

# Forestry in Papua New Guinea: the legal and institutional framework





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# Structure of the presentation

- Introduction
- Current legal challenges
- The role of landowners
- The need for procedural clarity
- Institutional architecture
- Transparency and information
- Prioritisation of reforms



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# Fit for purpose?

- Legislation must take account of a country's administrative realities
- An over-ambitious legal and policy framework is more likely to create distortions than improved performance.
- 1991 Forestry Act one of good intent; reflects an ambitious period Post-Rio
- But 15 years on, there is a need to take stock of whether the current legal and institutional framework is fulfilling its intended purpose.



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# Key issues

- 1) Increasing litigation over constitutional rights and duties, and due process in administrative decision-making
- 2) Centralised administration with limited capacity to monitor and manage the resource while also fulfilling its authority function
- 3) A deterioration in checks and balances enshrined in the 1991 Act
- 4) The need to strengthen and enhance information systems
- 5) The need to strengthen oversight mechanisms with the power to both investigate and to seek prosecution
- 6) Reforms to expedite conflict resolution.

# Legal challenges (1)

## (i) **Sustainability** (*East Arwin and Wawoi Guavi*):

- the veracity of resource inventories as the basis for licensing
- whether extensions to permits conform to sustained yield management practices
- forest development in the absence of a valid NFP (S.46 of the Act) certified resource inventory, updated NFDGs (S.47)

# Legal challenges (2)

## (ii) **Due process** (*East Arwin, Kamula Doso and Wawoi Guavi*):

- approval of Environmental Plans, payments of performance bonds
- valid acquisition of resource rights
- whether Board and PFMC recommendations were accounted for
- application of rules on competitive selection
- extensions to saved permits under S.78 and in spite of cut off date in S.148 (subsequently permitted under 2005 amendment to S132)

# Legal challenges (3)

- (iii) **Constitutionality of the Forestry Act** (*Section 19 Constitutional Reference No 5 of 2005 to the Supreme Court by the Ombudsman Commission*)
- NGDPs on ***equal participation by resource owners***, as well as ***rights to consultation and participation*** under the Forestry Act itself – do FMAs, resource allocation and the removal of S.59 of the Act comply?
  - ***Equality of Citizens*** under s.55 of the Constitution – does removal of S.59 of the Act discriminate against forest resource owners as compared with provision for consultation and participation under the Part III, Div 6 of Oil & Gas Act 1998.

# Legal challenges (4)

- ***Protection from Unjust Deprivation of Property*** under s.53 of the Constitution, as well as s.38 on valid qualifications of rights and freedoms: does S.1 of the Act comply by adequately specifying and affording reasonable justification of a public interest?
- Does.137(1E) of the Act (as amended in 2005), comply with ***conservation principles, sustained yield management, and logging practice*** required by the Constitution as well as the Forestry Act ?

# Legal challenges (5)

## (iv) The rule of law increasingly contingent on litigation

- *Sep Galeva and others v Paiso Company Limited and others* [2003] OS 427
- *Warongoi Blockholders* [1999]
- *Ben Ifoki & ors v the State, Registrar of Titles, Keroro Development Ltd, Deegold (PNG) Ltd, PNGFA* [1999] OS 313, & OS 556, consolidated
- But is this an efficient means of running the sector?
  - A disproportionate burden borne by civil society
  - At significant cost to the State (PNGFA faces an increasing case load)
  - Significant reputational consequences for the industry

# Legal challenges (6)

- Resolving all these challenges requires pro-active engagement in:
  - (i) Re-examining the role of landowners
  - (ii) Strengthening procedural guidance
  - (iii) Re-balancing the institutional architecture for administration and public oversight
  - (iv) Enhancing information systems and public transparency



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# The role of landowners (1)

- *Supreme Court reference by the Ombudsman Commission* is fundamental to the fabric of the Forestry Act – i.e. whether the resource acquisition model constitutes equitable participation

# The role of landowners (2)

- This in turn raises a number of other issues needing discussion (amongst others):
  - Whether the current compensation standard constitutes adequate consideration?
  - *De facto* land demarcation under ILG incorporation by the NFS giving rise to claims of ownership; arguably outside the purview of the ILG Act (Kalinoe, 2001).
  - The role of NFS in providing ongoing support to ILGs once incorporated; *Duman Dibiaso Incorporated Land Group No. 1664 and others v Kola Kuma and others (2004) SC805*.
  - The fiduciary duties of ILG chairs. At present ILG Act makes no provision imposing legal duties of accountability on leaders (Whimp, 1998).
  - The implications of proposals by the Task Force on Land Development.



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# Procedural clarity (1)

- Notwithstanding amendments to Forest Law and over 300 forms under the 1st Schedule of the 1998 Forestry Regulations, significant gaps in procedural clarity



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# Procedural clarity (2)

- Possible areas requiring procedural clarity
  - Standards for “awareness raising” and Free and Prior Informed Consent
  - Resource acquisition (landowners lack independent legal advice; lack of government oversight over acquisition for TAs)
  - Means of verifying authenticity of tenure and landowner consent;
  - Participation in resource allocation processes (Guidelines, DOS, negotiations); procedures should have been clarified before S.59 cancelled.
  - Structures for distribution of landowner benefits; representation of ILGS by VDCs and/or by IBGs and Landcos.
  - Ambiguities over the prosecution of offences; guidance on compounding, ensuring proper legal counsel.
  - Administration of domestic log movements, mill processing, sawn timber exports



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# Institutional architecture (1)

## **Institutional architecture is core to the credibility of the forest control system**

- **Allocation of functions within the forest-sector administration.**
- Risk of overstretch; policy, regulation, revenue, monitoring and forest management. Takes on functions of PFMCs, responsible for ILG incorporation and reforestation activities.
- PFMCs unable to act independently in verifying tenure, consent. Revisit concurrent powers with the provinces and LLG.
- Further outsourcing of monitoring function, to free up resources for NFS to perform authority function
- Taking into account concerns not to “hollow out” the NFS but to strengthen its capacity.

# Institutional architecture (2)

## **Internal checks and balances need strengthening**

- Where the Board is exposed to external interference, an independent Board Secretariat is an important guarantee, e.g.
  - power to mandate audits of information submitted by NFS and the propriety of Board decisions
- Proposed in 2005 Amendments but rejected
- An equivalent also needed for PFMCs



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# Institutional architecture (3)

## **Blend of external checks and balances is required**

- Ombudsman has only limited powers (prevented from enforcing decisions through litigation)
- Horizontal oversight by IRC and Treasury of price approvals
- Human Rights and/or Anti-Corruption Commission with powers to investigate and seek prosecution.
- Existing courts an inadequate solution - civil procedure complex and onerous, poor management of court registries, delayed judgements, high cost.

# Institutional architecture (4)

## **Alternatives that have been suggested include:**

- a) administrative tribunals (less bound by rules of evidence etc);
- b) consolidated land and NR courts (recently endorsed by NRI and Minister for lands)



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# Information systems

- SGS only captures part of the timber administration system; a need to extend it upstream to cover log sourcing, scaling and royalty assessments
- Not possible to reconcile data on timber production, mill throughput and recovery rates (currently not monitored) and exports of processed material (exempt from export taxes and so not subject to SGS verification). Of real concern as the proportion of processed timber exports expands exponentially
- Complementary action on customs collaboration (prior notification, HS codes)
- Strengthening local government information platforms to allow PFMCs to do their work; that are also publicly accessible (an enforceable right under s.57 of the Constitution)

# Prioritising actions

- Phase and prioritise reforms in line with available public finances and institutional capacity
- Possible actions include:
  - Realistic but strategic entry points; a Board Secretariat might be one such option.
  - Certain reforms may also have benefits that go much beyond forestry, e.g. administrative appeals tribunal.
  - A need to scale back on forestry operations in line with the funds and personnel available to supervise them. It is unlikely that administrative structures will otherwise ever be given the chance to catch up.