

RECONCILING CUSTOMARY
OWNERSHIP AND DEVELOPMENT

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Incorporated land groups in Papua New Guinea

A snapshot

Incorporated land groups in Papua New Guinea

In Papua New Guinea, legislation is in place that allows customary land groups to use their land in the formal economy. The main vehicle for this is a form of 'incorporation'. Incorporation is a legal term—in this case, for when a customary landowning group forms a body that has legal status under the formal legal system. This body, or corporation, can sue and be sued, hold assets in its name, hire agents, sign contracts and make rules governing its internal affairs. Oil palm growers in West New Britain in Papua New Guinea have had great success in using this type of legal vehicle for their own economic benefit. But there have also been problems, particularly when incorporated land groups are used as vehicles for receiving royalty and compensation payments from mining and forestry companies.

The important lessons from Papua New Guinea's experience are that incorporated land groups:

- » can be an effective way for customary groups to engage in the formal economy and legal system
- » can help to unlock the productive potential of land but need to be supported by mechanisms to help land groups identify and protect land in order to avoid conflict and disputes
- » are a convenient mechanism for receiving royalty and compensation payments but they need to have access to reliable and impartial advice to ensure that benefits are directed towards the economic and social development of the group
- » provide the flexibility and authority for community members to choose how to distribute income
- » require the support and regulation of government to ensure that they are effectively formed and managed
- » require mechanisms to educate and inform people on their functions and capabilities.

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Introduction

People have occupied the land of Papua New Guinea for tens of thousands of years. Over that time they have organised themselves into groups who manage land and govern themselves by what is known as ‘custom’ or ‘traditional practices’. The principles arising from custom are not written down but maintained through memory and by retelling happenings. Because there are no written records, the rules of how land is allocated, shared and used are passed from generation to generation by retelling. Similarly, histories are maintained by repetitive public orations of the origins of the group and marriages, births, deaths and the occupation of land. Most peoples in the Pacific region and the lands they hold continue to be governed by custom.

The modern world, however, is encroaching on the isolated peoples of the region, and customary groups are increasingly finding the need to interact with modern formal economies and legal systems. This meeting of traditional and modern worlds often comes about because of the need for land for some type of economic or social development—a school, health clinic, hotel or mine, or agriculture or forestry. In most cases customary landowners like to benefit from such developments, but they also like to benefit as a group, family, clan or tribe. At the same time they like to protect and preserve their customary interests and rights.

These wishes raise many issues and questions. How does a group that lives by custom negotiate and forge agreements with other parties such as government agencies or companies that operate in a formal economy and formal legal system? How are the rights of the customary group protected when it enters into such agreements? And, how can the rights of the other party to the agreement be protected?

Different countries have sought different ways to answer these questions. One of the most common ways is ‘incorporation’ of the customary landowner group so that it is formally recognised as a legal body by the legal system. The incorporated land group becomes the representative of the tribe in the formal legal system and is able to enter into agreements and make decisions on behalf of the customary group.

As a legal vehicle, an incorporated land group can serve the customary group in a number of ways:

- » protect the group’s rights and interests
- » explore opportunities for developing land or other assets that belong to the group
- » negotiate on behalf of the customary group in business, development or legal matters
- » assist the group in managing the use of land
- » receive payments such as rents and royalties on behalf of the group
- » distribute and/or invest rents, royalties or other income on behalf of the group
- » raise finance so that the customary group can invest in its own land.

Incorporation raises many questions for customary groups, who have their own decision-making systems and traditions. Can these be preserved within a legal creation like an incorporated land group? Who represents or speaks on behalf of the group? Who makes the decisions in the incorporated land group and what is the process by which they are made? How are the benefits of a tourism development or a mine, for example, distributed fairly to all members of the group?

Papua New Guinea has laws under which customary groups can be incorporated so that they can use their land in the formal economy while protecting their customary interests. But its experience shows that, even if good laws can deal with the complexities of customary landownership and land tenure, problems can still arise.

Incorporation in Papua New Guinea

The move to create corporations from customary landowning groups was begun to give Papua New Guineans business opportunities and involve them in the economic life of their country. The Land Groups Incorporation Act grew from the 1973 Commission of Inquiry into Land Matters (CILM) and the Plantations Redistribution Scheme. The Plantation Redistribution Scheme returned the land to customary owners that had been taken from them—alienated from them—during colonial times for use as plantations.

The Commission of Inquiry believed a system that enabled the legal recognition of customary land tenure must be built on traditional custom. It recommended a law be passed that would allow customary groups to register as a legal body if they wished. Both the Business Groups Incorporation Act and the Land Groups Incorporation Act were passed in 1974. However, another piece of legislation that should have accompanied these Acts was not presented to Parliament. This legislation would have allowed customary groups to register their land.

The process for incorporating customary groups, as described by Fingleton (2007, pp. 27–8), begins with preparing the group's constitution, which must set out:

- » the name of the group
- » the qualifications for (and any disqualifications from) membership of the group
- » the title, composition and manner of appointment of the committee or other controlling body of the group
- » the way in which the group acts and the way its actions are recorded
- » the name of the custom under which the group acts
- » the details of the group's dispute settlement authority
- » any limitations or conditions on the powers given to the group under the Act
- » any rules applicable to how the group's affairs are conducted.

A group submits its constitution to the Registrar of Incorporated Land, who is supposed to publicise the application and check the group's suitability for incorporation. After any comments or objections received have been considered, the registrar can issue a certificate of recognition. This means the group is legally incorporated, gaining legal status as a corporation with perpetual succession. Perpetual succession means that the corporate body continues to exist after the death of any of its members and the sale of its assets. Once legally incorporated the group can sue and be sued, enter into contracts and do other things a corporation can do.

The main immediate application of the Land Groups Incorporation Act was to allow customary groups to hold title to and manage land that had been alienated during colonial times and then returned to them under the Plantation Redistribution Scheme. However, this title cannot be used as security for commercial borrowing. If the incorporated land group wishes to create an asset that can be used as collateral to raise money from commercial financial institutions to invest in the land, it must follow the procedures known as 'lease and lease back', whereby the group gives the land to the state (alienation) and then leases it back from the state. The lease becomes a tradeable asset that can be used by the group or sold to any other entity, and is thus valuable collateral. Having title to the land, the incorporated land group can also issue leases to other groups or individuals to use the land. If commercial financial institutions deem these leases to be secure, they can be used as collateral.

Incorporated land groups and the forestry sector

The report of the Commission of Inquiry into Land Matters stressed that incorporation should be carried out only when there was a real need for it and when it was genuinely desired by the customary group concerned. For some time, virtually all of the land groups incorporated were those that had alienated plantation land returned to them. But when a Forestry Act was prepared to allow for the logging of forests on customary land, the existing Land Groups Incorporation Act was seen by the government as an ideal vehicle through which timber companies could deal with landowners in areas set aside for logging. Under the Forestry Act, the trees on the land are purchased from the owners of the land; the land does not change hands. Because land is only indirectly involved, not having title to land—or the legislation to enable them to gain title—is not a problem.

The Forestry Act 1991 requires landowning groups to be incorporated under the Land Groups Incorporation Act in areas where logging companies have gained the rights to log the forests. A Forest Management Agreement gives ownership of the trees, but not the land, to the National Forest Service, which is responsible for negotiating with the logging companies. Kalinoe (2003) describes this as 'the backdoor' method of gaining access to the land on which forests grow. The National Forest Service is responsible for paying royalties and compensation to the incorporated land groups. The land group leaders are then responsible for distributing payments to group members.

Experience shows that once the representatives of the incorporated land group have signed the Forest Management Agreement, the National Forest Service has very little more to do with the incorporated land groups. No assistance is provided to the groups to learn how to involve themselves in business opportunities offered by the timber industry and the Forestry Act prevents landowners from negotiating directly with logging companies. The National Forest Service says it lacks the funds to help land groups with their financial management and business opportunities. Most logging companies have not become involved in the social and economic welfare of the people on whose land they are cutting down trees.

In 2001 a World Bank review of 32 proposed logging projects found that over 90 per cent of landowners were not aware of the implications of belonging to an incorporated land group. Even fewer were aware of the possible economic opportunities provided by their incorporation into a land group or the responsibilities of the group's leaders.

Incorporated land groups and the petroleum industry

GENERAL ISSUES

When petroleum exploration companies enter customary land they must compensate customary landowners for any damage to the land. If an exploitable resource such as oil or gold is discovered, landowners should benefit from possibly large amounts of money paid as royalties or rents, negotiated by the government. Distributing compensation and royalty payments to landowners creates a problem for the resource companies and the government because they need to know whose land is involved and who the landowners are. Knowing who the real owners are is important because many people claim they qualify as a landowner when resource rents, royalties and compensation are to be paid.

Under mineral exploration and development legislation, it is the government's primary responsibility to identify landowners, carry out the process of incorporating land groups under the Land Groups Incorporation Act and mediate between the resource developer and the land groups. But government departments have become increasingly incapable of operating effectively in rural and remote areas because of a lack of funding and staff training. As a result these tasks have been passed on to the resource companies, who have taken on the role reluctantly so that they can expedite their projects. This has led to landowners thinking it is the responsibility of the resource companies, not the government, to provide them with health, education and other services normally provided by government (Power 2000a, pp. 86–7).

An account of how the incorporation process worked on the Kutubu petroleum development licence areas illustrates some features of land group incorporation in Papua New Guinea.

THE CASE OF THE KUTUBU GAS AND OIL FIELDS

The US oil and gas exploration company Chevron developed the Kutubu gas and oil fields in the late 1980s and early 1990s in the Southern Highlands and Gulf provinces. When developing the project it needed to identify landowners to arrange for compensation and royalty payments. Chevron assumed the responsibility and land groups were incorporated under the Land Groups Incorporation Act to 'give powers to landowners to manage their affairs in a businesslike way' (Power 2000b, p. 29). Chevron recognised that 'the constitutions of incorporated land groups guarantee that decisions regarding clan resources are made by the correct authorities in the clan' (Power 2000b, p. 29). So it developed a guide to land group incorporation and a training manual for fieldworkers and villagers, which were used by the field officers employed in the Kutubu project.

Land groups were identified by constructing detailed genealogies. From these a census of living members was extracted for each clan, whether they were resident in the village or elsewhere. Chevron engaged former government officers (*kiaps*), both expatriate and national, to undertake this work. For Petroleum Development Licence 2, census data for each of the 84 villages were entered, clan by clan, in the Village Book used by the former colonial government for village censuses. Village Books enable individuals to be recorded as members of nuclear families, extended families and landholding groups.

Two cultural and language groups, Fasu and Foi, are affected by the Kutubu oilfield. The Fasu occupies 92 per cent of the land under development and that land contains all of the oil. The Foi owns the balance, which has no oil. Fasu leaders chose to share royalty and equity benefits equally across the various Fasu incorporated land groups in the Kutubu oilfield, regardless of their population size and land area. This remarkable decision was taken after exhaustive discussions in the longhouses led by the senior Fasu landowner leader assisted by an expatriate lawyer, who was the manager of the landowner company. Unfortunately, the negotiations on sharing pipeline benefits among Foi groups were not as successful.

From Chevron's point of view the system worked well. In the Kutubu oilfield, 2788 payments were made between 1989 and 1995 to incorporated land groups to compensate for the impact on their land of petroleum activities, including road and pipeline construction. Only 90 transactions were held up temporarily because of land disputes between group members. These disputes were resolved using the Land Disputes Settlement Act (Power & Hagen 1996).

The model constitution for incorporated land groups was expanded to include clauses to address management. This was done to give greater protection to members of customary groups by providing a common law remedy for theft, which was not automatically available under the Land Groups Incorporation Act. In practice, because of their lack of access to police services and courts, land group members were not able to use these clauses, though many later had the need.

At Kutubu the customary landowners did not have a genuine desire to be incorporated. They were incorporated because the Kutubu gas and oil project required customary groups and land to be identified so that compensation and royalties could be paid. The landowners had little opportunity to develop the skills needed to manage an incorporated land group. There was almost no government support in the area, which prior to the gas and oil discovery had been isolated, poor, undeveloped and serviced mainly by Christian missions. And there are no intermediary organisations in Papua New Guinea like the Central Land Council in Australia to provide the support indigenous people need to form and manage themselves as a corporate body (see Case Study 6, 'The role of the Central Land Council in Aboriginal land dealings').

For the Fasu and Foi, the incorporation of their land groups was only about collecting revenues from the oil and gas project—not about, for example, working to improve other development or income-generating opportunities for the group. Weiner (2007, pp. 120–1) argues:

Having worked with the Foi, both before and since the advent of the oil project, there seems no doubt in either my mind or theirs: the incorporated land group is perceived solely as a petroleum benefit-receiving body, and all of the uses to which it has been put by the Foi (and other people within the petroleum project area) have been exclusively related to this function.

Inevitably, because the incorporated land groups are used as vehicles for only receiving income rather than generating income and social development, issues relating to 'rent seeking' and conflict have emerged. Rent seeking is a term used by economists to describe the behaviour of a group, individual or organisation who seeks to make money by manipulating the economic and/or legal environment, often at the expense of other people who also have entitlements, rather than make a profit through trade and production of wealth.

In the mid-to-late 1990s the Foi began exploring ways to gain a greater share of the compensation revenues and they applied to incorporate more land groups in an attempt to make their numbers equal to the number of Fasu land groups. Even the Fasu incorporated land groups began to break up. In 1998 alone, 13 new groups were formed, all of them subgroups of already incorporated groups (Weiner 2000). Many of the new incorporations were not investigated by the overworked and under-resourced Registrar of Incorporated Land but instead were 'rubber-stamped'. The number of Fasu incorporated groups has increased from 59 to about 83.

Another important reason for forming subgroups was to bypass instances of poor management of the original incorporated land group, and the limited opportunity for incorporated land group members to go to the police or the courts in the event of dishonest land group management. Government services were very weak and the foreign joint venture companies at Kutubu were extremely reluctant to get involved in local and regional politics, even arguing that legislation in the United States of America prevented them from doing so.

In the absence of extensive training, uneducated and commonly illiterate members of the incorporated land groups could not control their group managers, let alone their landowner company managers. Dishonest and criminal actions of some landowner company leaders went unhindered, millions of kina were lost and opportunities to begin legitimate businesses were squandered. Frustrated members of incorporated land groups tried to bring control of their groups closer to home by forming their own incorporated land groups.

Positive outcomes in the oil palm industry

Despite the problems experienced in the petroleum industry, customary landowners have used the Land Groups Incorporation Act successfully for their benefit in the oil palm industry. In West New Britain a number of adjacent landowning groups were incorporated to put to economic use large parcels of land that would otherwise have been unused or the subject of ownership disputes. Within this process, people began to benefit from returns generated by New Britain Oil Palm Limited, which were used to fund community development. They also continued to work their own oil palm blocks and to earn income from other agricultural activities. Importantly, they earn their income by working their land rather than, as noted in the case at Kutubu, simply collecting rent from companies occupying their land.

This case demonstrates that, when exposed to genuine business opportunities and assisted by capable business and legal advice (supplied in this case by New Britain Oil Palm Limited), some landowners respond constructively and resolve their differences for a common economic benefit. Several factors stand out as contributing to success. The leaders of landowning groups:

- » took strong leadership roles
- » applied customary principles of land management
- » looked after other groups with lesser economic rights and interests
- » exercised their own customary powers (with no assistance from the government) to exclude groups that had no rights in the land concerned.

In one case, after New Britain Oil Palm Limited evaluated the land as suitable for oil palm development, it reactivated a disused landowner company that had been established when two coconut plantations were returned to the former landowners. Customary land that had been logged and was located between the plantations was included to form a single block of land suited to oil palm development.

Five years of protracted dealing with the Lands Department, and extensive negotiation and bargaining among the 31 local customary groups involved, resulted in the incorporation of six land groups. Each customary landowning group identified a representative member to make up the management committee of the reactivated company. The incorporated land groups became shareholders in the company.

West New Britain has other examples of how the Land Groups Incorporation Act was used to allow customary groups to bring land into economic production. In one example, an incorporated land group was formed from nine clans that held an agricultural lease over a former plantation, which was then subleased to New Britain Oil Palm Limited. Another block, which had been alienated under the land tenure conversion legislation in the 1970s to pursue various development options that had failed, was also leased to the company. The income from this land is being used for community development by seven participating customary groups. In another example, four customary groups incorporated and leased back their land to themselves under the Land Act. All income from this project goes to community development, which includes an annual budget of K60 000 to pay school and university fees for all member children.

In these examples, the landowners have had one main aim: to convince New Britain Oil Palm Limited that they would be reliable business partners. Landowners employed custom to deal with group membership and land rights and learned the fundamentals of business management and the need to bargain and compromise among themselves to meet this goal. The outcome is that New Britain Oil Palm Limited is investing tens of million of kina to develop the land, including roads, buildings, houses and vehicles. Tax credits are received for the public parts of this infrastructure expenditure.

Land administration and policy reform

The national government has never made available the resources needed to properly implement the Land Groups Incorporation Act. The Lands Department assigned the task to the Registrar of Titles, who even now has only one assistant and does not have a computer. It was assumed that provincial departments would cooperate but no funding was made available to them to perform their statutory responsibilities to ensure incorporated groups are authentic and had a meaningful purpose.

In 2006 the government began extensively reforming land policy, which has included a review of the Land Groups Incorporation Act. This is the first time land laws have been reviewed since the Department of Petroleum and Energy review in 1998–99. The current initiative is very significant as it is well resourced and well supported at the community, bureaucratic and political levels.

While the Land Groups Incorporation Act may be improved by amendments, as the petroleum and energy review found, problems extend beyond the law. They also relate to the inability of customary groups to obtain group title in customary land and the lack of support available to incorporated land groups and members of these groups from government or elsewhere. Importantly, the current process of reform has given priority to improving land administration.

Lessons

ESTABLISH PROCESSES AND SUPPORT FOR GROUP REPRESENTATION OF CUSTOMARY LANDOWNERS

LESSON 1

The incorporation of landowning groups is an important tool available to customary groups to enable them to use their land in the formal economy while retaining their group ownership and identity.

LESSON 2

Legislation and procedures that allow a customary group to identify its land and hold group title in the land are an important way to support land group incorporation and to minimise fragmentation of landowning groups.

The incorporation of land groups enables customary landowning communities to participate in the formal economy at the group level. This is important in many Pacific island countries, as customary land is mostly owned by groups rather than individuals.

Processes to incorporate a landowning group need to be combined with processes for the group to clearly identify and protect its assets (land). This will prevent the fragmentation of landowning groups and the incorporation of new smaller groups designed only to capture valuable land for the benefit of their fewer members.

PROMOTE THE CONTRIBUTION INCORPORATIONS CAN MAKE TO LAND DEVELOPMENT

LESSON 3

Incorporated land groups can be an effective vehicle for unlocking the productive potential of customary land.

The incorporation of land groups can enable the development of substantial agricultural operations, such as the oil palm plantations in West New Britain. Landowners can use incorporation to extract substantial benefits in terms of income, employment, and social and infrastructure services from land.

ENCOURAGE SOCIAL AND ECONOMIC ACTIVITIES AMONG MEMBERS OF INCORPORATED GROUPS

LESSON 4

Incorporated land groups can be an effective way for customary groups to work with industry and resource companies whose activities require royalties and compensation to be paid to the landowners.

LESSON 5

When incorporated land groups are set up only to receive compensation and royalty payments the potential for group disintegration and conflict is acute. Incorporated land groups in this situation may be able to avoid these problems if they have access to advice on corporate governance and on ways members and royalty payments can be used in social and economic activities that benefit the group. This advice could be provided by a well-resourced government agency or an intermediary institution (like the Central Land Council in Australia).

In the forestry and mining sectors, landowners affected by the activities of those sectors are entitled to compensation and royalty payments. These payments can be facilitated through incorporation of the landowning groups. However, if groups are incorporated only for the purpose of receiving payments they face a strong incentive to engage in non-productive rent-seeking behaviour, as demonstrated at Kutubu. Such behaviour may be avoided if the members of the incorporated group can engage in productive wealth-creating activity or social development, as in West New Britain.

ACKNOWLEDGE THE FLEXIBILITY WITHIN INCORPORATED GROUPS FOR DISTRIBUTING INCOME

LESSON 6

An incorporated land group provides flexibility for the customary landowners to choose how to use or distribute the group's income.

A benefit of incorporated land groups is that the responsibility of how to use or distribute their income is in the hands of the customary landowners through the incorporated groups. How they deal with the proceeds is subject to the constitutions of the incorporated groups, but the mechanisms and decision-making processes are able to reflect traditional practices.

PROMOTE GOOD CORPORATE GOVERNANCE THROUGH INFORMATION, EDUCATION AND LEGAL SUPPORT

LESSON

7

For incorporated land groups to be effective they require the support of an accessible legal system.

LESSON

8

The effectiveness of incorporated land groups can be improved if members are able to access information and education about their roles and responsibilities as members of a corporate body.

There are instances of poor governance in the management of incorporated land groups. This may be due to dishonest practices of management or to poor education and information. Where there are illegitimate practices, people are often unable to get legal help, especially in remote areas. Illiteracy and low education levels also mean that group members often are poorly informed of the functions and activities of the incorporated land groups. Moreover, they are commonly isolated or ignorant about their rights and obligations under the law.

ENSURE THERE IS EFFECTIVE GOVERNMENT REGULATION AND SUPPORT

LESSON

9

The state has a key role in ensuring that sufficient and long-term resources are available for regulating and supporting the formation and management of incorporated land groups.

LESSON

10

The state may be able to provide the support incorporated land groups need through an intermediary institution like the Central Land Council in Australia. Such an institution may be able to secure its own funding, especially in relation to land that is able to generate a reliable and long-term source of revenue.

The sustainability of incorporated land groups often depends on effective administrative support from the government. Without government regulation and support incorporated land groups are vulnerable to disputes or misuse. While private sector organisations interested in the land or its resources may decide to take over the role of the state in supporting incorporated land groups, this is often only for as long as it takes for them to get access to the resources they want. Civil society may also decide to support incorporated land groups, but they are often not able to provide reliable and long-term support.

Appendix: Contacts

MEETINGS

- » Graham Pople, Madison Enterprises (PNG) Ltd, operators of Mt Kare Gold Prospect, Port Moresby
- » Laurie Bragge, Oilsearch, Port Moresby
- » Ian RS Marru, DPE Support Officer, Landowner Coordinator and Liaison, Port Moresby
- » Brian Aldrich, Managing Director, AKT and Associates, Port Moresby
- » Joe Badi, Manager, Acquisitions Branch, Forest Planning Division, National Forest Service, Port Moresby
- » Josepha Kiris, Chief Land Titles Commissioner, Port Moresby
- » Oswald Tolopa, Director Planning Division, Department of Lands and Physical Planning, Port Moresby
- » John Kawak, Lands Officer, Oilsearch, Moro
- » John Ipidari, Business Development Officer, Oilsearch, Moro
- » Ronalad Sihinue, Community Affairs Coordinator, Oilsearch, Moro
- » Philip Kanora, Coordinator, Murik Lakes Resettlement Project
- » Melchior Mangino, Field Assistant, Mamber Village, Angoram District, East Sepik Province
- » New Britain Palm Oil Limited
 - Jamie Graham, General Manager
 - Ashley Barnes, Coordinator Mini-Estates
 - Himson Waninara, Company Secretary
 - Lillian Holland, Lands Officer
 - Frank Lewis, Manager, Smallholder Project, Oil Palm Industry Corporation
- » West New Britain Oil Palm Development Committee (West New Britain Provincial Government)
 - Sam Gakan, Acting Administrator, Kimbe
 - Gawago Enabo, Administrator, Talasea District
 - Ben Morden, Lands
 - Kasen Dumot, Lands
 - Leo Brown, Agriculture
 - John Kaniovisi, Agriculture

- » Ben Mare, Director, Lolokoru Estates Ltd
- » Lawrence Valuka, Chairman, Lolokoru Estates Ltd
- » Urban Kave, Secretary, Kulungi Village, Kedopoho ILG Management Committee
- » John Simo, Chairman, Vulupi Plantation, Natoko ILG Management Committee
- » Gerald Kura, Secretary, Morokea Village, Morokea ILG Management Committee
- » Thomas Webster, Director, National Research Institute, and Chairman, National Land Development Taskforce

TELECONFERENCE AND EMAIL

- » Wycliffe Antonio, Land Administration and Survey Section, UniTech, Lae

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