Nearly 50\% of the Timber Reserves declared in Papua during this period were located near the Laloki, Goldie and Brown Rivers, principally because these were the most forested areas.

\begin{enumerate}
\item [{33}] The area was declared as a Protected Area on 11 October, 1905 (*Government Gazette* No. 18, 1905). This declaration was repealed and redeclared on 19 October, 1919 (*Government Gazette*, 29 October, 1919)
\item [{34}] The area was declared on 31 March, 1920 (*Government Gazette*, 7 April, 1920)
\item [{35}] Note 3, *supra*
\item [{36}] *Ibid.*
\item [{37}] No. 28 of 1909. This statute consolidated the former forestry statutes and the *Sandalwood and Rubber Ordinance* of 1907.
\item [{38}] No. 16 of 1908
\item [{39}] The *Timber Rights Purchase* concept was established by s.2 of the Act. See the discussions in Chapter 4.
\item [{40}] s.9
\end{enumerate}
<table>
<thead>
<tr>
<th>Date on which proclamation made</th>
<th>Date on which published in Papua Govt. Gazette</th>
<th>Timber Reserve Declared</th>
</tr>
</thead>
<tbody>
<tr>
<td>19. 9. 1912</td>
<td>2. 10. 1912</td>
<td>Land in Portion 184 on North side of Veimauri River (about 3884 acres)</td>
</tr>
<tr>
<td>31. 10. 1912</td>
<td>6. 11. 1912</td>
<td>Land in Portion 183 on Veimauri River (about 1950 acres)</td>
</tr>
<tr>
<td>28. 4. 1913</td>
<td>7. 5. 1913</td>
<td>Land in vicinity of Laloki and Brown River (about 10,000 acres)</td>
</tr>
<tr>
<td>14. 8. 1913</td>
<td>15. 8. 1913</td>
<td>Land in vicinity of Suloga Bay</td>
</tr>
<tr>
<td>30. 9. 1914</td>
<td>7. 10. 1914</td>
<td>Land in vicinity of Wonai Bay</td>
</tr>
<tr>
<td>7. 6. 1918</td>
<td>3. 7. 1918</td>
<td>Land in Portion 160 in vicinity of Goldie River</td>
</tr>
<tr>
<td>28. 8. 1918</td>
<td>4. 9. 1918</td>
<td>Land in vicinity of Brown River (about 2, 880 acres)</td>
</tr>
<tr>
<td>28. 8. 1918</td>
<td>4. 9. 1918</td>
<td>Land in vicinity of Brown River (320 acres)</td>
</tr>
<tr>
<td>28. 8. 1918</td>
<td>4. 9. 1918</td>
<td>Land in vicinity of Laloki River (500 acres)</td>
</tr>
<tr>
<td>3. 6. 1919</td>
<td>4. 6. 1919</td>
<td>Land in the vicinity of Laloki and Goldie River (about 400 acres)</td>
</tr>
<tr>
<td>31. 3. 1920</td>
<td>7. 4. 1920</td>
<td>Land in the vicinity of Laloki and Goldie River</td>
</tr>
<tr>
<td>30. 7. 1920</td>
<td>4. 8. 1920</td>
<td>Land in the vicinity of Mt. Lawes</td>
</tr>
<tr>
<td>18. 11. 1920</td>
<td>1. 12. 1920</td>
<td>Land in the vicinity of Munai Creek and Thompson's Creek (12, 800 acres)</td>
</tr>
<tr>
<td>5. 6. 1922</td>
<td>7. 6. 1922</td>
<td>Land in the vicinity of Mt. Manawagegewalina</td>
</tr>
</tbody>
</table>

SOURCE: Territory of Papua Acts (Volume 1) 2022
The *Timber Ordinance (Consolidated)* 1909 was amended twice; first in 1917 and again in 1920. This latter statute was more comprehensive and contained 31 sections. The *Timber Ordinance* 1909-1920 essentially maintained the provisions of the former statutes. In 1922, the *Timber Ordinance* 1922 was enacted to replace the *Timber Ordinance* 1909-1920. The incidence of legislative changes did not reflect any fundamental changes in forestry management.

In 1909, the *Timber Regulations* 1909 were enacted. The Regulations were amended in 1914 and again in 1918. The regulations related to the fees charged for timber permits and the amount of royalties payable to the Administration.

A decade after the first attempt to assess the timber potentials of Papua, the Australian Government engaged the Commonwealth Forestry Adviser, Mr Lane-Poole in 1923 to explore and assess the forest botany of the two Territories. In his report to the Australian Government in 1925, Lane-Poole recommended among other things, the establishment of a Territory Forest Service responsible for the implementation of the forestry legislation. The Colonial Government did not implement the recommendations until after 1936.

*Forestry Law in New Guinea: 1885-1949*

The development of forestry law and in fact the forestry sector in New Guinea was not regarded as a significant issue by the Reigh and the German New Guinea Kompagine. This was evident by the lack of regulation and control of forestry in the Territory. The German New Guinea Kompagine had exclusive power and authority to achieve its economic interests in the Territory. Forestry utilisation and management was, therefore, seen within the ambit of the general policy of maximum commercial exploitation of the Protectorate's resources. The absence of any forestry legislation in the Territory persisted even after Germany was defeated in the First World War.

---

41 *Timber Ordinance* 1909-1917 (No. 1 of 1918)
42 *Timber Ordinance* 1920 (No. 3 of 1921)
43 No. 2 of 1922. This was only a minor amendment which did not greatly affect the 1920 Ordinance.
44 Note 3, supra
45 Moses, n.7, op. cit., pp. 163-165
The first forestry legislation to be introduced in the Territory was the Timber Ordinance of 1922. The Forestry Ordinance 1922 was similar to the Timber Ordinance 1909-1920 which was in force in Papua. The Timber Ordinance 1922 was quickly amended in the same year\textsuperscript{46} and later in 1926 by the Timber Ordinance 1922-1926.\textsuperscript{47} The Timber Ordinance 1922-1926 was eventually repealed in 1936.

In 1935 Lance-Poole again took a trip to the two Territories and conducted an extensive exploration around the Goldfields of Wau and Bulolo, Rabaul and Laloki.\textsuperscript{48} In the course of his survey, Lane-Poole discovered that under the Timber Ordinance 1922 a few licence holders were already operating in the Territory of New Guinea. Table 2 shows the names of the licence holders, the term of their licences and the area of their operations.

\begin{table}[h]
\centering
\begin{tabular}{|l|c|c|c|c|}
\hline
HOLDER & LICENCE & PERIOD & FROM- TO & AREA  \\
\hline
G.S VESTERS & 204 & 15 years & 10/8/27 - 10/8/42 & 2,000 ha. $50 Ulamona North Coast \\
Apolistic C.M.S.H & & & & \\
C.G FRANCIS & 210 & 15 years & 1/6/32 - 1/6/47 & 400 ha. $10 Amgen Rd Gasmata \\
P.I SCHMIDT & 212 & 5 years & 16/8/34 - 16/8/39 & 400 ha. $10 Wunung Jacqueline South Coast \\
\hline
\end{tabular}
\caption{Timber Licence in Operation in 1935.}
\end{table}

\textsuperscript{46} Timber Ordinance 1922 (No. 2 of 1922). At that stage there was no Legislative Assembly for the Territory so all territorial statutes were ordained by the Governor-General of the Commonwealth of Australia with the advice of the Federal Executive Council.

\textsuperscript{47} No. 9 of 1926. The Act came into force on 6 May, 1906

\textsuperscript{48} Lane-Poole, C. A  
\textit{A Report of the Goldfields of New Guinea : Together with Recommendations regarding a Forest Policy for the Whole Territory,}  Sydney : RNB Agriculture Series (S 1) 1935, p.1
These licence holders were mostly individuals and operated on the island of New Britain. The term of their licences ranged from 5 to 15 years. And the timber that they harvested were most probably used for domestic purposes. Commercial logging was mainly concentrated in the Goldfields of Wau and Bulolo which had four commercial mills. 49

Again, Lane-Poole recommended that a Forest Service be established for the two Territories.50 He also recommended that the Forest Service staff should consist of a Conservator of Forests who would operate from the Headquarters at Rabaul, a District Forester and a Forest Overseer who would be based at Wau.51 Attached to his recommendations was a draft Forestry Ordinance which was later enacted in 1936. A Forest Service was eventually established in 1938.

A real desire in both the logging and export of timbers and the appreciation of the need for a professional controlling organisation in the Territory52, led the Legislative Council to implement Lane-Poole's recommendation by enacting the Forestry Ordinance 1936.53 The Act was influenced mainly by the activities at the Wau and Bulolo Goldfields. But as Lane-Poole pointed out, "this law and the regulations appended to it should meet not only the conditions that have arisen in the goldfields but any timber cutting in other parts of the Territory."54 In 1937, the Forestry Ordinance 1936-1937 was introduced. It incorporated the Forestry Ordinance 1936 with the Forestry Ordinance 1937. A new Forestry Regulation was also enacted at the same time.

The purpose of the Forestry Ordinance was to repeal the Timber Ordinance of 1922-1936 and to provide for the conservation and management of forests and other purposes.55 The Administration hoped to conserve the forest through the dedication of Territory Forests56 and the declaration of Timber Reserves.58 The Management of the forests was to be achieved through the purchase of timber rights from the customary

49 Id, p.20
50 Id, p.8
51 Id, p.17
52 Note 1 at p.454
53 No. 46 of 1936
54 Lane-Poole, n.48, op. cit., p.17
55 The term conservation here relates to the conservation of forest for future use. (Personal communication with Allan Ross (an officer of the PNG Forest Authority), 26 June, 1994.)
56 This is spelt out in the Preamble of the Ordinance.
57 s.10
58 s.11
owners\textsuperscript{59} and the control and supervision of timber permit\textsuperscript{60} and timber licence\textsuperscript{61} issuances. The legislation was to be administered by a Secretary appointed by the Administrator.\textsuperscript{62} The Secretary was to be assisted by Forest Officers\textsuperscript{63} and Forest Inspectors\textsuperscript{64} who were to be appointed by the Administrator.

The *Forestry Ordinance* of 1936 continued in force in the Territory until 1974. It is generally believed that, this statute is the cornerstone of the present forestry law in PNG.\textsuperscript{65} I think this view is misconceived for two primary reasons. First, this Ordinance did not introduce any new concepts into forestry management. It essentially adopted and developed the *Timber Ordinance* of 1909-1920.\textsuperscript{66} Second, this was not the first forestry legislation introduced in New Guinea and for that matter Papua. Thus to maintain the premise that the *Forestry Ordinance* of 1936 is the foundation of PNG forestry law is a grave distortion of fact and history.

**Forestry Law in Papua from 1950-1974**

The *Timber Ordinance* 1909-1920 continued in force in the Territory until 1950 when it was repealed and replaced by a new forestry statute. The new statute, the *Forestry (Papua) Ordinance* 1950\textsuperscript{67} applied the provisions of the *Forestry Ordinance* 1936-1937 of the Territory of New Guinea to the Territory of Papua. Section 4(1) of the *Forestry (Papua) Ordinance* stipulated that:

> The provisions of the Forestry Ordinance 1936-1937 of the Territory of New Guinea as in force at the date of commencement of this Ordinance, and the provisions of the Forestry Regulation, made under that Ordinance, at that date, shall be in force in the Territory of Papua as if contained in this Ordinance

A year later, the *Forestry (Papua) Ordinance* was amended by the *Forestry (Papua) Ordinance* 1951. A new section relating to the

\textsuperscript{59} s.9  
\textsuperscript{60} ss.14, 15, 18 and 19  
\textsuperscript{61} ss.14, 17, 18, 19  
\textsuperscript{62} s.6  
\textsuperscript{63} These officers were required to be holders of a degree or diploma in forestry, (s.7).  
\textsuperscript{64} An officer of the Public Service of the Territory or a European member of the New Guinea Police Force was eligible for this post, (s.8).  
\textsuperscript{66} Look at for instance the *Timber Rights Purchase* concept, Timber Reserves, Territory Forest and the issuance of timber permits and timber licences.  
\textsuperscript{67} No. 7 of 1950
declaration of an Administration land as Special Area was inserted into
the Ordinance. The Forestry (Papua) Ordinance 1951 remained in force
until 1974 when the two pieces of legislation were amalgamated under
the Statute Law Revision (Amalgamation of Laws) Act 1973. The
amalgamation of the two statutes were made without any alteration to
the provisions of the Forestry Ordinance 1936-1937.

**Forestry Law in New Guinea from 1950 to 1974**

In direct response to the forestry policy on capital investment in forestry
resource utilisation enunciated by Mr. Spencer in 1951, a new legislation
was introduced in the Australian Parliament aimed at encouraging large
scale development of forests resources in PNG. The legislation, known as
the New Guinea Timber Agreement Act, was to approve an agreement
made between the Australian Government and the Bulolo Gold Dredging
Limited with respect to the formation of a company known as
Commonwealth-New Guinea Timbers Limited (Timber Company). The
aim of the Timber Company was to acquire timber rights in the Territory
of Papua and New Guinea for the purposes of harvesting logs, sawmilling
of timber, the peeling of timber and manufacture of plywood. These
forest products were to be exported to Australia.

The Timber Company was required under the legislation to harvest
100,000,000 super feet of Hoop and Kliniki pine on Administration land
covering 15,000 acres in the Bulolo Valley in the Morobe Province. The
term of the agreement was 10 years with an option for renewal for a
further 10 years. The Timber Company was also accorded a wide range
of privileges including, the recouping of a certain rate of subsidy from the
Australian Government upon the exportation of timber products to
Australia. The company was also exempted from the operations of the
Timber Ordinance 1936-1937.

The Forestry Ordinance 1936-1937 continued to apply in the
Territory up to 1971 when it was amended by the Forestry (New Guinea)
(Amendment) Ordinance 1971. The aim of the new statute was

---

68 s.4 enabled the insertion of the new section, s.15A
69 No.2 of 1974; See s.3
70 No.40 of 1952
71 The Schedule, Clause 4(1)(a)
72 Id, Clause 10
73 Clause 12
74 Clause 14
To amend the *Forestry Ordinance* 1936-1937 of the Territory of New Guinea for the purpose of clarifying the rights of native owners of land who have disposed of the right to remove timber from that land, to provide for the adjustment of the purchase price of timber rights in certain circumstances, to remove out of date provisions, to provide for reafforestation, to provide for advisory services to be made available by the Administration to stimulate economic development in certain areas, and for related purposes.75

This was a very important piece of legislation for reasons which are set out below. First, the "timber reserve" concept was replaced with the "timber rights purchase area" concept, which when defined meant an area of native land over which the Administration had acquired the rights of felling, cutting, removing and disposing of timber under section 9 of the *Forestry Ordinance* 1936-1937.76 The change of concept meant the Administrator was prevented from declaring a Timber Rights Purchase area (herein after referred to as "the Area") as an Administration land. This change worked in favour of the customary owners, because unlike in the past when they also indirectly lost control of their land, the revised Timber Rights Purchase concept guaranteed them continued control of their land even though they had disposed of their timber rights.

Second, for the first time since the introduction of the Timber Rights Purchase concept, the legislation required that all future Timber Rights Purchase agreements were to be in writing. 77

Third, all Timber Rights Purchase agreements were required to operate within a given period.78 In the past there was no specific period in which the Administration would exercise its rights in an Area. This Ordinance gave certainty to customary owners in that, they knew when they would exercise their rights in their land after the cessation of the Timber Rights Purchase agreement.

Fourth, for the first time, the law obliged the Administration to set out in detail the break-down of the financial benefits which would be gained by the customary owners. The Administration was also required to inform the customary owners of the particulars of any timber permit which was to be consequently granted by the Administration in respect of the Area.79

Fifth, the Ordinance buried the practice of declaring timber

---

75 Preamble of the Ordinance.
76 s.3
77 Unwritten *Timber Rights Purchase* agreements were declared null and void by section 5(d)
78 Ibid
79 Ibid
reserves in the Areas.\textsuperscript{80}

Sixth, the right to erect sawmills or other buildings in Areas by permit and licence holders was also put to an end. The Ordinance prohibited the erection of such buildings in the Area. These changes were influenced by the prohibition on declaring Areas as Administration land.

Seventh, the legislation introduced the concept of reafforestation. The Ordinance introduced a new section which required that in areas of major forest activity, reforestation would follow soon after the harvesting of timber in that Area.\textsuperscript{81}

These drastic changes were a reflection of the introduction of the forestry policy in 1957 by Mr. Hasluck. It had finally dawned on the Colonial Administration that, as the customary owners were the true owners of the forestry resources, they also had an unequivocal right in determining its utilisation and management.

In the same year, the House of Assembly enacted the \textit{Forestry (Private Dealings) Ordinance 1971}.\textsuperscript{82} The Act, the brainchild of Mr. (later Sir) Julius Chan, the Member for Namatanai was to be incorporated and read as one with the \textit{Forestry Act}.\textsuperscript{83} It was accompanied by a regulation known as the \textit{Forestry (Private Dealings) Regulation}. In 1991, during the debate on the new Forestry Bill, Sir Julius Chan proudly told Parliament that;

\begin{quote}
For the first time, even before independence, I saw the anomaly \textit{(in the Forestry Act 1936-1971)} (emphasis mine) and introduced the \textit{Private Dealings Act} which gives the right to the owners of the land to form their own companies to negotiate conditions, harvest timber and infrastructure.\textsuperscript{84}
\end{quote}

The purpose of the Act was to enable customary owners of timber to dispose of their timber to any person, subject to certain safeguards, and for related purposes.\textsuperscript{85} Mossop suggests that the Act was introduced to "overcome the extremely centralised and cumbersome administration of the \textit{Forestry Act}."\textsuperscript{86}

\textsuperscript{80} This practice has been reintroduced in the present \textit{National Forest Policy 1991}; See Ministry of Forests \textit{National Forest Policy}, Hobola : Ministry of Forests, September 1991; The policy is discussed in some detail in Chapter 3
\textsuperscript{81} The new section was section 15B
\textsuperscript{82} No. 107 of 1971.
\textsuperscript{83} Preamble of the \textit{Forestry (Private Dealings) Act}
\textsuperscript{84} The Hansard, 16 July, 1991.
\textsuperscript{85} Carson, n. 5, \textit{op. cit.}, pp.7-8
\textsuperscript{86} Mossop, n.12, \textit{op. cit.}, pp.114-115
Under the Forestry (Private Dealings) Act the customary owners were required to form themselves into a body corporate which was to be certified by an authority appointed by the Minister for Forests. The customary owners would, through their customary land owning groups, apply to the Forests Minister to declare their area as a Local Forest Area. Where the Minister approved the application, the customary owners could then sell or otherwise dispose of their timber to any person. Such arrangements were, however, subject to the Minister’s approval.

These administrative procedures must be carefully complied with. Their breach can result in a judicial review of the process as illustrated in Manus Provincial Government v. Tarsicus Kasou. In this case the Manus Provincial Government sought judicial review of various administrative steps taken by an authority appointed under the Act before the commencement of logging. The Provincial Government argued that the defendant, who was appointed as an authority by the Forests Minister, to certify customary owner groups in the Manus Province, had acted unreasonably in certifying the customary owners of the West Coast Local Forest Area. The Provincial Government sought to have the defendant’s decision quashed. The court (Ellis J.) held that the defendant acted on bias. However, the court fell short of striking down the Minister’s decision.

The Forestry (Private Dealings) Act provided a means for customary owners to dispose of their timber to whoever they wished, provided:

(a) the interest of the owners were protected.
(b) there was no conflict with national interest.
(c) prospects for economic development were considered.
(d) the Administrator’s assent in relation to the above had been obtained.

No environmental controls were inserted into the Ordinance; and

---

87 Under the Regulation they only had to pay $50 with their application, (Forestry (Private Dealings) Regulation, s.2).
88 s.4 of the Act.
89 Id., s.5; see the comment by Carson, n.5, supra
90 Id., s.6
91 [1990] PNGLR 3
93 Barnett Inquiry, n.13 at p.44
no restrictions on the size of the area covered by the Local Forest Areas were provided. The Forest Department interpreted the Ordinance as allowing the sale of small forest areas. But as the Barnett Inquiry found, this was not the case. In fact large tracts of forest areas were being harvested illegally through this process.

Summary

The growth of the forestry sector in PNG began with the first European settlement in 1884. Although the sector lacked policy directives in the early period of colonisation, the first forestry legislation was introduced only eight years after settlement. This legislation was the cornerstone for future forestry legislation.

The forestry law has undergone a lot of amendments since 1892. This cannot be said about the forestry policy. The amendments in the forestry law reflected the changes in the attitude of the Colonial Administration and the techniques of forestry management. What did not change is the method of purchasing timber rights. The Timber Rights Purchase mechanism introduced in 1909 continues to prevail today.

\[94\text{Ibid.}\]
CHAPTER 3

POST INDEPENDENCE FORESTRY

Introduction

The aim of this Chapter is to ascertain whether or not the current forestry policy and legislation in PNG are a legacy of the colonial period. The underlying issue is whether PNG has been able to learn from the mistakes of the past and has been able to formulate forestry policies and legislation which reflect PNG ways as enshrined in the Preamble of the Constitution.

It will be shown in this Chapter that PNG has not diverged from the experiences of its colonial rulers. Only in the last four years has the Government taken concrete measures in rectifying the anomalies of the past. It will be argued that, although the Government is serious about bringing changes under the new forestry policy and legislation, it still has a long way to go before it can truly realise the effects envisaged by the changes to the forestry policy and legislation.

The Forestry Policy of 1979

Since Carson's report in 1974, there was no change in the forestry policy until 1979. In 1979, the Department of Forests made an attempt to revise the "Forest Policy." A White Paper titled 'Revised National Forest Policy' was presented and approved by the National Executive Council (NEC). The forest policy contained: 1


(1) proposals and guidelines for the formation and operation of PNG log exporting enterprises,
(2) guidelines for enterprises involved in timber processing,
(3) directions pertaining to foreign enterprises dealing in large log exporting and not processing within PNG,
(4) directives aimed at foreign enterprises which were involved in limited log export and road construction.

The Guidelines envisaged by policy statement (1) and (2) were found to be of little encouragement in promoting PNG owned enterprise, or large scale domestic processing because as Mossop pointed out, "the emphasis of the Revised Forest Policy had shifted from one of onshore processing..."
of logs to large scale exportation of logs."² Generally the Guidelines pronounced by the policy were described by Commissioner Barnett as:

> the observer could be excused for believing that the guidelines were prepared for a different country. It became apparent that virtually none of these guidelines are being followed.³

After a thorough analysis of the Government's forestry policy the Barnett Inquiry left the Revised National Forest Policy in tatters by declaring that the Commission could not find any document which would prove that there was a formal forest policy in operation in the country.⁴ The Barnett Inquiry concluded that the existing Forest Policy was merely a *de facto* forest policy.⁵ The lack of a coherent forest policy had created a very grave situation in that:

> [S]uch formulated policy that does exist is frequently and openly contravened by Ministers, senior Officers, Inspectors and timber operators. The result is that the national Department has lost its sense of purpose and Provincial Forestry Officers are wandering leaderless with no sense of belonging to a profession of foresters.

Commissioner Barnett recommended that the Government should put all efforts in the formulation and approval of an appropriate forest policy as soon as possible.⁶ This was to be done with the participation of the National Executive Council and relevant Government Departments, Provincial Governments and the forest industry.

**The Commission of Inquiry Into Aspects of the Forestry Industry**

Two events occurred more than a decade after PNG gained independence which have greatly influenced the direction of the forestry sector. These two events were the Commission of Inquiry Into Aspects of the Forestry Industry in 1987 and the Tropical Forest Action Plan for PNG (TFAP) initiated by the World Bank in collaboration with other international organisations.

In 1987 "there was public war of words in the press and in Parliament over the competence of the Forest Industries Council in undertaking large scale marketing of logs"⁷ The Prime Minister of PNG at

---

² Mossop, D "Taming the Robber Barons? The Reform of the Forestry Legislation in Papua New Guinea " (1992) 8 Q.U.T.L.J. 113 at 115
⁴ Ibid
⁵ Ibid
⁶ Note 1, pp.359-350
that time, Mr. Paias Wingti appointed a Commission of Inquiry to investigate the Forest Industries Council. The Commission was headed by Mr. Justice Thomas Barnett, a Judge of the National Court. The Barnett Inquiry took two years to complete its investigations and in July 1989 it presented its Final Report to the Prime Minister.

The Barnett Inquiry was originally set up to investigate certain matters relating, mainly, to the Forest Industries Council and its marketing activities. It was to investigate the process by which the Forest Industries Council became involved in the marketing of timber and ascertain the benefits obtained by PNG (if any) from the marketing operations of the Forest Industries Council. It initially worked on five terms of references but as its investigations expanded, a further four terms of reference were added. Its investigations ranged from the identification of national forest policy to the investigation of loggers and the benefits derived by customary owners and the Government.

The Barnett Inquiry revealed "widespread transfer pricing, corruption throughout Government and Government agencies, destruction of timber resources and few benefits from resource exploitation flowing to either the landowners or the nation." The Barnett Inquiry also revealed:

(a) an imbalance of power, between the Minister of Forests and the Department of Forests, that effectively gave the Minister of Forests total power over the allocation of concessions and licences.  
(b) an imbalance of power between the national Department of Forests and the Provincial Departments of Forests. Once again the central structure had right of veto, and the right to force through projects against the wishes of the local authorities.  
(c) a high level of corruption amongst Parliamentary Ministers and, to a lesser degree, amongst the Heads of the Department of Forests, the Forest Industries Council, and Provincial Governments.

The Barnett Inquiry showed that of a total of 14,833,000 hectares of forest resource, 3,37,000 hectares had been allocated as at 28 February, 1989; and that by 1992, another 3,463,000 hectares was going to be allocated. The total forest resource area in each Province and their allocation is shown by the table below.

Action Group, 1990, p.9
8 The Commission was set up on April 29, 1987.
9 Barnett Inquiry, n.1, supra p.1
10 Id, Appendix 1
11 Mossop, n.2, op. cit., p.116
12 See the summary of the Commission's findings by Asia-Pacific Action Group
During the 1980s, the Government was able to grant timber permits and licences to enterprises for the exploitation of the forestry resources. By “December 1992 there were approximately 65 registered forest products operators active in the country. Log harvest by PNG based industries was around 1.8 million cubic meters per annum. Of the total current and forested area of 35.6 million hectares, it was estimated that around 14.5 million hectares were of commercial value. Current timber permits had been issued over a total of 5.3 million hectares.  

The situation in the forest industry was at its worst state. The forestry law had allowed the situation to deteriorate to a point where it

---

was not serving the interest of the people for which it was enacted. Justice Barnett pointed out that, there was a substantial need for legislative reform which should be based on a well considered policy.\textsuperscript{14}

**Tropical Forest Action Plan - PNG (TFAP)**

The reckless destruction of the forest resources of PNG were not only felt locally, but also recognised internationally. In 1985, the World Bank in collaboration with the United Nations Food and Agriculture Organisation, the United Nations Development Program and the World Resources Institute began organising a donors meeting on the Tropical Forest Action Plan for PNG. "The initiative was designed to provide an international coordinating mechanism to help the world’s tropical countries come to grips with deforestation."\textsuperscript{15} In March 1990, the World Bank released its report titled "Papua New Guinea. The Forestry Sector: A Tropical Forestry Action Plan Review."

The World Bank identified six major problems which required immediate attention.\textsuperscript{16} These were:

1. PNG did not have adequate information on the growth, etcetera, of its timber resources. There was a need for this information to successfully deal with forestry problems.
2. There was a major breakdown in the effective management of resources. This was due to the lack of decision-making framework. And that there was no link between the Forestry Department and the other appropriate Government Departments such as the Department of Environment and Conservation.
3. There was a serious loss of revenue to the Government due to poor control of resources and corrupt practices.
4. Forest products processing in PNG was poor and lacked competition.
5. There was a need for conservation and proper land use.
6. PNG lacked proper forestry institutions. It needed skilled manpower and better forestry policies.

The underlying principle of the report was that timber cutting was to be reduced to a sustained yield of 3.6 million cubic meters annually from about 5.7 million cubic meters with the loss of earnings to be compensated by the donors of up to $US15 million per year for five years.\textsuperscript{17}

\textsuperscript{14} See generally Barnett Inquiry, Interim Report No.1
\textsuperscript{16} These points are also set out in a tabular form by Mossop in his paper on pages 117-118, n.2, supra
\textsuperscript{17} Mossop, n.2, op. cit., p.118
The Tropical Forest Action Plan for PNG has, however, been highly criticised for its "failure to identify and specify the forces that pose a threat to the rainforests in Papua New Guinea [and that] the Review is deeply flawed by its failure to confront the fundamental contradiction between a money-based profit-orientated economic system and its values on the one hand, and wider national, global, environmental, ecological, customary, political and social needs on the one hand." Brunton also criticised the Tropical Forest Action Plan on other grounds such as:

1. its focus on industrial forestry development;
2. the commodification of rainforests as a timber resource;
3. the report being founded on the unproven and uncertain concept of "sustained yield";
4. the report being premised on the maintenance of Papua New Guinea as a supplier of unprocessed resources;
5. the failure of the report to take into account the political and constitutional framework in which it was meant to operate;
6. its failure to recognise the importance of customary landowners in the development process; and
7. the inappropriateness of the World Heritage Area concept as a vehicle for conservation in Papua New Guinea.

Forced by the Tropical Forest Action Plan, the Government announced a two year moratorium on the issue of new timber licences starting in July 1990. This moratorium did not affect those applications which had already been submitted to the Forests Minister before the date of the announcement. Only five projects were exempted from the moratorium.

In December 1991, the Government varied its moratorium by exempting a further five projects. The moratorium was also extended for another 12 months to July 1993. Complaints were raised by the public that the Forest Minister had breached the moratorium by allocating 26 new areas for the harvesting of timber. Mr. Jack Genia, the Forests Minister at that time, brushed aside these complaints by replying that the Government was doing more than was necessary by suspending 36 operations for non-compliance in the period 1990/1991. He also argued that the 10 permit approvals (and not 26) were done in compliance with

---

See also the same line of arguments by Thompson, n.15, op. cit., 13
19 These points are paraphrased from Mossop's paper which appear on pages 119-120, supra
20 Asia-Pacific Action Group, n.7, op. cit., 53
21 The five projects exempted from the moratorium were; Musa-Collinwood Bay-Oro, Cromwell- Morobe, Josephstaal-Madang, Arawe-West New Britain, and April-Salumei-East Sepik. The additional exempt project were Lumassa-New Ireland, Makapa-Western, Hawain-East Sepik, Malalaua-Gulf, and Ome-Central.
22 The PNG daily newspaper Post Courier, 1 June, 1992
the National Executive Council's consent. Mossop describes the actions of the Minister and the Secretary of Forests in allocating timber permits in the lead up to the National Elections, and the introduction of the new Act as a breach of the moratorium and an improper rush to beat the more comprehensive legislation. These timber permits are now being reviewed by the Government.

The Tropical Forest Action Plan was a pathetic failure. According to Roman Grynberg the reason was that the donors were offering money to the Government and not the Ministers. The Tropical Forest Action Plan may have been a failure but one thing is certain and that is, it did prove to the Government that the forestry sector was in a bad shape and needed redirection. In fact the National Forest Policy introduced in 1991 contains mechanisms which are aimed at curtailing some of the problems identified by the Tropical Forest Action Plan.

The Forestry Policy of 1991

The Barnett Inquiry and the Tropical Forest Action Plan showed that the management and utilisation of the PNG forestry resources were in a very critical state. These two events created the impetus for the Government to reassess its position pertaining to the forestry sector. Consequently it introduced the National Forest Policy in 1991. The National Forest Policy is a very comprehensive document which contains an introduction and seven parts. Essentially the National Forest Policy comprises two main aims and supportive objectives. The main aims are:

1. Management and protection of the nation's forest resources as a renewal natural asset.
2. Utilisation of the nation’s forest resources to achieve economic growth, employment creation, greater Papua New Guinea participation in industry and increased viable onshore processing.

The Forest Authority hopes to achieve the first aim by conducting surveys in potential forest areas and thereby classifying the forests into five categories; the first category being Production Forests, the second, Protection Forests, the third, Reserve Forests, fourth, Salvage Forests, and fifth, land suitable for afforestation.

23 Post Courier, 10 June, 1992
24 Mossop, n.2, op. cit., p.119
25 Post Courier, 30 August, 1993
28 Id., p.5
After the forests are classified, the ownership of the forests are then determined. Where the forest is classified as a Production Forest, the Forest Authority can enter into negotiations with the customary owners with a view to purchasing their timber rights. This process will ensure the proper management of the forestry resources and the flow of benefits to customary owners.

The Forestry Authority hopes to achieve the second aim through the participation and involvement of nationally owned enterprises and PNG citizens, and the encouragement of onshore processing of timber. The Forest Authority will also promote and market forest products to minimise transfer pricing and will charge levies for forests products which will be distributed to customary owners.

To enable it to achieve its two main aims, the Forest Authority will follow three strategies. The first strategy will be the collation of information and advancement of knowledge relating to the utilisation and maintenance of PNG’s forest resources through forest research. Based on this information the Forest Authority will increase the acquisition of forestry resources and disseminate skills, knowledge and information in forestry through education and training. Under the third strategy, it will introduce effective strategies, including administrative and legal machinery, to manage the forest resource, and incorporating national, Provincial and local interests.

The Forestry Law

The aim of this section is to briefly examine the various forestry legislation that have been (and are) in force in PNG since independence. It will be shown that the existing forestry legislation is not very popular with the customary owners and the developers.

---

29 That is, customary owners are identified and encouraged to form themselves into landowning groups which would then be incorporated under the Land Groups Incorporation Act. The Forest Authority can then deal directly with the registered land group. See s.57 of the Forestry Act 1991 and s.13 of the Forestry (Amendment) Act 1993.

30 Note 27, op. cit., p.9; The process is the Forest Management Agreement which is discussed further in Chapter 4

31 Id, pp.33-35

32 Ibid

33 National Forest Policy, Supportive Objective 1; This is an important area which contributes to the overall objective of attaining sustainability of forestry resource

34 Id, Supportive Objective 2.

35 Id, Supportive Objective 3.
The main objective of the *Forestry Act* 1974 was to encourage customary owners to sell their timber rights to the government. The government could then through a selection process grant logging permit to developers to harvest the timber located in the timber rights purchase area.

The Act was readily adopted by the PNG Government after Independence. Although the legislation contained many loopholes which were capitalised on by the forest resource developers as exposed by the Barnett Inquiry, no changes were made to the Act to suit the circumstances of the newly independent nation. And even after the Barnett Inquiry, logging companies continued to breach the *Forestry Act*. The Act and its accompanying Regulation remained in force until 1991, when they were repealed by the *Forestry Act 1991*.

The aim of the Act was to enable customary owners to dispose of their forestry resources to any developer who was willing to pay them a certain amount of money. There was very limited government control.

The legislation was adopted from the pre-Independence Act without any alteration. In 1989, the constitutionality of this Act was challenged by the Manus Provincial Government in the Supreme Court. The Manus Provincial Government argued that the Act breached section 53 of the *Constitution* which precludes the compulsory taking of private property. It argued that the method of declaring Local Forest Areas under the Act, which allowed customary owners to dispose of their timber rights to any person was an infringement of section 53 of the *Constitution*. The court ruled that the provisions of the Act were validly enacted and was therefore valid.

Like its counterpart it continued in force until it was repealed by

---

36 *Central Pomio Logging Corporation Pty Ltd v. The State* [1992] PNGLR 20. This case shows a clear breach of the Act by the logging company when it failed to have its logs graded before being shipped.

37 No. 30 of 1991

the Forestry Act 1991. This Act was the most controversial of the two forestry statutes as it contained a lot of deficiencies which the developers, Ministers and the Forestry Officers capitalised on to satisfy their greed. Its repeal in 1991 brought great relief to those who were concerned with the interests of customary owners and the wanton destruction to the forests.

The Forestry Act 1991

Acting in response to the Barnett Inquiry Report and the Tropical Forest Action Plan, the Government eventually passed a new forestry legislation in July 1991. The Forestry Act came into force on 25 June, 1992. The Act is very comprehensive and sets up a complex administrative structure and procedure for control and regulation of all forestry operations throughout the country, including the allocation of timber permits.

The major elements of the legislation are:

1. the creation of a National Forest Board and the Provincial Forest Management Committees to be involved in the administration of the Act;
2. the introduction of a legislative basis and procedure for forestry planning; and
3. the reform of resource allocation procedures including the repeal of the Forestry (Private Dealings) Act.

During debate on the Bill in Parliament, Sir Julius Chan (Member for Namatanai), told Parliament that the Bill was taking the power away from the Cabinet and giving it to bureaucrats with the establishment of the authorities. He warned that Parliament would regret later. This view is very shallow and lacks insight. The creation of the Forest Authority indicates the corporate nature of the Forests Department. And the inclusion of the Provincial Forest Management Committees in the administrative structure signals the seriousness of the Government in fostering the participation of Provincial Governments and customary owners in the decision making process.

The Act also retains the four old practices which were established by its predecessors. First, under the Act, National Forests (formerly

39 Mcdui Development v. Genia [1990] PNGLR 50, In this case the Forests Minister (Mr. Genia) revoked Mcdui's licence to log in the Lake Imala LFA (Central Province) so that his company could go in and log the area
40 SCR No.7 of 1992; Re Forestry Act 1991, [1992] PNGLR 514; For a detailed understanding of the mechanics of this Act see the discussions in Mossop's paper, n.2, supra
41 Mossop, n.2, op cit., p.20
42 The Hansard, 16 July, 1991
43 Ibid
Territory Forests) can be declared under section 3. Second, certain trees or species of trees can be protected under section 4. Third, customary ownership and rights to forests are facilitated under section 46 and section 56(3). Fourth, Timber Reserves can be declared over Forest Management Agreement areas.

The core of the legislation is Part III which forms the basis for the management and development of forest resources and the procedure for forestry planning. It contains provisions dealing with Forest Plans, Forest Protection, Resource Acquisition and Allocation. It provides the mechanism for the utilisation of the forestry resources through the Timber Authority and the Forest Management Agreement process which are discussed in Chapters 4 and 5.

Section 136 of the Act repealed the Forest Industries Council Act; the Forestry Act; and the Forestry (Private Dealings) Act. Part X contains the saving and transitional provisions. Section 137 saves the existing permits, agreements and registrations which were granted under the former Acts.

In 1993, the logging giant, Rimbunan Hijau in collaboration with the PNG Forest Resources Association, launched an attack against the Government claiming that the Act was anti-customary owners and developers. In order to substantiate their claim they engaged a Queens Counsel (QC) from Australia to review the Act and make recommendations for changes. The QC reviewed the Act and recommended that various parts of the Act be amended to reflect the views and aspirations of the customary owners and the developers.

The involvement of Rimbunan Hijau in the debate angered many people. Others, including Sir Michael Somare, called for the deregistration of the company. The review by the Australian QC was also criticised. Some argue that his recommendations are faulty because (1) he lacks "understanding of or experience with customary or other land laws, an important and fundamental aspect to the whole debate", and that (2) "he is detached from the reality on PNG." The criticisms from

44 Rimbunan Hijau controls about 86 percent of the timber concessions in the country; The Times of PNG, 29 July, 1993
45 The Times, 22 July, 1993
46 Ibid
47 The sections of the Act which were recommended for change included; Part II, Division 2, ss.21, 42, 47, 49, 56 and 61
48 Note 44, supra
49 The Times, 5 August, 1993
certain groups in the community and some national politicians laid the groundwork for the defeat of the industry backed Tulapi Bill (which is discussed below).

The final point about the Act is that, it has now been declared by the Supreme Court in the case *SCR No 7 of 1992; Re Forestry Act 1991* to be "an exhaustive law in the field of national forestry control and development throughout Papua New Guinea and is a matter of national interest." In this case the Supreme Court was asked to determine whether the East New Britain Provincial forestry legislation, the *Forestry Operations Control Act 1992* was unconstitutional on the grounds of inconsistency with the national forestry legislation. Applying the *cover the field test*, the Supreme Court held that the Provincial forestry legislation was invalid. The importance of this case is that Provincial Governments are now restrained from enacting their own forestry legislation to regulate forestry activities in their respective Provinces.

**Forestry (Amendment) Act 1993**

This Act was enacted in 1993. It corrects and changes many of the typological and terminological errors in the principal Act, and brings the role of the PNG Forest Authority as a corporate body into perspective. It also reduces the number of the Board members from eleven to six and provides the Board with temporary powers to extend the terms of existing timber permits or licences and to grant timber authorities.

The PNG Forest Resources Association slammed the Government for enacting the Act because they claimed that they were neglected under the Act. However, the Act does not make any substantial changes to the principal Act. The rights of customary owners are therefore still maintained by the principal Act.

**The Tulapi Bill**

In the same year (1993), the Member for Kagua-Erave, Mr. Daniel Tulapi introduced in Parliament a proposed Bill to amend the *Forestry Act 1991*.

---

50 Note 40, *supra*
61 *Id*, p.515
62 For example, the term "Director-General" under the principal Act has been changed to "Managing Director."
64 *Post Courier*, 20 July, 1994
During the Second Reading of the Bill, the Member told Parliament that:

The enactment of the *Forestry Act* 1991 and the *Forestry (Amendment) Act* 1993, have caused our people, in particular, forest resource owners to review their belief in the Parliament and our ability to make laws to safeguard their rights.\(^65\)

The Member, further stated that:

Forest landowners believe that the *Forestry Act* 1991 and 1993 amount to a deprivation of the rights to decide how their resources are to be developed and what they are to receive in benefits.

The aim of the proposed Bill was to return the right of decision making on how and when the forestry resources are to be used, to the customary owners. The core of the Bill was to give all powers over approval of projects to the Board. However, the Board was to be composed of:

1. three industry representatives (FIA);
2. three forest resource owners representatives (PNG Forest Resources Association);
3. Managing Director (National Forest Service);
4. the Secretary of Department of Environment and Conservation; and
5. a member selected by the National Premiers Council.\(^66\)

Basically, the Board was to be stacked with pro-industry members.\(^67\)

Many other changes were advocated by the Bill. These included:\(^68\)
1. approval of forestry project proposals and timber permits by the Board,
2. removal of provisions designed to ensure that the consent of customary owners are properly obtained,
3. removal of provisions relating to registration of industry participants,
4. removal of the power of court to convict offenders and award damages, and
5. removal of the power of the Government to restrict log exports in respect of existing agreements.

These were drastic changes and led many people to view the Tulapi Bill with suspicion. The Bill was strongly opposed by the Non Government Organisations and other members of the society.\(^69\) The Tulapi Bill was defeated in the March Sitting of Parliament in 1994.\(^70\)

---

\(^65\) The Hansard, 12 August, 1993

\(^66\) Note 63, *supra*

\(^67\) Under s.10 of the *Forestry Act* 1991, almost all sectors of the community are represented on the Board. It becomes obvious why the Tulapi Bill was not supported well by various groups in the community.

\(^68\) Nadarajah, n.63, *supra*

\(^69\) *Ibid*

\(^70\) The Bill was defeated on 3 March, 1994; *The Times*, 3 March, 1994
Bill was defeated because "the Government perceives the Bill to be at total variance to its stand on forestry reform."\(^{71}\)

**Forestry Guidelines 1993**

In 1993, the Forest Authority through the Forests Minister, Honourable Tim Neville, introduced a document titled "National Forestry Development Guidelines." When introducing the National Forestry Development Guidelines (herein after referred to as "the Guidelines") he stated that "these Guidelines provide a prescription for remedying" a subsector which the Barnett Inquiry described as "out of control."\(^{72}\) The Guidelines introduce "tougher checks and procedures governing new project entrants and a new forest revenue system which will ensure that customary owners and the nation as a whole receive their full and just share of economic rent from timber that is harvested."\(^{73}\)

The Guidelines set out a program for forest resource development based on sustainable production.\(^{74}\) Requirements for reforestation and afforestation during and after the cessation of a timber project are set out under the Guidelines.\(^{75}\) The Guidelines also provide for industrial development in the forestry sector, training, localisation and forest research. A vital element of the Guidelines is the provision relating to the distribution of forest revenue.\(^{76}\)

The introduction of the new forest revenue system would ensure that customary owners receive shares from timber production of their forests. The revenue system was to be introduced as soon as possible. Under the new system no export duties would be paid on logs. Instead stumpage would be payable in respect of all timber which is harvested or scaled. Miscellaneous charges and levies under the current forestry arrangements will no longer be payable.\(^{77}\) This system is a revolutionary aspect of the Guidelines. The system has been described as fair to all the parties involved in the forestry sector.\(^{78}\)

The most crucial element of the revenue system is the stumpage. In

---

\(^{71}\) *The National*, 24 March, 1994

\(^{72}\) Neville, T *National Forestry Development Guidelines*, Port Moresby: Department of Forests, September, 1993, p.i

\(^{73}\) *Id*, p.ii

\(^{74}\) *Id*; pp.4-13

\(^{75}\) *Id*, pp.14-15

\(^{76}\) *Id*, p.20-24. The revenue system originates from Part VI of the *Forestry Act* 1991

\(^{77}\) *Ibid*

\(^{78}\) Personal communication with Tahereh Nadarajah of the National Research Institute, 3 May, 1994
its most simplest form stumpage means, 'you pay what you cut'. The Guidelines stipulate two forms of stumpage. These are the minimum stumpage and the additional stumpage.\(^79\) The minimum stumpage comprises three charges payable at a rate of per cubic meter of timber harvested. These charges are:\(^80\)

1. royalty - K5.00 (payable to customary and other owners of harvested timber)
2. Provincial levy - K1.00 (payable to the Provincial Government of the Province in which the timber is harvested)
3. forest administration levy - K14.00 (payable to the State, as represented by the Forest Authority)

The additional stumpage will be payable to a representative body appointed by the customary owners in each project area.

The distribution of forest revenue envisaged by the Guidelines is simplified in Figure 2 below.

![Fig 2 Distribution of Forest Revenue](image)

Source: Forest Authority (1994)

The stumpage system has two advantages. First it ensures that the customary owners gain fairly in the distribution of the forest revenue. As Mr. Neville pointed out, "resource owners would earn about K12.9 million in direct revenue and an additional K30 million in premiums which are going to the developers."\(^81\) Second, it discourages wastages of forest logs. Because the system requires that the logger pays for every log that is cut, the developer would not be inclined to rush in and bulldoze every tree. The revenue system therefore encourages proper management of the forest environment.

\(^79\) Neville, n.72, *op. cit.*, p.21
\(^80\) *Id*, pp.21-22
\(^81\) *Post Courier*, 6 August, 1993
One can easily be misled into believing that because of the friendly nature of the Guidelines to the customary owners and the environment, it has no shortcomings. The introduction of the Guidelines is, however, marred with a lot of controversy. These controversies have centered around the new revenue system.

The strongest opposition to the Guidelines has come from developers, and sadly enough, customary owners as well, through the PNG Forest Resources Association. The developers and the PNG Forest Resources Association have maintained a vigilant attack on the Guidelines since its launching in September 1993. They claim that their interests are not properly accommodated by the Guidelines.

In February 1994, the PNG Forest Resources Association threatened to bring logging operations throughout the country to a halt if the Forests Minister did not withdraw the Guidelines. In the following month, through its branches throughout the country, the PNG Forest Resources Association brought logging operations to a standstill and demanded that the Guidelines be withdrawn or they would stop all logging operations for an indefinite period. Even though the Forests Minister had earlier stated that the Guidelines were there to stay, he bowed to these pressures and deferred its implementation for one month. A Ministerial Committee was set up to review the Guidelines in March 1994. The review was completed before the Guidelines came into operation on 1 April, 1994.

What eventuated was that the revenue system was suspended indefinitely while the whole Guidelines were brought into operation in April 1994. The hope of customary owners for a fairer share of the forest revenue has really been dashed by the shelving of the revenue system. A paradigm can be drawn from the Holy Bible where it is said:

The stone that the builders rejected turned out to be the most important

---

82 The PNG Forest Resources Association was formed in 1992 to represent the customary owners and the land owner companies engaged in the forestry industry
83 See Post Courier, 20 July, 1993; 20 January, 1994; 18 February, 199; and 3 March, 1994
84 The National, 3 March, 1994
85 The National, 7 February, 1994
86 The Guidelines was to be implemented in March but was deferred to April 1994
87 The National, 25 February, 1994
88 The Committee was comprised of the Forests Minister, the Finance Minister and the Youth and Home Affairs Minister
89 The National, 3 March, 1994
In retrospect, it is sad that what is probably the best solution offered to the customary owners to alleviate their misery of forest revenue deprivation, is the very remedy that they vehemently opposed.

**Summary**

The lack of a substantial forest policy and the adoption of the colonial forestry legislation provided the impetus for the destruction of the forest resources of PNG. The industry was allowed to manipulate the customary owners and destroy the environment without any check for a period of about 20 years. The establishment of the Barnett Inquiry and the World Bank Report on Tropical Forest Action Plan for PNG were timely, for they uncovered a lot of anomalies within the forest industry which warranted immediate action. The introduction of the *National Forest Policy* and the *Forestry Act* of 1991 indicates the willingness of the Government to alleviate the problems besetting the forestry sector.

However, the Government's initiatives have not gone unchallenged. The ongoing conflict between customary owners, developers and the Government is a cause for concern. If this conflict is not resolved quickly the reforms envisaged by the new forestry policy and legislation cannot be implemented successfully. In the long-term all the parties involved in the forestry industry will suffer.

---

90 *The Holy Bible, 1 Peter 2:7*
CHAPTER 4

THE FOREST MANAGEMENT AGREEMENT: IS IT A FALLACY?

Introduction

The aim of this Chapter is to examine and critically analyse the procedure employed by the Government in allocating forest resources for development. This procedure is embodied in the Forestry Act 1991. The procedure is known as the Forest Management Agreement\(^1\) mechanism. This arrangement is essentially a contract and originates from the Timber Rights Purchase process which was espoused by the former forestry legislation. I will therefore begin by looking at the origin, objectives and implications of the Timber Rights Purchase process, particularly its impact on the customary owners. I will then relate the Timber Rights Purchase to the Forest Management Agreement with the aim of ascertaining whether the Forest Management Agreement is really the Timber Rights Purchase in disguise.

I will show that even though customary owners own the forestry resources they are the main losers in this arrangement. I will argue that the Timber Rights Purchase process is unfair to the customary owners and that the Forest Management Agreement process as espoused by the Forestry Act 1991 is no different from the Timber Rights Purchase and therefore needs to be reviewed.

The Timber Rights Purchase Agreement: Origin and Purpose

The origin of the Timber Rights Purchase devise can be traced to 1909 in the Timber Ordinance (Consolidated) 1909. The objective of the Ordinance was the utilisation and management of the forestry resources of the Territory of Papua. This aim was to be achieved through the Timber Rights Purchase process which was established by section 2 of the Ordinance. Section 2 stipulated that:

If the native owners are willing to dispose of the timber growing on any land it shall be lawful for the Lieutenant-Governor to acquire the right of felling, cutting, removing, or disposing of the timber upon such terms as may be agreed upon between him and the owners, and thereupon it shall not be lawful for any person, by purchase or other dealing with the owners of the land, to acquire any interest in the timber either while it is standing or after it has been felled, but the exclusive right of felling, cutting, removing

---

\(^{1}\) Section 2 of the Act defines "Forest Management Agreement" as a Forest Management Agreement entered into in accordance with Division III (4) of the Act
and disposing of the timber shall vest in His Majesty and those claiming under him, who for the purpose of felling, cutting, removing and disposing of the timber shall have the right of entering upon the land and of erecting such buildings, saw-mills and machinery as may be necessary.

The main elements of the Timber Rights Purchase were: (1) the willingness of the customary owners to sell their timber rights; (2) these rights were to be purchased only by the Administrator; (3) the Administration had the exclusive right to fell, cut, remove and dispose of the timber growing on the land; (4) customary owners were prohibited from selling the same timber rights to any other person after the conclusion of the Timber Rights Purchase arrangement; (5) the timber rights acquired by the Administration were transferable; and (6) those claiming under the Administration (timber permit and licence holders) had the right to enter the land and erect buildings, sawmills and bring machinery on to the land.

The Timber Ordinance (Consolidated), however, failed to specify: (1) the nature of the contract (written or oral); (2) the term of the Timber Rights Purchase contract; (3) the method and the amount of money payable and other benefits to the customary owners; (4) whether the rights of the Administration ended after the cessation of a timber project in the area; and (5) whether the customary owners would be compensated for the destruction to their land by the erection of sawmills and other buildings.

Timber in Timber Rights Purchase areas (hereafter referred to as "Areas") could only be harvested by a timber permit holder. Timber harvested from these Areas could be sold, exported or used for construction of buildings and for any other commercial purposes. However, it could not be supplied as firewood for domestic purposes. A timber permit could be granted by a Resident Magistrate, assistant Resident Magistrate or any other person authorised by the Administrator. The term of a permit was for 12 months with an option for renewal.

The Administrator was also permitted under the Timber Ordinance (Consolidated) to declare land over which timber rights had been purchased as a "Timber Reserve." A Timber Reserve could only be harvested by a timber licence holder who also had to be a timber permit

---

3 s.5
4 s.5(3)
5 s.9
holder. Only the Administrator could issue timber licences. The term of a timber licence ranged from one to twenty five years.\(^6\) Timber licences could not extend over an area of 75,000 acres. Licence holders were also required under the *Timber Regulations* to erect sawmills on Timber Reserve land.\(^7\)

The objective behind the "Area" concept was to encourage licence holders to convert the Timber Reserves into agricultural areas. It was apparent that the Administration was not only interested in purchasing timber rights but also the rights to use the land.\(^8\) The conversion of Timber Reserves into agricultural land was never anticipated by the customary owners who sold their timber rights to the Administration. Although the ownership of land remained intact with the customary land owners, the method of converting customary land into agricultural land through the guise of Timber Reserves without proper compensation was one of the most successful trickery employed by the Colonial Administration.

The *Timber Ordinance (Consolidated)* remained in force until 1920 when it was replaced by the *Timber Ordinance 1909-1920*. Under the provisions of this Ordinance, 14 Timber Reserves were declared by 1922.\(^9\) In 1922 a similar ordinance was enacted for the Territory of New Guinea.

In 1936, the *Forestry Ordinance* was enacted for the Territory of New Guinea. This Ordinance repealed the *Timber Ordinance 1922-1931*.\(^10\) The objective of the Ordinance was forest resource exploitation. Again this was to be achieved through the *Timber Rights Purchase* devise. This process was retained by section 9. The timber rights purchased, were for the harvest of five hardwood timbers, namely; *taun*, *kamarere*, *kwila*, *erima* and *walnut*.\(^11\) There were no fundamental changes to the structure or nature of the *Timber Rights Purchase* process. The

---

\(^6\) s.12
\(^7\) reg.5, *Timber Regulations 1918*
\(^9\) See Table 1, supra
\(^10\) s.3 of the Ordinance
only change worth mentioning is that under section 9(2), the Administrator was empowered to declare any land over which timber rights had been acquired as Administration land. Such Administration land could also be declared as Timber Reserve or Territory Forest. Territory Forests referred to land permanently designated to forestry purposes. The term "Territory Forest" was used in place of State Forests which was applied in Australia. The dedication of "Territory Forest" was aimed at reserving areas of forest permanently for the supply of timber on a sustained yield basis.

After the forest had been assigned as a Territory Forest or a Timber Reserve, the Administrator was allowed under section 14 to issue timber permits and licences to successful applicants for the removal of any forest produce from these designated areas.

The Forestry Ordinance therefore did not change the Timber Rights Purchase situation at all. Furthermore, it continued to maintain and encourage the deceptive method of customary land conversion and utilisation. The utilisation of customary land, apart from the harvesting of timber was encouraged by the Ordinance in that it conferred on the timber permit holder the right to:

1. occupy the land and erect a sawmill or other buildings, growing fodder for cattle and any other purpose approved by the Administrator,
2. build roads, construct tramways, and
3. graze and water cattle.

The focus of the Administration had now changed from encouraging timber licence holders to harvest timber, to one of facilitating and expanding the rights of timber permit holders. Not only did their rights extend from the harvesting of timber and the exploitation of land in the Areas, but the term of their permits had been increased to 10 years.

---

12 ss.10 and 11 of the Ordinance
13 World Bank Report, n.11, op. cit., 149
14 Lane-Poole, C. E. A Report of the Goldfields of New Guinea: Together with Recommendations regarding a Forest Policy for the Whole Territory, Sydney: RNB Agriculture Series (81), 1935, p. 11
15 Ibid
16 s.15(2) of the Forestry Ordinance 1936
17 s.15(3)
In 1950, the *Forestry Ordinance* 1936-1937 as applied in New Guinea was adopted by the Territory of Papua under the *Forestry (Papua) Ordinance* 1950. The *Timber Rights Purchase* process with its deficiencies was also accepted into Papua under the *Forestry (Papua) Ordinance*.

<table>
<thead>
<tr>
<th>Reservations</th>
<th>Papua</th>
<th>New Guinea</th>
<th>Total (000 Acres)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Territory Forests</td>
<td>47</td>
<td>25</td>
<td>72</td>
</tr>
<tr>
<td>Timber Reserves</td>
<td>22</td>
<td></td>
<td>22</td>
</tr>
</tbody>
</table>

**Other Administration Land**

| Purchased for forestry purposes       | 89    | 89         | 1,354              |
| Timber Rights Purchase                | 108   | 877        | 985                |
| Land under Permits and Licences       | 177   | 9          | 186                |
| **TOTAL**                             | 354   | 1,000      | **1,354**          |

Native owned (approximate) 39,500 49,000 88,500

Estimate Grand Total 40,000 50,000 90,000

**SOURCE:** Department of Forests (1969).

The *Timber Rights Purchase* process remained unchanged until 1971. In the meantime the Administration was able to capitalise on the *Timber Rights Purchase* process by purchasing timber rights over large tracts of customary land. The Administrator then designated certain areas in the country for forestry use. By 1963, a total land area of 1,354,000 acres had been designated. This is shown in Table 4.

The Administration had been able to purchase timber rights over a total area of 89,000 acres of land which was mainly located in the

---

18 No.7 of 1950
19 In essence, it was not really necessary for Papua to adopt the *Timber Rights Purchase* because it was actually initiated by a Papuan forestry legislation
20 World Bank Report, n.11, *supra*
Territory of New Guinea. Almost all the forest land owned and controlled by the Administration was on lowland or foothill country where the population was relatively small. Around the same year, the Administration was able to purchase timber rights from the customary owners over an area of 94,000 acres and designated the forest land as Territory and Reserve Forests. About 99% of the forest was still located on customary land. As noted by the World Bank Mission, this was attributed to the fact that customary landowners were not willing to sell forest land but were inclined to dispose of their timber rights. The Mission therefore recommended that the Administration should acquire timber rights over large blocks of customary land containing merchantable timber. It would then encourage large scale logging by investors. This has always been the major objective of the Colonial Administration and successive Governments of post-independent PNG.

The Administrator granted timber permits and licences in 15 of the 19 Districts (which later became Provinces after independence). Table 5 indicates the area of land covered in the permits or licences, the number of sawmills established in the logging area, and the total log capacity of the sawmills in 1963.

Most of the timber permits and licences were held by private individuals and corporations while the rest were held by the Departments of Public Works and Agriculture and religious missions.

In Papua, a total of 45 permits and licences were issued for the utilisation of timber over an area of 335,000 acres for which 138.5 super feet of logs were produced per day. In contrast, 43 permits and licences were issued in New Guinea over an area of 370,000 acres on which 51 sawmills were built. Although a higher number of permits and licences were issued in Papua, only 31 sawmills were built by the permit and licence holders. The three most important timber producing districts were Central, New Britain and Morobe, which together accounted for 75% of

---

21 Ibid
22 Ibid
23 Id, p.158
24 Id, p.150
25 Ibid
26 These sawmills produced 255.2 feet of logs per day
the timber permits and acreage with 39% mills and 57% of daily cutting capacity.

**TABLE 5: Indicators of Forest Utilisation, June 30, 1963**

<table>
<thead>
<tr>
<th>Area</th>
<th>Permits and Licences</th>
<th>No. Established</th>
<th>Capacity (000 ft. per day)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Central</td>
<td>36</td>
<td>15</td>
<td>73.1</td>
</tr>
<tr>
<td>Western</td>
<td>3</td>
<td>4</td>
<td>23.2</td>
</tr>
<tr>
<td>Gulf</td>
<td>1</td>
<td>2</td>
<td>3.5</td>
</tr>
<tr>
<td>Southern Highlands</td>
<td>3</td>
<td>3</td>
<td>5.1</td>
</tr>
<tr>
<td>Northern</td>
<td>9</td>
<td>2</td>
<td>9</td>
</tr>
<tr>
<td>Milne Bay</td>
<td>2</td>
<td>5</td>
<td>24</td>
</tr>
<tr>
<td>Morobe</td>
<td>12</td>
<td>6</td>
<td>97</td>
</tr>
<tr>
<td>Western Highlands</td>
<td>4</td>
<td>12</td>
<td>28</td>
</tr>
<tr>
<td>Eastern Highlands</td>
<td>3</td>
<td>7</td>
<td>31.5</td>
</tr>
<tr>
<td>Madang</td>
<td>1</td>
<td>3</td>
<td>4.5</td>
</tr>
<tr>
<td>Sepik</td>
<td>2</td>
<td>9</td>
<td>32.2</td>
</tr>
<tr>
<td>New Britain</td>
<td>18</td>
<td>11</td>
<td>55.2</td>
</tr>
<tr>
<td>Bouganville</td>
<td>2</td>
<td>3</td>
<td>6.5</td>
</tr>
<tr>
<td>New Ireland</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>88</strong></td>
<td><strong>82</strong></td>
<td><strong>393.4</strong></td>
</tr>
</tbody>
</table>

*Source: Department of Forests (1969).*

By 1967, some 6.6 million acres of forest land had been classified as suitable for inclusion in the forest estate, but title had only been attained for 0.18 million acres. During that period the terms of *Timber Rights Purchase* agreements were often up to 40 years.

The rights acquired by the Administration were also repeated in the *Timber Rights Purchase* agreement. These rights were, however, only exercisable within the boundaries of the Area.

The growth in the industry reflected the recommendations advocated in the forest policy introduced a few years earlier by the Minister for Territories.

---

28 Lamb, n.8, *supra*
29 For example, under Clause 5 of the Vailala Block 1 *Timber Rights Purchase* Agreement. The Agreement was concluded between the villagers in the Vialala Area of the Ihu District of the Gulf Province and the State on 11 April, 1989; Department of Forests, 1989
30 Carson, G. L *Forestry and Forestry Policy in Papua New Guinea*, Port Moresby: Department of Forests, 1974, p.3
The Timber Rights Purchase process under the 1936 Ordinance has been described by Carson as the vehicle for large scale exploitation of the forests. Others argue that the Timber Rights Purchase process was aimed at locating, assessing and regulating the availability of natural forest resources to bring them within the reach of development. This would be done through the acquisition of forest resources and turning them into forest estates. Whatever the argument, one point is evident. The Timber Rights Purchase devise had played an important role in the disposition and destruction of forest on large tracts of customary land.

The Timber Rights Purchase concept was retained after independence through the adoption of the Forestry Act 1974. The objective of the Act was to foster forest resources utilisation. Again the Timber Rights Purchase devise was to be the vehicle to achieve this purpose. As Lamb pointed out, though the Timber Rights Purchase device was hardly a satisfactory method for the long term management of forest, it allowed for the exploitation of timber before the complex problem of land tenure was solved. When the two legislation (which were applied separately in the two Territories) were amalgamated under the Forestry Act 1974, the Timber Rights Purchase concept remained unaffected.

By mid-1978, a total area of 2,226,000 hectares had been purchased by the Government through the Timber Rights Purchase process and several hundred permits had been issued to companies by mid-1976. By December 1992, there were approximately 65 registered forest products operators active in the country. Of this total, only 22 were engaged solely in log exports. Log harvest by PNG based industries by 1992 rose to about 1.8 million cubic meters per annum. Current timber

31 Id, p.7
33 Ibid
34 Lamb, n.8, supra
35 The Forestry Act 1974 was adopted after independence and was listed in the Revised Laws of Papua New Guinea as Chapter 216
permits have been issued over a total of 5.3 million hectares.\textsuperscript{38} This state of affairs is a result of the implementation of the \textit{Timber Rights Purchase} mechanism and the procedures under the \textit{Timber (Private Dealings) Act}.

The \textit{Timber Rights Purchase} procedure under the forestry law before 1991 can be summarised as follows:\textsuperscript{39}

(1) the area is identified \textit{(by the Government)};
(2) the volume of timber is assessed \textit{(by the Government)};
(3) the ownership of the land is established \textit{(by the Government)};
(4) the boundaries of the ownership groups are established by survey \textit{(by the Government)};
(5) royalty payments are agreed (lump sum; or deposit and payments as the logs are cut and measured);
(6) all owners (or their designated agents) then sign the purchase agreement;
(7) the restrictions on cutting certain trees (food trees, culture trees etc.) on operation asked for, are established \textit{(by the Government)}.

\textbf{Contracts made through the Timber Rights Purchase Process}

The \textit{Forestry Ordinance} 1936-1971 and the \textit{Forestry Act} 1974 enabled the Administration to purchase timber rights from customary owners who were willing to dispose of their timber rights. The transaction could proceed only if the customary owners were willing to dispose of their timber rights. The premise was that customary owners were aware of the economic value of trees standing on their land. Armed with this knowledge, customary owners willingly sold their timber rights to the Government. This presupposition is, however, not true because in practice it was (and is) the Government who carried out feasibility studies to determine the volume and value of merchantable trees standing on customary land. With this information in hand, the Government made the offer to purchase the timber rights over merchantable trees standing on customary land. Customary owners were then required to accept the Government's offer. As Brunton pointed out:

\begin{quote}
\textquote{As a matter of practice landowners never set the conditions of the agreement for the sale of their timber rights. The conditions of sale were always imposed on them on a take-it or leave-it basis.}\textsuperscript{40}
\end{quote}

\begin{flushright}
\textsuperscript{38} \textit{Ibid}
\end{flushright}

\begin{flushright}
\textsuperscript{39} Yauieh, n.36, \textit{op. cit.}, p. 24
\end{flushright}

\begin{flushright}
\textsuperscript{40} Brunton, B "A Quarter of Next to Nothing : Participation and Responsibility with Forestry Resources" (Port Moresby, 1993), p.6
\end{flushright}
This was the hallmark of many of the *Timber Rights Purchase* arrangements which were concluded mainly on the insistence of Government officials.\(^{41}\) This is illustrated by the Timber Rights Purchase Agreement which begins with the statement that:

The State is desirous of purchasing such rights from the customary owners and has approached the Vendors specified in Schedule 1 hereto to acquire such rights over the area specified in Schedule 2 hereto (The Timber Rights Purchase Area).\(^{42}\)

One may argue that the State set the conditions of the Agreements because of its fiduciary relationship with customary owners. It could also be argued that because customary owners were illiterate and uninformed of the nature of such contracts, the State as the custodian of the people and their interests, was only acting in the best interest of the customary owners. This argument, however, could only be sustained if it is shown that the State did not breach this fiduciary relationship.

The Timber Rights Purchase Agreement was a standard document which was prepared and contained blank spaces which were to be filled in for the relevant Areas and by the customary owners. Clause 1 of the Agreement contained the interpretations. Clause 2 declared that the Agreement was in compliance with the *Forestry Act*. Clause 3 provided that the term of the Agreement was for 40 years. Clause C of the Agreement stated that:

\[
\text{[T]he Vendors have agreed to sell to the State the right of felling, cutting, removing and sale of timber over the area specified in Schedule 2 hereto subject to the terms and conditions herein contained.}^{43}\]

Clause 5 contained the restrictive covenants.\(^{44}\) Some of these conditions were that the right to fell, cut, remove and sell timber were only permitted in the Area, and that these rights were to remain in force for forty years.\(^{45}\) Another condition was that customary owners were restricted from selling

\(^{41}\) This is clearly illustrated in the case of Umboi Timber Rights Purchase Agreement and the Ningera Timber Rights Purchase Agreement; Simet, J and Ketan, J *Trans-Pua Study: Vanimo Local Land Group Structures and Territorial Claims*, (An NRI Report), Boroko: National Research Institute, 1992, pp. 63-78

\(^{42}\) Clause A of the Timber Rights Purchase Agreement; See n.29, *supra*

\(^{43}\) *Ibid*

\(^{44}\) *Ibid*

\(^{45}\) Schedule 3 of the Timber Rights Purchase Agreement; See n.29, *supra*
or dealing with other persons except those persons authorised by the Government.

The timber that the customary owners sold included "fallen trees, felled trees, and all wood whether sawn, hewn, split or otherwise fashioned" and "tree, shrub, bush, seedling and re-shoot of any kind and of any age." The issue is whether the customary owners were fully aware that the Government, by purchasing the right to harvest, plant, grow and manage 'fallen and felled trees, and wood whether sawn, hewn, split or otherwise fashioned' also directly extended its right to the removal and destruction of trees, shrubs, bushes, seedlings and re-shoots of any kind and of any age. It is my argument that this aspect of the agreement was not explained to the people. A classic example is that of the people in the Area of the Umboi Timber Project on Umboi Island in the Morobe Province. Between December 1992 and January 1993, I personally conducted research with the assistance of the Siassi students studying at the University of Papua New Guinea into the Umboi Timber Project. We asked the people what the Government bought under the Timber Rights Purchase Agreement. They replied, "Gavaman baim ol timba bilong mipela" (Government bought our timber). When we asked them to explain what timber the Government bought from them, they said that it was the trees suitable for harvesting as timber. When we asked them, if they knew that the Government had also purchased all the bushes, shrubs, uneconomical trees and sand in the Area, the majority of them (including some of the village leaders who were involved in the negotiations) were shocked in disbelief. It was apparent that they were led to believe that only economic trees in their forests were covered under the Timber Rights Purchase Agreement. We concluded that the customary owners assented to the Timber Rights Purchase Agreement on the basis of false

46 s. 1, Forestry Act 1974
48 The Umboi Timber Project initially began in 1988, but due to inter alia environmental destruction by the operator of the project, Putput Logging Pty Ltd, it was suspended in 1989. Ironically, the same company has been allowed to continue with its operations on the Umboi Island under a new Logging and Marketing Agreement.
49 The students were namely William Bawasu (BSc IV), Peter Samuel (BA I) and Esther Gaigemang (LLB I)
50 The research was funded by the Siassi Felosip Group of Port Moresby and spread over a five weeks period
statements made by Government officials at the time of the making of the Agreement.

Clause 4 of the Timber Rights Purchase Agreement set out the mechanism for calculating the sale price, the manner of payment and the estimated quantities of timber harvested. This mechanism is very complicated and requires the assistance of a mathematician to work out the calculations. The consideration for the sale was usually below K200.00.

The purchase price varied from one Area to another and was calculated on the basis of the value and volume of timber in the Area. For example, in the Vilala Area which had a total area of 88,680 hectares, the purchase price was K3,929,491. And for the April-Salumei Area, the sale price was K20,140,017.00. The April-Salumei Area contained an estimated volume of 9,002,562 m³ of hard and soft wood. The payments are usually done by deposits which are paid out by the Government in instalments over a specified period of time. The amount did not include payment for the future use of the customary land by the Government after the forest had been logged, but the amount was confined to the purchase of timber rights.

A vital part of the Agreement is Schedule 1. This schedule contains the list of persons, their clans, village and their signature. The title of these people are not given, but it is assumed that they are the leaders of the various clans of the villages located within the Area. They are expected to read the Timber Rights Purchase Agreement and indicate their consent by signing the Agreement in Schedule 1. In the Vilala Block 1 Timber Rights Purchase Agreement, the names of ten people are listed as representing the two clans of the Lohiki village who own Block 1 of the Area. The Agreement, however, was signed by only three of the ten

---

51 The Individual and Community Rights Advocacy Forum (ICRAF) is currently collecting information on the April-Salumei Timber Rights Purchase Agreement. ICRAF intends to test the validity of the Agreement in the National Court later this year (1994). (Personal communication with Dr. B. Brunton (Director of ICRAF), 27 June, 1994). The outcome of this case will be very important as it will reflect on the validity of most of the existing Timber Rights Purchase arrangements.

52 For the April-Salumei Timber Rights Purchase Agreement the consideration was K142 as cited by Brunton, n.40, op. cit., pp.10-11; The consideration for the Vilala Block 1 Area was K144

53 Schedule 4 of the Timber Rights Purchase Agreement

54 Brunton, n.40, op. cit., pp.10-11
persons listed. The question is, does this make the contract void on the grounds that not all the parties to the contract have executed the Agreement? The doctrine of privity of contract clearly provides that "only actual parties to the contract can acquire legally enforceable rights or incur legally enforceable obligations under it."\textsuperscript{55} It is therefore possible to argue that because the other seven people did not sign the contract, they have not actually sold their timber rights to the Government. As such the Government would be acting illegally in harvesting the timber in the Vilala Block 1 Area.

Another issue is whether the people who signed the Agreement actually understood the terms of the contract before signing it. The Agreement "was written (and is) in English (with no translation in Pidgin or Ples Tok\textsuperscript{56}). It is in such convoluted manner that the vendors (customary owners) could not appreciate that they were selling their property for a nominal sum fixed by the State, and that they would lose a greater proportion of the market value of their trees to foreign logging companies."\textsuperscript{57}

The other issue is whether the persons who claim to represent the customary owners have the authority to do so. In Chapter 1 we saw that alienation of forest to strangers is not permitted by customary law. We also saw that before a decision is taken on a major activity or transaction in a clan area, consensus has to be reached by all members of the clan concerned. Only after a consensus is reached can clan leaders make decisions on behalf of their members. If custom has changed with modernisation in which case forest resources can be sold for economic purposes, has the decision-making processes also changed? It is my view that the decision-making processes relating to the sale to, and use of land by strangers is still a clan matter. The leaders must therefore still have the mandate of their people to agree to sell their timber rights to the Government. If they do not have the authority of their people, then they do not have the capacity to enter into the Timber Rights Purchase Agreement.

\textsuperscript{55} Khoury, D and Yamouni, Y. S\hspace{1mm}Understanding Contract Law, (3rd Edition), Sydney: Butterworths, 1992, p.170
\textsuperscript{56} Pidgin is the most common language spoken by the majority of the people in PNG. Ples Tok is mother tongue
\textsuperscript{57} Brunton, n.40, op. cit., p.5
Problems with the Timber Rights Purchase Process

The problems associated with the Timber Rights Purchase process are obvious. But they can be summarised as follows. First and foremost the customary owners were illiterate and uninformed and therefore could not possibly understand the contract which was drafted in English. The second problem was that they lacked adequate advise from independent sources, resulting in an inequality of bargaining power of the parties.58 One would expect the Government, being in possession of the necessary information, expertise and the capital, to act in the interests of the customary owners. In practice, the customary owners were ripped-off and their rainforests totally destroyed.

The third problem was that the contracts were concluded in haste. The Timber Rights Purchase Agreements had to be finalised quickly so that logging operations could begin. This particular problem was evident in the Vanimo Timber Rights Purchase Agreement.59

The fourth problem was that the customary owners were not informed of the nature of the Agreements in detail. What they knew was, that the Government was buying their merchantable trees. What they were not told was the environmental and social consequences of logging operations. Again the Umboi and Vanimo Timber Rights Purchase Agreements provide good examples of this problem.

The Timber Rights Purchase device remained in force for 16 years after independence and was finally changed by the Forestry Act 1991. The new procedure introduced by this Act is discussed below.

The Timber Rights Purchase Process under the Forestry Act 1991

Timber rights are acquired from customary owners through a new method introduced by the Forestry Act 1991. The Forest Management Agreement is essentially a contract between the Government and customary owners for the sale and purchase of timber rights located on customary land.

58 Blomley v. Ryan (1956) 99 C.L.R. 362; See also Chen-Wishart, M Unconscionable Bargains, Wellington : Butterworths, 1989, pp.31-77
59 Simet and Ketan, n.41, supra
Under the agreement the State acquires certain rights to exploit the timber growing on customary land while the customary owners derive monetary and other benefits from the development of their timber resources.60

The Government sees its role in the Forest Management Agreement process as the intermediary between customary owners and developers.61 The Government hopes to manage the forest through the acquisition of timber rights which would also enable it to acquire the right to grow, plant, and manage subsequent trees (and other crops) on customary land.62 This objective is to be achieved through the Forest Management Agreement process.63

The Forest Management Agreement procedure is set out in section 56 of the Act. Subsection (1) of the section reads:

(1) Subject to this Division, the Authority may on behalf of the State, recommend to the Minister acquisition from customary owners of customary land of the right -
   (a) to harvest timber from the land; or
   (b) to plant, grow and manage timber on that land; or
both, in the form of a Forest Management Agreement that complies with this Act and contains such terms as are agreed between the customary owners and the Authority, and the Minister may approve such acquisition.

It is my view that the essential elements of this section are: (1) the PNG Forest Authority must initiate the process by recommending to the Forests Minister to acquire the timber rights; (2) the consent of customary owners is not required at the time of the recommendations; (3) the right to harvest timber is acquired; (4) the Government acquires the right to grow and manage timber on land and the right to harvest the planted trees on the land; (5) the agreement is to be written; (6) the Forest Management Agreement must be signed by the Minister64; and (7) title to customary land is not affected.65

63 Ibid
64 s.56(2) of the Act maintains ownership of the land with the customary land owners
65 s.56(3)
Points (1) and (2) are different from the requirements of the old Act. They rely on the assumption that customary owners are keen on selling their timber rights to the State. They also presuppose that the Forest Authority has already designated forest areas for utilisation without the prior knowledge of the customary owners. Points (1) and (2) can be described as arbitrary provisions due to their lack of regard for the views of the customary land owners. Points (3), (5) and (7) are reminiscence of the Timber Rights Purchase except that customary rights to the land are now expressly recognised by the Act. Points (4) and (6) are new innovations which reflect the seriousness of the Government in controlling the "out of control" timber industry and its desire to manage the forestry resources of the country.

It is envisaged that through the Forest Management Agreement, the State will opt to purchase both the right to harvest and plant, and manage timber in Forest Management Agreement areas. The presupposition is that this will give the Government the exclusive right to deal with forest land in whatever way it wants. Conversely, the Forest Management Agreement prohibits the customary land owners from dealing with the forest land. This is one of the shortfalls of the Act because it fails to recognise the diversity of use-values of forest land.

Section 56 of the Act is paradoxical. On the one hand it provides that the State will harvest and manage timber located on the customary land. On the other hand it also respects the land-use rights of the customary owners. The Act falls short of stating the extent of the Government's right to the future use of the customary land. The issue is whether the Government can continue to plant and manage trees after the harvest of the first replanted trees (forest plantations). Moreover, who will own the replanted trees? The assumption is that the Government has that right and also owns these trees. This fits in with the overall objective of the Forest Management Agreement which is forest resource

66 See s. 60
management. It is submitted that this assumption makes a mockery of section 56(3) of the *Forestry Act*. The objective of subsection (3) is to assure the customary owners that their title to the forest land is protected under the Act. To say, on the one hand, that title to customary land remains intact, while on the other hand, that control and continuous use of the same land remains with the State, is fallacious.

It is my view that the right to plant, grow and manage timber on the *Forest Management Agreement* land is similar to the deceitful colonial practice of converting Areas into agricultural land which was repealed in 1971. The only difference is that, in this case the land is used for State timber plantations. This is contrary to the Government's policy on resource ownership under the *National Forest Policy* which aims at "recognising, respecting" and "giving proper regard to the rights of customary land owners."[^69] This extends to the recognition of the right to future uses of the land by customary owners. This right should not be encumbered by the Government under the auspices of the *Forest Management Agreement*. What is proposed is that under the Government's reforestation policy, customary owners should be encouraged to grow and manage timber plantations during and after the cessation of a timber project in the *Forest Management Agreement* area with financial support from the developer and technical and managerial input from the State.[^70] Another method, which was proposed by Carson is to lease the land from the customary owners after the cessation of a logging project and use it for reforestation.[^71] This should have been the approach taken by the Government and not the clustering of processes as we have seen under the *Forest Management Agreement*.

The rights acquired by the State under section 56 are spelt out in detail under section 60. These rights include: (1) cutting and removing timber; (2) planting, growing and managing timber; (3) building and maintaining roads, bridges and wharves; and (4) the use of gravel. This section has retained almost all the attributes of its predecessor. These rights rest in the Forest Authority which can transfer the rights to persons making claims under the Forest Authority. Only persons who are

[^69]: Note 60, *op. cit.*, p.4; Section 46 of the *Forestry Act* 1991
[^70]: This method of reforestation is sometimes referred to as community forestry; See Yagro, n.68, *supra*
[^71]: Carson, n.30, *op. cit.*, p.5
registered as Registered Forestry Industry Participants and who are granted a timber permit by the Forest Minister under sections 73 and 76 of the Act can claim the rights under section 60.72

The form and content of a Forest Management Agreement is stipulated by section 58. The Forest Management Agreement must:

1. be in writing;
2. specify the monetary and other benefits to be received by the customary land owners in consideration for the rights granted;
3. specify the estimated volume of merchantable timber in the area covered by the Forest Management Agreement;
4. specify the term of the Forest Management Agreement;
5. have a map showing clearly the boundaries of the Forest Management Agreement area;
6. contain a certificate certified by the Provincial Forest Management Committee declaring the authenticity of the persons forming the land groups in accordance with section 57(1) and the willingness of the customary land owners to enter into the agreement; and
7. dedicate a portion of the land covered by the Forest Management Agreement as forest management areas.

Where the Minister accepts a recommendation under section 56, the Forestry Authority can proceed to make its intentions known to the customary owners. If the customary owners give their consent, a Forest Management Agreement is consequently concluded. However, practice has shown that obtaining the consent of all the customary owners is difficult. Therefore, the recent Forestry (Amendment) Act 1993 provides the Forest Authority with two options to curtail the problem. It can either obtain the consent of at least 75% of the adult customary owners present and residing in the proposed Forest Management Agreement area or it can obtain this consent through the agents of the customary owners or a land group incorporated under the Land Groups Incorporation Act.73

This is a contradiction. On the one hand, the Government seeks to encourage the orderly organisation of the customary owners into land groups which will reduce the potential for future conflicts between customary owners themselves and the Government or the developer. On the other hand, the Government completely destroys this objective by

72 Section 114 of the Forestry Act prohibits any person from engaging in any forestry activity unless he or she is registered as a Forestry Industry Participant.
73 s.13, Forestry (Amendment) Act 1993; The Land Groups Incorporation Act is not so popular with the customary land owners; See the discussion in Chapter 1
providing a cheap and quick means of conjuring customary owners' consent. The method of obtaining 75% of consent and the consent from agents is really an escape route for the Government to avoid the onerous task of mobilising the customary owners.

A possible problem created by section 13 of the Forestry (Amendment) Act 1993 is that, it fails to provide a procedure for obtaining the consent of 75% of the customary owners. The underlying issue is, how do you first determine the 100%? The Act does not even establish a method for verifying the consent of those who consent to the transaction. A certificate is required only for the verification of the land group established under the Land Groups Incorporation Act.

At the time of writing the Forest Management Agreement document was still being formulated. The Forest Management Agreement procedure which has been stipulated in the Act is spelt out in detail by the National Forestry Development Guidelines, the summary of which is set out in a diagrammatic form in Figure 3 below.

Customary Rights under the Forest Act 1991

A pressing issue that needs a little consideration is the question of customary rights to forestry. Does the Act recognise and respect customary rights? The starting point is section 46 of the Forestry Act. Section 46 states that:

[T]he rights of customary owners of a forest resource shall be fully recognised and respected in all transactions affecting the resource.

The fundamental terms are "respect" and "resource." Parkop poses two questions which are; "what rights of customary owners shall be 'fully respected'? And what are the resources which customary owners own in the forest that must be recognised and respected?"
These rights encompass social, spiritual and cultural dealings with the forest. They include dealings with wild animals and birds, forest plants used for cordage, bark, fish poisons, magic portions, medicine, narcotics, food and carrying vessels, tools, weapons, insects, fungus, nuts and seeds, fruit, game, edible roots.

Arawe Logging Pty, Ltd and Thomas Krokio & Ors v. The Independent State of Papua New Guinea and Minister for Forests (1989) N751 at 5-6. The case was adjudicated by Brunton A.J (as he then was) and is the only case which dealt with the Timber Rights Purchase issue.
and greens\textsuperscript{79} to clay for pottery. These resources are referred to as non-wood forest resources.\textsuperscript{80}

It may be argued that under the \textit{Forest Management Agreement} arrangement, the customary rights to non-wood forest resources are extinguished by reason that when the customary owners sign the Forest Management Agreement, they by implication agree to forego these rights to the forest. This argument was quickly rejected by Brunton AJ (as he then was).\textsuperscript{81} However, the recognition and respect for these rights are not envisaged in the Act. This situation has been described by Brunton, AJ. (as he then was) as:

\begin{quote}
It has been the sad history of the relationship between the law and traditional landowners, not only in this country, but in other countries such as Australia, that the narrow legalistic view of their customary interests has been used to deprive traditional landowners of their rights.\textsuperscript{82}
\end{quote}

Parkop looked at this issue and argued that, the specific rights of customary landowners merely appear to supplement the fundamental premise made by the Act that the forest is regarded as only having a timber value and that such a value can be exchanged for capital.\textsuperscript{83}

The question is whether the failure to recognise existing customary rights by the Act and the \textit{Forest Management Agreement} will be regarded as a violation of section 46 of the \textit{Forestry Act} which, by its operation, would render \textit{Forest Management Agreements} void. Mossop argues that there are two possible interpretations of section 46.\textsuperscript{84} The first interpretation is that, it is "a non-justiciable guide to action" which will not affect the validity of acts done under the Act.\textsuperscript{85} This means that the section is merely declaratory. As such its breach does not affect the validity of acts under the Act. Another interpretation is that section 46 is a

\begin{footnotes}
\item[80] Nadarajah, T \textit{The Sustainability of Papua New Guinea's Forest Resource} (Port Moresby : NRI (Discussion Paper No.76), 1994) 58
\item[81] Note 79, \textit{supra}
\item[82] \textit{Ibid}
\item[83] Parkop, n.67, \textit{supra}
\item[84] Mossop, n.61, \textit{supra} at p.121
\item[85] \textit{Ibid}
\end{footnotes}
substantiative provision which qualifies the other provisions of the Act. If this is true then its implications cannot be under-estimated.

After commenting on the recognition of customary rights by the Act, Parkop concludes that, the new Forestry Act does very little to cater for customary rights and concerns. While it does concede the 'primacy' of customary rights in planning, acquisition and allocation of the forest resource in section 46, it offers very little by way of definition and consequence of the advocacy of such rights.86

Summary

It is obvious that the Timber Rights Purchase concept is a colonial legacy. It was introduced as an instrument for forestry resources exploitation. Through the Timber Rights Purchase mechanism, the Administration and later the State, was able to bring forestry resources which were owned by customary owners under its control and management. It also acted as a smokescreen for customary land utilisation through farming and agriculture. The process failed miserably to accommodate customary rights to the forests, and it provided the impetus for the manipulation of customary owners and the wanton destruction of the forests.

The Government has tried to rid itself of the devious Timber Rights Purchase scheme by introducing the Forest Management Agreement concept. However, the Forest Management Agreement is really the Timber Rights Purchase in disguise. The Government has therefore, inherited the very evil that it wanted to destroy. The Timber Rights Purchase process in its current form (Forest Management Agreement) is therefore nothing less than, a fallacy. Unless the Government takes measures to rectify the problems highlighted in this Chapter, it is likely to face a lot of court challenges by customary owners who may make exorbitant claims from the Government.

86 Parkop, n.67, op. cit., p.12; This point is also supported by the industry and the PNG Forest Resources Association, The Times, 22 July, 1993
CHAPTER 5

THE DEVELOPMENT OF FORESTRY RESOURCES UNDER THE FORESTRY ACT 1991

Introduction

The forestry resources in PNG are utilised in three ways. These methods are the timber permit process, the timber authority process, and the timber licence process. Each method has its own distinctive attributes. This Chapter examines these forest utilisation methods with the objective of ascertaining the degree of participation by the parties involved in these process, and the benefits derived by these players.\(^1\)

Registered Forestry Industry Participants

Before a person can participate in the forestry sector, he or she has to be registered with the PNG Forest Authority. Section 105 of the Forestry Act states that a person shall not engage in any activity under the Act unless that person is registered as a forest industry participant or a consultant. A Registered Forest Industry Participant or a consultant may be a natural person or a corporation.\(^2\) A person who carries out an activity under the Act without being registered is liable to a fine of up to K100,000.\(^3\)

A person who intends to engage in the forest industry has to apply to the Managing Director for registration as a forest industry participant.\(^4\) The application must be in the prescribed form, specify the particulars of the applicant, state the kind of work to be undertaken and be accompanied with the prescribed fee.\(^5\) Where the applicant is a corporation it has to be registered under the Companies Act. The Forestry Act does not distinguish between a national and foreign company. If the applicant is a foreign company which is registered under the Companies Act, the applicant has to take into account the requirements imposed on

---

\(^1\) The parties are; the national Government, Provincial Governments, customary owners and the developer.

\(^2\) s.104 defines 'forestry industry participant' as natural person or corporate carrying out an activity under the Act

\(^3\) s.122(1)

\(^4\) s.107(1)

\(^5\) s.107(2)
foreign companies by the *Investment Promotion Act* 1991. A breach of the *Investment Promotion Act* can result in prosecution and hefty fines as realised by a Malaysian logging company recently.

A Registered Forestry Industry Participant is:

(a) a person (whether natural or corporate) carrying out or intending to carry out any activity for which a timber permit, timber authority or licence is required under this Act; and
(b) any person (whether natural or corporate) engaging in, or intending to engage in, the forestry industry as a contractor, buyer or processor.

This section explicitly prohibits a registered forest consultant from engaging in activities which require a timber permit, timber authority, or as a contractor, buyer or processor.

An application lodged with the Managing Director under section 107 has to be considered fully. In this regard the Managing Director must take into account a number of factors. These include: (1) the financial resources of the applicant; (2) the expertise and experience of the applicant in the activity for which he or she is applying; and (3) any previous performances of the applicant in the forest industry. The term *to be considered fully* in section 109(1)(a) connotes that, the Managing Director can consider other qualifications as well when determining the application.

After considering the application, the Managing Director is to refer the application with any recommendation to the Forest Board (herein after referred to as "the Board"). The Board can approve or reject the application. If the Board approves the application, the Board will direct

---

6 The *Investment Promotion Act* (IPA) was enacted in 1991 to replace the *National Investment and Development Act* (NIDA) which was regarded by many in the private and Government sectors as very cumbersome and impeded economic development. NIDA was aimed at controlling foreign investment in PNG. It restricted foreign investment to only certain activities. IPA’s main thrust is to encourage greater investment and faster economic growth. It however still maintains restriction of foreign investment to certain enterprises.

7 The Malaysian logging company, Niugini Lumber Merchants Pty Ltd, was fined K30,000.00, by the National Court for breaching the *Investment Promotion Act* 1991; *Post Courier*, 24 December, 1993

8 s.4 of the *Forestry Act* 1991

9 s.109(1)(a)

10 s.109(2)
the Managing Director to register the applicant as a Registered Forestry Industry Participant or a consultant.

A successful applicant is registered as a registered forest consultant or as a Registered Forestry Industry Participant by the Managing Director in a register maintained by the Managing Director.\(^{11}\) It is mandatory that all registered consultants and Registered Forestry Industry Participants deposit a 'performance bond' up-front at a bank nominated by the Managing Director before conducting an activity permitted by the Act.\(^ {12}\) The performance bond is a security held by the Government to ensure that the consultant or the Registered Forestry Industry Participant satisfies all the conditions of the licence, permit or timber authority. A forest consultant and a Registered Forestry Industry Participant can thereafter engage only in specific forest activities. These activities are categorised into three groups: namely those that require a licence, those requiring a timber authority and those requiring a timber permit.

The Timber Permit Process

After the Government concludes a *Forest Management Agreement* with the customary owners, the Board or its agent then proceeds to conduct a feasibility study into the forest area with the objective of developing the forestry resource.\(^ {13}\) This requirement is in line with the *National Forest Policy*.\(^ {14}\) A feasibility study is not necessary where the proposed annual allowable cut of a forest development project does not exceed 5000 m\(^3\), for the harvesting of forest plantations, or for salvage logging.\(^ {15}\) This requirement enables the Government to conduct a feasibility study of the project so that it becomes aware of the possible environmental and social impacts of the project.

When the feasibility study is completed the Provincial Forest Management Committee (herein after referred to as the "Committee"), in consultation with the customary owners and the Provincial Government concerned, are required to prepare draft project guidelines for the

\(^{11}\) s.106
\(^{12}\) s.98
\(^{13}\) s.62
\(^{15}\) s.62(2)
proposed forestry project. The draft project guidelines are submitted to the Board which must review it and then issue final guidelines for the project. This requirement is an innovative feature of the Act. It encourages the national Government, the Provincial Governments, the developers, and customary owners to work together. Currently there are only one or two Committees in operation in the country. The issue is whether or not these Committees will function effectively. The practice in PNG has shown that there is a tendency to pay lip service to the law. The common excuse is usually, lack of funds and skilled expertise.

When the final guidelines of the project have been issued, the project is advertised and expressions of interest are sought from Registered Forestry Industry Participants for the development of the forestry project. The advertisement must be published in PNG. However, the advertisement can also be published overseas. Only those who are registered as Forestry Industry Participants need apply. While the expressions of interest are being processed by the Government, a Registered Forestry Industry Participant can apply to the Managing Director for permission to enter the project area and conduct feasibility studies, appraisal of the forest resources and other preparatory work relating to the project. Section 65 of the Act stipulates that:

A registered forest industry participant may apply to the Managing Director for permission to enter the project area for the purpose only of carrying out-
(a) feasibility studies; and
(b) appraisal of the forest resources; and
(c) other preparatory work,
relating to the project, and where the Managing Director is satisfied that the conditions of registration of the applicant are appropriate to the project, he shall grant such permission.

The activities are restricted only to the conduct of feasibility studies, appraisals of the project and other preparatory work related to the

---

16 s.63(1)
17 s.63(2)
18 There is already one in operation in West New Britain Province. The Forest Authority is currently working on establishing Committees in Provinces which have timber potential.
20 s.64(1)
21 s.64(2)
22 s.65
project. A Registered Forestry Industry Participant may also make project proposals which are to be lodged with the Managing Director.23

Sections 66 to 72 of the Act provide a meticulous method of processing the developer's project proposals. It involves the Forest Authority through the Board, the Committee and the Minister. These authorities are required to cooperate in determining the development of the project. This is another innovative feature of the Act, which encourages the participation of all the parties involved in the development of the forestry resources. Its aim is to limit the use of discretionary powers by the Forests Minister and ensures fair allocation of timber permits.

**The Timber Permit**

A Registered Forestry Industry Participant may apply for a timber permit. The attributes of a timber permit are that it must:24

1. specify the description of the project area;
2. specify the amount of the allowable cut;
3. specify the rate of royalties, levies and charges to be paid;
4. make provision for the construction and/or use of roads, bridges and other infrastructural requirements;
5. state the amount of performance bond; and
6. state any other conditions consistent with the project.

The Act allows the Board to advertise for tender, a forest development project.25 A Registered Forestry Industry Participant can respond to this advertisement by lodging his or her interest with the Managing Director within the time specified in the advertisement. A successful applicant must comply with section 66 of the Act which requires that a Registered Forestry Industry Participant must lodge project proposals with the Managing Director.

Where the project proposals are accepted by the Board, the Registered Forestry Industry Participant proceeds to enter into negotiations with the Committee with the aim of concluding a project agreement.26 The project agreement is then submitted to the Board for

---

23 s.66
24 s.73(2)
25 s.64
26 s.70(b)
consideration. After considering the project agreement the Board shall recommend to the Minister to grant a timber permit to the Registered Forestry Industry Participant. The Minister may issue a timber permit to the Registered Forestry Industry Participant.

The procedure for the application of a timber permit is therefore complex and takes time. As noted above, this process is scrutinised by both the Committee and the Board before it reaches the Minister who issues the timber permit. This mechanism reduces the opportunity for bias and corrupt dealings.

Before a timber permit is granted to the Registered Forestry Industry Participant, he or she is required to obtain approval for three documents. These documents are namely: (1) an environmental plan; (2) water use permit; and (3) pollution permit. The two latter documents are required by proponents of activities which are likely to pollute the water and the environment generally. After these documents have been presented to the Minister, he or she is required to grant a timber permit to the Registered Forestry Industry Participant.

In the preparation of its environmental plan, a Registered Forestry Industry Participant is required to take into account the specific guidelines for logging operations issued by the Department of Environment and Conservation in January 1994. An environmental plan for a forestry project which fails to comply with these guidelines will be rejected by the Minister for Environment and Conservation.

---

27 s.71
28 s.72
29 s.73
30 The old Forestry Act gave a lot of discretion to the Minister to deal directly with the applicant for a timber permit. The Act encouraged the potential for Ministerial bias. This was clearly illustrated in Tonolei Development Corporation v. Lucas Waka- Minister for Forests (1982) (Unreported) N404L; Medui Development v. Genia [1992] PNGLR 50
31 s.73(1)(a); See the discussions in Chapter 6 and 7
32 A water permit is required under the Water Resources Act, (ss.28-29), where a proposed activity is likely to pollute a river, lake, stream, or swamp
33 A pollution permit is required under the Environmental Contaminants Act for activities which are likely to create pollution to the environment such hazardous chemicals and noise.
34 See National Gazette No. G 96(25 November, 1993); The National, 10 January, 1994
The term of a timber permit is ten years. However, where the forest development project is large, the term may exceed ten years. A timber permit exceeding ten years must contain provisions for review by the Board after the expiration of the first ten years and on the expiration of every successive five years. A timber permit may be renewed or extended.

Forestry Development Project

Before proceeding with a forest development project, the permit holder must lodge with the Board a project statement, a five year working plan and an annual logging plan. When the Board has approved these documents the developer can proceed with the project. The project statement must also contain a follow-up land use plan. A new five year working plan must be submitted to the Board three months prior to the expiry of each five year period. The annual logging plan must be lodged with the Board one month prior to the end of each year and must be based on the methods and procedures specified in the current five year working plan. A developer whose annual logging plan conforms to the methods and procedures described in the five year working plan is issued with a certificate by the National Forest Service to that effect.

The developer must also lodge monthly statements about the operation with the Managing Director. During the course of logging, the developer is required to identify all logged areas, measure and brand logs according to the specifications given by the Managing Director. The logged timber are randomly checked by a Forest Inspector. This is to ensure that all royalties, charges and other fees payable to the customary owners are proportionate to the volume and quantity of the timber felled.

---

35 s.73(2)(e)
36 s.78
37 s.100(3)
38 s.101(1)(a)
39 s.102(1) and (2)
40 s.102(3)
41 s.120(6)
42 s.103; Timber Authority holders are also bound by this section.
43 A classic example of falsifying such information was shown in the case of The State v. Asaoka Kouji of Rabaul [1976] PNGLR 292
The permit holder must be prepared to relinquish a proportion of its interest in the forest development project (particularly in the area of marketing of logs) to the Government. The national Government can, through the State Marketing Agency\(^{44}\), purchase at the market price from the holder of the permit at least 25% of the amount of logs which the permit holder is permitted to export annually.\(^{45}\) This mechanism is known as the State Purchase Option.\(^{46}\) The State Purchase Option concept is similar to the equity participation provisions of the *Mining Act 1992*\(^{47}\) and the *Petroleum Act*. Under these two statutes the national Government, when entering into a mining or petroleum agreement with the developer of a mining or petroleum project, can exercise its option by acquiring 30% or 22.5% interest respectively in the mining or petroleum project. This mechanism allows the national Government to directly participate in the development of the project.

The issue is, whether it is advisable for the national Government to acquire 25% shares in a forest development project. It is my proposition that the Government should restrain itself from exercising this right. There are two basic reasons for this. First, it would prevent the Government from making unnecessary losses when production is stalled due to natural factors; where the price of timber plummets or when there is an on call \(^{48}\) by the developer for more funds where the cost of the project exceeds estimated expenditure. The Government does not lose anything if it does not exercise the State Purchase Option. Instead it will continue to receive revenue from the project through the taxation process and royalties, charges and levies imposed by the *Forestry Act*.\(^{49}\) The second reason is that, the Government would be seen as taking sides. By refraining from directly participating in the project, the Government will

\(^{44}\) The State Marketing Agency is established by s.42. It replaces the Forest Marketing Board which was controlled by the former Forest Industries Council.

\(^{45}\) s.115(1)

\(^{46}\) s.115(3)

\(^{47}\) s.17, *Mining Act 1992*; See the compilation of seminar papers on "Mining Act 1992" (Seminar at Travelodge, Port Moresby, 20th August, 1992, sponsored by Ernst & Young, Carter Newell and McIntosh Corporate Limited)

\(^{48}\) In simple terms, this is a process by which financial contributors of a development project are called upon by the developer of the project to contribute funds to offset any expenses incurred as a result of unforeseeable circumstances.

\(^{49}\) Section 121 of the Act enables the Government to impose levies on: (1) follow-up development; (2) Provincial development; (3) forest management and development; and (4) PNG Forest Authority. These levies are separate from the royalties payable under the Act and the tax payable under the *Income Tax Act 1959* (as amended).
be free to act independently when the need arises when dealing with certain aspects of a particular forestry project. To exercise the State Purchase Option would be to limit its own freedom in taking necessary actions on the project.

The Timber Authority Process

The timber authority process dates back to 1892. It was first introduced in a rather rudimentary fashion under the *Indigenous Timber Ordinance*. The scope of timber authorities are lesser than a timber permit, but are greater than licences. The timber authority process has taken on different names but its objective has remained intact. The aim of the timber authority was declared by His Honour, Pratt J. as:

> to protect customary owners being exploited. The Timber Authorities provide that the customary owners can only sell their logs to non-natives on terms and conditions which the Government considers fair.\(^{50}\)

Under the *Forestry Regulations* which was made pursuant to the former forestry statute, any person, with the authority of a Forest Inspector, could purchase forest produce from a customary owner for his or her domestic use.\(^{51}\) The timber authority was only issued to applicants who intended to purchase barks, gums, rattans, nipa and other species of palm, bamboo, nuts, plants, flowers, leaves, roots ferns, timber for firewood, posts, rails, mine laths, or any other timber for which a royalty of an amount not exceeding K20.00 was payable.\(^{52}\) The timber authority process continued to apply in PNG after independence in 1975.

*The Provincial Government and the Timber Authority Process*

It is estimated that today about 77% of PNG's total area of 467,500 km\(^2\) is covered by forest varying in type from the swamp and lowland forests of the coastal plains to alpine vegetation and moss forests of the highlands.\(^{53}\) These forests are found virtually in every Province. In 1989, the Department of Forests identified viable forestry resources in almost

---

50 *Rainbow Holdings v. Central Province Forest Industries Pty Ltd* [1983] PNGLR 34 at p.36
51 reg. 16-18
52 reg.17
all the Provinces except for the Chimbu Province and initiated a medium term development strategy for the harvest of these timber resources.\(^5^4\) In 1988, eleven new forestry projects were established in the Gulf, Manus, Oro, Central, Madang, Morobe, Western Highlands and West New Britain Provinces.\(^5^5\) Five defunct projects in Madang, East New Britain, Gulf, New Ireland and Central Provinces were expected to be revived in the same year.\(^5^6\) Additional areas totalling 56,827 hectares, were to be allocated to existing projects in 1988. It was estimated that a total of 1,625,000 hectares were to be allocated for forestry development in 1989, in the Western, Gulf, Southern Highlands, Central, Milne Bay, Oro, Morobe, New Ireland, North Solomons, East New Britain, Madang, West Sepik and East Sepik.\(^5^7\) Many other forestry projects were also planned in other Provinces.

With these forestry resources next to their doorsteps, how do the Provincial Governments participate in the development of these resources? The Forestry Act provides a lot of avenues for their participation, the most important being the timber authority process. Under the Act, the timber authorities process is solely a Provincial Government matter.\(^5^8\) Before discussing the relationship of the Provincial Governments and the timber authority process, it is necessary to examine the role Provincial Governments play in forestry matters.

The Organic Law on Provincial Governments

The Organic Law on Provincial Governments finds its place in the category of laws known as Organic Laws. These are regarded as superior to an ordinary Act of Parliament, but below the Constitution.\(^5^9\) They are entrenched. To change them requires advance notice. They can only be passed by a two-thirds absolute majority of votes of the National


\(^{55}\) *Id*, p.126

\(^{56}\) *Ibid*

\(^{57}\) *Id*, p.127

\(^{58}\) s.89 of the Act; A Timber Authority can only be issued by a Provincial Forests Minister in accordance with the advice of the Committee

\(^{59}\) s.10, *Constitution*
Parliaments in two separate sittings, separated by at least two months interval. The Organic Law on Provincial Governments was enacted in 1977 in response to section 187A of the Constitution. This section falls under Part VIA of the Constitution which was only inserted in the Constitution in 1976. Part VIA deals with the establishment of Provincial Governments and local level governments. Section 178A provides for the establishment of Provincial Governments. Regan and Ghai argue that the Organic Law on Provincial Governments was based on negotiations between the national Government and one Province, during which the specific concerns of that Province, rich in natural resources and with relatively high standards of education and other services had to be accommodated.

The Constitutional Planning Committee envisaged that the Provincial Governments should co-ordinate all Government activities and act as agents of the national Government in the execution of national Government policies and laws. Goldring argues that what emerged from the Constitution and the Organic Law on Provincial Governments was quite different. For instance, the Organic Law on Provincial Governments provides for inter alia, the grant of Provincial Governments, the manner in which a Provincial Constitution is adopted, the structure of Provincial Governments and their legislative and delegated powers and fiscal matters.

The Organic Law on Provincial Governments permits the Provincial legislatures to enact laws for certain primarily 'provincial' subjects and 'concurrent' subjects. There are nine subjects which are primarily provincial subjects. These are:

(1) the control by licensing of mobile traders (other than mobile banks);
(2) primary schools (including community schools and village self-

---

60 Id., s.17
61 Id., s.14
64 Ghai and Regan, n.62, supra
65 Goldring, n.63, op. cit., p.73
66 Ibid
67 s.24, Organic Law on Provincial Governments
help schools) and primary education other than curriculum;
(3) the sale and distribution of alcoholic liquor;
(4) the control by licensing of public entertainments and of places of public entertainment;
(5) housing (other than housing owned or to be owned by the State);
(6) libraries, museums, cultural centres and Cultural Councils (but does not apply to libraries, museums, cultural centres and Cultural Councils established and conducted, or to be established or conducted by the State)\(^{68}\);
(7) sporting activities;
(8) to the extent provided for by section 39, village courts; and
(9) subject to section 1871 (local and village governments) of the National Constitution, local, community and village governments and other local level governments.

The exercise of these powers, however, does not extend to the imposition of taxation except as specified in the *Organic Law on Provincial Governments*. Provincial Governments can also pass legislation regarding subjects which are deemed 'concurrent'. In this arena Provincial Governments and the national Government can enact laws on the same subject; the only condition being that the Provincial legislation must not be inconsistent with an Act of the National Parliament on the same subject.\(^{69}\) Thus the Provincial Government can pass laws on such things\(^{70}\) as agriculture and livestock, fishing and fisheries, forestry, wildlife protection, parks and reserves, town planning and health. Provincial Governments and the national Government are required by section 85 of the *Organic Law on Provincial Governments* to consult each other in relation to major project developments affecting a Province. This section allows for close consultation between the two tiers of Government.

In pursuance of its powers under section 27 of the *Organic Law on Provincial Governments*, two Provincial Governments; namely Manus and East New Britain enacted their own Provincial forestry legislation. In 1989, the Manus Provincial Government enacted the *Manus Provincial Forest Management Act 1988-1989*. This Provincial Act was designed to supplement the national forest legislation and was aimed at protecting the Province's forests. The Provincial Act set a maximum volume of timber to be harvested annually in the Province by logging operators. In 1989, a

---

\(^{68}\) s.24(2)
\(^{69}\) s.33
\(^{70}\) The list is provided in s.27 and covers 24 subjects
logging operator in the Province was successfully prosecuted by the Provincial Government for breaches of the Provincial Act.\textsuperscript{71}

In 1992, the East New Britain Provincial Government enacted the \textit{Forestry Operations Control Act} 1992. This Provincial Act required a timber permit holder under the \textit{Forestry Act} 1991 to submit a Forestry Operations Development Plan to the Provincial Executive for its approval.\textsuperscript{72} In the same year, the East New Britain Provincial Government sought the Supreme Court's opinion under section 19(3)(eb) of the \textit{Constitution} regarding the validity of the Provincial forestry legislation.\textsuperscript{73} The Supreme Court held that the Provincial Act was inconsistent because the \textit{Forestry Act} 1991 was an exhaustive law in the field of national forestry control and development in PNG and deals with a matter of national interest.\textsuperscript{74} This decision essentially prohibits the Provincial Governments from enacting their own forestry legislation. The Manus Provincial forestry legislation noted above would be invalid by reason of this case.

\textbf{The Forestry Act and Provincial Governments}

The \textit{Forestry Act} provides a lot of avenues for the participation of the Provincial Governments in the development of forestry resources situated on customary land in their Provinces. The \textit{Forestry Act} firstly establishes the Committee.\textsuperscript{75} It is composed of six members who represent the Provincial Government, the National Forest Service, the local or community governments, the customary owners and the Non-Government Organisations.\textsuperscript{76} The functions of the Committees are:\textsuperscript{77}

\begin{itemize}
  \item[(1)] to provide a forum for consultation and co-ordination on forest management between national and Provincial Governments, forest resource owners and special interest groups
  \item[(2)] to undertake continuous consultation with the Provincial Minister responsible for forestry matters on matters relating to acquisition and allocation of forest resources,
  \item[(3)] to assist the Provincial Government in preparing forest plans and
\end{itemize}

\begin{itemize}
  \item \textit{Jaha Development Corporation Pty Ltd v. Gei Ilagi, Secretary for Department of Manus} (unreported) Ap. No.242 of 1989)
  \item \textit{SCR No 7 of 1992; Re Forestry Act 1991 [1992] PNGLR 514}
  \item Id, p.520
  \item s.3(1)
  \item s.21
  \item s.22
  \item s.30(1)
\end{itemize}
Functions (1), (2) and (3) are restricted only to a consultation process, while function (4) is directed at advising.

Section 49 of the *Forestry Act* requires Provincial Governments in consultation with the Committee members to draw up Provincial Forest Plans which must conform with the National Forestry Development Guidelines. It must also contain a Provincial Forestry Development Guidelines and a five year rolling forest development program. This provision gives the Provincial Governments an opportunity to effectively participate in the development of their forestry resources. The Committee is required to assist in the early identification and resolution of disputes involving customary owners in a forestry resources project area. The Committee is further required to ensure that the environment within and in the vicinity of the forestry project is protected.\(^78\)

**Application for a Timber Authority**

A vital role of the Committee is to make recommendations to the Provincial Forests Minister on the issue, extension, renewal, transfer, amendment and surrender of timber authorities. The procedure for applying for a timber authority is similar to that of the licence. The distinction between the timber authority procedure and the licence process is that only Registered Forestry Industry Participant can apply for a timber authority and that the application is considered by the Committee (with the consent of the Board) and approved by the Provincial Forests Minister.

An application for a timber authority must be in the prescribed form, and be lodged with the Managing Director.\(^79\) The application should be accompanied by: (1) the prescribed fee; (2) the prescribed particulars; and (3) a map of the area in respect of which the application is made for the timber authority.

---

\(^78\) s.30(1)(f)  
\(^79\) s.88(2)
It is very important that the application must show: (1) details of the project proposed; (2) details of any agreements relating to the sale of timber harvested; (3) verification of ownership; and (4) the written consent of the landowners to the project proposed.\textsuperscript{80}

Section 88 of the \textit{Forestry Act} clearly suggests that before an application for a timber authority is lodged with the Managing Director, the applicant must be able to produce documentation concerning the ownership of the forest, the subject of the application and the consent of the customary owners. The implication here is that timber authorities are only issued for activities as specified in section 87 of the Act where the land involved is customary land.

This section is defective because it allows customary owners and a Registered Forestry Industry Participant to conclude their own contract without the national Government and Provincial Government's participation. The Provincial Government, through the Committee, is only engaged during the screening process. Section 88 of the \textit{Forestry Act} leaves a lot of room for corrupt practices - the very problem that the Government is aspiring to eradicate in the forestry industry.

Section 88 of the \textit{Forestry Act} is a compromise \textit{proviso}. It compromises the practice of declaring Local Forest Area under the \textit{Forestry (Private Dealings) Act} and the timber authority concept in the old \textit{Forestry Regulations}. It is composed of certain Local Forest Areas and timber authorities attributes. This proposition finds support in the statement of Sir Julius Chan to Parliament in July 1991. When supporting the Forestry Bill, he said:

\begin{quote}
I think the present Minister and the previous Minister looked at the \textit{Forestry Act}, \textit{Private Dealings Act} and have come up with a good comparison. One aspect of the Bill which I like is that it incorporates the \textit{Private Dealings Act}. I am the father of the \textit{Private Dealings Act}.\textsuperscript{81}
\end{quote}

The current timber authority is a vain attempt by the Government to rectify the unscrupulous nature of the Local Forest Area and the timber authority under the former forestry statutes. The current timber authority has two conflicting objectives. On the one hand, it tries to expand the

\textsuperscript{80} \textit{Ibid}
\textsuperscript{81} The Hansard, 16 July, 1991
scope of the former timber authority so as to accommodate the Local Forest Area. On the other hand, it attempts to eliminate the problems encountered by the same two processes. In either way the timber authority process will not achieve its purpose. It is my view that the Act only creates a bigger problem than was anticipated.

To obtain a timber authority a Registered Forestry Industry Participant must apply to the Managing Director. The Managing Director refers the application to the Committee which is required to consider and evaluate the application and make recommendations to the Provincial Forests Minister. When evaluating an application, the Committee can seek the assistance of the National Forest Service and of any relevant Government Department. For instance, it can seek the advice of the Department of Environment and Conservation on the possible environmental effects of the proposed project. However, this requirement is not mandatory.

The Committee assumes this consultation responsibility only after a project has begun operation. The issue is, does the Act impose a duty on the Committee to take environmental factors into account when evaluating an application for a timber authority? To resolve this issue one must look at Part III/Division 5(D) and section 30 of the Forestry Act. Subdivision D does not impose any express duty on the Committee to take environmental factors into account. The duty imposed by section 30(1)(f) arises only after a decision has been made. It is submitted that the Committee is not obliged to take environmental considerations into account under Subdivision D and section 30. The Act has shifted this obligation to the Forest Authority. This duty is found in section 89(5) and section 6. Section 89(5) reads:

> On receipt of a recommendation under Subsection (4), the Provincial Minister shall give notification to the Board that he intends to grant a timber authority over the project area and shall request the consent of the Authority to grant.

---

82 s.88
83 s.89
84 Part III of the Act relates to Forest Management and Development, and Division 5 provides the guidelines to follow in allocating forestry resources while Subdivision D is focused on Timber Authorities.
This subsection is a 'catch' proviso. Section 89 enables the Provincial Forests Minister to grant a timber authority to a successful Registered Forestry Industry Participant, on the recommendation of the Committee. Section 89(5) ensures that the timber authority is granted to a genuine Registered Forestry Industry Participant by subjecting the granting of a timber authority to the scrutiny of the Board. Section 89(5) requires the Board to consent to the granting of the timber authority by the Provincial Forests Minister. In fulfilling this obligation, the Board has to take into account its objectives as spelt out in section 6. It's objectives include inter alia:

the management, development and protection of the Nation's forest resources and environment in such a way as to conserve and renew them as an asset for succeeding generations.

The Board has a duty to ensure that these objectives are fully implemented. It becomes apparent that if the Committee does not take environmental factors into account, the Board can advise the Provincial Forests Minister to decline the applicant a timber authority if in its opinion, the proposed project will have an adverse environmental effect. The Board is required to notify the Provincial Forests Minister of its decision within four weeks. If it fails to inform the Provincial Forests Minister, consent to grant the timber authority would be deemed to have been given.

One of the weaknesses that exists between the national Government and Provincial Governments is, there is no meaningful dialogue and consultation in the development of major natural resources in the Provinces. The role of Provincial Governments in resource development activities has been criticised by Regan. He argues that their role has been restricted to limited administration of the forestry sector and being consulted by the national Government about new resource projects, as required by section 85 of the Organic Law on Provincial Governments. Despite this criticism, my view is that the

---

85 s.6(1) of the Forestry Act 1991
86 Id, s.89(6)
87 Ibid
89 Id, at pp.11-19
90 Id, p.14
Forestry Act has set the pace for active Provincial Government involvement in the area of forestry resource development schemes. This is clearly illustrated in the establishment of the Committees, the drafting of Provincial Forest Plans and the exclusive dealing with timber authority process.

The Timber Authority

Timber authorities are issued by the Provincial Forests Minister to Registered Forest Industry Participants in the following cases:

1. where the amount of timber to be harvested annually does not exceed 5000m$^3$; or
2. where the timber to be harvested is for domestic processing only; or
3. for purposes of-
   (i) removing timber for agricultural or other land use by the relevant authorities, or
   (ii) roadline clearing, outside the area covered by a Forest Management Area; or
   (c) for the purpose of harvesting of other forest produce to an amount specified in the timber authority.

This section has expanded the scope of the timber authority to cover a wide range of activities over large areas of land.

The timber authority authorises the holder to carry out operations specified therein. It is non-transferable. Unlike the applicants for a timber permit, the applicants for a timber authority do not need to conduct a feasibility study of the proposed project. Neither do they need to adhere to any guidelines relating to the project or any other obligations imposed by sections 61 to 65 inclusive.

The Licence Process

The third method of forest utilisation is through the licence process. A Registered Forestry Industry Participant or a consultant can apply for a

---

91 s. 87(1) of the Act
92 s.87(3)
93 Id, s.87(4)
94 Ibid: The obligations under sections 61 to 65 are mandatory and have to be satisfied by an applicant of a timber permit before a forest development project can commence.
licence under the Act. The application must be submitted in the prescribed form to the Managing Director. It must contain particulars of the applicant, specify the proposed activity, and be accompanied by the prescribed fee.

The proposed activities are restricted to those that are specified in section 91(1). These are: (1) the harvesting of timber; (2) the transport of timber; (3) the sale or purchase of timber; (4) the marketing of timber; (5) the processing of timber; (6) the grading of timber; and (7) other activities (other than those which require a timber authority or timber permit) which in the opinion of the Board require a licence relating to forest produce.

A registered consultant also requires a licence to engage in consultancy work.

Upon the receipt of an application under section 92, the Managing Director is required to refer the application to the Board for evaluation. The Board may then issue a licence to the applicant. The term of a licence must not exceed 12 months and is renewable. An extension of the licence can only be granted by the Minister. The term of extension must not exceed 12 months. A licence cannot be transferred or amended.

Section 97 of the Forestry Act enables the Minister to revoke the licence of a consultant or a Registered Forestry Industry Participant where he or she breaches any provisions of the Act, commits an offence relating to forestry matters, against any other law or fails to comply with the conditions of the licence. Again, it can be seen that the power to deal with a licensee after a licence has been granted is given to the Minister and not the Board. This is a contradiction of the roles of the Board and the Minister. While the Board has the power to determine whether a licence should be granted, the Minister has the power to extend the term of a licence and to revoke it. It would have been more appropriate if this power had also been vested with the Board and not the

---

95 s.92 of the Forestry Act
96 s.93
97 s.94
98 s.95; Where a condition of the licence has been breached the licence will not be extended
99 s.96
100 The offence provisions of the Act are sections 114, 122,124 and 125.
Minister. This would have reduced the incidents of bias and corruption identified by Regan in 1990.\textsuperscript{101}

The Timber Supply Area

The fourth method of forest utilisation in PNG is through the Timber Supply Area process, which was recently initiated in 1994. As the name suggests, it encourages the continuous supply of timber over vast areas of forest land.

It is a new concept which is modelled on the Canadian forest management system.\textsuperscript{102} It has three primary aims. The first aim is to ensure the continued supply (as the name suggests) of timber over a longer period, usually 50 years. Second, it encourages down stream processing- an activity lacking in the forestry industry.\textsuperscript{103} Third, it ensures financial security to developers.\textsuperscript{104}

The Timber Supply Area is intended to cover large areas of rainforests in the country. Currently the Forest Authority has designated 25 forest areas as Timber Supply Areas. Some of these areas are presently being operated under Timber Rights Purchase agreements. At this stage there is no documentation available from the Forest Authority which would indicate the degree and scope of the Timber Supply Area concept.\textsuperscript{105} What is apparent is that, the Timber Supply Area agreement is a contract only between the Government and the developer with the exclusion of customary owners and Provincial Governments. Figure 4 illustrates this point.

\textsuperscript{101} See note 88, \textit{op. cit.}, pp.11-19

\textsuperscript{102} Forestry officials claim that the Timber Supply Area is derived from page 15 of the National Forestry Development Guidelines. An examination of page 15 reveals no mention of the Timber Supply Area process. The objectives of the Timber Supply Areas are however espoused in page 15.

\textsuperscript{103} Personal communication with Alan Ross (an officer of the PNG Forest Authority) on 26 June, 1994.

\textsuperscript{104} \textit{Ibid}

\textsuperscript{105} \textit{Ibid}
The *Timber Supply Area* concept has been severely criticised by academics and Non Government Organisations (NGOs) because of its destructive impact on the forests. The NGOs argue that the implementation of the *Timber Supply Area* will result in the following:

1. it will completely undermine the customary owners right to make land use decisions;
2. it will increase pressure to cut trees beyond a sustainable level;
3. it will not allow access to forest resources;
4. it will undermine the *Forest Management Agreement* process established in the Act; and
5. it threatens native biodiversity.

Some questions which the *Timber Supply Area* concept fails to address are:

1. were the customary owners consulted before the introduction of the *Timber Supply Area*?
2. will the *Timber Supply Area* be superimposed on the current *Timber Rights Purchase areas* (or *Forest Management Areas* (if any)) or will they be separate?
3. do the *Timber Supply Areas* take into account biodiversity?
4. if this concept is based on economic development of the rural areas, what evidence is there to show that the *Timber Supply Areas* will achieve this objective when its predecessors and existing processes have failed miserably in this area.

---


107 *The Times*, 25 August, 1994

108 Kwa, n.106, op.cit., at p.15

109 It was reported a some months ago that the customary owners are confused about the *Timber Supply Area* concept, *Post Courier*, 28 April, 1994
The *Timber Supply Area* concept lacks legal backing and the necessary framework for implementation. At the time of writing, *Timber Supply Area* No. 14, which encompasses the North of the Ramu River and the North Finistere Range in the Madang Province, had already been advertised for development. Thirteen more *Timber Supply Areas* are being considered for presentation to the National Executive Council for approval. The Forestry Authority is also preparing to put forward a proposed Bill to amend the *Forestry Act 1991* to enable the implementation of the *Timber Supply Area* concept. The proposed Bill is being vigorously opposed by the NGOs.

**Summary**

The *Forestry Act* attempts to rectify many of the problems encountered previously and goes a long way to harmonise the relationship between the major players in the forest industry. It establishes three methods of forest utilisation and is presently in the process of sanctioning the fourth method. The three methods, namely the timber permit process, the timber authority process, and the licence process are not new. They have been established for a long time in the forestry sector. The Act has merely dressed them up in new outfits. This is particularly so with the timber permit process and the timber authority process. The timber permit process under the *Forest Management Agreement* is aimed at proper forest management. However, it does not diverge much from the timber permit process under the devious *Timber Rights Purchase Agreement* process. As for the timber authority process, it only allows for the breeding of corrupt dealings by intermingling the timber authority and the local forest area concept.

However, not all is gloomy. The Act establishes a number of control mechanisms in respect of the various activities prescribed thereunder. These mechanisms are aimed at minimising the prevalence of corruption within the forestry sector. The administrative framework of the Act espouses participation by the main parties involved in the forestry industry, namely: customary owners, Provincial Governments, the

---

110 The advertisement appeared in one of the local daily newspapers in March, 1994.
111 In a weekly newspaper the NGOs put up an advertisement urging the Members of Parliament to oppose the proposed amendment to the *Forestry Act* which would see the implementation of the *Timber Supply Area* concept, *The Times*, 25 August, 1994.
national Government and the logging operator. The Act must be applauded in this respect.
CHAPTER 6

THE ENVIRONMENTAL LAW AND ITS IMPACT ON FORESTRY

"The Lord looked at everything he had created, and he was very pleased" (Holy Bible, Genesis 1:31)

Introduction

PNG has a wide range of eco-systems, containing some of the richest floras and fauna and one of the few remaining centres of biodiversity. It also has vast mineral resources such as gold, copper, oil, and gas.

In its endeavour to achieve economic development, through the utilisation of its natural resources, the Government is conscious of its environmental responsibility. The need to consider environmental factors in economic development, has been echoed repeatedly. The Government's genuineness in environmental protection is reflected in its environmental policy supported by environment legislation.

The aim of this Chapter is to present a critique on the Government's environmental policy and the supporting environmental legislation and to ascertain how they affect forestry resources development. The environment legislation are: (1) the Environmental Planning Act; (2) the Water Resources Act; and (3) the Environmental Contaminants Act. The Forestry Act 1991 will be discussed in the light of the Government's environment policy and the environment legislation.

---

2 For example, the speech by Mr. Stephen Tago, the Minister for Environment and Conservation, to the Members of the House of Assembly on 16 August, 1974 (The Hansard); the speech by Mr. Michael Singan, to the people of PNG on World Environment Day, 5 June, 1992 (Post Courier, 5 June, 1992); and the speech by the Prime Minister, Mr. Pias Wingti, to the people of PNG on World Environment Day, 5 June, 1994 (The Times, 9 June, 1994)
3 Cap.370; All statutes (and associated Regulations) in PNG have a unique Chapter Number in the Revised Laws of Papua New Guinea. For convenience, I will use the acronym Cap.
4 Id, Cap.205
5 Id, Cap.368
**The Environmental Policy of PNG**

When PNG gained independence in 1975, it had no separate Department of Environment and Conservation. Prior to independence, an Office of Environment and Conservation was created as part of the Department of Lands, Surveys and Mines. It was only in 1985 that a Department of Environment and Conservation was established. During its 10 year history it had “passed through the Department of Lands, Surveys and Mines, Natural Resources; Lands, National Mapping and Environment; Lands, Surveys and Environment; and Physical Planning and Environment.”\(^5\)

The importance of the environment and its conservation was recognised by Parliament in 1975, when it adopted the recommendations of the Constitutional Planning Committee which included the declaration of the five National Goals and Directive Principles found in the Preamble of the *Constitution*.

In 1977, the Parliament accepted the policy on environment and conservation titled 'Environment and Conservation Policy-A Statement of Principles' (Environmental Policy).\(^6\) The Environmental Policy had three parts. Part one contained the introduction, Part two declared the environmental responsibility of the people of PNG (which is derived from the *Constitution*) and Part 3 contained environmental principles.

The responsibility espoused by Part 2 is based on Goal 4 of the National Goals and Directive Principles. Goal 4 calls on the Government and the people to use the natural resources and the environment wisely. They are also called on to conserve and replenish these natural resources and the environment for the benefit of present and future generations.

This goal has become the foundation for all of the Government's environmental endeavours.

---

\(^5\) Department of Environment and Conservation (Handbook, 1980) p.1

The actual policy is found in Part 3 of the Environmental Policy which is an exposition of Goal 4. Part 3 sets out a wide range of environmental principles which are to be taken into account when planning and managing development projects. For our present purposes, the relevant principles are:

(1) The natural resources of Papua New Guinea including the air, water, plants and wildlife and especially the different kinds of plant and animal communities must be protected for present and future generations by careful planning and management.

The protection of the natural resources (with biodiversity) for the present and future generations, is paramount in the planning and management of natural resources.

(2) The ability of the environment to produce renewal resources must be maintained, and where possible, restored or improved. We must use our minerals and other non-renewal resources wisely.

In the process of planning and development of renewable natural resources, planners and developers are called upon to apply the principles of sustainable development.

(3) We recognise that any development project, whether based on agriculture, forestry, mining, industry, transport, water, tourism or human settlement, must take into account the impact on the natural environment and human communities. Failure to do this often results in future social and economic costs.

Environmental impact studies should be conducted for development projects, so that possible deleterious effects of development projects on the people and the environment can be averted.

The Environmental Policy contains for the most part declarations. The underlying principle of the Policy is twofold. First, the Government acknowledges the need for the economic development of the country through the utilisation of its rich natural resources. And second, it recognises the need to protect and conserve the environment for the benefit of present and future generations. It therefore, calls on its citizens to be responsible in their attitude towards their environment.
The Primary Environmental Statutes

The Environmental Policy was supported in the following year on World Environment Day (2 June, 1978), by the enactment of the *Environmental Planning Act*, the *Environmental Contaminants Act* and the *Conservation Areas Act*[^1] and later the *Water Resources Act*. These Acts are known as the primary environmental statutes. The first two are concerned with environment protection, while the *Conservation Areas Act* and the *Water Resources Act* are specifically for special areas conservation and water use control respectively. The provisions of these statutes (with the exception of the *Conservation Areas Act*) will be discussed below. Only the relevant provisions which impose conditions on resource developers will be analysed.

In introducing the Bills to Parliament in 1978, the Minister for Environment and Conservation at that time, Mr. Stephen Tago told Parliament that the Bills provide:

> Firstly, a means of making sure that when we develop, we develop in environmentally wise ways. Secondly, they will prevent the release into the Environment of poisons which will destroy that environment. Thirdly, they will ensure that parts of Papua New Guinea are preserved for future generations of Papua New Guineans and that our flora and fauna remains a significant part of our environment and our cultural heritage.®

These statutes are therefore directed at controlling and regulating activities which have a direct bearing on the natural environment. The underpinning of these legislation is sustainable development. As the Minister correctly stated, "these Bills are seeking wise environmental management, that is, the wise balance of development and conservation of Papua New Guinea."[^2] These statutes must be viewed against this background.

[^1]: Cap. 362
[^2]: The Hansard, 1 June, 1978
[^3]: *Ibid*
The Environmental Planning Act

The aims of the Environmental Planning Act are:

(a) the development of the environment having regard to uniform systems of environmental management in accordance with the fourth national goal of the National Goals and Directive Principles.
(b) to give effect to those Goals and Principles under section 25 of the Constitution and for related purposes.\(^\text{10}\)

Section 1(1) begins by declaring that the Act is a law which complies with the constitutional requirements. Subsection (2) declares that the Act is a law which relates to a matter of national interest. This declaration effectively restrains the Provincial Governments (and local level governments) from enacting their own laws relating to the same subject.\(^\text{11}\)

Section 2 contains the interpretation. The most important definition being that of the environment. Environment is defined as:

\[
\text{the total stock of physical, biological and social resources available to man and other species and the ecosystems of which they are a part.}
\]

The definition of environment in the Act is inclusive. It covers almost every conceivable resources that may be available to human beings and other species in an ecosystem for which human beings are a part. The broad nature of this definition obliges planners and developers to take account of other species and the ecosystem which are part and parcel of the environment. Many planners and developers, however, lose sight of this fact. Human beings seem to be the determining factor.

The Environmental Planning Act does not apply to the Mining (Bouganville Copper Agreement) Act, the Mining (Ok Tedi Agreement) Act, or the Petroleum (Gulf of Papua Agreements) Act.\(^\text{12}\) The rationale for this exemption is that these projects are regulated by their own respective

---

\(^{10}\) Section 25 of the Constitution imposes an obligation on all Governmental bodies to implement the National Goals and Directive Principles. The National Goals and Directive Principles are non-justiciable (s. 25(1) of the Constitution)

\(^{11}\) This point was reaffirmed by the Supreme Court in SCR No 7 of 1992; Re Forestry Act 1991 [1992] PNGLR 514

\(^{12}\) s. 3(2)
indenture agreements. Apart from these three resource projects all other projects are subject to the requirements of the *Environmental Planning Act*.  

Any development which is likely to affect the environment is required to comply with the provisions of the Act. The most important provisions are those relating to the preparation of Environmental Plans. Section 8 restrains Government authorities from granting a licence, permit or lease, loan or guarantee, to a proponent of a project for which an Environmental Plan is required, until the proponent has satisfied the requirements of the Act. This section is mandatory and clearly maintains the centrality of the *Environmental Planning Act* and its relationship to resources and development based legislation.

The restriction also applies to the issuance of timber permits and licences under the *Forestry Act*, the grant of leases and permits under the *Land Act*, the registration of companies under the *Companies Act* and loan guarantees by financial institutions to the proponent of the project.

There are two exceptions to this restriction:

(1) projects which do not require an Environmental Plan, and
(2) where the proponent is a foreign entity and seeks registration, or has been registered under section 57 of the *National Investment and Development Authority Act*. The Executive Director of the National Investment and Development Authority may request the Minister to allow the entity to be registered prior to the approval of a proposal.

The general principles of this section have been incorporated in the *Forestry Act 1991*, which requires that timber permits will not be issued unless the developer has obtained approval from the Department of Environment and Conservation for its Environmental Plan.

---

13 But see s.7 of the *Mining Act 1992*, which excludes the requirements of the *Environmental Planning Act* from mining activities
14 See Part V of the Act
15 These are s.4(6) and s.10 projects
16 This exception is provided under s.8(2)
17 ss.73 and 75
The Environmental Contaminants Act

The Environmental Contaminants Act was enacted together with the Environmental Planning Act. The Environmental Contaminants Act is the primary legislation for abetting, preventing, and controlling environmental pollution caused by resource-based development projects and, urban/industrial development. It gives effect to the Environmental Policy which stipulates that:

Pollution of the land, air, water and seas in quantities which are likely to be dangerous to human health, to plants and to animals, and cause to the environment must be prevented.\(^\text{18}\)

Section 1 declares that the Act complies with the requirements of the Constitution. It also excludes Provincial Governments from legislating on matters relating to environmental contamination. The Act binds both project developers and the State. Section 2 sets out a long list of interpretations. For our purpose the relevant terms are:

(1) "environmental contaminants" means-
   (a) any substance whether liquid, solid, gaseous, or radio-active, or any form of electro-magnetic or thermal energy which, when discharged, emitted or deposited into the environment, causes or may cause, by reason of its properties, characteristics, the volume, amount and weight and point of its discharge or other circumstances, at present or future alteration of the environment so as to affect adversely its beneficial use; and
   (b) any substance, material or matter prescribed to be an environmental contaminant or a hazardous environmental contaminant.

(2) "pollution" means any act which causes or may cause impairment of the quality of the environment for any use that can be made of it.

The terms are comprehensive and cover almost every possible aspect of environmental destruction. A person who wants to discharge a substance which qualifies as an environmental contaminant likely to pollute the environment, must apply for a licence. The aim of the legislation is to require:

\(^\text{18}\) Note 6, supra
people who are polluters or who might pollute to apply for a licence. This licence will set out how much of each kind of environmental contaminant can be released into the environment, so as to minimise the damage to the environment.  

The Act sets up an Environmental Contaminants Advisory Council whose role is to advise the Minister on matters relating to the Act. The Minister can appoint Inspectors, Analysts, and Environmental Officers to enforce the Act. 

The licensing provisions are sections 16 to 31. The Act operates in a familiar way to the Environmental Planning Act. Licences can be granted by the Minister to polluters through requisition, or on the voluntary application of the polluter. Exemptions may also be granted under the Act. 

The Act also relates to the importation, sale, manufacture or distribution of hazardous environmental contaminants. A permit is required to import, sell, manufacture or distribute hazardous environmental contaminants. Logging operators are required to comply with Part V of the Act for the importation of timber preservatives which are necessary for the treatment of harvested logs. 

Certain activities are prohibited by the Act. These include noise pollution, breakages of glass and littering. Private persons can institute legal proceedings in the court under section 49 of the Act. This section empowers a private person or any other entity to institute proceedings against a person who deposits litter in his or her private

---

19 The Hansard, n.8, supra  
20 s.9; The Council is yet to be established  
21 s.12  
22 s.4  
24 s.28  
25 Part V of the Act  
26 Personal communication with Ms. Louis Kesu (Assistant Secretary - Environmental Contaminants Division of the Department of Environment and Conservation), 19 May, 1994  
27 s.52  
28 s.50  
29 s.49; These three activities are also prohibited by the Summary Offences Act; See also Summary Offences (Amendment) Act 1989
Proceedings may only be instituted if the offender does not respond to a notice served on him or her by the Director. Section 52 also confers a right on private persons to sue a noise pollutant where he or she believes that the noise being emitted by the pollutant is excessive or unreasonable. However, this right is limited where the pollutant is the holder of a permit. An aggrieved person can only institute proceedings in the District Court.

This situation leads to two conclusions. First, the Act can be said to allow easy access to the members of the public to seek a remedy in the lower courts for any infringement of the Act without having to go through the complex procedures of the National Court. Second, the fines are proportionate to a polluter who may be an ordinary person, but they are not high enough where the pollutant is a big business organisation.

The *Environmental Contaminants Act* is not effectively enforced because of the lack of: (1) funds; (2) skilled manpower; (3) standards; and (4) political will. The third factor is a major shortcoming of the Act. Because there are no standards for the emission and discharge of environmental contaminants, the Department of Environment and Conservation officers are not able to quantify the amount of discharge into the environment.

In 1993, the Department of Environment and Conservation introduced a Bill in an attempt to increase the penalty provisions of the *Environmental Contaminants Act* and also to comply with the *Montreal Protocol on Substances that Deplete the Ozone Layer*. The Bill was passed by Parliament in June 1994. Penalty fines now range between K5,000.00 to K50,000.00.

---

30 s.49(2); *Environmental Contaminants Act*
31 s.51(1)
32 This is signalled by the fact that the fines are not excessive (the maximum fine under these two sections being only K500.) and thus fall within the jurisdiction of the District Courts.
33 Personal communication with Ms. P. Kibikibi (Legal Officer - Environmental Law Division of the Department of Environment and Conservation), 18 May, 1994; These are the main problems of the Department of Environment and Conservation
34 Department of Environment and Conservation, Ministerial Brief to the National Executive Council, 11 October, 1994 (File: OS - 05.02.01.01)
35 For instance, polluting the environment without a licence under s.30 of the *Environmental Contaminants Act* can now result in a fine of K5,000 under s.6 of the new Act
36 Importation of hazardous chemicals without a licence under s.33 of the *Environmental Contaminants Act* can result in a fine of up to K50,000, under s.7 of the new Act
It would be wrong to assume that the increase in penalties is a recognition of the prevalence of prosecutions under the *Environmental Contaminants Act*. In my research, I was not able to find any prosecutions relating to the *Environmental Contaminants Act*. The issue is, what is the use of increasing penalties when the underlying problems of the *Environmental Contaminants Act* such as lack of funds, skilled manpower, pollution standards and political will, is not rectified by the amendment?

**The Water Resources Act**

The *Water Resources Act* came into force on 22 April, 1982. It has two objectives. First, it aims to ensure that there is sufficient water available for national use. And second, it ensures that, the quality and quantity of the water is not spoilt. Section 2 of the Act defines water as:

all the water in the country, including lakes, rivers, streams, swamps, surface and all underground waters, water sources, and coastal waters comprising the internal waters and territorial sea as those expressions are used in the *National Seas Act*.

This definition is broad and encompasses water that is located both on and under the land and also the sea. It highlights the scope of control that Parliament intended the legislation to have over water resources.

The right to control and use the water is vested in the State. Customary rights to the use of water are preserved under the Act. Section 4(2) effectively denies the right of individual citizens (including village communities) from the control of water that is situated on their land. The only right that they have is the right to use the water.

Certain individuals, or class of persons, an Area, or a water use may be exempted by the Minister from any provisions of the Act. The Act does not apply to areas covered by the *Petroleum (Gulf of Papua)*

---

37 No.8 of 1982
38 s.5(1)
39 s.4(2)
40 s.3
Agreements Act. The administration of the Act is bestowed on the Water Resources Board established under Part II of the Act.

Any person may apply to the Board for a water use permit. The Board is required to consider the application in conjunction with any Environmental Plans of projects that may use the same water. The Board's decision to grant a water use permit is subject to existing development projects allowed under the Mining Act, the Petroleum Act, and the Forestry Act. Section 40(9) clearly states that a water use permit cannot be granted unless an Environmental Plan has been approved in accordance with the Environmental Planning Act.

A permit granted under sections 28 and 40 confers on the holder the right to:

(a) the exclusive right of the construction or protection of works.
(b) the right to construct, in accordance with the plan and program approved by the Minister.
(c) the right to flood such areas of land as specified in the permit.
(d) the right to discharge water or waste in accordance with prescribed conditions.

A water use permit holder may make an application to the Board to amend the program. A permit holder can surrender his or her permit at any time. Where a holder does not comply with conditions of the permit, or does not make adequate use of it, the Board may revoke it.

Forestry operators must comply with the provisions of the Water Resources Act where their project is likely to affect a body of water.

---

41 s.2(2)
42 The Water Resources Bureau which is responsible for processing permit applications was formerly a division of the Department of Environment and Conservation. However, since the Wingti Government took office it has now become part of the new Department of Science and Energy
43 s.28
44 s.29; This section subjugates the grant of a water permit to the provisions of the Environmental Planning Act dealing with Environmental Plans
45 s.29(2) of the Water Resources Act
46 s.43
47 s.44
48 s.45
49 s.46
Summary

The environmental legislation discussed above play a fundamental role in protecting and conserving the environment. The *Environmental Planning Act* demands wise environmental planning, while the *Environmental Contaminants Act* and the *Water Resources Act* ensure the control of discharge and emissions of environmental contaminants into the environment.

Forestry resource developers are required to take account of these Acts when they plan and develop their timber projects. Loggers are required to submit Environmental Plans which must comply with the *Environmental Planning Act*. They are also required to obtain a permit under the *Environmental Contaminants Act* to import hazardous environmental contaminants which are used in the treatment of harvested logs. In order to use any water in the logging area, forestry resource developers are required to obtain water use permits under the *Water Resources Act*.

The conclusion that can be drawn from the above analysis is that, the activities associated with the forestry industry do not only have to conform to the *Forestry Act*, but they must also satisfy the requirements of the primary environmental statutes. This goes to prove that the *Forestry Act* is the primary legislation for forestry control and management, but is subsidiary to the three primary environmental statutes.
CHAPTER 7

THE PRINCIPLES OF ENVIRONMENTAL IMPACT STATEMENT AND THEIR IMPLICATIONS ON FORESTRY RESOURCES PROJECTS

Introduction

The purpose of this Chapter is to examine the concept of "environmental impact statement" (EIS) and its application to forestry management in PNG. It will be argued that there is no clear definition of an Environmental Impact Statement and also that current practices in environmental management in PNG apply the concept of Environmental Impact Statement even though there is no definitive reference to it. It will be shown that there are various forms of Environmental Impact Statement, but the main problem is their application.

The Environmental Impact Statement Concept

At the outset, the term Environmental Impact Assessment (EIA) and Environmental Impact Statement must be distinguished. They refer to different stages of environmental assessment. Environmental Impact Assessment refers to the initial stages of project assessment. The results of an Environmental Impact Assessment is usually presented in a formal document commonly known as Environmental Impact Statement.¹

Clark states that "[T]here is no general and universally accepted definition of Environmental Impact Assessment."² He illustrates this point by giving examples of four different definitions which are set out below.³

---

(a) an activity designed to identify and predict the impact on the biogeo-physical environment and on man's health and well-being, of legislative proposals, policies, programs, projects and operational procedures, and to interpret and communicate information about the impacts.

(b) to identify, predict and to describe in appropriate terms the pros and cons (penalties and benefits) of a proposed development. To be useful, the assessment needs to be communicated in terms understandable by the community and decision-makers and the pros and cons should be identified on the basis of criteria relevant to the countries affected.

(c) an assessment of all relevant environmental and social effects which would result from a project.

(d) assessment consists in establishing quantitative values for the selected parameters which indicate the quality of the environment before, during and after the action.

The purposes of an Environmental Impact Assessment have been stated as follows:

(a) [T]he purpose of an [Environmental Impact Assessment] is to determine the potential environmental, social and health effects of a proposed development. It attempts to define and assess the physical, biological, and socio-economic effects in a form that permits a logical and rationale decision to be made.  

(b) [T]he object of an Environmental Impact Assessment is to identify the possible risks to the environment that may result from a proposed action. This information is then used to decide whether to proceed with the action, and on what basis.

It is generally accepted that an Environmental Impact Statement is "a document which sets forth a description of the environmental implications of a proposed project or action." And the Environmental Impact Assessment is basically a document which contains discussions on the environmental impacts of a proposed action.

---

4 PADC, n.2, op. cit., p. 4
5 Thomas, I Environmental Impact Assessment : Australian Perspectives and Practice, Melbourne: Graduate School of Environmental Science, Monash University, 1987, p.9
The origins of Environmental Impact Statement

The Environmental Impact Statement originated in the United States of America in the National Environmental Policy Act of 1969 (NEPA). It is said that the Environmental Impact Assessment is also a creature of the Act. The Act was enacted in response "to accelerating environmental degradation and concomitant public demand for action." Baillie argues that the "Act was a formulation of Congress's environmental policies combined with directions to, and procedures for agencies to comply with and advance those policies." Others argue that the Act was really a general statement of purpose and the "initial law was only a few pages in length and mostly rhetorical in context." Since its enactment it has "had a major effect on the normal routines of Government bureaucracies" and it has widely been accepted worldwide as an efficient tool for environmental control.

The Purpose of an Environmental Impact Statement

The purpose of an Environmental Impact Statement is:

(a) to provide information to Government Departments and authorities whose responsibility is to assess the importance or likely side-effects of an operation and to weigh the benefits and damages as a result of a proposed development before approval is given for development to proceed.

(b) to bring matters to the attention of the members of the public, the Department of Environment and Planning and to the determining authority, in order that the environmental consequences of a

---

11 Marcus, n.9, supra
13 The Environmental Impact Statement concept has been adopted by developed countries such as Canada, Australia, Netherlands, Japan and developing countries such as Colombia, Thailand, Philippines, Sudan, Botswana and Rawanda; See Wathem, n.1, op. cit., p. 3
14 Clark, M Environmental Impact Assessment as an Aid to Tasmanian Developers, Tasmania : University of Tasmania, Environmental Studies. Occasional Paper 2, 1976, p.2
proposed activity can be properly understood. In order to secure these objects, the Environmental Impact Statement must be sufficiently specific to direct a reasonably intelligent and potential mind to the possible or potential environmental consequences of the carrying out or not of that activity. It should be written in understandable language and should contain material which would alert lay persons and specialists to problems inherent in the carrying out of the activity.\textsuperscript{15}

Other justifications of the Environmental Impact Statement are: (1) to make the person carrying out the project take environmental factors into account\textsuperscript{16}; (2) to allow regulatory authorities to supervise more effectively; and (3) to allow public participation. Public participation is an important aspect of the Environmental Impact Statement procedure. The objective of public participation "is to allow for the exchange of information and to help identify those issues of greatest importance."\textsuperscript{17}

\textbf{The Content of an Environmental Impact Statement}

The Environmental Impact Statement is divided into different sections which deal with specific aspects of the proposed action. Its form and content may vary from country to country depending on their practice. In the United States for example, an Environmental Impact Statement must contain the following:\textsuperscript{18}

\begin{enumerate}
\item a description of the proposed project,
\item the relationship of the proposed action to land use plans, policies, and controls for the affected areas,
\item the probable impact of the proposed action on the environment,
\item alternatives to the proposed action, and environmental implications thereof,
\item any probable adverse environmental effects which cannot be avoided,
\item the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity,
\item irreversible and irretreivable commitments of resources involved,
\item considerations of other federal policies offsetting adverse environmental effects.
\end{enumerate}

\textsuperscript{15} Prineas v. Forestry Commission of New South Wales (1983) 49 LGRA 402 at p. 417
\textsuperscript{16} This particular purpose is shown clearly in the PNG Environmental Policy; Office of Environment and Conservation Environment and Conservation Policy - A Statement of Principles, Waigani: Department of Environment and Conservation, 1976
\textsuperscript{17} Jones, G. M "Canadian Environmental Assessment Procedures" in Clark, Gilad, Bisset and Tomlinson, n.3, \textit{op. cit.}, p. 47
\textsuperscript{18} Baker, Kaming and Morrison, n. 6, \textit{op. cit.}, pp. 3-4
environmental impacts of the proposed action, the alternatives to the proposed action, and its benefits.

The Environmental Impact Statement in the PNG Context

The concept of the Environmental Impact Statement in PNG is still unclear. A review of the relevant documents and the practice in PNG indicates that, generally, the concept is practised, but it is referred to by a variety of names. For example, in the Environmental Policy, it is referred to as "environmental studies". The term Environmental Plan is used by the Environmental Planning Act and the term "Impact Assessment" is used in the Handbook, "Approaches to Environmental Planning in Papua New Guinea", published in 1980 by the Office of Environment and Conservation.

The term "environmental plan" is not well defined. To confuse the matter further, there is no clear demarcation between an Environmental Impact Assessment and the Environmental Impact Statement under the Environmental Planning Act. The only attempt to draw this distinction is in the 1980 Handbook which relates the impact assessment to an Environmental Impact Assessment. The Handbook sets out the stages of environmental planning by making it plain that an impact assessment or Environmental Impact Assessment is to be conducted before an Environmental Plan is prepared for submission to the Minister for Environment and Conservation. However, the Environmental Impact Assessment is rarely understood because of the lack of clarity in the Environmental Planning Act and the Environmental Policy. It has taken the back stage while the emphasis has been placed on Environmental Impact Statement.

The practice in PNG is that the "Environmental Plan" is another term for Environmental Impact Statement. This is not unusual because

19 Note 16, supra
20 Revised Laws of Papua New Guinea, Cap.370
22 Personal communication with Department of Environment and Conservation staff, 19 May, 1994
23 Note 16, supra
24 For instance, the Environmental Plan for the Umboi Timber Project is titled "The Environmental Impact Study on the Development of the Umboi Timber Project"; It also appears in s. 29 of the Water Resources Act and ss. 73, 75 and 77 of the Forestry Act 1991
The practice in PNG is that the "Environmental Plan" is another term for Environmental Impact Statement. This is not unusual because as Lohani and Halim point out, Environmental Plan is also referred to as an Environmental Impact Statement. For our present purposes, the term Environmental Plan will be used.

The concept of the Environmental Plan was introduced by the Government in 1977. The final part of the Environmental Policy states that:

> [T]o assist the Ministry of Environment and Conservation to identify possible problems, *environment studies* of major projects may be required by the Government. (Emphasis mine.)

The Environmental Policy requires proponents of major projects to prepare "Environment Studies" for their proposed projects. The issue is whether the term "environment studies" refers to an Environmental Impact Assessment or an Environmental Impact Statement. It is my opinion that the term "environment studies" refers to an Environmental Plan. This view is based on the fact that the term Environmental Plan finds its place in the *Environmental Planning Act* and other related legislation.

The objectives of an Environmental Plan is to ensure that:

(a) the effects of the project on the environment are examined;
(b) different ways of developing the resources are studied in order to choose the alternatives which cause the least environmental damage;
(c) the ways of protecting the environment from bad effects are proposed and evaluated;
(d) the project is examined in relation to the present land use and possible regional development of the area;
(e) the interested public and people in the area of the project are consulted on the environmental effects; and
(f) once the project starts a continual watch is kept in order to warn about problems which might arise.

---

24 For instance, the Environmental Plan for the Umboi Timber Project is titled "The Environmental Impact Study on the Development of the Umboi Timber Project"; It also appears in s. 29 of the *Water Resources Act* and ss. 73, 75 and 77 of the *Forestry Act* 1991


26 Environmental Policy, n.16, supra

27 Note 16, supra
There are two advantages of an Environmental Plan. The first is that, it enables professionals who are not part of the decision-making process to contribute expert opinion on the proposed project, so that the Department of Environment and Conservation will have a selection of information on which it can decide whether or not to proceed with the project. Second, this is a very important aspect of resources development process in PNG. This is especially true where the people are the "resource owners" and that they must be actively involved in the development of resources situated on or near their boundary. Customary owners argue that they own the land and also what is on and below the land. The recognition of customary ownership of resources by the Government has the potential of defusing the possibility of future tensions between customary resource owners and developers, and conversely it enables customary resource owners to actively participate in the development of the resources.

**The establishment of the Environmental Plan Process**

The Environmental Policy falls short of establishing the framework for the preparation of Environmental Plans. This shortcoming is rectified by the *Environmental Planning Act*. The pertinent provision of the Act is section 4. Section 4(1) stipulates that:

> Where, after 8 May, 1990 a proposal is to be implemented, and the project involved is one of a class of projects in respect of which guidelines have been issued under section 5, the Minister may, if in his opinion the proposal may have significant environmental implications, serve a requisition in the prescribed form on the proponent requiring him to submit an environmental plan.

This provision requires the Minister for Environment and Conservation to request Environmental Plans for projects in respect of which guidelines have been issued under section 5.

---

28 As more resource development projects (especially mineral and petroleum) spring up around the country more people (customary landowners) are increasingly demanding more participation in these projects based on their claims of prior ownership over the resources; *Post Courier*, 20 November, 1992.

29 See Chapter 1

30 The State, however, owns all the minerals under the *Mining Act* 1992, (s. 5) and petroleum under the *Petroleum Act*, (s.5).
In 1980, the Office of Environment and Conservation published an Handbook "outlining the process for effective environmental planning and the Guidelines which specify the content of environmental plans as required under section 5 of the Act." This Handbook contained a list of development activities which are covered under the Act. These projects range from major engineering projects to projects involving the extraction and processing of natural resources including minerals, forest products and fisheries.

The Guidelines were long and comprehensive. The Guidelines listed factors which had to be adhered to when drawing up Environmental Plans. In 1985, the Guidelines were revoked by the Governor-General, acting on the advice of the Minister for Environment and Conservation. They were replaced by a new set of guidelines known as the "Guidelines for the Preparation, Content and Format of Environmental Plans."

**The Environmental Plan Process**

The *Environmental Planning Act* provides two methods of submitting an Environmental Plan. First, a project developer can voluntarily submit an Environmental Plan. Second, the developer can submit an Environmental Plan on the request of the Minister. The Minister can only serve a requisition on certain classes of projects which he or she thinks will affect the environment.

The Environmental Plan may be submitted during the planning, feasibility study, construction or operation phase of the project. It may be submitted for a present or a future proposal. An Environmental Plan once approved, may be withdrawn if the proponent does not wish to proceed with the proposed action. The Minister may require any

---

31 Note 21, *op. cit.*, pp. 64-66; The Guidelines were published in the National Gazette on May 8, 1980 (No. G37)
32 Ibid
33 The revocation was effected on 14 March, 1985
34 s.4(6)
35 s. 4(1); The requisition can be served either personally or by post (s. 25).
36 Ibid.
37 s. 4(3)
38 s. 4(6)
39 s. 22
additional information, plans or specifications from the proponent which will be deemed to be part of the Environmental Plan.\textsuperscript{40}

Where an Environmental Plan is submitted voluntarily, the Minister may:

(a) approve the proposal subject to such terms and conditions as he or she thinks fit, or
(b) refuse to approve the proposal.\textsuperscript{41}

This process excludes the participation of Provincial Governments, customary owners, individuals, and groups who may have an interest in the project and it limits the scope of assessment of the Environmental Plan.

Where an Environmental Plan is submitted as a consequence of a request under section 4(1) of the Act, it has to be approved by the Minister after assessment and scrutiny. First, the Minister serves a requisition notice on the developer to prepare and submit an Environmental Plan for his or her approval. Second, the developer then submits an Environmental Plan to the Department of Environment and Conservation. Third, the Environmental Plan is assessed by experts within and outside the Department.\textsuperscript{42} After the assessment, the Minister may receive representations from the public. Their comments must be received by the Minister within 28 days after the publication of the Environmental Plan in the \textit{National Gazette}, the daily newspaper, and the radio broadcasting service of the Province affected.\textsuperscript{43} It is argued that this time frame is too short for the public to respond to the Environmental Plan as prepared by the proponent. This is especially true for people who may be affected by the proposed project. They are usually too far from Port Moresby, or Lae, to read the daily newspapers, the \textit{National Gazette} or listen to the Provincial radio. This particular requirement is therefore inappropriate for PNG.

\textsuperscript{40} s. 4(4)
\textsuperscript{41} s.4(7)
\textsuperscript{42} s. 13(1)
\textsuperscript{43} s. 13(2)(vii). This section reads, [t]hat any person or authority may make representation to the Minister on the environmental plan or its assessment within the time specified in the notice. Section 14 also provides for any representation by any person or authority. Section 13(3) states that the time specified is 28 days.
After the Minister has received all the necessary comments on the Environmental Plan, he or she makes a conclusion and then provides four submissions to the National Executive Council for its determination. The four submissions are: (1) the environmental plan; (2) the summary of assessment by the experts; (3) the summary of the public and individual comments; and (4) his recommendations.

If the National Executive Council is not satisfied with the recommendation of the Minister, it may set up a Board of Inquiry to conduct further investigations, refer the matter to the National Planning Committee, or an appropriate body for its opinion. The Board is empowered to conduct its investigations in public. It may summon witnesses and take evidence on all matters relevant to the application. The Board is not bound by the strict rules of evidence or procedure, but it is required to comply with the principles of natural justice. After the inquiry, the Board then submits its findings to the National Executive Council.

After obtaining the Report of the Board of Inquiry, the National Executive Council makes its decision on the Environmental Plan. It may approve the Environmental Plan, approve it on conditions, or reject it. This procedure has never been implemented since the enactment of the Environmental Planning Act. In fact, no Environmental Plans have ever been rejected by the Minister for Environment and Conservation or the National Executive Council.

A proponent whose Environmental Plan has been approved on condition or rejected by the National Executive Council may submit a revised Environmental Plan to the National Executive Council for its

---

44 s. 15  
45 s.16(2)  
46 s. 17(1)  
47 s. 17(4)  
48 s. 17(6)(d)  
49 s. 17(6)(c)  
50 s. 17(6)(a)  
51 s. 17(6)(b)  
52 s. 18(1)  
53 All Environmental Plans are usually approved by the Minister for Environment and Conservation and subsequently endorsed by the National Executive Council. The inquiry provision has therefore not been utilised so far.
approval. A revised proposal is subject to the same requirements under the Act.

According to the records of the Department of Environment and Conservation, Environmental Plans have always been approved by the Minister. There has been no case where an Environmental Plan has been rejected. Even when an Environmental Plan is defective, it will still be approved by the Minister. This was evident in the Yema Local Forest Area Environmental Plan. In a letter to the Managing Director of the developer of the Yema Local Forest Area the Minister noted that:

After a review of the Plan (ie; EP), a comment is that the report lacks address of some specific aspects of the project planning, implementation, monitoring and management. In general, there is lack of baseline information on the various environmental parameters and the environmental protection measures proposed in general and not site specific enough.

One would have assumed that the Minister would reject the Environmental Plan. However, this was not the case. In the same letter, the Minister informed the developer that "[H]aving said the above, I am pleased to inform you that approval is granted to your Environmental Plan as required under the Environmental Planning Act."

The Content of an Environmental Plan

The 1985 Guidelines require that an Environmental Plan must be published in two volumes. Volume "A" contains the Executive Summary which sets out the description of the proposed project, its anticipated environmental impacts and the benefits to be derived from the project. It should be in English and Pidgin or Motu as appropriate.

---

54 s. 21(1)
55 s. 21(2)
56 Even though the Department of Environment and Conservation officers advise the Minister to reject Environmental Plans which do not comply with the Environmental Planning Act and the Guidelines. The faulty Environmental Plans usually end up being accepted by the Minister; Personal communication with Department of Environment and Conservation staff, 19 May, 1994
57 Department of Environment and Conservation, 18 November, 1993 (File No. 20-9-99)
58 Ibid.
59 The analysis is based on the Environmental Impact Statement for the Umboi Timber Project, which I'm familiar with.
60 Motu is one of the three main languages spoken in PNG. The other two are Pidgin and English.
Volume "B" usually contains the details. This includes the introduction and the following:

(1) The detailed purpose of the development. This section shows the relationship of the project to the fourth goal of the National Goals and Directive Principles of the Constitution. And a statement on the compatibility of the project with the national and Provincial plans and goals, and the total capital cost of the project.

(2) The viability of the project. This section shows the technological expertise and resources of the proponent, the method of site selection, proposed future development and future benefits. It also includes the results of any feasibility studies.

(3) Description of the proposed development. This section describes the location, land tenure, the infrastructure and general development plans, details of development operations, and life of the project.

(4) Development timetable. The description of the sequence of development is set out in this section.

(5) The existing environment. This includes the description of the physical, biological, and socio-economic components.

(6) Environmental investigations. This part contains a detailed presentation of the possible effects of the proposed developments on the existing environment.

(7) Environmental impacts and safeguards. The description of the environmental impacts on the environment and the safeguards to contain these impacts.

(8) Energy balance.

(9) Identify and protect all historical, archaeological and ethnographic sites.

(10) Environmental Monitoring Management.

A proponent is obligated under paragraph (2), (5) and (6) to conduct its own studies to ascertain parts of the existing environment which are going to be affected by the proposed project. This obligation goes beyond the mere compilation of existing material in the Environmental Plan. It is on the basis of this and other information that, the proponent is able to predict the possible impacts of the project on the existing environment. The consequence of including false information in

---

61 See generally the analysis by Nadarajah. She shows that it is in this area that most loggers fail; See Nadarajah, T Effectiveness of the Papua New Guinean Environmental Planning Act 1978 in Forestry Timber Projects, Port Moresby : NRI (Discussion Paper No. 69), 1993
the Environmental Plan amounts to an offence which carries a fine of K500.62.

Public Participation in the Environmental Plan Process

In PNG, public participation, and especially the participation by customary owners and Provincial Governments in the decision-making process, is a delicate issue. Public participation is envisaged by Goal 5 of the National Goals and Directive Principles of the Constitution. This is echoed in the Environmental Policy which stipulates that:

The responsibility for maintaining environmental quality must be shared between the national, Provincial and local Governments and councils, as well as by clans, families and individuals.

The sharing of environmental responsibility is also espoused by the Environmental Planning Act. The Act provides avenues which facilitate public participation in the Environmental Plan process. There are a number of reasons for public, customary owners and Provincial Governments participation in any resource decision-making. First, they own the resources and it is only proper that they are engaged in the decision-making process. Second, they act as the watchdog over the exercise of administrative functions. Third, they provide insight into the long-term effects of the projects.

The Environmental Planning Act starts by directing proponents to take into account “any guidelines, directions or plans on the protection, conservation and management of the environment, issued by the Provincial Secretary of the Province concerned.” A Province to be

---

62 s. 23, Environmental Planning Act: There is ample evidence that many developers falsify information in their Environmental Plans. But to date, none has never been prosecuted under the Act. In fact, in my research I could not find a single case brought under the auspices of this and the other environmental statutes.


64 Note 16, supra

65 See the discussion on customary owners participation by Nadarajah, n.61, op. cit, pp.15-16.

66 Pain, N "Third Party Rights, Public Participation Under the Environmental Planning and Assessment Act 1979 (N.S.W.). Do the Floodgates Need Opening or Closing?" (1989) EPLJ 26 at p.27

67 With the exception of the National Capital District, none of the 19 Provinces have any guidelines; directions or plans pertaining to environmental protection and conservation.
affected by a project, which requires an Environmental Plan or otherwise, has to be informed of the proposed project and the Environmental Plan.\textsuperscript{68} The Provincial Secretary has to be sent a copy of the summary and recommendations of the Minister.\textsuperscript{69} The decision of the National Executive Council has to be transmitted to the Provincial Secretary of the Province affected.\textsuperscript{70}

When a requisition is served on the proponent, the Minister is to forward a copy of the requisition to the Secretary of the Province affected and all authorities or persons to be affected by the proposed project.\textsuperscript{71} This allows the people to be affected by the proposed project to respond.\textsuperscript{72} The Minister is required to inform the general public of any action taken, within 21 days after the service of the requisition of the Environmental Plan.\textsuperscript{73} This procedure illustrates one of the anomalies of the Environmental Plan, which is that, a decision to proceed with the proposed action is usually taken before the public actually gets involved. Thus, the preparation of an Environmental Plan is only a formality. It is not surprising therefore that, the findings of an Environmental Plan usually "tend to endorse the options chosen and attempt to allay concerns that the potential environmental impacts, as originally suspected are minimal and that the benefits of the project outweigh the damages cost."\textsuperscript{74}

Two sections of the \textit{Environmental Planning Act} which encourage public participation are sections 13 and 16. Section 13(2)(b)(iii),(iv) and

\begin{itemize}
\item This particular provision has not been fully rationalised by the Provinces. They continue to rely on the national Government for direction in environmental planning and conservation in their respective Provinces.
\item When a requisition is served on a proponent by the Minister or when the Minister is in receipt of an application for exemption under s. 10, the Minister is required under s. 6(a)(ii) and s. 10(2)(a)(i) respectively to serve a copy of the requisition and the application for exemption on the Provincial Secretary of the Province affected. The Minister is also required under s. 13(2)(a) to "send a copy of the Environmental Plan and the assessment to the Provincial Secretary of the Province affected and advise him or her that representation may be made within a specified time." For a detailed understanding of the relationship between the Provincial Governments and the national Government see Ghai, P.Y and Regan, A. J \textit{The Law, Politics and Administration of Decentralisation in Papua New Guinea}, Port Moresby: National Research Institute (Monograph 30), 1992.
\item s. 16(1)(a)
\item s. 18(2)(a)
\item s. 6(a).
\item s. 6(b).
\item Htun Nay "The EIA process in Asia and the Pacific" in Wathern, ed, n.1, \textit{op. cit.}, p. 230
\end{itemize}
Despite these provisions, the degree of participation by the people in the planning stages of a resource development is minimal. The reasons for this are many. First, the majority of the people live in rural areas and have limited access to newspapers and the radio to obtain information about an Environmental Plan of a proposed project in their locality. Second, the time frame for making a representation to the Minister is only 28 days. This time frame is too short to allow any meaningful participation by the people. The statutory requirement of 28 days is therefore, unrealistic. The third reason is that the customary owners lack the skills and expertise to critically evaluate the Environmental Plan and contribute meaningfully to the development of the resources on their land.

To actively engage the customary owners in developmental projects the first hurdle to be overcome by the government and the developers is to understand and appreciate their social and political system. In this respect customary owners must be given sufficient time, skilled personnel and access to information to examine and fully understand the impact of the development project on their lives. In this way they can meaningfully participate in the development project.

The Effect of Environmental Plan in Forestry Resource Development Projects

Forestry resource development projects fall under the category of projects which are covered by the general guidelines pursuant to section 5 of the Environmental Planning Act. Proponents of forestry development projects are therefore required by the Guidelines and the Environmental Planning Act to prepare an Environmental Plan.

The Forestry Act 1974 and the Forestry (Private Dealings) Act

75 This fact is clearly sounded in the Environment Policy, n.16, supra
Under the provisions of these two Acts, developers were not required to obtain an approved Environmental Plan for their projects before proceeding with their projects. Timber permits could be granted to developers without any considerations of the Environmental Planning Act. Although the Environmental Planning Act came into force in 1980, Environmental Plans for forestry development projects were not submitted until 1986.76

**The Forestry Act 1991**

The Act restrains the Forests Minister from granting a timber permit unless the proponent has obtained an approved Environmental Plan from the Department of Environment and Conservation.77 This is an innovative feature of the Act. It is aimed at curtailing the problems of environmental destruction by forestry resource developers, a problem uncovered by the Barnett Inquiry.78 This mechanism connects the Environmental Planning Act to the Forestry Act 1991.

The Forestry Act 1991 also goes further by requiring that before a forest development project is designated for development, the Forest Board must conduct a feasibility study to ascertain its impacts on the environment and the people to be affected.79 The feasibility study is really the Environmental Impact Assessment. The Board determines the future of the project on the basis of the Environmental Impact Assessment. The project proponent can also conduct its own Environmental Impact Assessment80 before preparing its Environmental Plan. Like the Board, the proponent can determine the feasibility of the project and its socio-economic impacts on the basis of the Environmental Impact Assessment. If the project is feasible, the proponent can proceed to prepare an Environmental Plan for submission to the Department of Environment and Conservation.

---

76 Nadarajah, n.61, *op. cit.*, p.6
77 s.73(1)
79 s.62
80 s.65
In 1993, Tahereh Nadarajah conducted research to ascertain the effectiveness of the *Environmental Planning Act* on forestry development projects. She discovered that in 1990, there were 330 timber projects in operation, but only 6% of these projects had submitted their Environmental Plans.\(^{81}\) By 1993, a total of 116 logging projects had commenced operations. Of these only 40 submitted their Environmental Plans.\(^{82}\) In comparison, the percentage of Environmental Plans submitted as against the total number of active projects in 1992 was 36%.\(^{83}\)

She also found that most of the Environmental Plans lacked quality, and the contents of some Environmental Plans were similar, even though they were prepared for different areas. The main shortcoming of the Environmental Plans was their lack of indepth studies of the impact of the projects on the ecology and socioeconomic environment.\(^{84}\) For instance, in the Yema Local Forest Area, the Environmental Plan lacked specific aspects of project planning, implementation, monitoring and management, and baseline information.\(^{85}\) Nadarajah's research also revealed that:

> Overall, most of the Environmental Plans seem to comply with the *Environmental Planning Act* and the 1985 Guidelines.\(^{86}\)

Nadarajah concluded that:

> The Barnett inquiry indicates that not one enterprise investigated by the Commission has a satisfactory record of performing to the conditions of its operation, the production of an Environmental Plan, although a necessary step in ensuring that the *Environmental Planning Act* and the 1985 Guidelines are followed, is not in itself a guarantee to safeguard a forest resource from malpractice.\(^{87}\)

In late 1993, the Department of Environment and Conservation, in an effort to rectify some of the problems identified by Nadarajah, introduced specific guidelines for the preparation of Environmental Plans for forestry development projects.\(^{88}\) The Guidelines came in force on 25

---

\(^{81}\) Nadarajah, n.61, *op. cit.*, p.8  
\(^{82}\) *Id*, p.9  
\(^{83}\) *Ibid.*  
\(^{84}\) *Id*, p.1  
\(^{85}\) Note 57, *supra.*  
\(^{86}\) Nadarajah, n.61, *op. cit.*, p.13  
\(^{87}\) *Id*, p.14  
\(^{88}\) Department of Environment and Conservation *Forestry Environmental Plan Guidelines*, Port
November, 1993. Apart from the requirement that forestry projects must aim for sustained yield forest management, the Forestry Environmental Plan Guidelines, are in all respects, similar to the general Guidelines applicable to all other development projects introduced by the Department of Environment and Conservation in 1985.

Summary

The Environmental Impact Statement is possibly the best available mechanism for decision-makers when it comes to determining the environmental impacts of a proposed action. Though it may be "western" it has proved to be a very important tool for decision-makers in the developing countries such as PNG.

PNG is probably one of the first developing countries to realise the benefits of Environmental Impact Statement by enacting its own planning legislation in 1978. Certain aspects of the Environmental Planning Act are, however, inappropriate for PNG. These relate to publication of notices relating to the Environmental Plan and the procedure for public participation. These areas need to be reviewed. As regards forest resource projects in PNG, the Environmental Impact Statement process is sufficiently catered for in the Forestry Act 1991.

Generally, the problem in PNG is not one of the inappropriateness of the Environmental Impact Statement concept, but that of implementation. PNG is not the only developing country with this problem. This problem is mostly associated with the lack of skilled manpower, inadequate funding, lack of infrastructure and database. If PNG wants to achieve sustainable development, it must seriously attempt to rectify these problems.
CONCLUSION

Forestry plays an important role in the lives of the people of PNG in two ways. First, it is a source of food and materials for the people of rural PNG. Second, it is a major contributor to the economy. Forest products rank third after minerals and agriculture sectors. The forest is also the home to most of the flora and fauna species found in PNG.

Most of the forestry resources of PNG are owned by customary land owners who also own the land. The forests, like the land are the very part of PNG traditional society. This truth has been unfettered since the dawn of colonialism in PNG. The involvement of the customary land owners in the development of their forestry resources is crucial to the success of a forestry development project.

However, since the first European settlement of PNG in 1884, the forests have always been exploited for economic purposes. The non-economic values of the forests have usually taken the back stage. This is probably the saddest part of the PNG forestry history.

The most lethal tool for forestry resources developers has been the Timber Rights Purchase process which was introduced in 1909 under the Timber Ordinance (Consolidated). The Timber Rights Purchase process was both anti-environmental management and anti-customary land owners. Through the Timber Rights Purchase the Colonial Administration and later the independent Government utilised large areas of forests. It was initially introduced as a vehicle for forest resources and land exploitation. In the early 1970s, the emphasis of the Timber Rights

---

1 CSIRO A Blueprint for Sustainable use of PNG's Forests : Definitions and Indicators of Progress, Canberra : CSIRO, 1992, p.1
3 Carson, C. L. Forestry and Forestry Policy in Papua New Guinea, Port Moresby : Department of Forests, 1974, p.2
4 Unlike other resources such as gold, copper, silver and petroleum which were declared as Crown property and now owned by the State, forestry resources have always remained the property of the customary owners.
5 No.28 of 1909; s.2
Purchase process was shifted to being a devise for enhancing the living standards of the customary owners of the forestry resources.⁶

At the height of the Barnett Inquiry, it was common knowledge that the Timber Rights Purchase process and the other forestry resources utilisation mechanisms under the Forestry (Private Dealings) Act⁷ had caused more harm than bring benefits to the customary owners of the forests and their environment.

The forestry industry reforms introduced by the Government with the enactment of the new forestry legislation, the introduction of a comprehensive forestry policy and guidelines in 1991 and 1993 are encouraging. However, there are two main problems with the Forestry Act 1991. First, the new forest rights acquisition model, the Forest Management Agreement, is not a new concept. With the exception of its forest management attribute, it still retains many of the characteristics of its predecessor, the Timber Rights Purchase process. The Forest Management Agreement is intended to promote the sustainable development of the forestry resources.⁸ However, it lacks the necessary framework to attain this objective. This is particularly true of the issue of future rights over forest plantations and land-use rights over forest plantation lands. There is still confusion in this area of the legislation.

The other problem with the Forestry Act 1991 is with the timber authority process. It has been shown that the timber authority process is a compromise proviso. It is an offspring of the Local Forest Area process under the former Forestry (Private Dealings) Act and the timber authority devise under the Forestry Regulations made pursuant to the Forestry Act 1974. Like the Timber Rights Purchase these two processes were applied to the detriment of the customary land owners and with disregard of the environment.

These two shortfalls reflect the attitude of a Government which is keen on reforms but is weak to try out new and progressive ideas. The

---

⁷ Revised Laws of Papua New Guinea, Cap.217
⁸ The Forest Management Agreement encourages the wise management of forest resource use and encourages the use of forestry plantations.
Government's lack of foresight not only encourages the continuation of the former devious forestry practices but also sanctions them under a new legislation. This was clearly highlighted by a Forest Authority official who claimed that "certain foreign companies are now already purchasing timber rights from customary owners over timber authority areas all over the country using different names for each timber authority area even though the companies are owned by a single parent company."9 It would seem that while the Forest Authority is still going through the process of establishing the Provincial Forest Management Committees, the timber authority process which is solely a Provincial Government matter, is already being misused by some unscrupulous companies. This situation confirms the views of Dr. Siaguru who has described the forestry industry as being "far worse than prior to the Barnett Inquiry."10

Forestry cannot be divorced from the environment. It is a part and parcel of the natural environment. In the global sense PNG accounts for about 1.5% of the world's tropical rainforests.11 The sustainable management of these tropical rainforests is therefore crucial. Sustainable management of forests can only be achieved through proper environmental planning. In PNG, modern tools for environmental planning were introduced as early as 1978, with the enactment of the three pieces of environmental legislation.12 These pieces of legislation have been described as strong13 and some of the best in the world. On paper, these pieces of legislation provide models on good environmental management.

Unfortunately, these statutes are not effectively implemented because of a number of reasons, including:14 (1) lack of funds; (2) lack of skilled manpower due to lack of training incentives; (3) lack of pollution

---

9 Personal communication with PNG Forest Authority officers on 21 April, 1994
10 Personal communication with Dr. Siaguru (Head of the Forestry Department, PNG University of Technology) 12 April, 1994.
11 Note 1, op. cit., p.3
12 These three statutes were the Environmental Planning Act (Cap.370), the Environmental Contaminants Act (Cap.368) and the Conservation Areas Act (Cap.362) In 1982, the Water Resources Act (Cap.205) was also enacted to join the other pieces of environmental legislation
14 Personal communication with Ms. P. Kibikibi (Legal Officer - Environmental Law Division of the Department of Environment and Conservation), 18 May, 1994. The other officers of the Department generally agreed with Ms. Kibikibi on this points.
standards as required under the *Environmental Contaminants Act*; and (4) the lack of political will by the Government.

Another problem besetting the Department of Environment and Conservation is the lack of consultation between it and other planning and resources based Departments. For a long time the consultation process between the Department of Environment and Conservation and the Forests Department has been ineffective.\(^{15}\) To further this relationship the new forestry policy and legislation require that forestry Environmental Plans have to be approved by the Department of Environment and Conservation before a timber permit is granted to a forestry resource developer.\(^{16}\) The introduction of the Environmental Impact Assessment in the *Forestry Act* 1991 and the newly introduced forestry Environmental Plan guidelines clearly indicate the Government's desire to foster proper and better environmental management in the forestry sector, which will consequently result in the achievement of sustainable forest management.

It is obvious that all the necessary policies and legislation are in place to attain sustainable forestry development in PNG. What is required is a more concerted effort by the Government to implement these policies and legislation instead of paying lip-service to them.

\(^{15}\) Personal communication with Titi Nagari (an officer of the Department of Environment and Conservation), 18 May, 1994

Akehurst, M A Modern Introduction to International Law, (Sixth Edition), London : Allen and Unwin, 1987


Amankwah, H. A "Eminent Domain and Land Use Control in West Africa (Ghana and Nigeria) and Papua New Guinea : The Political and Social Implications " (1988) 16 MLJ 58


Baillie, G. B "Environmental Law and Litigation in the United States - An Australian's Impression of American's New Legal Frontier" (1985) 5 EPLJ 14


Bates, G. M. Environmental Law in Australia, Sydney: Butterworths, 1992

Blum, C. M "The Origin, Evolution and Direction of the Untied States Natural Environmental Policy Act" (1985) 5 EPLJ 179

Bonyhady, T Environmental Protection and Legal Change, Annadale: Federation Pres, Pty Ltd, 1992


Brunton, B "A Quarter of Next to Nothing: Participation and Responsibility with Forestry Resources" (Port Moresby, 1993)


Carson, C. L. Forestry and Forestry Policy in Papua New Guinea, Port Moresby: Department of Forests, 1974


Chen-Wishart, M Unconscionable Bargains, Wellington: Butterworths, 1989

Clark, M *Environmental Impact Assessment as an Aid to Tasmanian Developers*, Tasmania: University of Tasmania, Environmental Studies: Occasional Paper 2, 1976


CSIRO *A Blueprint for Sustainable Use of PNG's Forests: Definitions and Indicators of Progress*, Canberra: CSIRO, 1992


Department of Environment and Conservation (Handbook, 1988)


Department of Forests "Vilala Block 1 Timber Rights Purchase Agreement, Ihu, Gulf Province", Hohola: Department of Forests, 1989
Epstein, A. L *Contention and Dispute: Aspects of Law and Social Control in Melanesia*, Canberra: Australian National University Press, 1974

Ernst & Young, Carter Newell and McIntosh Corporate Ltd "Mining Act 1992", Port Moresby: Ernst & Young, Carter Newell and McIntosh Ltd, 1992


Fowler, J. R "A Comparative Analysis of Liability for Environmental Damage" (1990) 7 EPLJ


Hutchins, E *Culture and Inference: A Trobriand Case Study*, Havard: Havard University Press, 1980


ITTO "Tropical Forest Update" (Newsletter)(Volume 4(2)), Canberra : ITTO, 1994

James, R. W and Fraser, I *Legal Issues in a Developing Society*, Port Moresby : Faculty of Law, University of Papua New Guinea, 1992

James, R. W *Land and Policy in Papua New Guinea*, Port Moresby : PNG Law Reform Commission (Monograph No. 5), 1985

Kerr, J. R "Law in Papua New Guinea", speech delivered on 27 November, 1968 at the University College, Pimlico, (Townsville), Queensland

Khoury, D and Yamouni, S. Y *Understanding Contract Law*, (3rd Edition), Sydney : Butterworths, 1992


Larmour, P  *Customary Land Tenure: Registration and Decentralisation in Papua New Guinea*, Port Moresby: IASER, 1992


Melanesian Institute for Pastoral and Socio-Economic Services (Catalyst)  
*Development and the Environment in PNG*, (The Steinberg Report), Goroka: Melanesian Institute, 1990


Morris, M. L  "In the Evolution of Environmental Impact Assessment - A Time of Change for Australia" (1987) 4 *EPLJ* 295

Mossop, D  "Taming the Robber Barons? The Reform of Forestry Legislation in Papua New Guinea" (1992) 8 *Q.U.T.L.J* 113


Nadarajah, T  *The Effectiveness of the Papua New Guinean Environmental Planning Act 1978 in Forestry Timber Projects*, Port Moresby, NRI (Discussion Paper No. 69), 1993


Sack, P. G and Clark, D German New Guinea: The Annual Reports, Canberra: Australian National University, 1979


The Encyclopedia of Papua New Guinea, Canberra: Australian National University, 1983

Thomas, I Environmental Impact Assessment: Australian Perspectives and Practice, Melbourne: Graduate School of Environmental Science, Monash University, 1987


Val Haynes, C. P "Succession to Land in Papua New Guinea", paper presented at the Australian Universities Law School Association Conference at Macquarie University (Sydney), 1981

Val Haynes, CEP "The Land Mobilisation Program and Customary Land", paper presented at the Seminar on *Customs at the Crossroads: The Future of Custom in PNG* (October 29-30, 1992), organised by the PNG Law Society and the UPNG Law Faculty


