

**SHEILA SUKWIANOMB**

**SETTLEMENT PAYMENTS IN PAPUA NEW GUNIEA -  
Are they Just or Unjust?**

**LLM RESEARCH PAPER  
LAWS 582: MASTER'S LEGAL WRITING**

**FACULTY OF LAW**

TE WHARE WĀNANGA O TE ŪPOKO O TE IKA A MĀUI



**VICTORIA**  
UNIVERSITY OF WELLINGTON

**2016**

## *Contents*

I	INTRODUCTION .....	4
II	THE HISTORY OF ACQUISITION OF CUSTOMARY LAND IN PAPUA NEW GUINEA .....	6
A	Alienation of Customary Land in Papua New Guinea.....	6
1	The meaning of land under customary law.....	6
2	The recognition of customary land rights: Post-independence.....	8
3	The modes of acquisition of customary land.....	10
B	Grievances of Customary Landowners .....	14
III	WHAT ARE SETTLEMENT PAYMENTS?.....	18
A	Overview of the National Land Registration (Amendment) Act 2006.....	18
1	The main functions under the National Land Registration (Amendment) Act 2006	18
2	The process for awarding settlement payments under the National Land Registration Act 1977.....	22
3	The current concerns regarding settlement payments.....	26
IV	THE FUTURE OF SETTLEMENT PAYMENTS IN PNG .....	34
V	CONCLUSION.....	38
	BIBLIOGRAPHY .....	40

### *Abstract*

*This paper discusses and analyses settlement payments paid to customary landowners in Papua New Guinea by the State for the acquisition of their customary land prior to Independence. These payments had been introduced after customary landowners had raised their grievances over the low purchase prices that they had been allegedly paid by the early European settlers and the colonial administration over their customary land. They are statutorily fixed payments provided under the National Land Registration Act 197. However, since the introduction of these payments, the State has encountered a number of problems. The main problems are firstly that customary landowners are still dissatisfied with the amounts paid and therefore continuously demanding further payments. Secondly, the National Land Commission which was established to administer the process of facilitating these payments under the National Land Registration Act is not performing its functions effectively. Therefore this paper aims to study the historical reasons behind introducing these payments and argues that based on the current problems that the State is experiencing with paying landowners' settlement payments it should consider whether or not to continue to pay customary landowners.*

### *Word length*

*The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 11880 words.*

### ***Subjects and Topics***

Land Law

Customary Land Law

## I INTRODUCTION

Traditionally for Papua New Guineans land was the most valuable resource in their world. It was viewed as more than just an asset.<sup>1</sup> As Standish states,<sup>2</sup> land was the “source of livelihood and group identity.” Land did not only provide for their daily needs but was the basis of their existence.<sup>3</sup> Therefore due to Papua New Guineans deep connection with their land, they were very protective over it.<sup>4</sup> Consequently the meaning of land has not changed for Papua New Guineans since the western concepts of land were introduced. For the majority of Papua New Guineans the perception of how valuable land is to them has increased over time. Moreover for the 85% of Papua New Guineans who continue to live a subsistence lifestyle, it still provides for their daily needs.<sup>5</sup> For this reason and because of the importance Papua New Guineans place on land, land disputes are common in Papua New Guinea (PNG).<sup>6</sup>

In PNG the most common land disputes pursued by customary landowners are over ownership, compensation payments and royalty payments. There is however one type of dispute which is pursued as much as the other types of land disputes but which has not been addressed or discussed as much as the others. These disputes are called settlement payments. A simple definition of a settlement payment is a payment made by the State to indigenous people who own land (customary land) and which was acquired either voluntarily or compulsorily from them and which is now owned by the State.<sup>7</sup> Settlement payments, although quite different in meaning to compensation payments, are however commonly referred to as compensation payment and for this the reason it is not common to hear about settlement payments.<sup>8</sup> Settlement payments, however are final payments made to customary landowners to address grievances over the inadequate payments paid

---

<sup>1</sup> George Mark Super Muroa “Legal Aspects of Compulsory Acquisition of Land in Papua New Guinea” (LL. M. Thesis, University of Tasmania, 1987) at 1.

<sup>2</sup> W A Standish “Politics And Societal Trauma” in Peter G Sack (ed) *Problem of Choice: Land in Papua New Guinea’s Future* (Australian National University Press, Canberra, 1974) at 151

<sup>3</sup> Muroa “Legal Aspects of Compulsory Acquisition of Land in Papua New Guinea” above n 1 at 1.

<sup>4</sup> P Chatterton “The Historical Dimension” in Peter G Sack (ed) *Problem of Choice: Land in Papua New Guinea’s Future* (Australian National University Press, Canberra, 1974) at 10.

<sup>5</sup> Michael John Trebilcock “Customary Land Law Reform in Papua New Guinea: Law Economics and Property Rights in a Traditional Culture” (1983) 9 (1) *The Adelaide Law Review* 191.

<sup>6</sup> Lawrence Kalinoe “Compensating Alienated Customary Landowners in Papua New Guinea: Rethinking the rationale and the regime” (2005) *MLJ* [3 - 4].

<sup>7</sup> Kalinoe, above n 6 at 6.

<sup>8</sup> Above n 7.

for the acquisition of their land prior to Independence by the colonial administration.<sup>9</sup> They are payments made to fully secure the State's title to land and to avoid future claims being pursued by customary landowners.<sup>10</sup>

Settlement payments are statutorily fixed payments provided under the National Land Registration (Amendment) Act 2006 (The Amendment Act).<sup>11</sup> The National Lands Commission (NLC), the body established to award settlement payments, administers this process and awards payments to customary landowners, once a parcel of land that had been formerly acquired is declared National land. Since the enactment of the NLRA the State has not settled all outstanding claims. Approximately 3% of all land in PNG is State land and 97% is under customary ownership.<sup>12</sup> Furthermore, the majority of State services and infrastructure development in PNG<sup>13</sup> are provided on State land, such as schools, hospitals, government administration buildings, and other infrastructure services. What is disappointing however, is that customary landowners are aggrieved by the inadequate payments made for the purchase of their customary land which provides for some of these services and infrastructure. Services that they themselves benefit from<sup>14</sup> and quite often threaten to shut down these services or in some cases prevent people for using the subject services until their claims are addressed.

However, land purchased during the colonial days was paid for according to the unimproved value at that period of time. It therefore seems unreasonable that customary landowners are receiving a second payment for land the State had already paid for and which in addition provides for services that they are benefiting from. It is therefore the thesis of this paper that it is unjust to pay settlement payments and that the State should consider ceasing these payments.

Accordingly, chapter II will discuss the history of acquisition in PNG and the reasons and policies behind introducing settlement payments. Chapter III discusses the National Land Registration (Amendment) Act 2006 that provides for settlement payments, its main functions and the problems that the State has encountered with facilitating settlement

---

<sup>9</sup> Kalinoe, above n 6, at 6, 11 and 19.

<sup>10</sup> Kalinoe, above n 6, at 20 and James, above n 17 at [79-80].

<sup>11</sup> Kalinoe, above n 6, at 6.

<sup>12</sup> Charles Yala and Ken Lyons *The National Land Research Framework for Papua New Guinea National Land Development Program* (National Research Institute, Discussion Paper No 122, February 2012) at 11.

<sup>13</sup> G Muroa "Customary Land Tenure in Papua New Guinea" in H A Amankwah J T Mugambwa and G Muroa (ed) *Land Law in Papua New Guinea* (Law Book Co, Sydney, 2009) at 62.

<sup>14</sup> Kalinoe, above n 6, at 4.

payment. Chapter IV discusses the justifications for why the State should cease paying settlement payments.

## *II The History of Acquisition of Customary Land in Papua New Guinea*

### *A Alienation of Customary Land in Papua New Guinea*

#### *1 The meaning of land under customary law*

PNG was first colonised in 1884. At that period of time Papua and New Guinea were two separate territories.<sup>15</sup> Great Britain had declared Papua as a British Protectorate in 1884 whilst Germany annexed New Guinea in the following year.<sup>16</sup> In 1902 Australia then assumed control over Papua from Britain<sup>17</sup> and by 1921 it also took over the administration of New Guinea when Germany gave up control after World War I and New Guinea became a Mandated Territory of the League of Nations.<sup>18</sup> By 1947 both territories were unified as the Territory of Papua and New Guinea, governed by Australia<sup>19</sup> until 1973 when PNG gained self-governance. Shortly after, on 16 September 1975, PNG gained independence.<sup>20</sup>

What is noteworthy in PNG's history is that throughout the colonial period the land rights of the indigenous people of PNG were recognized.<sup>21</sup> Before the arrival of Europeans, Papua New Guineans had had their own customary land tenure systems.<sup>22</sup> These land tenure systems varied extensively because of the different customs and traditions practiced all over the country. Today there are over 800 ethnic groups speaking different languages in PNG and over 2,000 dialects.<sup>23</sup> Despite these variances in custom one common custom found throughout the country was the ownership rights people had over land and how they valued their land. Customarily for Papua New Guineans land was their source of life: used

---

<sup>15</sup> Muroa "Customary Land Tenure in Papua New Guinea, above n 14, at 74.

<sup>16</sup> James, above n 17, at 1.

<sup>17</sup> Muroa "Customary Land Tenure in Papua New Guinea, above n 14 at 80.

<sup>18</sup> James, above n 17, at 1.

<sup>19</sup> Above.

<sup>20</sup> Above.

<sup>21</sup> *John Mugambwa* "A Comparative Analysis of Land Tenure in Uganda and Papua New Guinea" (2007) 11(1) *Journal of South Pacific Law* 39 at 40.

<sup>22</sup> Yala, above n 13, at 10.

<sup>23</sup> Yala, above n 13, at 10 and See also P G Sack *Land Between Two Laws: Early European Land Acquisitions in New Guinea* (Australian National University Press, Canberra, 1973) at 23: Sack states that studies have shown that in PNG people who speak the same language but have different dialects can also have distinct social customs.

for their living space and social cohesion.<sup>24</sup> They believed the land owned them and that they were only occupying and using the land for as long as they needed.<sup>25</sup> There was no such concept as owners of the land.<sup>26</sup> They saw themselves as caretakers who took care of the land and also used it to sustain themselves. Traditionally people in PNG lived and occupied the land in groups. Furthermore, under customary law the definition of land did not include anything that human beings could not cultivate and make. It did not include trees, crops or the permanent fixtures on the land.<sup>27</sup> The right to control the use of land was vested in the group and according to the custom of that particular group. The group as a whole made decisions about the use of the land or group representatives made decisions.<sup>28</sup> Group membership was based on kinship<sup>29</sup> which was classed into patrilineal and matrilineal societies<sup>30</sup> and members of the group had only usufructuary rights over the land.<sup>31</sup> Group representatives were usually traditional leaders or there was one traditional leader who spoke on behalf of the traditional leaders.<sup>32</sup>

Traditionally, members had ownership rights over those things that they could create or cultivate. As Muroa states, “the only attributes that individuals could truly call their own were the fruits of their labour”.<sup>33</sup> However, under customary law the definition of what an individual could claim ownership over was so broad that the only thing an individual did not claim ownership over was water and land.<sup>34</sup> Land and water were non-ownable because traditionally they were viewed as part of the earth’s surface that could not be divided into portions.<sup>35</sup> They were immovable objects and it was believed that once they were removed

---

<sup>24</sup> Peter G Sack “Problem of Choice” in *Problem of Choice: Land in Papua New Guinea’s Future* (Australian National University Press, Canberra, 1974) at 7.

<sup>25</sup> Chatterton, above n 4 at 10.

<sup>26</sup> Above.

<sup>27</sup> Muroa “Customary Land Tenure in Papua New Guinea, above n 14 at 65.

<sup>28</sup> P G Sack *Land Between Two Laws: Early European Land Acquisitions in New Guinea* (Australian National University Press, Canberra, 1973) at 41. Because custom varied, authority over decision making about land was also different in different societies. Examples of who made decisions on behalf of the group and the process are on pages 52-55 and a discussion of land rights transfer.

<sup>29</sup> Susan Toft and Yaw Saffu *Attitudes Towards Land Compensation in Papua New Guinea* (Law Reform Commission of Papua New Guinea, Working Paper No. 27, 1997) at 1.

<sup>30</sup> Trebilcock, above n 5 at 195.

<sup>31</sup> Muroa “Customary Land Tenure in Papua New Guinea, above n 14 at 65.

<sup>32</sup> The chiefly system practiced in other parts of the Pacific such as in Vanuatu or in Samoa does not exist in most societies in PNG, although there are a few exceptions. See P G Sack *Land Between Two Laws: Early European Land Acquisitions in New Guinea* (Australian National University Press, Canberra, 1973) at 25, who commented that although not the norm there are parts of PNG that practice the chiefly system.

<sup>33</sup> Muroa “Customary Land Tenure in Papua New Guinea, above n 14 at 64.

<sup>34</sup> Sack *Land Between Two Laws: Early European Land Acquisitions in New Guinea*, above n 29 at 40.

<sup>35</sup> Above.

from the earth's surface they became movable objects.<sup>36</sup> An example would be a floating island or a container filled with water from a stream. In contrast, under common law, although land was defined as an immovable property, land could be divided into portions on the earth's surface.<sup>37</sup> Sack<sup>38</sup> explains that for people in the traditional sense it is difficult for them to envision land being divided by imaginary lines.

Land boundaries were defined by natural features on land or in water such as by the watercourses, ridges or trees<sup>39</sup> However, the purpose of traditional boundaries under customary law were not a means for the group to identify its land or limit an area of land that it could use.<sup>40</sup> In exceptional circumstances, when the need arose these boundaries could be identified such as during a war, or when people were looking to settle in an area. But once the matter had been resolved there was no further need to clarify boundaries. Under customary law, boundaries were marks that could expand or reduce when a need arose. The main purpose for traditional boundaries was to differentiate between the inhabited and uninhabited areas.<sup>41</sup> Therefore in analysing the definition of boundaries under customary law compared to that under common law, it is evident that they share similar characteristics: both use land marks and boundaries to identify where people live. The difference under common law is that boundaries are used to identify land ownership whereas under customary law they were used to identify usage rights over land.

## 2 *The recognition of customary land rights: Post-independence*

Upon annexation of both Papua and New Guinea, land rights were recognised by the colonisers.<sup>42</sup> In Papua, Britain declared that “natives’ land would be secured”<sup>43</sup> and even specifically advised the indigenous people that Britain was there to secure the safety, enjoyment of their land and protect them from being deprived of their land by force or fraud.<sup>44</sup> However, Germany did not make such a declaration. Neu Guinea Kompagnie (New Guinea Company) which was granted an Imperial Charter by the German

---

<sup>36</sup> Above.

<sup>37</sup>Muroa "Legal Aspects of Compulsory Acquisition of Land in Papua New Guinea" above n 1 at [3 -4].

<sup>38</sup> Sack *Land Between Two Laws*, above n 29 at 41.

<sup>39</sup>Muroa "Customary Land Tenure in Papua New Guinea, above n 14 at 65.

<sup>40</sup> Sack *Land Between Two Laws*, above n 29 at 38.

<sup>41</sup> Above.

<sup>42</sup> Muroa "Customary Land Tenure in Papua New Guinea, above n 14 at 74.

<sup>43</sup> Above.

<sup>44</sup> See G Muroa "Customary Land Tenure in Papua New Guinea" in H A Amankwah, J T Mugambwa and G Muroa (ed) *Land Law in Papua New Guinea* (Law Book Co, Sydney, 2009) at 74; and P G Sack "The Triumph of Colonialism" in *Problem of Choice: Land in Papua New Guinea's Future* (Australian National University Press, Canberra, 1974) at 204.



government to administer New Guinea had also been instructed to recognize and respect “native” land rights.<sup>45</sup> Sack<sup>46</sup> concluded that “the established principle of Western colonial law that all land in a colony inhabited by “primitive” people became automatically the property of the colonising State or Sovereign” had been abandoned by the late 1880s. This meant that land rights in Pacific countries, such as PNG, who had been colonised during that period of time, were recognised and protected.<sup>47</sup> However, Mugambwa<sup>48</sup> argues that this policy was not always the case and that for a few countries in East Africa such as Kenya and Uganda, who had been colonised ten years after PNG, their land rights were not recognized. It was rather the “exception and not the rule” that customary land rights be recognized in these countries and therefore he argued that there was no reasonable explanation why land rights were protected in the Pacific and not in other countries.<sup>49</sup>

Fortunately for Papua New Guineans this meant that unless land was found to be vacant or waste land, and declared as such, all land belonged to the indigenous people of PNG and remained governed by their customary law.<sup>50</sup> Therefore, for the colonial administration to have access to Papua New Guinean’s land they had to acquire it. In New Guinea, Germany had expressly provided the Neu Guinea Kompagnie with power to acquire land. In 1899 the German Administration assumed the powers of acquisition.<sup>51</sup>

In Papua, Britain had not expressly stated its power to acquire land upon proclamation of Papua in 1884.<sup>52</sup> It did make provision for this in the following years in its Land Ordinances. After Australia assumed powers it had also provided for this in its Land Ordinance 1911-1940.<sup>53</sup> Subsequently, there were issues raised or challenged in court on the powers of the administration to acquire land in those early years before it had enacted

---

<sup>45</sup> Germany officially colonised New Guinea on 17 May 1885 and Neu Guinea Kompagnie was granted exclusive right to acquire ownerless land and land belonging to the indigenous people of New Guinea. See G Muroa “Customary Land Tenure in Papua New Guinea” in H A Amankwah, J T Mugambwa and G Muroa (ed) *Land Law in Papua New Guinea* (Law Book Co, Sydney, 2009) at 74.

<sup>46</sup> P G Sack “The Triumph of Colonialism” in *Problem of Choice: Land in Papua New Guinea’s Future* (Australian National University Press, Canberra, 1974) at 204 as cited in John Mugambwa “A Comparative Analysis of Land Tenure in Uganda and Papua New Guinea” (2007) 11(1) *Journal of South Pacific Law* 39 at 40-41.

<sup>47</sup> See John Mugambwa “A Comparative Analysis of Land Tenure in Uganda and Papua New Guinea” (2007) 11(1) *Journal of South Pacific Law* 39 at 41.

<sup>48</sup> Mugambwa, above n 22 at 41.

<sup>49</sup> Above.

<sup>50</sup> James, above n 17 at 1 and 74.

<sup>51</sup> Muroa “Customary Land Tenure in Papua New Guinea, above n 14 at 79.

<sup>52</sup> Muroa, above n 1 at 18.

<sup>53</sup> Muroa “Customary Land Tenure in Papua New Guinea, above n 14 at 78.

legislation to acquire land. The issue of whether or not the colonial administration had powers to acquire land in Papua in those early years was settled in 1973 in the case of *Administration of the Territory of Papua and New Guinea v Doriga (1973)*.<sup>54</sup> In that case, the High Court held that the British Government's policy at the time of declaration of Papua as a Protectorate was to ensure that indigenous people enjoyed the use of their land and was preserved for future use.<sup>55</sup> The Court stated that the Crown's policy therefore was for indigenous people to continuously use their land freely and only where the Crown required it for public purpose would it be acquired compulsorily.<sup>56</sup>

Accordingly, both Germany and Britain had the authority to acquire land and when Australia took control of New Guinea from Germany it also made provision in its legislation to acquire land in New Guinea.<sup>57</sup> Thereafter, all succeeding land legislation in PNG made provision for the acquisition of land.<sup>58</sup>

### 3 *The modes of acquisition of customary land*

In PNG traditionally land was never seen as a marketable commodity.<sup>59</sup> Although there is evidence of transfer of land rights, particularly the transfer of control rights over a particular parcel of land, it was done especially for fulfilment of traditional obligations rather than for economic gain.<sup>60</sup>

For New Guineans<sup>61</sup> and similarly for Papuans, the transfer of land rights was traditionally used as payments for a debt or pledges such as giving land to a group or groups who helped during traditional warfare, typically as a token of appreciation or for groups who were left landless. It was also used to strengthen ties with other groups: for instance land was transferred to the family of the bride as a form of bride price.<sup>62</sup> As land was the most valuable treasure that people in traditional societies could part with, one group transferring rights to it, it was essentially a symbolic gesture to demonstrate how much one group valued their relationship with another, either to assist them in their time of need or simply as a show of appreciation. Land was not transferred for economic reasons, and if it was

---

<sup>54</sup> *Administration of the Territory of Papua and New Guinea v Doriga* [1973] ALJR 621. [*Doriga case*].

<sup>55</sup> *Doriga Case*, above n 55 at 629 per Barwick.

<sup>56</sup> *Doriga Case*, above n 55 at 629 per Barwick.

<sup>57</sup> Muroa "Customary Land Tenure in Papua New Guinea, above n 14 at [79-82].

<sup>58</sup> At 81-82.

<sup>59</sup> Colin Filer "Compensation, Rent and Power" in Susan Toft *Compensation for Resource Development in Papua New Guinea* (Law Reform Commission (PNG) Monograph No. 6, Boroko, 1997) at 157.

<sup>60</sup> *Sack Land Between Two Laws*, above n 29 at 48.

<sup>61</sup> At 47.

<sup>62</sup> At 47-48.

transferred in traditional terms this was a secondary purpose particularly by the transferor<sup>63</sup> who did it particularly to fulfil another traditional obligation<sup>64</sup>.

Thus the traditional principles of the indigenous people of PNG were completely different to the principles of transferring property rights in the Western countries. This made it quite difficult for the indigenous peoples of PNG to comprehend why the colonial governments required their land in those early years of colonisation. This resulted in some unpleasant encounters that were experienced by both the indigenous people and the settlers or the colonial governments.<sup>65</sup> Muroa<sup>66</sup> states that the colonial government's "scrupulous respect for native rights and interest" led to difficulties when attempting to introduce the Torrens system into the country.<sup>67</sup> This appears to be confirmed by Chatterton's analysis<sup>68</sup> of early land purchases. Chatterton points out that as well as the linguistic problems that would have been encountered by the interpreters in the early colonial days, the process of finding who had the authority to dispose of land would have been difficult for the colonial administration.<sup>69</sup> The indigenous people did not understand the western system of sale and purchase of land, as under custom there was no such concept as an "owner of land." Therefore the colonial administration would have had problems trying to establish who had the power to sell a parcel of land.<sup>70</sup>

The laws, however, that were introduced by the colonial administration to acquire land from the indigenous people of PNG have remained generally the same since pre-independence days.<sup>71</sup> The enactment of the Land Ordinance 1962 finally amalgamated land legislation in both territories and which became the principle Act for administering

---

<sup>63</sup> At 47.

<sup>64</sup> For instance, if the transferor required pigs to pay bride price which he or the group did not have at the time.

<sup>65</sup> In P G Sack *Land Between Two Laws: Early European Land Acquisitions in New Guinea* (Australian National University Press, Canberra, 1973) at 108-110; Sack reported experiences encountered in the New Guinea area in the early 1900s where there was evidence of indigenous people killing Germans because of disputes over acquisition of their land and how it was used; and also reports of the Germans killing indigenous people in revenge for these murders.

<sup>66</sup> Muroa "Customary Land Tenure in Papua New Guinea, above n 14 at at 79.

<sup>67</sup> At 80.

<sup>68</sup> See P Chatterton "The Historical Dimension" in Peter G Sack (ed) *Problem of Choice: Land in Papua New Guinea's Future* (Australian National University Press, Canberra, 1974) at 10

<sup>69</sup> See P Chatterton "The Historical Dimension" in Peter G Sack (ed) *Problem of Choice: Land in Papua New Guinea's Future* (Australian National University Press, Canberra, 1974) at 10.

<sup>70</sup> Above.

<sup>71</sup> Jim Fingleton "Pacific Land Tenures Reform: New Ideas for Reform" (July 2008) FAO Legal Papers Online No 73 < [www.fao.org](http://www.fao.org)> at 2.

Government Land and dealings involving customary land.<sup>72</sup> The Land Act 1996 that currently administers Government land in PNG defines customary land as “land that is owned or possessed by an automatic citizen<sup>73</sup> or community of automatic citizens by virtue of rights of a proprietary or possessory kind that belong to that citizen or community and arise from and regulated custom”.<sup>74</sup>

In PNG the two modes of acquiring customary land are either voluntarily or compulsorily. Under the Land Act to acquire land means either to purchase or lease. Notably under the Land Act ‘customary landowner’ is the term used when referring to a person or persons who own or control under the custom. However, the Act does not provide for the definition of a ‘customary landowner’ nor is the definition provided in the Interpretation Act 1975.

For the purposes of defining a customary landowner which will be a term frequently used throughout the paper, the definition which provides the most comprehensive definition is provided for under the Land Groups Incorporation (Amendment) Act 2009 and which states:

A “customary landowner” means a clan, lineage, family, extended family or other group of persons who hold, or are recognised under custom as holding, rights and interests in customary land, and includes a land group incorporated under the Land Groups Incorporation Act (Chapter 147).

For convenience the term customary landowner will also be used throughout the paper to refer to indigenous people who are alleged to be the owners of a particular parcel of customary land or have an interest over that customary land.

The Land Act provides for three processes to acquire land voluntarily. Firstly, there is acquisition by agreement which is the outright right of purchase of land on terms and conditions agreed upon by the State and the customary landowners. Secondly, there is acquisition by customary lease. This process occurs in circumstances where the State

---

<sup>72</sup> Land in PNG is divided into two main categories: customary and non-customary. Customary land is also referred to as unalienated land and is used to identify land that indigenous people own and control. Non-customary is referred to as alienated land and includes freehold and State or Government Land. See G Muroa “Customary Land Tenure in Papua New Guinea” in H A Amankwah, J T Mugambwa and G Muroa (ed) *Land Law in Papua New Guinea* (Law Book Co, Sydney, 2009) at 62.

<sup>73</sup> An automatic citizen as defined under the Interpretation Act 1975 as a person who automatically gained citizenship on Independence Day or is a citizen by descent.

<sup>74</sup> See s2 of the Land Act 1996.

considers that the subject parcel of land is likely to be required by customary landowners but which the State still requires for a certain period of time. Finally there is the acquisition of land for the grant of a special agricultural and business lease (SABL). The latter is the process the State has established to assist customary landowners to participate in the economy through the development of their customary land.<sup>75</sup>

Acquiring land compulsorily is the other mode of acquisition and which since 1906 in Papua and 1903 in New Guinea has only been exercised if land is required for a public purpose.<sup>76</sup> The State's power to exercise compulsory acquisition in order to acquire land for public purposes is a method applied in other countries as well. The New Zealand Public Works Act 1981 and the Australia Lands Acquisition Act 1989 are the equivalent to the current Land Act 1996 which provides for compulsory acquisition.

Apart from the process of acquiring customary land by the State, the other process of accessing land for development purposes or in the interest of the public has been through the declaration of waste and vacant land. All colonial governments had provided legislation to access waste and vacant land. The earlier enactments had however generated some issues at that time. Under customary law, arguably there was no waste or vacant land.<sup>77</sup> However an opposing view was expressed in the case of *Agevu v Government of PNG (1977)*.<sup>78</sup> In that case one of the issues addressed before the the Court was whether or not title to waste and vacant land was vested in the Crown.<sup>79</sup> O'Meally AJ referring to section 83 of the Land Act 1962 which provided for the declaration of waste and vacant land held, that s83 and all previous statutory provisions that made provision for waste and vacant land were purely regulatory. They did not create or extinguish any authority or right in the Crown from use of these parcels of land.<sup>80</sup> Furthermore, O'Meally J stated that upon annexation of Papua all such land were automatically vested in the Crown as Crown land.<sup>81</sup> Based on this

---

<sup>75</sup> John Numapo *Commission of Inquiry into Special Agricultural and Business Lease (SABL) Final Report* (Commission of Inquiry, June 2013) at 9. The SABLs were only introduced in the late 1970s and involve the State leasing a subject parcel of land identified by the customary landowners from them by an instrument of lease. On that same instrument the State then agrees to lease back the subject land to the landowners. Thus the SABL is also commonly referred to as the Lease-Lease back title. The lease is for a period not exceeding 99 years and the current Land Act allows for the landowners to choose whomsoever is to be granted the SABL under s102 (2).

<sup>76</sup>Muroa "Customary Land Tenure in Papua New Guinea, above n 14 at 81.

<sup>77</sup> H A Amankwah "Outline of Papua New Guinea: Land Tenure Policy", in H A Amankwah, J T Mugambwa and G Muroa (ed) *Land Law in Papua New Guinea* (Law Book Co, Sydney, 2009) at 10.

<sup>78</sup> *Agevu v Government of PNG [1977]* PNGLR 99.[*Agevu case*]

<sup>79</sup> *Agevu case*, above n 84 at 101-102.

<sup>80</sup> Above.

<sup>81</sup> Above.

presumption, the majority of land that the colonial government acquired was waste and vacant land.<sup>82</sup>

What has been described above are the methods of accessing land from customary landowners. There are however historical records that show that not all land had been accessed through these processes. There is also evidence of confiscations of land by early settlers and the colonial administration. However, very few parcels were acquired in this manner. Other studies show that confiscation occurred when the Europeans or the Colonial Government wanted to punish members of groups or whole groups for something offensive they had done to the early settlers or colonial regime.<sup>83</sup> In summary, through these processes, approximately 1% of all land in PNG was alienated prior to Independence and which account for 600,000 hectares out of a total of 46.3 million hectares of land in PNG.<sup>84</sup>

### *B Grievances of Customary Landowners*

In PNG, social customs differed as much as the languages<sup>85</sup> therefore controlling rights and user rights to land varied according to the customs of a particular group. Studies have shown that transferring land rights for economic reasons had occurred, however it has been emphasised that these were not the primary reasons for transferring land rights. Although, a group may receive traditional money<sup>86</sup> for the transfer of their controlling rights over a parcel of land which the group could later use for bride price, land was not used as an asset that could be traded off under a barter system, exchanged for another asset, or marketed so as to receive traditional money. Control of land rights were transferred either for political reasons, such as strengthening ties with neighbouring groups or as a gesture of appreciation or to assist those who were landless. In general the complete transfer of land rights was not

---

<sup>82</sup> This Muroa states “has been the source of bitter contention between the customary government and customary claimants” as customary landowners argue that this land were in actual fact owned by them. G Muroa “Customary Land Tenure in Papua New Guinea” in H A Amankwah, J T Mugambwa and G Muroa (ed) *Land Law in Papua New Guinea* (Law Book Co, Sydney, 2009) at 87.

<sup>83</sup> P G Sack *Land Between Two Laws Early European Land Acquisitions in New Guinea* (Australian National University Press, Canberra, 1973) at 113.

<sup>84</sup> Susan Toft, above n 30 at 2.

<sup>85</sup> Sack *Land Between Two Laws*, above n 29 at 48

<sup>86</sup> “Traditional money” refers to the traditional currencies used by people all over PNG traditionally not only to purchase goods and services, but also to settle disputes or for traditional bride price. In most parts of PNG these traditional currencies were sea shells such as a pearl shell which was regarded as a valuable shell and a traditional store of wealth. Today traditional money is still used but mainly for traditional ceremonies. See Gudmundur Fridriksson “Traditional Money of PNG” (Gudmundur Fridriksson Blog, December 30, 2015) <gudmundurfridriksson.wordpress.com.>

common and traditionally land was inalienable. It was more common to share the use of the land or to return the land to the owners once it was not required anymore.

However, due to colonisation and land purchases, firstly by the settlers and then the colonial administration,<sup>87</sup> the perception of how customary landowners viewed their land not only changed but their practices changed as well.<sup>88</sup> Where once land had been seen as a space provided to live in, provided for their survival and which was non-ownable. It was now seen as property which you could claim ownership over just like traditional tool or tree. Furthermore, people began to ensure that they stated their claim over areas which were once disputed or which were regarded as no man's land.<sup>89</sup> Customary landowners started to become very protective over land they regarded as theirs. Although they had always been protective of their land, they became even more so after colonisation when customary landowners saw how their land was being damaged for commercial and development purposes.<sup>90</sup> People who were once willing to share unutilised land with another group who were landless or had not used a particular parcel of land because of a dispute were now very resistant to selling or leasing the land.

It is possible that this resistance could have developed as a result of the manner in which land was acquired in the earlier years which was sometimes abused by the Administration as mentioned above with regard to confiscations. However, this is not the only factor. Another factor was that the colonisers utilised their land in ways not for personal use. For these customary landowners who had only known that land could be used for gardening, hunting and raising of their animals, through land dealings with Europeans they then came to realise its full economic possibility.<sup>91</sup> Firstly, this economic potential was seen in the earlier years when customary landowners were offered traded goods that they had never seen before, such as an axe, tobacco or cloth for the exchange of their land, that is, land could be turned into a valuable commodity.<sup>92</sup> The potential was further seen when indigenous people saw the investments Europeans received from developing their "land".<sup>93</sup> They then began to realise that their land was an economic asset. As a result they started to question previous land sales and began to conclude that their land was worth more than what had been paid. Furthermore they also began to feel as though they were being

---

<sup>87</sup> Chatterton, above n 4 at 10 and 8.

<sup>88</sup> Chatterton, above n 4 at 8 and Sack *Land Between Two Laws*, above n 29 at 31.

<sup>89</sup> Standish, above n 2 at 151.

<sup>90</sup> Susan Toft, above n 30 at 2.

<sup>91</sup> Chatterton, above n 4 at 8.

<sup>92</sup> Chatterton, above n 4 at 8.

<sup>93</sup> Amankwah, above n 83 at 22.

economically deprived of their land that had been sold and felt they too had the potential to develop it.<sup>94</sup>

On account of this and as the administration attempted to acquire more land, landowners began to resist the sale of their land,<sup>95</sup> or alternatively made it more difficult for the administration to purchase by demanding very high prices.<sup>96</sup> Once Papua and New Guinea were declared colonies customary landowners were prohibited from selling their land privately.<sup>97</sup> In Papua, the Land Regulation Ordinance 1888<sup>98</sup> restricted private sales. In New Guinea after the Imperial Charter of 17 May 1885, a public notice had been published on 22 May 1885 announcing that all future land acquisitions by Europeans were illegal unless it had been authorised by the administration.<sup>99</sup> These laws were imposed in both Papua and New Guinea to protect customary landowners' rights.

Consequently, landowners were only permitted to sell or lease land to the Administration and if they refused their land could be compulsorily acquired. Accordingly, customary landowners at that time couldn't comprehend that the administration was trying to protect them. Before both territories were officially colonised customary landowners could dispose of their land without restrictions. Therefore, these changes in policies made them very suspicious of the behaviour of the "white man".<sup>100</sup> As a result Papua New Guineans resented the arrival of Europeans.

The main land disputes of customary landowners were firstly over the land prices paid to their ancestors which were thought to have been inadequate; secondly, landowners were not aware that their land was being alienated from them in entirety; thirdly, there were claims that compensation paid was paid to the wrong people;<sup>101</sup> and fourthly, many of the parcels declared waste and vacant land were not vacant and were in fact actually hunting and grazing grounds.<sup>102</sup> Although the Administration had made provision in legislation to address these disputes prior to the 1900s and continued to enact legislation to ensure that

---

<sup>94</sup> Above.

<sup>95</sup> Chatterton, above n 4 at 9.

<sup>96</sup> Muroa "Customary Land Tenure in Papua New Guinea, above n 14 at 74 at 81.

<sup>97</sup> At 76.

<sup>98</sup> Above.

<sup>99</sup> See Peter Sack and Bridget Sack *The Land Law of German New Guinea* (Australian National University, Canberra, 1975) at ix. After the Imperial Charter had been published on 17 May 1885. It had been supplemented by this public notice issued by the Imperial Commissioner on 22 of May 1885.

<sup>100</sup> Chatterton, above n 4 at 9.

<sup>101</sup> Above.

<sup>102</sup> James, above n 17 at 1 at 77.



there were avenues for customary landowners to address their disputes, this did not deter their feelings towards the ‘white man’ nor make it any easier for the Administration to acquire land. However, it has been noted that some of these processes were ineffective and therefore another reason why disputes were not resolved.<sup>103</sup>

Despite all the above reasons, that could justify why indigenous people were aggrieved about the acquisition of their land and the reasons for their change in attitudes towards selling their land, the fundamental reason in my view was because of the customary landowners close connection with the land. Land was so precious to them that they were even willing to risk their life to protect.<sup>104</sup> As a result of all these contributing factors and because of Papua New Guineans’ high regard for their land, the number of grievances that they had over the alienation of their land heightened in the years drawing near Independence.<sup>105</sup> Accordingly, because of an endless number of land disputes that the Administration had to address where some were on the verge of turning into violence in some parts of the country,<sup>106</sup> a Commission of Inquiry into Land Matters (CILM) was set up on 16 February 1973. One of its main tasks was to investigate the reasons behind landowners’ grievances and make recommendations as to how to address them.<sup>107</sup> In response to addressing landowners’ grievances, CILM firstly recommended the establishment of a quasi-judicial body to firstly settle these landowners’ grievances. Secondly after the landowners’ grievances had been resolved, its other function would be to register these parcels of land as National land so that they are secure and free from dispute.<sup>108</sup>

The National Land Registration Act 1977 (NLRA) was enacted accordingly to implement these recommendations and the National Land Commission (NLC) was established to administer these functions. Forty years on and the State still has not addressed all the

---

<sup>103</sup> James, above n 17 at 71.

<sup>104</sup> See J Dove, T Miriung and M Togolo “Mining Bitterness” in Peter G Sack (ed) *Problem of Choice: Land in Papua New Guinea’s Future* (Australian National University Press, Canberra, 1974) at 182. Dove, Miriung and Togolo in this chapter gave an excellent insight into how Bougainvilleans had felt about their land and the development of the Paguna copper mine in Bougainville. The attitudes and feelings Bougainvilleans had are the same as any Papua New Guinean would have had or still have today about developments on their land, regardless of the type of development.

<sup>105</sup> John Mugambwa “Land Disputes in PNG: A Colonial Legacy and Post Independence Solutions (1987) 15 MLJ 94 at [108-117] as cited in H A Amankwah “Outline of Papua New Guinea: Land Tenure Policy” in H A Amankwah, JT Mugambwa and G Muroa (ed) *Land Law in Papua New Guinea* (Law Book Co, Sydney, 2009) at 22.

<sup>106</sup> Above.

<sup>107</sup> James, above n 17 at 191.

<sup>108</sup> Kalinoe, above n 6 at 10.

outstanding land claims amounting to approximately 1% of land that was acquired from customary landowners. It is now timely to consider the rationale behind the policy that was introduced over three decades ago and assess whether the State should still continue to facilitate this process of awarding settlement payments for land that had been legally acquired prior to Independence.

### *III What Are Settlement Payments?*

#### *A Overview of the National Land Registration (Amendment) Act 2006*

##### *1 The main functions under the National Land Registration (Amendment) Act 2006*

In 1977, the NLRA was enacted firstly to confirm the State's interest in land and secondly to address any customary landowners' grievances over the inadequate payments for their land.<sup>109</sup> In 2006, the NLRA was amended by the National Land Registration Act (Amendment) Act 2006. The Amendment Act and the main functions are as set out in the preamble of the Act which are to:

- (a) establish a Register of National Land; and
- (b) make provision for the registration in the Register of National Land of all land acquired or to be acquired by the State on or after Independence Day; and
- (c) make provision for the registration in the Register of National Land of land acquired before Independence Day by a pre-Independence Administration in Papua New Guinea and which is now required for a public purpose; and
- (d) give effect to s54 (a) (special provision in respect of certain lands) of the Constitution by providing for the recognition of the title of the State to certain land that is required for public purposes, the title to which may be, or may appear to be, in doubt; and (e) settle grievances in relation to the land described in Paragraph (d) by providing for certain settlement payments; and
- (e) declare and describe, for the purposes of s53 (1) (protection from unjust deprivation of property) of the Constitution, certain matters as public purposes and justified reasons for the acquisition of property; and

---

<sup>109</sup> At 10.

- (f) give effect to s53(2) of the Constitution that just compensation must be paid by the expropriating authority, giving full weight to the National Goals and Directive Principles and taking into account the interest if the State as well as the person or persons are affected.

Notably, five of these seven functions are aimed at securing the State's title to land, which is the main purpose of the Act. Previously, the colonial government had made provision in legislation to validate the State's interest in land but these were irregular processes that were mainly dependent on a claim lodged by a disputing party to verify the State's ownership over a particular parcel.<sup>110</sup> By contrast, the NLRA that CILM had proposed to be introduced is an exhaustive process to validate the State's title to land. CILM had advised that it was necessary to verify the government's title to all land required for a public purpose as well as all land that it already owned, declared, registered, leased; or had been converted to freehold as well as future land purchases.<sup>111</sup> Furthermore, by renaming all land National land and registering the subject land in the Register of National Land this would then clear all legal uncertainty and in future all registered State Land would constitute National Land.<sup>112</sup> The fundamental reason, however, for CILM recommending this process is as James explains:<sup>113</sup>

The significance of these proposals of CILM is that security is intended only for titles to State Land required for public purpose, and the government would openly confirm its title to such lands, thereby avoiding the necessity of a presumption of ownership based on supposition of facts (e.g. because the government has occupied or had control of land for twelve years, it is the owner).

Accordingly, the NLRA has been enacted to give effect to the above and likewise has also made provision for securing all other land that the State had acquired for other purposes before Independence. It is significant to note that since PNG gained Independence, the government has acknowledged that the State might still require land for development purposes. All land the State would acquire would only be for public purposes.<sup>114</sup> Therefore

---

<sup>110</sup> James, above n 17 at 79.

<sup>111</sup> At [79-80].

<sup>112</sup> Above.

<sup>113</sup> Above.

<sup>114</sup> See Rudolph William James *Land Law and Policy in Papua New Guinea* (Papua New Guinea Law Reform Commission, Monograph No 5, 1985) at 78.

under it the NLRA has also made provision to register all land acquired for public purposes after Independence as National Land as well.<sup>115</sup>

Settlement of customary landowners' grievances, Kalinoe<sup>116</sup> states, is a secondary purpose of the Act but a necessary one to fully secure State land. It is a measure applied to verify whether or not land had been properly acquired or acquired at all prior to Independence by the colonial government so that the subjects' parcels will be fully secured. More importantly it is a process that gives effect to s54(a) of the Constitution which states that a special provision is required to address disputes of customary owners for land that has been acquired before Independence and which the State has claimed as required for public purposes. Additionally, the process of addressing landowner's grievances under the NLRA was implemented based on the recommendation of CILM that had proposed that a permanent body be established to address customary landowners' grievances over the inadequate payments paid for their land during the colonial period. It had further recommended that after addressing the landowners' grievances in certain circumstances landowners should be paid limited compensation for land that landowners argued had been undervalued at the time of purchase. Accordingly the NLRA has made provision for these two functions of addressing landowner's grievances and paying limited compensation which are termed as "settlement payments" under the Act.

Since the establishment of the NLRA, it seems, and is as will be discussed in further detail below, that settling of customary landowners' grievances so that they can be awarded settlement payments has become the main function of the Act. A secondary purpose is to verify the State's title to land and thereby register the subject land as National Land. Before explaining the process of how settlement payments are awarded to landowners, the problems that the State has encountered because of facilitating these payments and the current administrative issues being faced by NLC that need to be addressed. It is vital to define what settlement payments are.

---

<sup>115</sup> The Registrar of National Lands Commission has advised that although NLC is supposed to register land acquired after Independence as National Land, the State has rarely made declarations to this effect. He, did not explain the reasons why. But it is assumed that as the Act does not make provision for settlement payments for land acquired after Independence, there are no third parties pursuing any interest on the subject parcels and therefore there no urgency to register these lands. Interview with Arua Leva, Registrar of the National Land Commission, Papua New Guinea (Sheila Sukwianomb, Telephone Conference, 27 April 2016).

<sup>116</sup> Above.

The NLRA does not explicitly define what settlement payments are but rather refers to it as ‘a payment by the State provided under Part VI (Settlement of Payments)’ of the Act. In addition there is no definition provided in Part VI and this part only provides for the process of determining a claim before awarding settlement payments. Currently, however, there is limited research or publication on the issue of settlement payments nor is a definition provided. Therefore it is the author’s view that the most comprehensive definition provided for settlement payments is defined by Kalinoe who has written on the above topic in his article on “Compensating alienated customary landowners in Papua New Guinea: Rethinking the rationale and the regime” and states:<sup>117</sup>

Compensation payments under the National Land Registration Act 1977 are for declared national land previously acquired by the State. Strictly speaking, such payments are not compensation but rather “settlement payments” and they are statutorily fixed by Schedule 2 of the Amendment Act (as amended in 2006).

As settlement payments are commonly referred to as compensation payments in PNG.<sup>118</sup> Kalinoe therefore uses the term “compensation payments” to differentiate between the two types of payments. However, unlike compensation for loss of property which is paid back at the equivalent value of what was lost.<sup>119</sup> Kalinoe explains that settlement payments are statutorily-fixed payments. They are calculated at a fixed rate irrespective of the value of the land that had been lost.<sup>120</sup>

In Summary, settlement payments under schedule 2 are the limited payments that CILM had recommended be paid to landowners. In Chapter II explained that both Britain and Germany had provided legislation very early on in the colonial years to acquire land. Therefore apart from the private land sales that had been facilitated by the early settlers or through the illegal acquisitions of land most parcels of land had been purchased. It is clear that as a remedy could not offered to landowners through other legislation and the Courts. Settlement payments were introduced under the NLRA. They were intended to be a one off

---

<sup>117</sup> Kalinoe, above n 6 at 5.

<sup>118</sup> See Lawrence Kalinoe “Compensating Alienated Customary Landowners in Papua New Guinea: Rethinking the rationale and the regime” (2005) MLJ Kalinoe 3 at [3-4] and *Gabi v Nate* [2006] PGNC 178 at [32] per Injia DCJ whom refers to settlement payments as Compensation under the National Land Registration Act 1977.

<sup>119</sup> J A Umeh *Compulsory Acquisition of Land and Compensation in Nigeria* (Sweet & Maxwell, London, 1973) at 42.

<sup>120</sup> *Gabi v Nate* [2006] PGNC 178 at [11] per Injia DCJ. [*Gabi case*]

final payment that would put to rest any unresolved issues these people had over the acquisition of their land.

2 *The process for awarding settlement payments under the National Land Registration Act 1977.*

Under the NLRA, section 7 provides:

7 Notice of Intention to Declare National Land Where Land Was Acquired Before Independence Day.

(1) Where, in the opinion of the Minister:

- (a) any land was acquired before Independence Day by a pre-Independence Administration in Papua New Guinea; and
- (b) the land is required for a purpose or a reason that is declared or described by Section 3 or by an Organic Law or another Act to be:
  - (i) a public purpose; or
  - (ii) a reason that is reasonably justified in a democratic society that has a proper regard for the rights and dignity of mankind, and that is specified in the notice, the Minister may, by notice in the National Gazette, intimate his intention to declare, not earlier than the expiry of three months following the date of publication of the notice, that the land is National Land.

A person aggrieved with the notice under s7, s8 provides with 3 months a person must notify the Minister of his or her grievances. Following this grace period, s9 provides that the Minister will then publish a notice to declare land acquired before Independence Day as National Land.<sup>121</sup> Persons with grievances are required to lodge their claims within 3 months after which the Minister assesses the claim and at this point the Minister can withdraw from pursuing a s9 declaration. If the Minister proceeds to publish an s9 declaration a person's claim is converted into a claim for settlement payment.<sup>122</sup> It has been established in the Supreme Court case of *Pipoi v Seravo 2008*,<sup>123</sup> that once a declaration

<sup>121</sup> The processes provided under s7 and s9 of the National Land Registration Act 1977 are commonly referred as s7 and s9 Declarations.

<sup>122</sup> See s39 of the National Land Registration Act 1977.

<sup>123</sup> *Pipoi v Seravo* [2008] PGSC 7 at [53].

is made under s9 of the NLRA, a dispute is no longer of landownership but payment of compensation under s10 of the NLRA.

As stated above under s8, any person with an interest in the subject parcel of land is provided with a 3-month grace period to object after a s7 notice is published. People who claim that their land was illegally acquired or who have landownership disputes are provided with this opportunity to lodge their claims. Should it be confirmed that these disputes are indeed related to the above two issues. A declaration under s9 will not be pursued and the subject parcel of land will be referred to either the Land Titles Commission or the Local Land court.<sup>124</sup> It is evident that the main purpose for providing for this process under s7 and s8 is to ensure that all legal uncertainties are resolved before a declaration is made. This is to avoid future claims being pursued once a land is declared National land and to secure the State's title to that land. Accordingly, the Act prohibits a review or an appeal under the NLRA and once a s9 declaration is made it is deemed final.

Section 10(1), however does allow for parties who are still aggrieved with a s9 declaration to rely on s57 (enforcement of guaranteed rights and freedoms) and s155 (National Judicial System) of the Constitution to have the matter reviewed in Court. The Courts have, only in exceptional circumstances, exercised their powers under the Constitution, to review or invalidate a declaration.<sup>125</sup> In the *Independent State of PNG v Lohia Sisia*,<sup>126</sup> Bredmeyer J, states that it was Parliament's intention that s9 or s19<sup>127</sup> should be respected and given some weight as once land is declared and registered it is conclusive evidence that the State has title over it. For claimants whose grievances relate to inadequate payments, claims are converted into a claim for settlement payment under s39 of the Act, they are then assessed for admissibility before being heard by the NLC.

Section 40 provides for the vetting process which is a set criteria to determine whether a claim is admissible or not. Firstly, s40(2) provides that a claim is admissible if there is evidence that a previous claim had been made before Independence and secondly no form of payment had been made, including an ex-gratia payment by a pre-Independence

---

<sup>124</sup> Parties disputing the State's ownership over land would be referred to the Land Titles Commission to address and parties disputing land ownership by custom would be referred to the Local Land Court to determine the rightful landowners over the subject land.

<sup>125</sup> *Independent State of PNG v Lohia Sisia* [1987] PNGLR 107 at 108 per Bredmeyer J. [*Lohia case*].

<sup>126</sup> *Lohia case*, above n 136 at 108.

<sup>127</sup> Section 19 provides for effect of registration under the National Land Registration (Amendment) Act 2006.

administration to address this grievance.<sup>128</sup> If found to be otherwise, the claim is inadmissible and will not be heard before the NLC. On the other hand s40 (3) provides that if the Commission finds a special reason as to why a claim had not been made before Independence it may admit the claim.

For instance a claim could be admissible in circumstances where it had been brought to the attention of certain members of the land group that the purchase price had been unfairly distributed or these members had not been aware of the sale on the date of acquisition and only found out at a later date.<sup>129</sup> Finally, s40 (4) provides that the Commission when determining to admit a claim under s40 (2) where a previous payment had been made. It is irrelevant for the Commission to consider the type of payment made (whether in cash or paid by a commodity) or to consider whether the land was paid according to its value at the time of purchase. The screening process as set out in the Act is a thorough process provided to ensure that only genuine claims are heard by the Commission. However, Kalinoe<sup>130</sup> states that this process has not always been seriously applied by the Commission<sup>131</sup>.

Another important aspect which must be considered at any stage during the declaration or vetting process is that if it is found that there are conflicting or inconsistent claims, the NLC must under s43 refer the subject disputes to the Local Land Court to be addressed. Conflicting claims are normally claims in regard to disputes over the ownership of land.<sup>132</sup> However, s43 (1) allows for the claims to be amended to remove conflict or inconsistency where parties are able to resolve their differences.<sup>133</sup> The final stage after the vetting process is the awarding of a settlement payment under s44. The amount of settlement payments awarded for each parcel of land are as set out in schedule 2 of the Amendment Act. They are fixed rates which are calculated according to the area of land in hectares regardless of the unimproved or improved value of the land. The only significant difference is that the Act provides rates for urban areas which are different to land in rural areas. To illustrate the differences in rates between a land in town and outside of a town and how

---

<sup>128</sup> See s40 (2) (a) and (b) of the National Land Registration Act 1977.

<sup>129</sup> See Rudolph William James *Land Law and Policy in Papua New Guinea* (Papua New Guinea Law Reform Commission, Monograph No 5, 1985) at 80.

<sup>130</sup> Kalinoe, above n 6 at 11.

<sup>131</sup> At this point in time there is no evidence to confirm whether NLC failed to follow the vetting process.

<sup>132</sup> Above.

<sup>133</sup> This could happen if a number of parties have claimed ownership over a large portion of land such as a township and during the assessment stage, all parties agree that they own the land equally, However, if parties dispute ownership or if they do not own the subject land equally then the matter would be referred to the Local Land Court to confirm ownership and their interest over the subject land.



rates are calculated, shown below are the rates provided in schedule 2 for land parcels not exceeding 5 hectares in urban and rural areas.

Table 1. Schedule of fees for land parcels below 5 ha

<b>A. Land in Towns</b>	<b>K</b>
Not exceeding 1 ha	5000.00
Exceeding 1 ha but not exceeding 2 ha	9500.00
Exceeding 2 ha but not exceeding 3 ha	13,500.00
Exceeding 3 ha but not exceeding 4 ha	17,000.00
Exceeding 4 ha but not exceeding 5 ha	20,000.00

Table 2. Schedule of fees for land parcels below 5 ha

<b>B. Land Outside of Towns</b>	<b>K</b>
Not Exceeding 5 ha	2000 per ha or part of a ha

Significantly what was provided under the NLRA and is still provided for under the Amendment Act is a discretionary amount of up to a 50% increase of the total amount that can be awarded to claimants in special cases. Section 45(3) provides that the Commission can recommended a 50% increase to the Minister responsible<sup>134</sup> for determining such an increase to accept or reject wholly or in part the recommendation of the Commission.<sup>135</sup> Such circumstances that would qualify under s 45 (3) for an increase are cases where although the land declared under s9 is relatively small, the subject land had it been acquired at the date of claim would have represented a larger proportion of the total land available to the landowners then or for their future needs. Furthermore there is no appeal provided under the Act against a decision of the Commission and persons aggrieved can rely only

<sup>134</sup> The National Land Registration Act 1977 did not stipulate which Minister was responsible to make a determination to pay a 50% increase. However, before the 2006 amendments, the Minister responsible for land matters was responsible to make an assessment to pay 50% and then responsible to pay the award (Interview with Aura Leva, Registrar of the National Land Commission, Papua New Guinea [Sheila Sukwianomb, Telephone Conference, 27 April 2016]). The 2006 Amendment Act now provides under s43 (4) that the Secretary for finance is responsible to pay settlement payments upon advice of the Attorney General once certified by the Solicitor General.

<sup>135</sup> See s45 (3) and s45 (5) National Land Registration (Amendment) Act 2006. National Land Registration (Amendment) Act 2006.

on s155 of the Constitution to have the matter reviewed or apply on the ground of a failure by NLC to comply with the principles of natural justice under s34(2) of the Act.<sup>136</sup>

### *3 The current concerns regarding settlement payments*

PNG is fortunate that its land rights were respected once it was colonised. As a result, the colonial government's policies recognised these land rights and introduced a number of methods to acquire land which would ensure that landowners had enough land for future purposes and the administration would only acquire land when necessary. History has shown that because of Papua New Guineans' high regard for land under customary law, they have always been reluctant to transfer their land rights. A number of other reasons have also been provided for this resistance, including how the colonisers in the earlier days abused the processes<sup>137</sup> and the exploitation of their land.<sup>138</sup> It is the author's view however, that their main reason for resistance was the attitude of the people of PNG towards colonialism and particularly the sense that their land was being developed in a manner that they had never imagined before. It thus produced feelings of envy and bitterness towards Europeans and therefore made them scrutinize past land sales that their forefathers had participated in. Consequently, the NLC was established in 1977 to address these customary landowners' grievances from people who are former landowners of these parcels of land. Kalinoe<sup>139</sup> states that the NLC was a politically popular decision. It was introduced by the then government to show its people that it sympathized with them and the 'unjust payments' that the colonisers had paid for their land and thus that a policy was in place to ensure former owners were rightfully compensated when they gained Independence.

By 1998, it had been reported that all government towns, outstations and other establishments had been under claim under the NLRA. This would be perceived as a positive step towards the State securing its claim to title over these parcels of land. However, it was discovered from research that for some of these parcels of land that had been declared, NLC had awarded claimants settlement payments more than once.<sup>140</sup> Konos land in New Ireland Province for instance had been paid settlement payments twice: once

---

<sup>136</sup> See s46 National Land Registration (Amendment) Act 2006.

<sup>137</sup> Muroa "Customary Land Tenure in Papua New Guinea, above n 14 at at 87.

<sup>138</sup> For customary landowners who had only known land for subsistence farming, seeing Europeans clearing their land to plant crops for commercial purposes was in their eyes seen as a form of exploitation: See Susan Toft and Yaw Saffu *Attitudes Towards Land Compensation in Papua New Guinea* (Law Reform Commission of Papua New Guinea, Working Paper No. 27, 1997) at 2.

<sup>139</sup> Kalinoe, above n 6 at 15.

<sup>140</sup> At [18-19].

in 1995 (K60, 000) and once in 1998 (K60, 000).<sup>141</sup> The Era Nese land in Port Moresby which had been paid for in 1960s and 1970s had also been under claim in 2003 by another generation of claimants.<sup>142</sup> In Manus Province, in 2003 the Momote Airport was under claim even though an amount of K23, 250 had already paid in 1990.<sup>143</sup>

It is quite surprising that land that had already been declared and an awarded settlement payments was being pursued for more payments. The process has been referred to as a generational pursuit or compensation frenzy. What has been happening is that after the older generation has passed on the younger generation than lodge a further claim for settlement payments.<sup>144</sup> The Era Nese land is one clear example of that. In the 1960s and 1970s it was stated that Guba Doriga had been paid for the subject land and in 2003 a men named Loa Boko had now been pursuing for settlement payments over the same parcel of land.<sup>145</sup> Kalinoe also refers to these payments as “generational rent”.<sup>146</sup> However, in cases such as the Kono land where settlement payments were made within a span of three years and for the same amount, it seems highly questionable whether the administrative staff of NLC or the Commissioners were performing their functions diligently.

These illegal processes conducted under the NLRA continued until a significant judgment was passed by the National Court on the 23 November 2006 in *Gabi v Nate*.<sup>147</sup> The case related to about 52 proceedings which had been consolidated for judicial review over the various decisions made by NLC, chaired at that time by Nathaniel Marum. The decisions had been made between the period 1999-2000 in which various sums of settlement payments were awarded under the NLRA. The State had applied<sup>148</sup> s155 of the Constitution to have the matter judicially reviewed and in support of this had raised a number of grounds. The main grounds were that NLC had breached the principles of natural justice, it had exceeded its jurisdiction or acted ultra-vires its powers under the Act. The State also raised the issue of res judicata. Generally, the breaches were that the NLC and its Commissioner Marum had made awards in excess of the prescribed limit under the Act, and had allowed a review of previous awards and increased the awards or made new awards of previous claims that had been settled. An example was in case No 1 regarding the declaration of

---

<sup>141</sup> Above.

<sup>142</sup> At 19.

<sup>143</sup> Above.

<sup>144</sup> Above.

<sup>145</sup> Above.

<sup>146</sup> Above.

<sup>147</sup> *Gabi case*, above n 131 at 178.

<sup>148</sup> *Gabi case*, above n 131 at [1], [2], [3], [4].

Goroka Township<sup>149</sup> which comprised of several parcels of land and 23 individuals representing various groups. In 1991, NLC had made an award of K28, 796 to owners of the land but they were dissatisfied by the amount awarded and sought a review by NLC in the year 2000. This time were awarded an amount of K23 million. In the *State v Kakle*,<sup>150</sup> involving Angroam Township a declaration had been made in 1995. In 2000 NLC made an award for two groups each be paid K950, 000.

Additionally and what was also quite astonishing, in 3 other the cases, the State had entered into a Deed of Release with the claimants and had settled for an ex-gratia payment. For example in OS 664/04, *State v Joe Kagl*,<sup>151</sup> NLC had increased the award based on the protest of a claimant in 2000 to K950, 000. The award was then superseded by an ex-gratia amount of K600, 000 at which the State had entered into a Deed Settlement with the parties. *Gabi v Nate*<sup>152</sup> was a very controversial case and if these NLC decisions had not been reviewed it would have incurred payments in excess of K100, 000 million by the State. In some cases part payments had already been made for these illegal awards and what was even more astounding was in those cases brought to the State's attention the State had agreed to these illegal awards.<sup>153</sup> Fortunately, even though the State was partly to blame for these breaches, it applied to have all 52 cases reviewed. The Court quashed the awards that had been made by NLC and ordered a rehearing of all matters to be held by a new Chief Commissioner and ordered NLC to pay all parties and their lawyers' costs. The Court was highly critical of the NLC decisions. Injia DCJ further added that Commissioner Marum was fortunate that under the NLRA he was protected from being prosecuted personally or else the Court would have apportioned some of the costs to be met by Commissioner Marum.<sup>154</sup>

It is quite phenomenal that that NLC, an institution that was established to protect the States interest would incur such high costs for the State and also for a Commissioner who was appointed to perform a quasi-judicial function could make such improper and illegal decisions. In *Gabi v Nate*,<sup>155</sup> the Court tried to establish why Commissioner Marum had not strictly applied the rates provided under the NLRA and had made decisions beyond his powers. Injia DCJ reviewed looked at some of the decisions Commissioner Marum had

---

<sup>149</sup> *Gabi case*, above n at 131 at [79], [80].

<sup>150</sup> *Gabi case*, above n 131 at [117].

<sup>151</sup> *Gabi case*, above n 131 at [112], [113], [114], [115] and [116].

<sup>152</sup> *Gabi case*, above n 131 at 178.

<sup>153</sup> *Gabi case*, above n 131 at [47], [48], [49], [50], [51] and [52].

<sup>154</sup> *Gabi case*, above n 131 at [267].

<sup>155</sup> *Gabi case*, above n 131 at 178 at [25]-[26].

made. His Honour stated that that Commissioner Marum, knowing very well the limits of his powers under the NLRA, had resorted to s53 of the Constitution to justify the orders that he had made.<sup>156</sup> Section 53(2) of the Constitution, relied on by Commissioner Marum states:

53 Protection from unjust deprivation of property

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

Commissioner Marum had held that the amounts as prescribed under schedule 2 of the NLRA were unjust and applied s53 (2) as his basis for deciding the awards that he made. For instance, in *State v Lucas Rokia*,<sup>157</sup> where a new award replaced an existing award, Commissioner Marum had stated:

That this fresh order supersedes [the] previous order dated 9/9/83 and to apply Schedule 2 of the National Land Registration Act for basic settlement payment is to defeat the purpose of s53 (2) of the PANG Constitution which amongst other things provides for just compensation to be made on just terms by expropriating authority, giving full weight to the National goals and directive principles and having due regard to the National interest for protection from unjust deprivation of interest and the right to ownership of the property.

In addition, Commissioner Marum had also supported his decision relying on s45 (3) of the NLRA to support his reasoning for an increase. Section 45(3), provides for the Commission to recommend a 50% increase where it is of the opinion that the subject land even though small at the time of the declaration, had it been acquired on the date of claim. It would have represented a large proportion of the total land available for use to the owners, relative to their then and future needs. Consequently, Mr Marum had said that the subject land in *State v Lucas Rokia*<sup>158</sup> represented a proportion of the total land available for use to the owners' current and future needs and therefore stated that s45(3) of the NLRA must be invoked to increase the amount.

---

<sup>156</sup> *Gabi case*, above n 131 at 178 at [27], [28], [29].

<sup>157</sup> See *Gabi v Nate* [PGNC] 178 at [28] per DCJ Injia.

<sup>158</sup> Above.

Although many of the Respondents' lawyers had presented lengthy submissions to support the Commissioner's reasoning in *Gabi v Nate*,<sup>159</sup> Injia DCJ, in explaining his reasons why NLC had no powers to assess compensation outside provisions as provided under the Act and particularly under s45 (amount of settlement payments) and under schedule 2 (Basic amount of settlement payments), stated the following:<sup>160</sup>

Section 45(1) may as well be inconsistent with s53 (2) of the Constitution. But the issue of constitutional validity of s 45 (1) and Schedule 2 of the Act was not advanced in these proceedings. If parties, in particular the respondents wish to challenge the constitutional validity of s45 (1), that is a matter for them. Under s 45, NLC is not given any power to assess compensation which is "just, fair or reasonable" in accordance with any prescribed principles or factors. Therefore, s 53 (2) or any other provision of the Constitution cannot be read into the Act. The NLC powers are prescribed by s 45 and Schedule 2 and the NLC must accept the limits of its power.

For these reasons and other reasons set out in the judgment, all 52 NLC decisions were quashed and referred back for rehearing. Not surprisingly, the NLRA was amended on the 22 August 2006 and came into force in late 2007, mainly because of NLC actions and in particular because of Commissioner Marum's decisions on settlement payments which triggered the review of the Act. A few provisions were amended, including schedule 2.<sup>161</sup> Schedule 2 was amended to provide for significant increase in the rates of payments for each hectare or number of hectares per parcel of land. This was inevitable, considering there had never been a review since the enactment of the Act and the number of claimants who were aggrieved by the awards as shown in *Gabi v Nate*<sup>162</sup> had applied for a review of the settlement payments before the same commission, even though it was illegal to do so. There was a significant increase for all parcels of land within and outside of the town. Below in table 3 and 4 are examples of fees for land not exceeding 5 hectares for land in towns and outside of towns under the NLRA and the 2006 amended Act:

---

<sup>159</sup> *Gabi case*, above n 131 at 178.

<sup>160</sup> *Gabi case*, above n 131 at 178 at [32].

<sup>161</sup> Interview with Arua Leva, Registrar of the National Land Commission, Papua New Guinea (Sheila Sukwianomb, Telephone Conference, 27 April 2016).

<sup>162</sup> *Gabi case*, above n 131 at 178 at [1].

Table 3. National Land Registration Act 1977: Land Outside of Towns

Not exceeding 5 ha	K100.00 per ha or part of a ha
Exceeding 5 ha but not exceeding 10 ha	K500.00 plus 50.00 per ha or part of a ha in excess of 5
Exceeding 10 ha	K750.00 plus 10.00 per ha or part of a ha in excess of 10.

Table 4: National Land Registration (Amendment) Act 2006:  
Land Outside of Towns

Not exceeding 5 ha	K2000.00 per ha or part of a ha
Exceeding 5ha but not exceeding 10 ha	K10,000.00 plus 1,000.00 per ha or part of a ha in excess of 5ha
Exceeding 10 ha but not exceeding 50 ha	K15,000 plus 200.00 per ha or part of a ha in excess of 10 ha
Exceeding 50 ha	K20, 000 plus 100 per ha or part of a ha in excess of 50 ha.

The above table shows how the increases were even more than 100% and for land in towns which are not shown in the above table the increases were even higher with land parcels ranging from 1 ha to 50 ha increasing by 1000% in each category. The most significant increase however, throughout the whole schedule of fees, was for land exceeding 500 ha for land within towns. Where there was a 100,000% increase. Previously, under the NLRA schedule 2 provided for parcels exceeding 500 ha to be paid an amount of K28, 300 plus K10 per ha or part ha in excess of 500 ha. In 2006 these figures were increased to K283,

000 plus K100 per ha or part ha in excess of 500ha. In analysing these amended figures that have been amended, it is clear that the original rationale for settlement payments has been lost. In *Gabi v Nate*,<sup>163</sup> Injia DCJ<sup>164</sup> states:

Compensation under the NRLA is calculated at a fixed rate irrespective of the value of the land, improved or unimproved which, although may sound arbitrary and oppressive to traditional landowners, is the law and it has good policy reasons for its existence.

Settlement payments are meant to be paid as a standard rate irrespective of the current value of the land today, the numbers of years have passed since the land was purchased and whether there are improvements or not on the land. It is not a compensation payment which is to put someone in the position that he or she had been in before that person experienced a loss or before an event transpired. However, judging from the manner in which the fees have been increased it appears that these schedules of fees have considered the current land value of a particular land as they have been amended at very high percentages. For example, as stated above, a land in town that exceeds 500 ha in town under the NLRA, the claimant was entitled to K28, 300 plus K10 per ha or part ha in excess of 500 ha. Under the amended Act, it has now been increased to K283, 000 plus K100 per ha or part ha in excess of 500ha. That amount seems very high and raises the question as to whether the current value of land has been taken into consideration.

There could be a number of reasons why fees have increased by these amounts, such as inflation or the standard of living is higher now than in 1977. However, all parcels were not increased at the same percentages for both land in town and outside of town and therefore raising the issue whether the current land value was considered. On another note, it is apparent that regardless of the reasons for the increases, the claimants will still not be satisfied with the amounts awarded under the Act. The principal reason is that there is now a high expectation of the amount of awards claimants are entitled to since the decisions made by Commissioner Marum between 1999-2001. This is shown by *The State v Stanley Awa*,<sup>165</sup> judicially reviewed in *Gabi v Nate*.<sup>166</sup> The Minister had declared an area of land known as Amua Land as National Land on the 24 June 1991. NLC had awarded the claimant K100 according to the prescribed fees, but then revisited the matter and awarded

---

<sup>163</sup> *Gabi case*, above n 131 at 178 *Gabi v Nate* [2006] PGNC 178.

<sup>164</sup> *Gabi case*, above n 131 at [32].

<sup>165</sup> *Gabi v Nate & Awa* [2006] PGNC 178 at [111].

<sup>166</sup> *Gabi case*, above n 131 at [111].



K300, 000. The amount of K100 under the NLRA was evidently for land less than 5 ha outside of town but when Commissioner Marum had made the award he had valued it at an amount of K300, 000. Apart from relying only on s53 (2) of the Constitution, it is still unknown how Commissioner Marum had reached the figure of K300, 000. Now that the matter is to go back for rehearing<sup>167</sup> based on the decision in *Gabi v Nate*,<sup>168</sup> the claimant would be entitled to K2, 000 under the amended fees. It is argued that it is highly unlikely that the claimant would be pleased or understand the reasoning behind an increase of only K1, 900 after his expectations had been raised previously and if he is a subsistence farmer or a person educated to grade 6, he will not understand why he cannot be awarded that much.

Since 2006, very few of these 52 cases have been reheard or decisions have been made by NLC due to a number of administrative matters.<sup>169</sup> However, for the decisions that have been made there is no data available at this point in time to confirm if claimants are satisfied by the new awards or they have applied to court for another review. It is very likely that claimants, especially if the awards are low, would be dissatisfied as explained above. It is significant under the 2006 Amendment Act, the preamble now provides that one of its main functions is to give effect to s53(2) which was sighted earlier on in the chapter and states as follows:

[to] Give effect to Section 53(2) of the Constitution that just compensation must be paid by the expropriating authority, giving full weight to the National Goals and Directive Principles and taking into account the interest if the State as well as the person or persons affected.

Evidently the amended Act recognises s53 (2) of the Constitution. However, it remains as only one of the aims to be achieved under the Act and not as a provision to be relied on when the Commission is determining the award. Thus the Commission still must rely on the fees as provided under the Act. No application has been made to argue that settlement of payments as provided for under s45 and schedule 2 of fees are unconstitutional relying on s53 (3). It would be interesting to know the Court's position on these points.

---

<sup>167</sup> The matter is still pending before the Commission (Interview with Arua Leva, Registrar of the National Land Commission, Papua New Guinea (Sheila Sukwianomb, Telephone Conference, 27 April 2016).

<sup>168</sup> *Gabi case*, above n 131at 178

<sup>169</sup> Interview with Arua Leva, Registrar of the National Land Commission, Papua New Guinea (Sheila Sukwianomb, Telephone Conference, 27 April 2016).

As to why many of these decisions have not been heard or are still pending decisions, particularly from the *Gabi v Nate*<sup>170</sup> decision, the main reason is that NLC is under staffed or there are delays in appointing Commissioners because of a number of procedural formalities that have to be complied with before a Commissioner is gazetted.<sup>171</sup> Currently the main administrative problem is that the appointment of Commissioners can take almost two years. Currently there is one Chief Commissioner who was appointed in 2010 and was officially gazetted in 2013 and one Commissioner awaiting gazettal of his appointment.<sup>172</sup> Thus there are a backlog of cases to be heard.

Meanwhile whilst NLC has these administrative issues to deal with, including hearing of all pending matters, the Minister for Lands and Physical Planning has continued to publish s7 and 9 declarations. In 2015, the Minister for Lands and Physical Planning gazetted 5 parcels of s7 notices of intention to declare land National Land and 6 parcels of land National Land under s9.<sup>173</sup> Furthermore in NLC's 2015 Annual report, it has been reported that 58 land matters. Inclusive in these 58 matters were 7 parcels of land that had been those referred back to NLC from the National Court<sup>174</sup> in *Gabi v Nate*.<sup>175</sup> Accordingly from the above findings it is evident that NLC is unable to manage the settlement of grievances. Thus unless that State addresses the current issues that NLC is experiencing and judging from the delay in addressing the cases referred from *Gabi v Nate* in 2006,<sup>176</sup> the backlog in NLC will increase and it will take a number of decades before all grievances of inadequate payments in PNG are settled.

#### *IV The Future of Settlement Payments in PNG*

In 2005, the National Land Development Task Force was established to address the current land problems in PNG.<sup>177</sup> It had been identified in a Land Summit held early on in the

---

<sup>170</sup> Interview with Arua Leva, Registrar of the National Land Commission, Papua New Guinea (Sheila Sukwianomb, Telephone Conference, 27 April 2016).

<sup>171</sup> Interview with Arua Leva, Registrar of the National Land Commission, Papua New Guinea (Sheila Sukwianomb, Telephone Conference, 27 April 2016).

<sup>172</sup> Interview with Arua Leva, Registrar of the National Land Commission, Papua New Guinea (Sheila Sukwianomb, Telephone Conference, 27 April 2016).

<sup>173</sup> National Lands Commission "Information Paper on the National Lands Commission" (2015) at 6.

<sup>174</sup> National Lands Commission, above n 184 at [11-12].

<sup>175</sup> *Gabi case*, above n 131 at 178.

<sup>176</sup> *Gabi case*, above n 131 at 178.

<sup>177</sup> Ministry for Justice, Papua New Guinea "A White Paper on Law and Justice in Papua New Guinea (March, 2007) at 20.

year<sup>178</sup> that services provided for administering land in PNG were very poor, there were delays in dispute resolution processes, and there were conflicting opinions on how to register customary land in PNG.<sup>179</sup> Consequently, it had identified that all these land issues were a contributing factor as to why PNG was not developing economically.<sup>180</sup> In regards to dispute resolution the NLDT recommended that a single land court system be introduced to resolve all land disputes as in most parts of the country the matters were not being addressed and the backlogs were increasing. Accordingly this recommendation was adopted by the Ministry for Justice in a White paper in 2007, which stated that a single land court system would be established under the magisterial services.<sup>181</sup> It would be a specialist land court headed by a Deputy Chief magistrate and staffed by specialist magistrates who would deal with only land matters.<sup>182</sup> Furthermore, the Land Titles Commission (LTC) and NLC would be abolished and their jurisdictions transferred to the District Court (Land Division).<sup>183</sup>

This proposal was never implemented for unknown reasons. In 2014 because of the current state of NLC and also because it was costly to manage LTC and NLC. The Department of Justice and Attorney General (DJAG) (who manages the administrative functions of the two Commissions), proposed restructuring these two bodies.<sup>184</sup> It was proposed that NLC and LTC should be merged headed by a Chief Commissioner and all the Commissioners would have powers to address disputes involving LTC and NLC legal functions.<sup>185</sup> Currently the administrative structures for these new institutions have been drafted and are awaiting the legislative amendments to be finalised before being tabled in Parliament.<sup>186</sup>

Primarily all of these land reforms have been focused at these secondary functions under the 2006 Amendment Act, which is settling of landowners' grievances and awarding settlement payments. They are all proposals on how to improve NLC administrative

---

<sup>178</sup> The Land Summit was held in August, 2005 and was initiated by the then Minister for Land and Physical Planning. See Ministry for Justice, Papua New Guinea "A White Paper on Law and Justice in Papua New Guinea (March, 2007) at 20.

<sup>179</sup> Ministry for Justice, above n 189 at 20.

<sup>180</sup> Above.

<sup>181</sup> Norm Oliver and Jim Fingleton "Dispute Resolution: Settling Customary Land Disputes in Papua New Guinea" in Australian Agency For International Development (ed) Making Land Work Volume 11 Case Studies on Customary Land and Development in the Pacific (AusAID, Canberra, 2008) at 232.

<sup>182</sup> Ministry for Justice, above n 189 at 21.

<sup>183</sup> Ministry for Justice, above n 189 at 21.

<sup>184</sup> Oliver, above n 193 at 232.

<sup>185</sup> Interview with Arua Leva, Registrar of the National Land Commission, Papua New Guinea (Sheila Sukwianomb, Telephone Conference, 27 April 2016).

<sup>186</sup> Above.

functions and reduce backlogs. There has been no discussion on considering whether the State should continue to pay settlement payments or not since this was a recommendation made by the post-Independence Government and there are political reasons behind this decision. Even the review of the NLRA in 2006 was primarily for the purpose to increase the schedule of fees. It seems no Government wants to discuss the issue of continuing to pay settlement payments. The main reason why, as Kalinoe states,<sup>187</sup> is that it “is still a popular political decision” and a decision that has pitted “indigenous Papua New Guineans against their State.” The State is consequently paying for land that had been acquired by the colonial administration but which today provides for the infrastructure and services that 8 million Papua New Guineans benefit from.

Studying the provisions under the Act closely, the primary function of declaring land National Land finalises at the point when the land is declared National Land under s9 and the subject land is then registered as National Land in the National Land Register. If there are any grievances before the declaration or after the declaration and they involve the unlawful acquisition of land they are then referred to the Local Land Court or LTC to deal with. Administratively, the Department of Lands and Physical Planning (DLPP) performs the declaration of land functions and the Registrar of National Land who is the Registrar of NLC registers the declarations. Hence the only other function that NLC performs under the Amendment Act, excluding the vetting process, is the award of settlement payments. Under these circumstances repealing of the Amendment Act could easily abolish NLC, as the functions of declaration and registration of National Land could be performed by DLPP. However there remains the issue of the expectations of the landowners who since Independence have been provided with this avenue to collect a second payment for the acquisition of their land. Is it just that they are paid these additional settlement payments?

Settlement payments, as I have already discussed, are a fixed set of fees paid according to s45 (1) and schedule 2 of the Amended Act. They are fees to be paid regardless of the value of the land. They are not compensation payments. The definition of compensation as defined by Professor Richard Jackson on compensation in PNG defines compensation as:<sup>188</sup>

---

<sup>187</sup> Kalinoe, above n 6 at 15.

<sup>188</sup> Richard Jackson *Cheques and Balances: Compensation and Mining in Papua New Guinea* in Susan Toft *Compensation For Resource Development in Papua New Guinea* (Law Reform Commission (PNG) Monograph No. 6, Boroko, 1997) as cited in Lawrence Kalinoe “Compensating Alienated Customary Landowners in Papua New Guinea: Rethinking the rationale and the Regime” (2005) 3 MLJ at 5.

Compensation in its original and continuing underlying sense means to bring matters back into a (previously assumed) balance! In the mechanical world it meant, among other things, the addition of weights on either side of a fulcrum or to the motor device of a clock (the pendulum) so as to achieve a new or restored balance.

Undoubtedly settlement payments are not meant to pay customary landowners for purchasing their land according to the amount it was valued then. It has been said that it is difficult to determine the price of the value of a parcel of land in the 1900s using the current valuation systems, as land has to be valued according to the systems that were in use at that time.<sup>189</sup> CILM, in its report, had stated that customary landowners were unfairly or unjustly paid with the commodities or low amounts of money and that they were not paid for the real value of their land.<sup>190</sup> However, this is unjustifiable considering that it is difficult to use the valuation system of today to value land purchased as early as the 1900s.

It is argued that the State should stop paying settlement payments as it should not be held responsible for the past actions of the colonisers and furthermore this is land that has been developed and which claimants themselves are benefiting from. However, as Sack<sup>191</sup> states, 3% of all alienated land is among the most fertile land in PNG. Thus an argument in favour of the landowners is that their prime land was taken away from them and therefore they are entitled to just compensation. In addition some landowners may argue that they are not directly benefiting from all developments on the land that has been acquired. An example might be a parcel of land that now has a supermarket on it. They are not directly benefitting from the profits of these shops nor has rent been paid to them since this land now belongs to the State.

Accordingly, it is concluded that there are many reasons for and against paying settlement payments but the main argument against paying settlement payments is that it will never be just in the eyes of customary landowners that their land was taken away from them. They have too many historical grievances over the alienation of their land, alienation considering how important land is to them. These payments will never be just and thus expect to be compensated for the past actions of the colonial administration. Unless the State improves the administration of NLC and reduces its backlog, in another 20 years, the 2006 Amendment Act will be due for review and the Schedule of fees will increase again.

---

<sup>189</sup>Kalinoe, above n 6 at 12.

<sup>190</sup>Kalinoe, above n 6 at 12.

<sup>191</sup>Sack “The Triumph of Colonialism,” above n 47 at 205.

Paying customary landowners settlement payments was a political decision prior to Independence and one that has created an expectation by the customary landowners that they deserve to be paid. Unless the government takes a bold step to stop this popular political decision, the payments of settlement payments will simply continue until all subject land acquired prior to Independence claims are settled. This could take many decades. Furthermore it is a continuous drain on government's resources.

The-post colonial government had good intentions when they proposed these payments as there was no other avenue available to facilitate payments for landowners aggrieved by the acquisition of their land as the subject parcels had already been purchased. However, 39 years on it is clearly evident that this process is ineffective. It has instead caused more problems for the State. This paper has examined a number of reasons that could justify the State discontinuing these payments. Namely, NLC is ineffective and there are a number of backlogs pending. The proposed reform to improve the administrative functions of NLC are being continuously delayed. Land that the landowners claim settlement payments over are the parcels that provide for the infrastructure and services that they also benefit from. Finally settlement payments are not compensation payments and therefore landowners can never be paid the equivalent value of the land that they lost. It is argued that as it is impossible to ever resolve landowners' grievances over the colonial purchases of their land. Based on the above reasons the State could justify ceasing settlement payments. However, until the State decides whether it should continue to pay settlement payments the problems it encounters with landowners will persist. It is therefore timely that this issue be addressed.

## *V Conclusion*

At the 2005 Land Summit, it was recognised that settling land disputes is a contributing factor holding up economic development in PNG and consequently the government has introduced a number of reforms to effectively manage this problem. However, since the enactment of the National Land Registration Act 1977, the State has never considered whether it should continue to pay settlement payments and therefore with all the problems it has encountered whilst managing the National Land Commission. It is my belief that landowners will never be satisfied with these settlement payments facilitated under the National Land Registration Act 1977. There are a number of justifiable reasons as to why the State should consider discontinuing these payments. Furthermore, it is argued that because of all the current problems the State is experiencing with facilitating settlement payments, this is the appropriate time to address the issue. If however, the State continues to ignore this problem, in a few years' time PNG could see another generation of

landowners pursuing even higher amounts of settlement payments than the current landowners.

## *BIBLIOGRAPHY*

### *A Cases*

*Administration of the Territory of Papua and New Guinea v Doriga* [1973] ALJR 621.

*Agevu v Government of PNG* [1977] PNGLR 99.

*Gabi v Nate* [2006] PGNC 178.

*Independent State of PNG v Lohia Sisia* [1987] PNGLR 107.

*Pipoi v Seravo* [2008] PGSC 7.

### *B Legislation*

#### *1 Australia*

*Lands Acquisition Act 1989.*

#### *2 New Zealand*

*Public Works Act 1981*

#### *3 Papua New Guinea*

*Land Act 1996*

*Land Ordinance 1962*

*Land Group Incorporation Act Chapter 147*

*Land Group Incorporation (Amendment) Act 2009.*

*National Land Registration 1977*

*National Land Registration (Amendment) Act 2006.*



*C Books and Chapters in Books*

H A Amankwah “Outline of Papua New Guinea: Land Tenure Policy” in H A Amankwah J T Mugambwa and G Muroa (ed) *Land Law in Papua New Guinea* (Law Book Co, Sydney, 2009) at 22.

H A Amankwah J T Mugambwa and G Muroa *Land Law in Papua New Guinea* (Law Book Co, Sydney, 2009).

T Bredmeyer “The Kenyan Model” in Peter G Sack (ed) *Problem of Choice: Land in Papua New Guinea’s Future* (Australian National University Press, Canberra, 1974).

B G Burton Bradely “The Psychological Dimension” in Peter G Sack (ed) *Problem of Choice: Land in Papua New Guinea’s Future* (Australian National University Press, Canberra, 1974).

P Chatterton “The Historical Dimension” in Peter G Sack (ed) *Problem of Choice: Land in Papua New Guinea’s Future* (Australian National University Press, Canberra, 1974).

E J Clayton and M C Evans “The Limits of Choice” in Peter G Sack (ed) *Problem of Choice: Land in Papua New Guinea’s Future* (Australian National University Press, Canberra, 1974).

R G Crocombe “The Niue Alternative” in Peter G Sack (ed) *Problem of Choice: Land in Papua New Guinea’s Future* (Australian National University Press, Canberra, 1974).

J Dove T Miriung and M Togolo “Mining Bitterness” in Peter G Sack (ed) *Problem of Choice: Land in Papua New Guinea’s Future* (Australian National University Press, Canberra, 1974).

D M Fenbury “The Cultural Squeeze” in Peter G Sack (ed) *Problem of Choice: Land in Papua New Guinea’s Future* (Australian National University Press, Canberra, 1974).

R J Gunton “A Bankers Gamble” in Peter G Sack (ed) *Problem of Choice: Land in Papua New Guinea’s Future* (Australian National University Press, Canberra, 1974).

T M Kambipi “Cash-Cropping and Population Pressure” in Peter G Sack (ed) *Problem of Choice: Land in Papua New Guinea’s Future* (Australian National University Press, Canberra, 1974).

W Kaputin “Indefeasibility and Justice” in Peter G Sack (ed) *Problem of Choice: Land in Papua New Guinea’s Future* (Australian National University Press, Canberra, 1974)

C W Kimmorley “Destruction of Adaptation” in Peter G Sack (ed) *Problem of Choice: Land in Papua New Guinea’s Future* (Australian National University Press, Canberra, 1974).

C J Lynch “Customising the Law in Peter G Sack (ed) *Problem of Choice: Land in Papua New Guinea’s Future* (Australian National University Press, Canberra, 1974).

Michael Manning and Philip Hughes “Acquiring Land For Public Purposes in Papua New Guinea And Vanuatu” in *Australian Agency For International Development (ed) Making Land Work: Volume Two, Case Studies on Customary Land and Development in the Pacific* (AusAID, Canberra, 2008).

J Momis “Taming the Dragon” in Peter G Sack (ed) *Problem of Choice: Land in Papua New Guinea’s Future* (Australian National University Press, Canberra, 1974).

G Muroa “Customary Land Tenure in Papua New Guinea” in H A Amankwah J T Mugambwa and G Muroa (ed) *Land Law in Papua New Guinea* (Law Book Co, Sydney, 2009).

J Nilles “Law Enforcement and Law Reforms” in Peter G Sack (ed) *Problem of Choice: Land in Papua New Guinea’s Future* (Australian National University Press, Canberra, 1974).

Norm Oliver and Jim Fingleton “Dispute Resolution: Settling Customary Land Disputes in Papua New Guinea” in Australian Agency for International Development (ed) *Making Land Work: Volume Two, Case Studies on Customary Land and Development in the Pacific* (Aus AID, Canberra, 2008)

N E Olewale “The Price of Progress” in Peter G Sack (ed) *Problem of Choice: Land in Papua New Guinea’s Future* (Australian National University Press, Canberra, 1974)

M B Orken “They Fight for Fun” in Peter G Sack (ed) *Problem of Choice: Land in Papua New Guinea’s Future* (Australian National University Press, Canberra, 1974)

Peter Sack and Bridget Sack *The Land Law of German New Guinea* (Australian National University, Canberra, 1975).

P G Sack “Alienation and Identity” in *Problem of Choice: Land in Papua New Guinea’s Future* (Australian National University Press, Canberra, 1974).

Peter G Sack “Problem of Choice” in *Problem of Choice: Land in Papua New Guinea’s Future* (Australian National University Press, Canberra, 1974).

P G Sack “The Triumph of Colonialism” in *Problem of Choice: Land in Papua New Guinea’s Future* (Australian National University Press, Canberra, 1974).

P G Sack *Land Between Two Laws Early European Land Acquisitions in New Guinea* (Australian National University Press, Canberra, 1973).

W A Standish “Politics and Societal Trauma” in Peter G Sack (ed) *Problem of Choice: Land in Papua New Guinea’s Future* (Australian National University Press, Canberra, 1974).

J A Umeh *Compulsory Acquisition of Land and Compensation in Nigeria* (Sweet & Maxwell, London, 1973) at 42.

D J Whalan “Technical Law and the outside expert” in Peter G Sack (ed) *Problem of Choice: Land in Papua New Guinea’s Future* (Australian National University Press, Canberra, 1974).

#### *D Journal Articles*

Lawrence Kalinoe “Compensating Alienated Customary Landowners in Papua New Guinea: Rethinking the Rationale and the Regime” (2005) 63 MLJ 3

John Mugambwa “A Comparative Analysis of Land Tenure in Uganda and Papua New Guinea” (2007) 11(1) *Journal of South Pacific Law* 39.

John Mugambwa “Land Disputes in PNG: A Colonial Legacy and Post Independence Solutions (1987) 15 MLJ 94.

Michael John Trebilcock “Customary Land Law Reform in Papua New Guinea: Law Economics and Property Rights in a Traditional Culture” (1983) 9 (1) *The Adelaide Law Review* 191.

### *E Papers and Reports*

Colin Filer *Compensation, Rent and Power in Susan Toft Compensation for Resource Development in Papua New Guinea* (Law Reform Commission (PNG), Monograph No. 6, 1997).

John Numapo *Commission of Inquiry into Special Agricultural and Business Lease (SABL) Final Report* (Commission of Inquiry, June 2013).

Ministry for Justice, Papua New Guinea *A White Paper on Law and Justice in Papua New Guinea* (Ministry for Justice, March 2007).

National Lands Commission *Information Paper on the National Lands Commission* (National Lands Commission, 2015).

Susan Toft and Yaw Saffu *Attitudes Towards Land Compensation in Papua New Guinea* (Law Reform Commission of Papua New Guinea, Working Paper No. 27, 1997).

Rudolph William James *Land Law and Policy in Papua New Guinea* (Papua New Guinea Law Reform Commission, Monograph No 5, 1985).

Charles Yala and Ken Lyons *The National Land Research Framework for Papua New Guinea National Land Development Program* (National Research Institute, Discussion Paper No 122, February 2012).

### *F Thesis*

George Mark Super Muroa “Legal Aspects of Compulsory Acquisition of Land in Papua New Guinea” (LL. M. Thesis, University of Tasmania, 1987).

*G Internet material*

Gudmundur Fridriksson “Traditional Money of PNG” (Gudmundur Fridriksson Blog, December 30, 2015) <[gudmundurfridriksson.wordpress.com](http://gudmundurfridriksson.wordpress.com).>

Jim Fingleton “Pacific Land Tenures Reform: New Ideas for Reform” (July 2008) FAO Legal Papers Online No 73 <[www.fao.org](http://www.fao.org)>.