Papua New Guinea Forest Studies

Paper Two

The current legal and institutional framework of the forest sector in Papua New Guinea

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## **Summary of findings**

The paper examines the current legal and institutional framework governing the administration of the forest sector in Papua New Guinea. From the evidence examined, the review concludes that the main requirements for reform at this stage concern the systems that ensure the fulfilment by the state of its responsibilities, and this is a more pressing issue than operator compliance, important as this also is.

The paper is divided into two parts:

- i. An analysis, summarized below;
- ii. An annex providing an overview of institutional roles and responsibilities, as well as processes for resource acquisition, allocation, planning and control.

The analysis starts with an examination of cases currently before the courts. Several of these challenge the legality of administrative decision-making in the forestry sector as well as the constitutionality of the Forestry Act itself. The courts, together with the Ombudsman Commission are playing a vital role in enhancing accountability within the forestry sector, in a way that their peers in other jurisdictions have not been able to do. This is a particular strength of PNG.

The analysis goes on to highlight lack of procedural clarity. While there is relatively detailed guidance on monitoring and control, there remains significant ambiguity over processes for resource acquisition and allocation - especially in respect of landowners. Key concerns include: landowner awareness-raising and participation in the evaluation of project proposals; means of verifying authenticity of tenure and landowner consent; and structures for distribution of landowner benefits. There are also serious ambiguities over the prosecution of offences.

The analysis tackles the allocation of functions for forest-sector administration. It highlights experience with outsourced log export monitoring by SGS, and makes suggestions to extend its scope to other routine monitoring and administrative functions of the National Forest Service (NFS). This could free up resources for NFS to focus on forest management such as resource inventory and SFM standards, as well as on landowner awareness-raising and support. However, decisions to outsource need to take into account concerns not to "hollow out" the NFS but to strengthen its capacity. Work to review the NFS's core functions cannot also take place independently of wider reforms – in particular mechanisms for landowner incorporation for which NFS takes particular responsibility.

The paper goes on to examine the systems of checks and balances within the structure of the PNG Forest Authority – including the distribution of functions between the Forest Board, the Provincial Forest Management Committees (PFMCs) and the NFS. The current structure has proven vulnerable to political interference. To address this problem, it has been proposed that a Board Secretariat be established to independently verify information submitted to Board members, as well as the legality of Board decisions. The paper also highlights the need to better resource PFMCs in performing their tasks, including through closer collaboration with Provincial and Local-Level Governments.

The analysis then examines the blend of instruments necessary for external oversight of forest-sector administration. The paper discusses the already active role of the Ombudsman, and goes on to describe other functions, including oversight by other executive agencies, the Supreme Audit Institutions, third party auditing, proposals for a Human Rights and/or Anti-Corruption Commission and the need for specialized dispute resolution mechanisms.

The analysis concludes with the need to phase and prioritise reforms in line with available public finances and the institutional capacity to see them through. Some important trade-offs need to be considered, e.g. passing the costs of enhanced administrative capacity onto industry versus efforts to reduce the tax burden on companies. The challenge lies in identifying realistic and strategic entry points, including those that are likely to have traction in sectors beyond forestry.

## II ANALYSIS

#### 1. Enhancing the legal and institutional framework for forest-sector administration

A credible system of forest sector administration requires a clear legal basis with broad stakeholder buy-in, unambiguous procedures and standards of performance, an effective allocation of functions, as well as an appropriate blend of instruments for external oversight and dispute settlement.

This paper assesses the extent to which the legal and institutional framework governing the PNG forest sector currently delivers this, and lays out possible options for improvement. The key issues at stake relate to:

- conflicts over the interpretation of law;
- the legality of administrative decision-making;
- the need to reconcile an ambitious legal and policy framework with limited administrative capacity (including appropriate decisions over core and outsourced functions);
- the exercise of discretionary powers;
- the need to safeguard checks and balances between levels of government and between different stakeholders:
- rethinking institutional arrangements for landowner incorporation and support;
- reconciling the 1991 Forestry Act with the provisions of the 1998 Organic Law on Provincialand Local-Level Government;
- public oversight that has the power to both investigate and seek prosecution;
- instruments to expedite conflict resolution.

#### 1.1 Resolving legal challenges

An increasing number of civil society actors have sought to challenge the validity of resource acquisition and licensing agreements, alongside claims for trespass and nuisance. Those cases currently before the courts are but the latest in a series of similar actions. Separately, the Ombudsman's Commission has filed a Supreme Court Reference in 2005 challenging the Constitutionality of the Forestry Act itself. This may have profound implications for administration of the forest sector in future. It is therefore imperative that these cases are resolved.

The following outlines the substantive issues currently at stake, pending final determination by the courts.

#### 1.1.1 The absence of a valid National Forest Plan

Resource owners and the PNG Eco-Forestry Forum have challenged the government on its decisions to issue permits in the absence of a valid National Forest Plan, as required under S.46 of the 1991 Forestry Act. This stipulates that 'Forest resources shall only be developed in

<sup>&</sup>lt;sup>1</sup> Others significant cases include: *Sep Galeva and others v Paiso Company Limited and others* [2003] OS 427, in which the National Court ruled against violations of administrative procedure and landowner consent in the award of Timber Authorities for the Kiunga – Aiambak road project in Western Province; as well as *Warongoi Blockholders* [1999] in which the Supreme Court upheld an award of K2.3 million in damages to leaseholders for trespass and nuisance as a result of logging activities.

accordance with the National Forest Plan'. Three sets of issues relating to validity of the National Forest Plan are highlighted:

- While the 1996 National Forest Plan contained (as required under Act) a National Forest Development Program for the period 1996 - 2001, it provided no information on how forest resources were to be managed after this time. It is therefore argued that it must, to all intents and purposes, now have expired.<sup>2</sup>
- Although S.47(b) of the Act requires a National Forest Plan to be based on a certified National Forest Inventory, this has yet to be done.<sup>3</sup>
- S.47(c)(i) also requires that the National Forest Plan contain the National Forestry Development Guidelines. While these undertook to be reviewed every 3 years,<sup>4</sup> the 1993 Guidelines have not been updated.

#### 1.1.2 Extensions to the term of saved permits

S. 137(1) of the 1991 Forestry Act (as amended in 1993, 1996 and 2005), provides that 'permits, licences, timber rights purchase agreements and other authorities granted under [the previous Forestry Act] (repealed), ...valid and in force immediately before [the 1991 Act], shall continue... to have full force and effect for the term for which they were granted ...or until they sooner expire or are revoked according to law.' It also provides that 'all agreements entered into under the Forestry (Private Dealings) Act ...(repealed) valid and in force immediately before the coming into operation of [the 1991 Act] are ...deemed to be timber permits granted under [the 1991] Act...'.

Decisions by the NFA to subsequently extend saved permits for up 10 years have, however, provoked controversy. This includes an extension under S.73 of the 1991 Act, to the term of a saved Timber Permit held by the Wawoi Guavi Timber Company in 2002. The January 2003 *Review of Disputed Forest Allocations* and the submissions of resource owners, have subsequently highlighted concerns over the social acceptability of the extension, and whether the extension conformed to sustained yield management practices, as required under s.78(3) of the 1991 Forestry Act.<sup>5</sup>

This is despite a commitment in the National Forestry Development Guidelines (NFDGs) to review all existing forestry projects (not including Timber Authorities), and to amend the terms and conditions of saved permits to ensure compliance with the Act as required under s.137(2).<sup>6,7</sup>

<sup>3</sup> The PNGFA has, however, since adopted the forest resource assessments undertaken by the Forest Inventory Mapping (FIM) system.

<sup>&</sup>lt;sup>2</sup> The Board subsequently extended the validity of the National Forest Plan for a further 12 months from November 2002.

<sup>&</sup>lt;sup>4</sup> Page 1, National Forestry Development Guidelines, prepared by Tim Neville, MP, Minister for Forests, Port Moresby, September 1993.

<sup>&</sup>lt;sup>5</sup> S.123(2) of the Forest Regulations Act 1998 provides that an application for an extension will not be considered by the Board until the information and particulars set out in S.78(3) have been obtained.

<sup>&</sup>lt;sup>6</sup> S. 137(2) of the 1991 Act provides that, 'where the Board is of the opinion that any term or condition of any.. permit, license, timber rights purchase agreement or other authority granted under the [the previous Forestry Act] (repealed); ...or agreement entered into under the Forestry (Private Dealings) Act ...(repealed) ...is at variance with the provisions of [the 1991 Act] to an extent which makes it unacceptable, ...it shall by written notice advise the [license holder or parties to the agreement] of the term or condition that is unacceptable; ...and specify the variation in the term or condition required to ensure compliance with this Act.

It has also been argued that extensions to permits saved under S.137(2) have:

- a) Taken place after the cut-off date established in s.143 of the 1991 Act.<sup>8</sup>
- b) Cannot be entertained under s.78 (extensions and renewals).

The 2005 amendments to S.137 of the 1991 Forestry Act partly respond to this challenge. S.137 (1B) now allows for the extension of Timber Permits granted in respect of a saved TRP, where the latter is of longer duration. S.137 (1E) states that all timber permits previously saved under s.137 subsections (1) and (1A), and extended under s.78, are deemed to be extended under this section.

The Board of the Forest Authority is of the view that these and other amendments to the Act in 2005 are a necessary and pragmatic measure, given the need to streamline a complex and rigid regulatory framework. However, the Eco-Forestry Forum believes that the 2005 amendments defeat the purpose of the principal Act – including the proper identification of landowners through ILGs. With a number of Timber Permits granted immediately before the 1991 Act entered into force, and for periods as long as 35 years, the 2005 amendments will allow existing projects to be extended and operated under the pre-1991 laws for a further 25 years. Submissions also challenge the constitutionality of S.137 (1E) in giving retrospective validity to previous decisions to extend saved permits.

## 1.1.3 Extensions in area to existing permits

S.64 of the 1991 Forestry Act provides for extensions to the area of a timber permit where the forest resources within the forest development project shall be used primarily to sustain an existing processing facility.

- Under S.64(3), a forest development project may qualify as an extension to an approved timber permit operation where it is contiguous to an existing timber permit, the holders of which have a satisfactory record and are acceptable to landowners.
- It is also necessary that the project is the subject of a development options study, final project guidelines are consistent with the National Forest Development Programme, and 'is, in the opinion of the Board, so small on its own that it is unable to operate as a commercially sustainable forest development project.9
- S.64 (4) provides that all eligible timber permit holders with operations contiguous to the project in question shall be invited by the Board to make project proposals.

The provisions of S.64 are undisputed. However, their implementation remains the subject of ongoing litigation in the case of the Kamula Doso FMA in Western Province. Amongst others, the PNG Eco-Forestry Forum has appealed to the Supreme Court to set aside the ruling of the National Court in *Wawoi Guavi Timber Company Limited v. Papua New Guinea Forest Authority* 

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<sup>&</sup>lt;sup>7</sup> The NFDGs provide for performance audits, including a review of project documentation, field inspections and (where appropriate) notification of remedial action and/or withdrawal of the permit. Where the operator has complied or taken satisfactory remedial action, the Board will then assess the implications of the new legal and policy framework on the project, and will notify the license holder of aspects unacceptably at variance with the Act. The Board may under S.137(2) unilaterally vary terms where agreement cannot be reached. NFDGs, prepared by Tim Neville MP, Minster for Forests, Port Moresby, September 1993, page 28 - 29.

<sup>&</sup>lt;sup>8</sup> S.143 of the 1991 Forestry Act provides that the Board may extend the term of any permit or license saved by S.137 (or a grant a Timber Authority) for period not exceeded one year, until such time as the National Forest Plan has been drawn up under S.47 of the Act (1996) or 31 December 1993 – whichever the sooner

<sup>&</sup>lt;sup>9</sup> S.64(3)(b) – (e), Forestry Act (1991)

[2004] OS 557. This required the PNGFA to give effect to a decision of Board in 1999, that the Kamula Doso FMA be an extension of the Wawoi Guavi Timber Permit.

The substantive issues at stake include:

- The findings of the Ombudsman Commission (2002)<sup>10</sup> and the Independent Review of Proposed New Forestry Projects,<sup>11</sup> that the Kamula Doso FMA as signed by the landowners, was invalidly executed and certified, and that these failures needed to be rectified.
- The Ombudsman's conclusion that any future allocation of Kamula Doso "must comply with the provisions of the Forestry Act as amended in 2000" including the requirement that it be allocated by competitive selection. The current wording of S.64(3) (7) is a result of that amendment.

## 1.1.4 The constitutionality of the Forestry Act and subsequent amendments

In Section 19 Constitutional Reference No 5 of 2005 to the Supreme Court, the Ombudsman Commission raises a number of questions relating to the constitutionality of provisions of the Forestry Act 1991 and the Forestry (Amendment) Act 2005. The 2005 amendments will only be gazetted once these have been determined.

The Supreme Court Reference addresses four main sets of issues:

- (i) The National Goals and Directive Principles on the equal participation by resource owners in the development of their resources, as well as the right to consultation and participation under s.6 and s.46 of the Forestry Act itself. The Ombudsman has submitted questions as to whether these principles are fulfilled by:
- The purchase of timber rights under Forest Management Areas (FMAs). Alternatively, do FMAs merely equate to the rights and interests of resource owners as based on the consideration given in an agreement for sale and purchase of their resources?
- S.17 of the Forestry (Amendment) Act 2005. This cancels s.59 of the 1991 Forestry Act, which required PNGFA to consult with resource owners in relation to the intentions of the Board in recommending the allocation of a timber permit over that area.
- S.62 and 63 of the Act requiring PFMCs to investigate participation by landowners in Forest Development Projects and/or prepare guidelines for such projects in consultation with landowners.
- (ii) Equality of Citizens under s.55 of the Constitution. The Ombudsman has asked whether the cancellation of s.59 of the 1991 Forestry Act under s.17 of the Forestry (Amendment) Act 2005 amounts to discrimination against forest resource owners, as compared with provision for consultation and participation under the Part III, Div 6 of Oil & Gas Act 1998:
- S. 48 of the Oil & Gas Act provides for a development forum to be convened 'prior to the first grant of a licence or licences in respect of a petroleum project [which] fair[ly] represent[s] all persons or organisations which the Minister believes will be affected by that petroleum project.'

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<sup>&</sup>lt;sup>10</sup> Ombudsman Commission of Papua New Guinea

<sup>&</sup>lt;sup>11</sup> PNG Forest Review Team, Individual Project Review Report Number 16, Kamula Doso (Western Province)

- S.50 of the Oil & Gas Act provides that the State, resource owners and affected Local-Level and Provincial-Level Governments shall enter into a Development Agreement.<sup>12</sup>
- (iii) Protection from Unjust Deprivation of Property under s.53 of the Constitution, as well as s.38 on valid qualifications of rights and freedoms guaranteed under Part III.3.C of the Constitution (Special Rights of Citizens).

The Ombudsman has asked whether s.1 of the 1991 Forest Act meets these requirements. This includes:

- Not only declaring a particular public purpose, but also describing, defining, stating the necessity of and affording reasonable justification for it.
- Specifying the rights or freedoms that it regulates or restricts, etc.
- (iv) Provisions of the Constitution and the Forest Act itself on the sustainable management of natural resources.

The Ombudsman has asked whether s.137(1E) of the 1991 Forestry (as amended), providing for the extension of saved timber permits originally entered into under the *Forestry (Private Dealings) Act (repealed)*, is contrary to conservation principles, sustained yield management, and logging practice required by the Constitution as well as s.6, 58(d), 78 and 137 of the Act.<sup>13</sup>

## 1.2 Clarifying administrative procedures and standards of performance

The current weight of litigation over the validity of FMAs and decisions to award and extend licenses stems in part from a continuing lack of procedural clarity, including auditable standards of performance.

Timely amendments to the 1991 Forestry Act have been made to address potential loopholes, including changes to S.64(3) - (7) in 2000 governing the extensions of existing permits over contiguous areas, as well as S.89 in 2005 governing the procedure for approval of timber authorities. Both sets of changes responded to specific instances of abuse and subsequent investigations and/or litigation. PNGFA has also gazetted nearly 300 forms under the  $1^{\rm st}$  Schedule of the 1998 Forestry Regulations (as amended), and developed detailed manuals and procedures for incorporation of landowner groups, issuances of Timber Authorities, planning monitoring and control of log harvesting, identification, scaling and reporting on logs, as well as log exports.

Nevertheless, while procedures for monitoring and control are relatively detailed, there remains significant ambiguity in procedures for resource acquisition and allocation. Key areas of concern include: landowner awareness-raising and participation in the evaluation of project

<sup>13</sup>S.137(1E) of 1991 Forestry Act (as amended) provides that a saved timber permit originally entered into under the *Forestry (Private Dealings) Act (Chapter 217) (repealed), 'may be extended ...by the Minister upon recommendation of the Board where the Board considers that the remaining forest resource in the project area is not sufficient to meet the requirements of section 78', but contains no reference to social acceptability and other conditions as required for the extension of timber permits under S.78 or S.137(1B)* 

<sup>&</sup>lt;sup>12</sup> Under the 1999 Forestry Act, there is no equivalent instrument other than the FMA between the State and resource owners (S.58) and the project agreement between the licensee and the State (S.72(b)(i)).

proposals; means of verifying authenticity of tenure and landowner consent; and structures for distribution of landowner benefits. There are also serious ambiguities over the prosecution of offences. The development of clear performance standards would ensure greater consistency in the implementation of these processes. It might even limit the chances of conflict further down the road.

The process of resource acquisition and allocation is set out in Annex 2.2

#### 1.2.1 Landowner awareness raising

While the PNGFA conducts landowner awareness campaigns prior to the incorporation of ILGs and the acquisition of timber rights, the 1991 Forestry Act makes no specific provision for this. Nor have procedures for awareness-raising been developed to assist NFS officers in the field. Yet this is possibly the most critical step in informing landowners of the potential implications of ILG incorporation and logging, and in reducing the potential for subsequent conflict. Under circumstances where NFS officers may be required to complete awareness-raising in as little as 3 weeks, over an area as large as 100,000ha<sup>14</sup> and with remote communities, clear standards of performance governing Free and Prior Informed Consent remains a significant gap.

It is not surprising, therefore, that the Forest Authority has been criticised for not explaining clearly to land groups what they are signing up to. There are no examples of a FMA where the NFS has actually entered into detailed discussions with the landowners as to how best to develop their areas, prior to obtaining consent. The time frame for acquisition is simply too short (Power, 2000). Applying a longer time frame might, however, allow the Forest Authority to determine more appropriate forms of forest management for any given area (Turia, 2005).

#### 1.2.2 Resource acquisition under Timber Authorities

There are no specific guidelines for resource acquisition under Timber Authorities. Whereas under a FMA, the NFS takes responsibility for awareness raising, land group incorporation and acquisition, under the Timber Authorities it is left to applicants. For Timber Authorities, including selective harvesting of 5000 m<sup>3</sup>, and forest conversion for road-line development or agriculture, applicants need only secure the approval of a clan agent, signed in front of a village magistrate or land mediator (using Form 165 in Schedule 1 of the 1998 Forestry Regulation). ILG incorporation is an option, but is not necessary. No landowner awareness need be undertaken, nor does a Timber Authority require a development options study or project guidelines. <sup>15</sup> This has previously opened the way for abuse of resource acquisition processes, as highlighted by the Kiunga – Aimbak case (see Box 1).

The 2005 amendments to the Forestry Act have strengthened scrutiny of applications by both the PFMCs and the Board. Landowner consent nevertheless remains a concern given growing interest in Timber Authorities as a source of raw material for downstream processing and as a means for landowner companies to partner with external investors. 1617 That said, additional

<sup>&</sup>lt;sup>14</sup> PNGFA, 2 November 2006

<sup>&</sup>lt;sup>15</sup> Clement Victor (2006) A case study of the Situm Timber Authority, Morobe Province, for the PNG Forest Sector Studies, European Commission.

<sup>&</sup>lt;sup>16</sup> Ecoforesty Forum, Workshop for PFMC NGO and Landowner Representatives, Lae, 24 – 26 October,

<sup>&</sup>lt;sup>17</sup> The Situm Timber Authority, Morobe Province, is a case in point. This is a small-scale logging operation with maximum harvestable volume of 5,000 m<sup>3</sup> per year for domestic processing only. In this case, landowners approached PI Logging Company of Lae directly. PI is a registered Forest Industry

safeguards on resource acquisition will need to account for the already high transaction costs of obtaining a Timber Authority relative to the volumes of timber involved (less than 5000 m<sup>3</sup> per year).

## Box 1 The Kiunga – Aimbak road alignment case

This case concerns the award of a Timber Authority to Concord Pacific Limited for forest conversion in respect of stages 2 and 3 of the Trans Island Highway in the Kiunga-Aiambak area of Westem Province. Based on information received from the Ecoforestry Forum in November 2002, the Independent Forest Review Team (*Review of Disputed Timber Permits*) judged the application for a Timber Authority deficient in respect of S.90C(3) which requires (amongst others) verification of ownership and the consent of each resource owning clan agent within the project area. Specifically, landowners allege ILG incorporation processes were left incomplete; the company did not even submit completed application forms to the Registrar of Land Groups. The fact that the license had been expedited with neither the prior recommendation of the PFMC nor the approval of the Board meant that these deficiencies were not addressed.

Sources: Forestry and Conservation Project Review Team (Kiunga - Aiambak, Simbali And Bonua Magarida) Final Report; *Sep Galeva and others v Paiso Company Limited and others* [2003] OS 427.

## 1.2.3 Certification of authenticity of tenure and landowner consent

S.58(f) requires a FMA to contain a certificate<sup>18</sup> from the Provincial Forest Management Committee 'to the effect that it is satisfied as to: (i) the authenticity of the tenure of the customary land alleged by the persons or land group or groups claiming to be the customary owners; and (ii) the willingness of those customary owners to enter into the agreement. At present, no specific guidance has been issued to PFMCs on means of verifying this beyond the documentation generated by land group incorporation and registration.<sup>19</sup>

The same problem applies to s.64, s.78 and s.137(1B) (as amended) of the Forestry Act (1991). These require the PFMC to ascertain the 'acceptability' of proposed extensions and renewals to affected landowners in the project area. In circumstances where the membership of ILGs may have changed since a FMA was first agreed, a methodology for verifying consent seems essential.

In both instances, the PFMC relies on the briefing information that is provided by the PNGFA staff who have conducted the landowner awareness, assisted in the incorporation of land groups and collected the signatures for the FMA.

Participant is using the timber harvested for its own downstream processing operations, targeting the local market. Clement Victor (2006) *A case study of the Situm Timber Authority, Morobe Province,* for the PNG Forest Sector Studies, European Commission.

<sup>&</sup>lt;sup>18</sup> Form 79 Sch 1, Forestry Regulations 1998.

<sup>&</sup>lt;sup>19</sup> This includes census lists of members, genealogies, group property lists, constitutions, as well as applications and certificates of registration, as specified in the Land Groups Incorporation Act (1974) and the PNGFA *Manual on Land Group Incorporation* (February 2005).

### 1.2.4 Landowner participation in resource allocation

The controversy generated by the cancellation of s.59 of the Forestry Act (1991), including the 2005 Supreme Court Reference, highlights a lack of confidence in the ability of resource allocation processes to guarantee landowner participation (beyond their basic consent at the acquisition stage). Key steps in the allocation process include Development Options Studies (s.62(4)), project guidelines (s.63(2)), PFMC evaluation of project proposals (s.68) and project negotiation (s.70 and 71). Section 28(3) of the Act entitles affected landowners to attend PFMC meetings. However, neither the Forestry 1991 Act nor the Forestry Regulations 1998 provide any further guidance on landowner involvement at each of these stages. This is compounded by the fact that landowners may themselves be unaware of the allocation procedure.

S.59 of the Forestry Act (1991) has now been replaced by an amendment to s.57. This requires the Board to consult with the Provincial and Local-Level Government, as well as members of Parliament and the electorate, as to its intentions in entering into an FMA. Here too, no clear procedures have yet been defined. The only additional guidance lies in:

- s.83 of the Forestry Regulations Act (1998) (as originally applied to s.59) under which local stakeholders have 14 days to submit their views having been notified by the Board.
- Step 24 of the PNGFA's Checklist of steps required to be taken before a Timber Permit can be granted. This refers to s.115 of the Organic Law on Provincial and Local Level Government 1998 ('Control of Natural Resources'). This requires National, Provincial and Local-Level Government 'in the province or provinces where the natural resource is situated [to] liaise fully with the landowners in relation to the development of the natural resources."

It is arguable that standards for landowner participation should have been determined for all other steps in the resource acquisition and allocation process, before S.59 was repealed.

#### 1.2.5 Structures for the distribution of benefits

As stated in section 2.1 of this report, s.235 of the Forestry Regulations (1989), requires landowners to 'appoint or establish, and nominate for recognition by the Managing Director, a corporate body or Local-Level Government to represent them' for purposes of apportioning payments. The Regulation is, however, silent on how these should relate to land groups incorporated under s.57 of the Forestry Act (1991) in line with the PNGFA Manual on Land Group Incorporation.

Whereas the policy intent behind land group incorporation had envisaged ILGs as bodies nested within the structure of local government (through representation on Village Development Committees), and/or corporate structures (either as shareholders under the *Companies Act* or as business groups under the *Business Groups Incorporation Act* for the purposes of 'working' group titles), the provisions of S.235 provide no guidance on verifying that nominated bodies reflect these aspirations.

S. 235 (2) merely provides that "where the Managing Director is of the opinion that a body nominated under Subsection (1) satisfactorily represents in accordance with this section the customary owners in the project area, he shall recognise the body for such purpose, and notify the body accordingly."

#### 1.2.6 Prosecution of offences

The Forestry Act 1991 does not provide for the PNGFA to compound offences (i.e. issue fines). Rather, all offences must be prosecuted by a Forest Inspector. <sup>20</sup> Under S. 41 of the Forestry Act, the Minister may, on the recommendation of the Board, appoint an officer of the National Forest Service to be a Forest Inspector. In practice, however, it would appear that the PNGFA does compound offences whenever it choses to take disciplinary action against operators referred to it by its field officers. No case has reportedly been prosecuted in the past few years.<sup>21</sup> But in compounding offences, PNGFA has the potential to accord itself substantial discretion; with the exception of a 'default penalty' under s. 122(1),<sup>22</sup> the Act states penalties up to a certain limit and/or a maximum jail sentence. There is arguably an urgent need for further legal and administrative guidance on when offences may be compounded (if at all) and the minimum penalty that may apply in different cases. This may be important in limiting the exercise of discretion and maintaining an effective deterrent where compounds might otherwise be so low as to be written off as a routine operating cost by offending companies.

## 1.3 Refining the allocation of functions for forest-sector administration

A description of the institutional architecture governing the forestry sector can be found in Part 2 of the Annex. This section assesses how the different components of the PNGFA - the National Forest Service (NFS), the Board and the Provincial Forest Management Committees (PFMC) - might be better positioned to deliver on their objectives and functions under the 1991 Forestry Act. Options for outsourcing as well as revitalizing internal checks and balances are discussed. Complementary reforms to the role of Provincial- and Local-Level Government, as well as to institutions for landowner incorporation and support, are also addressed.

## 1.3.1 The functions of the National Forest Service (NFS)

#### (a) Risk of overstretch?

S. 9 of the 1991 Forestry Act tasks the Board with carrying out the core functions of PNGFA as set out in S. 7, including:

- (i) planning (preparation and review of the National Forest Plan);
- (ii) resource acquisition under FMAs:
- (iii) selection of operators and negotiation of license conditions;
- (iv) control and regulation of exports;
- (v) administration and enforcement;
- (vi) registration of forestry industry participants;
- (vii) negotiation of international obligations.

The NFS bears responsibility for all these functions, but the 1991 Forestry Act provides little guidance in terms of what aspects. The NFS may also be delegated functions by the Board and the PFMCs under Ss.19 and 30(2). Where many PFMCs lack technical capacity, most in fact depend on the NFS to fulfil their functions under the Act. In addition, the NFS must take

<sup>&</sup>lt;sup>20</sup> S.129. A forest inspector is an officer of the NFS who is appointed by the Minister on the recommendations of the Board under S.41.

<sup>&</sup>lt;sup>21</sup> PNGFA, 23 October 2006.

<sup>&</sup>lt;sup>22</sup> S.122(1) 'A forest industry participant, and any person acting in the capacity of an employee, servant or agent of a forest industry participant, who engages in forest industry activities except under and in accordance with a timber permit, timber authority or license, held by the forest industry participant...'

responsibility for landowner incorporation under S.57, given limited resources within the Department of Lands and Physical Planning.

This leaves the NFS with a broad and potentially open-ended mandate spanning both administrative and forest management functions. At the same time, out of a requested K50 million, the NFS receives an annual budget of K23 million. It is not within the scope of this report to judge whether this is sufficient to meet the NFS' mandate. However, it does raise an issue of prioritization in order to ensure key functions get the funding they need. This includes resources for planning, monitoring and control, as well as landowner relations.

## • Resource planning

The NFS has said that it has been unable to complete a certified forest inventory, as originally envisaged under the 1996 National Forest Plan, due to a shortage of resources. The Plan itself has not been updated since it expired in 2001, nor has the National Forest Development Guidelines (1993) despite a commitment to renewal every three years. At the very least, a certified forest inventory will help to bring existing projects into compliance with the requirements for sustained yield management practices under the 1991 Forestry Act.

## • Monitoring and enforcement

The Field Services Division of NFS operates on a budget of K5 million a year. This supports 126 technical staff, including 90 field offers with responsibility for 44 active projects. This, however, is insufficient.<sup>23</sup> For a large project like the Makapa, for example, at least two officers are needed yet only one may be active at any one time, e.g. for set-up inspections and closures. From the company's perspective, the lack of NFS presence also hinders work, e.g. when the responsible officer is in Port Moresby. A permanent presence by the PNGFA at base camp is an important issue for the company. Field officers also lack many of the basic resources needed to operate independently of concession companies – including housing, as well as vehicles and radio links.<sup>24</sup>

With the challenge of having to monitor up to 30 'set ups' (harvest blocks) at a time, field officers are having to rely on spot checks as opposed to detailed inspections in order to meet target response times and other obligations under the Planning, Monitoring and Control Procedures. This places greater onus on self-regulation by companies depending on corporate policies on SFM or supply chain management, as well as professional accreditation of company log scalers by the Timber and Forestry Training College in Lae, as means of maintaining integrity. <sup>25</sup>

The NFS has not yet implemented a system to monitor mill recovery rates, as the basis for regulating installed capacity – despite the growing proportion of processed wood exports. The experience of countries such as Malaysia and Indonesia shows that adequate control of installed capacity is essential to any prospect of sustainability. <sup>26</sup>

<sup>&</sup>lt;sup>23</sup> PNGFA, 23 October 2006.

<sup>&</sup>lt;sup>24</sup> Vatabu M. (2006) *Makapa Timber Project Case Study Report – Western Province*, Papua New Guinea Forest Sector Studies.

<sup>&</sup>lt;sup>25</sup> PNGFA, 23 October 2006.

<sup>&</sup>lt;sup>26</sup> PNGFA, 23 October 2006.

#### • Landowner support

Also of concern are the resources needed for support to landowner groups. Given the severe shortage of capacity in land administration, the PNGFA has taken responsibility for the incorporation of land-groups within project areas. This includes physically assisting their registration with the Registrar of Incorporated Land Groups in the Department of Lands and Physical Planning (DLPP). But the NFS' own resource limitations means that its Resource Acquisition and Landowner Liaison functions are unable to provide ongoing extension services for ILGs once incorporated. This includes the management of ILG membership and funds.

The ruling of the Supreme Court in *Duman Dibiaso Incorporated Land Group No. 1664 and others v Kola Kuma and others (2004) SC805* is significant in this respect. It found that the PNGFA, as a trustee of royalties held on behalf of landowner groups, has an interest not only in ensuring those monies are paid into designated accounts, but also in their final disposition for legitimate purposes. In a situation where large royalty payments are encouraging ILGs to splinter into smaller family-based units, and with upwards of 500 ILGs in some FMAs, this presents a serious challenge which the NFS is not equipped to address. This reflects s.235(7) of the Forestry Regulations Act 1998 which provides that the Board may suspend the operation of bank accounts where it has reasonable grounds to believe that the moneys have been expended or invested in breach of any rules and procedures governing or establishing the representative body.

## (b) What role for outsourcing?

While there is certainly a need to prioritize funding for certain core functions, outsourcing may provide an additional option in assisting the NFS to better manage its mandate. The value of outsourcing has already been demonstrated by the log export monitoring scheme operated by SGS (for further details of SGS's functions, see Annexes 1.7 and 2.5).

SGS was originally contracted in 1995, responding to the 1989 Independent Commission of Inquiry under Judge Barnett. This identified major losses in export revenues as a result of extensive transfer pricing. Since SGS began work, an additional K265 million in export revenues, as well as K27 million in landowner payments, has been collected. The role of an outsourced log export monitor has consequently gained strong support within Treasury. The SGS tag-based log tallying system can also be used to secure chain of custody back to landing points within individual set-ups (harvest blocks). As such, SGS has worked to give credibility to timber administration systems in PNG.

While presently mandated to monitor only log exports, it has been suggested that SGS's remit be extended to include outsourced monitoring of upstream harvesting and timber administration. Under circumstances where NFS field staff lack resources for more intensive monitoring, this would provide greater assurance of compliance with the Logging Code of Practice, as set out in Planning, Monitoring and Control Procedures. The idea could be taken a step further to outsource all aspects of field monitoring and timber administration (including royalty payments). This could potentially free up the NFS to focus on core aspects of forest management, including resource inventories, SFM standards as well as landowner awareness-raising and support.

However, there is a strong feeling amongst foresters that, instead of 'hollowing out' the NFS, the emphasis needs to be on capacity building and institutional strengthening. Indeed, it has originally been intended that SGS would transfer new skills, technology and management procedures, to a point where its functions could eventually be re-absorbed by NFS. ISO9000 certification of the export monitoring procedure theoretically enables a complete hand-over of

the documentation process. Although NFS staff have been seconded into SGS for training, no such decision has yet been taken.<sup>27</sup>

An alternative to further outsourcing might be routine 3<sup>rd</sup>-party audits of NFS' field operations. This would also provide greater assurance of legal compliance, but it does not address the fact that NFS' field operations are potentially over-stretched. Any discussion of further outsourcing and/or third party auditing would need to take place as part of a broader review of the NFS' core functions and the allocation of resources to fulfil these.

## (c) Overhauling institutional arrangements for landowner incorporation and support

A review of the NFS' core functions should also take account of the need to overhaul institutional arrangements for land-group incorporation and support, as this provides the basis for just and secure timber rights acquisition and benefit-sharing.

The main purpose of the Land Groups Incorporation Act (1974) was to provide the legal vehicle for the holding of registered group titles, and not a means of identifying and adjudicating who the true owners of the land are. The 1973 Commission of Enquiry into Land Matters envisaged that the registration of customary land would be addressed under separate legislation. It also enabled landowners to cash crop their own land (Whimp, 1998).

The 1974 Act has worked out very differently in practice. There are now around 10,000 registered ILGs (Antonio, 2006), most of which have been established as a mechanism to manage and distribute benefits from natural-resource investments (an approach pioneered by Chevron). They have consequently also become a means to identify 'authentic' customary land owners. In the forestry sector, this has gone so far to require detailed maps of customary land boundaries. This means that the ILG incorporation process has become a form of *de facto* land demarcation giving rise to claims of ownership – a practice that is arguably outside the purview and ambit of the Land Groups Incorporation Act (Kalinoe, 2001). This has potentially serious consequences given the inherent weakness of ILGs as corporate bodies.

While the incorporation process undertaken by the NFS includes safeguards against membership of more that one group, most ILGs face major difficulties in managing their membership and the accountability of ILG chairs once incorporated. This is compounded by the inability of PNGFA to offer continuing support; and, in some cases, the formation of landowner companies as a means of channelling benefits. With none of the same safeguards, the use of landowner companies appears to defeat the whole purpose of ILGs under the Forestry Act (Turia, 2005).

This begs the question of whether the NFS should be taking virtually sole responsibility for the incorporation of ILGs. The fact that NFS is doing so is essentially due to the lack of other options given chronic under-capacity within the Department of Lands and Physical Planning (DLPP). Up to 2001, the NFS had overseen the incorporation of 1,870 ILGs across 32 FMAs, many of which have since sub-divided. Even more concerning are landowner consent and incorporation processes under Timber Authorities, in which the NFS may not be involved (resulting in the abuses highlighted in the Kiunga – Aimbak case).

If indeed land group incorporation under the Forestry Act amounts to *de facto* land registration, this raises three sets of challenges:

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<sup>&</sup>lt;sup>27</sup> SGS, 17 October 2006.

- The NFS either needs to be properly equipped (including dedicated staff and adequate operational funding), and/or DLPP, district lands officers as well as Village Development Committees (on which ILGs are represented) need to have the capacity to oversee (if not take responsibility for) the incorporation process and to provide long-term extension to ILG management.
- 2. A proper legal framework needs to be put in place, as current practice by the forestry sector is not accommodated within the ILG Act. This will need to take into account the ongoing work of the Task Force on Land Development. The Task Force is currently looking into alternatives to earlier (and ultimately controversial) proposals for customary land registration.
- 3. Greater focus needs to be placed on the fiduciary duties of ILG chairs. At present the Land Groups Incorporation Act makes no provision imposing legal duties of accountability on leaders (Whimp, 1998).

There are also suggestions that an alternative to ILGs now needs to be found to ensure the distribution of benefits to genuine resource owners. It is essential to address these challenges if the social fabric of rural communities as well as prospects for long-term investment are not to be further undermined.<sup>28</sup>

# 1.3.2 The Functions of the National Forest Board and the Provincial Forest Management Committees (PFMCs)

## (a) A deteriorating set of checks and balances

The intent behind the Forest Act (1991) was to institute a system of checks and balances that also secured greater stakeholder participation. This is embodied in:

- (i) The Board and the Provincial Forest Management Committees (PFMCs) as <u>evaluatory</u> mechanisms, versus the <u>planning</u>, <u>administration and control</u> functions of the NFS.
- (ii) The PFMCs as a <u>consultative</u> instrument versus the Board as the body responsible for <u>carrying out</u> the functions and objectives of the PNGFA.
- (iii) The inclusion of <u>stakeholder representatives</u> within the membership of the PFMCs and the Board, including Local and Provincial Government, NGOs, landowners and industry.

The roles of the Board and the PFMCs are described in Annex 1.1 and 1.3 respectively. Those of Local and Provincial Governments and landowner groups are described in Annex 1.4 and 1.6

This arrangement does not detract from the role of the Minister as the representative of the National Executive Council in approving policies, licensing decisions and appointments. However, it does severely curtail the Minister's discretionary powers.

<sup>&</sup>lt;sup>28</sup> Kalinoe, L (2001) Incorporated Land Groups in Papua New Guinea, A paper prepared for the Australasian Law Teachers Association Conference (ALTA) 2001 July 1 – 4, 2001, University of the South Pacific, Emalus Campus, Port Vila, Vanuatu. Whimp, K (1998) Some issues of law and policy relating to landowner organization and representation mechanisms, paper given at the 'Conference on Incorporated Land Groups', organised by the Department of Petroleum and Energy and Chevron, Granville Motel, Port Moresby, 8 – 9 September, 1998. Wycliffe Antonio, Department of Lands and Surveying, PNG University of Technology, presentation on Incorporated Land Groups (1974): Lessons from its Application given at National Research Institute workshop on 'Understanding Transactions on Customary Land' 2 – 3 November 2006, Port Moresby.

However, judging by current case law, the findings of the Independent Forest Review Team and other commentators, the operation of these checks and balances appear to have been hampered by (amongst others):

- The relative vulnerability of the NFS to political interference, given the lack of consistent leadership. The NFS has operated on the basis of Acting Managing Directors for the past few years.
- The inability of the Board and the PFMCs to secure independent verification of information submitted to them by the NFS, and of the legality of their own decisions.

NGOs have also criticized the 2005 Amendment to the Forestry Act as increasing political control by including a Ministerial nominee on the Board and by enhancing the power of the Board to suspend PFMCs.<sup>29,30</sup>

The lack of functioning checks and balances has on occasion compromised the ability of the PNGFA to ensure consistent application of rules and procedures. The judge in Sep Galeva and others v Paiso Company Limited and others [2003] OS 427, ruling on the grant of Timber Authorities for the Kiunga – Aimbak road alignment highlighted how "[t]he lack of ...a clear and correct line of formal communication between the key players in compliance with the procedural requirements prescribed by the laws [was] clearly evidenced from the documents including the [PNGFA] files."

The award of the Vailala Blocks 2 & 3 project area to Frontier Holdings Limited is a similar example. Turia (2005) described how political circumstances came to dictate the resource acquisition and allocation process (see Box 2).

## Box 2 The Vailala Blocks 2 and 3 Timber Project

Timber Permit 2-16 was issued by the Minister for Forests to Frontier Holdings Limited on 24 June 1992, for a period of 10 years. This covered Vailala Blocks 2 & 3 - two separate but adjacent timber areas in Ihu District, Gulf Province. The permit was issued on the assumption that Vailala Blocks 2 & 3 had been acquired as TRPs prior to the 1991 Forestry Act. However, the PNGFA had no record of this purchase in their listings of Forest Resource Acquisitions. PNGFA was then placed under intense political pressure to re-acquire the timber rights as FMAs, despite the fact that a National Forest Plan was not yet in place and was a pre-requisite for forest resource development under S. 54 of the Act. In the event, it took the PNGFA the shortest time (just two weeks) to complete the landowner awareness phase for the reacquisition of the Vailala Blocks.

Source: Turia (2005)

#### (b) Enhancing the capacity of the Board in overseeing the functions of the PNGFA

These and other cases have inspired some discussion of mechanisms to safeguard the system of checks and balances within the PNGFA, as originally intended under the Act. Building on the suggestion of a Forestry Tribunal, originally put forward by Judge Barnett, it was proposed by

<sup>&</sup>lt;sup>29</sup> S.10(1)(i) and S.25(7) – (9) Forestry Act (1999) as amended.

<sup>&</sup>lt;sup>30</sup> Eco-Forestry Forum, *The Forestry Amendment Bill 2005. Unwinding 10 years of reform.* 

individuals within the PNG government that a Probate Commissioner be established.<sup>31</sup> This would have power to vet and sign off on administrative decisions, and to seek prosecution in instances of illegality.

This idea was subsequently adopted by members of the Board as a means to shield its decision-making processes from external interference – but in the form of a Board Secretariat with the power to sign off on both NFS advice as well as Board Decisions, and to contract in third parties to assist it in its work (see Box 3). Currently, the Board has little basis on which to inform its decisions beyond the information that is provided to it by the Managing Director of the NFS.

A Board Secretariat was proposed for inclusion in the 2005 Forestry (Amendment) Act. It was not ultimately adopted but deserves further attention as a means to revitalise the checks and balances originally envisaged in the Forestry Act 1991. It may also provide the basis for routine 3<sup>rd</sup>-party auditing of NFS' core functions.

## **Box 3 Proposed Functions of the National Forest Board Secretariat**

As proposed for inclusion in the 2005 Forestry (Amendment) Act, the Board Secretariat would have the power to (amongst others):

- certify Board submissions for their compliance with the Act and other relevant laws and Government policies, including the acquisition and allocation process of forest development projects, operational audit of projects, audits of the accounts of the Authority, and implementation of performance bonds;
- monitor and report on the compliance of Provincial Forest Management Committees in the performance of their powers and functions,
- liase with the Board and the National Forest Service on Board matters relating to the powers and functions of the Authority.

The propose amendment would have also empowered the Board Secretariat to brief out or outsource to an independent third party matters including submissions or papers prepared for the Board for compliance with the Act and other relevant laws, standard technical forestry, environmental, financial, accounting, and commercial practices and Government policies

Source: proposed text for Forestry (Amendment No.2) Bill 2005

## (c) Resourcing and empowering PFMCs to act independently of the NFS

Annual meetings of PFMC NGO and landowner representatives facilitated by the Ecoforestry Forums have raised a number of common constraints. Amongst others, PFMC members highlight the lack of resources that would otherwise enable them to independently verify key requirements under the Act. These include: (i) the authenticity of tenure and the willingness of customary owners to enter into an FMA under s.58(f) of the Forestry Act; as well as, (ii) social acceptability, performance of licensees and remaining forest resources in respect of applications to extend or renew a Timber Permit under s.78 and s.137. At present PFMC members are largely reliant on the NFS Regional Offices for information and access to project sites.

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<sup>&</sup>lt;sup>31</sup> INA, 30 October 2006.

The capacity of PFMCs to act independently of the NFS in undertaking such assessments is arguably essential to the system of checks and balances intended in the 1991 Act. Greater resourcing would also enable the PFMCs to play a more active role in awareness-raising prior to the conclusion of an FMA and in liaising with local-level governments. Some PFMCs (notably Western Province and Simbu) have successfully secured Provincial budget allocations in addition to funding by the Forest Authority, but remain the exception.<sup>32</sup>

Other constraints highlighted by PFMC members include: irregularities over frequency, prior notification, attendance and minute-taking of PFMC meetings; as well as legal awareness and other training in fulfilling PFMC roles and responsibilities under the Act. <sup>33</sup>

## 1.3.3 Strengthening the role of Provincial and Local-Level Government

There is currently no functional link between the Provincial and Local Government and the obligations of the PFMC to (amongst other things) verify authenticity of tenure, and the social acceptability of proposed permits and extensions. This is exacerbated by the fact that Provincial and Local-Level Government sees no share of royalty payments other than what it receives in negotiated levies from specific projects. There is hence very little incentive for these lower tiers of government to see that the requirements of the Forestry Act are adequately complied with.

Yet the fact that PFMCs do not have the capability to independently verify the work of the NFS, presents a strong case for vesting greater powers in local government structures, commensurate with the Organic Law on Provincial Level and Local Level Government (1997). This includes resourcing and empowering Ward Councils and Village Development Committees in facilitating and overseeing landowner awareness-raising and land group incorporation processes. While there is a lot of disappointment in the decentralisation process, it constitutes a political settlement that cannot be retracted and can only be made to work. There are also Provincial and Local-Level administrations such as Milne Bay that are working proactively to put in place policies on sustainable harvesting and down-stream processing, and who need as much support as they can get.

## 1.4 Options for external oversight of forest-sector administration

The previous section highlighted the resource constraints faced by the NFS in compliance monitoring, and the case this presented for further outsourcing. It also highlighted the breakdown of checks and balances between the components of the PNGFA, and the need to enhance the capacity of both the Board and the PFMC to act independently of the NFS. But while solutions such as a Board Secretariat might enhance internal oversight, other instruments providing external oversight are an important guarantee on the integrity of forest-sector administration. This spans a number of functions including: (ii) investigation; (iii) routine auditing; (iii) oversight by other executive agencies; (iv) the power to seek prosecution; and (v) dispute resolution.

<sup>33</sup> Eco-Forestry Forum, Minutes of Workshops for PFMC NGO and Landowner Representatives, 26 – 28 October 2004, 25 – 27 October 2005, 24 – 26 October 2006.

 $<sup>^{\</sup>rm 32}$  Eco-Forestry Forum, Workshop for PFMC NGO and Landowner Representatives, Lae, 24 – 26 October, 2006

An important guarantor on external oversight is S. 51 of the Constitution. This grants "Every citizen ...the right of reasonable access to official documents, subject only to the need for such secrecy as is reasonably justifiable in a democratic society...". It is in fact an enforceable right under S.57.

#### 1.4.1 The Ombudsman Commission

Under s.219 of the Constitution, the primary functions of the Ombudsman Commission are (1) Investigation of alleged wrong conduct and defective administration by governmental bodies;<sup>35</sup> (2) investigation of alleged discriminatory practices, by any person or body;<sup>36</sup> and (3) Investigation of alleged misconduct in office under the Leadership Code.<sup>37</sup> As a constitutional body in its own right, the Ombudsman Commission operates independently of both the legislature and the executive. Under S219(1)(a)(ii) of the Constitution, it can also initiate investigations of its own initiative (as opposed to acting only in response to a public complaint).

As such, the Ombudsman commission has proved one of the most active and influential forms of public oversight in the forestry sector – including investigations into the grant of an extension to the Wawoi Guavi Timber Permit in respect of Kamula Doso FMA, the Supreme Court reference challenging the constitutionality of the Forestry Act 1991 (see section 1.1.4). The power vested in the Ombudsman Commission to investigate the conduct of public officer holders, and to seek their referral to the Public Prosecutor or an appropriate tribunal under s.27 of *Organic Law on the Duties and Responsibilities of Leadership*, <sup>38</sup> is especially significant.

However S.219(6) of the Constitution prevents the Ombudsman Commission from enforcing the reports of its investigation by litigation. This was affirmed by the National Court in *Ken Norae Mondiai and others v. Wawoi Guavi Timber Company Limited and others* [2006] PGNC 4; N3061 (4 July 2006). The Ombudsman Commission is also constrained from providing routine oversight of the forest sector given its heavy case load and limited capacity. While a sector-specific Ombudsman is an attractive option, there is currently no legal basis to establish one.<sup>39</sup>

As such, the Ombudsman Commission will need to work alongside other external oversight functions, including supervision by other executive agencies, routine audits, and specialised dispute resolution mechanisms.

#### 1.4.2 Oversight by other executive agencies (price approvals for log exports)

The National Executive Council bears ultimate responsibility for the workings of the NFS. However, there are specific areas that potentially require additional cross-departmental scrutiny.

The negotiation of sales by log exports is currently subject to price approval by the NFS Marketing Branch. SGS will scrutinise remittance invoices to ensure prices are not negotiated at above approved rates. Whether, however, the system works to address transfer pricing turns on the integrity of the price approval mechanism itself. The complexity of the timber market, and apparently wide variation in export prices as highlighted in recent SGS data, 40 makes a case for broadening involvement in price approval processes beyond the NFS, to include the Internal Revenue Commission and the Treasury. Both have a direct interest in ensuring revenues are captured. This option is also taken up in Paper Three of this series of forest-sector studies.

#### 1.4.3 Supreme Audit Institutions

<sup>&</sup>lt;sup>35</sup> Constitution, Sections 219(1)(a) & (b) Organic Law on the Ombudsman Commission

<sup>&</sup>lt;sup>36</sup>Constitution, Section 219(1)(c) Organic Law on the Ombudsman Commission

<sup>&</sup>lt;sup>37</sup> Constitution, Section 219(1)(d) Organic Law on the Ombudsman Commission

<sup>&</sup>lt;sup>38</sup> S 27

<sup>&</sup>lt;sup>39</sup> Ombudsman Commission, 24 October, 2006.

<sup>&</sup>lt;sup>40</sup> SGS (2006) Log Export Monitoring Monthly Report for August 2006 to the Papua New Guinea Forest Authority. October 2006 unpublished.

S. 213 of the Constitution of Papua New Guinea establishes the Office of the Auditor-General. Under S.214 (and also S.3 of the Audit Act 1989), the functions of the Auditor General are to "inspect and audit, and to report at least once in every fiscal year ....to the Parliament on the public accounts of Papua New Guinea, and on the control of and on transactions with or concerning the public moneys and property of Papua New Guinea, and such other functions as are prescribed by or under Constitutional Law." Under the Organic Law on Provincial-Level and District-Level Government and Audit Act 1989, the Auditor General may also establish a Provincial Audit Service with responsibility for auditing the account of the Provincial and District government annually and with the power to inspect accounts at any other time.

While the Auditor-General already audits PNGFA finances, there is a potential role of the Supreme Audit Institutions in auditing disbursements, receipts and final disposal of landowner payments. This is especially pertinent to the duty of public trust borne by government in respect of royalties held on behalf of, and disbursed to, ILGs (see s.1.3.1a).

## 1.4.4 Auditing under voluntary certification schemes

As argued in section 1.3.1, there may be an important role for routine 3rd party audits of the NFS' core monitoring functions where these have not been outsourced. This could potentially be introduced:

- (i) On request by a Board secretariat (as a form of internal oversight) see section 1.3.2; or
- (ii) Under voluntary schemes, such as ISO 19000 certification for environmental management and systems monitoring (as a form of external oversight).<sup>41</sup>

## 1.4.5 Anti-Corruption and Human Rights Commissions

There are currently proposals to establish an Anti-Corruption Commission and/or an equivalent commission on Human Rights Commission. Significantly, this would have the power to both investigate and seek prosecution, and so would work to complement the role of the Ombudsman Commission. Like the Ombudsman Commission, the proposal is that these would constitute constitutional bodies in their own right enabling them to act independently of both the legislature and the executive.

## 1.4.6 Specialised dispute resolution mechanisms

The relatively large number of cases that have been brought before the courts relating to administrative decision-making is testimony to high public expectation in the courts and the ability of aggrieved parties to secure access to justice. However, the courts are severely overloaded. Nor is a growing pile of litigation a necessarily efficient way for government to conduct its business. A case needs to be made for more effective dispute resolution through specialised institutions.

Given that a major part of the existing forest-sector litigation relates to alleged abuse of administrative processes, a strong case can be made for establishing a dedicated *Tribunal for Review of Administrative Decisions*, akin to the Administrative Appeals Tribunal (AAT) in Australia. The latter was established by Act of Parliament in 1976. One advantage with the AAT

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<sup>&</sup>lt;sup>41</sup> 3rd party auditing of SFM is also taking place under operator-based schemes, including FOCERT (group certification of community producers) as well as Innovision (PNG) Ltd which is working towards FSC certification in the Makapa FMA.

model is that its proceedings can be conducted with as little formality and technicality as the requirements of the Act and a proper consideration of the matters before the Tribunal permit. Nor is the Tribunal bound by the rules of evidence and can inform itself in any manner it considers appropriate. As such it would have the potential to expedite decisions that would otherwise take months or even years in the normal courts of law.<sup>43</sup>

There may also be a case for establishing combined, dedicated *land and natural resource courts*, where there are no specialised courts or tribunals in the forestry sector, and where land courts are currently convened through the appointment of local or principal magistrates and district officers under the Land Dispute Settlements Act 1975. Given the indivisibility of land and natural resources, and the nature of land tenure in PNG, a specialised court would seem essential.

Finally, lessons may also be drawn from the quasi-judicial functions of *Wardens* under the Mining Act 1992 and the Oil and Gas Act 1998, responsible for (amongst others) the determination of compensation payments. Equivalent functions are vested in Land Mediators as appointed by Provincial Land Dispute Settlement Committees under the Land Dispute Settlements Act 1975. However no equivalent yet exists in the forestry sector.

## 1.4.7 Another Commission of Inquiry

It has also been proposed by some NGOs that another Commission of Inquiry be instituted. This may be a necessary first step towards a comprehensive review of the PNGFA (including the core and outsourced functions of the NFS), and the blend of instruments necessary for both internal and external oversight. However, this can only be mandated at the behest of the Executive and depends on political will.

## 1.5 Strengthening information systems

Information systems constitute a significant constraint on effective administration and oversight of the forestry sector. Provincial forest offices may send monthly declarations on a diskette to Port Moresby, but the idea of a computerized system linking the provinces, regions and NFS headquarters never took off. This is despite investments by AusAid in the mid 1990s. The reasons include constraints with the existing telecommunications network. As such, the NFS continues to rely on paper-based log tally sheets (FR 100 or what was previously known as FD 66) to record the volume of logs harvested and to assess timber royalties.

SGS has since installed its own computerized database on export consignments. As the only information source of its type, landowners are currently using this to cross check royalty payments. However, it only captures part of the timber administration system and there is a need to extend it upstream to cover log scaling and royalty assessments. Nor is it currently possible to reconcile data on timber production, mill throughput and exports. The latter is of real concern as the proportion of sawn exports expands exponentially.<sup>44</sup>

<sup>44</sup> SGS, 17 October 2004.

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<sup>&</sup>lt;sup>43</sup> See also: http://www.aat.gov.au/

## 2. Phasing and prioritizing reform

Fingleton, in a regional study on Pacific Islands forestry legislation, reminds us that legislation must take account for a country's administrative realities.<sup>45</sup> An over-ambitious legal and policy framework is more likely to create distortions than improved performance – as already witnessed with the 1991 Forestry Act.

The options set out above are intended to address those distortions. However, the further development of administrative procedures, reforms to the structure of the PNGFA, enhanced external oversight and investments in information systems must themselves account for limited resources.

Amongst others, a decision to outsource certain functions of the NFS must come with a commitment to investing in the functions that remain - if it is not to 'hollow out' and demobilize the Service. Equally, the costs of enhanced administrative capacity cannot simply be passed on to industry independently of reforms to the tax burden on companies (see Paper 3).

Changes to the legal and institutional framework governing the forest sector will need to be prioritized and phased, in line with available public finances and the institutional capacity to see them through. The challenge is to identify realistic but strategic entry points - a Board Secretariat might be one such option, a forest-sector Warden another.

Certain reforms may also have benefits that go much beyond forestry – an obvious candidate being an administrative appeals tribunal. The courts are playing a crucial role in holding administrative decision-making to account. But litigation is also extremely costly and measures that might expedite access to justice and dispute resolution are desperately needed.

Finally, as Fingleton argues, there may be 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.

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<sup>&</sup>lt;sup>45</sup> Fingleton, J. (2002) *Regional Study on Pacific Islands Forestry Legislation,* FAO Legal Papers Online #30.

## III ANNEX

#### 1. INSTITUTIONAL ROLES AND RESPONSIBILITIES

This section describes the roles and responsibilities of:

- the different elements of the National Forest Authority (PNGFA) as embodied in the National Forest Board, the National Forest (NFS) and the Provincial Forest Management Committees (PFMCs).
- Provincial and Local-Level Governments.
- Other executive agencies.
- Land-owner companies and incorporated land groups.
- Outsourced functions of SGS.
- Enforcement agencies and other forms of external oversight.

#### 1.1 National Forest Board

Section 9 of the Forestry Act specifies that there shall be a National Forest Board which shall carry out the functions and objectives, manage the affairs and exercise the powers of the National Forest Authority (PNGFA).

Section 10 then goes on to outline the membership of the Board which shall consist of -

- a) the Department Head of the Department responsible for environmental protection matters, or his nominee;
- b) the Departmental Head of the Department responsible for trade and industrial development matters, or his nominee;
- c) the Departmental Head of the Department responsible for finance and planning matters, or his nominee;
- d) the Director-General [Managing Director of the National Forest Services];
- e) one member with appropriate experience in commerce and finance, preferably with respect to forestry, nominated by the Minister;
- f) the President of the Forest Industries Association or his nominee;
- g) one member to represent non-governmental organizations concerned with environmental, social or developmental issues;
- h) four members, one from each region of the country, to represent the provincial governments of that region.

The composition of the Board has changed at least three times over the short period that the Act has been in operation. The membership was initially reduced under the 1993 amendment to the Forestry Act to just 6 members, leaving out three representatives from provincial governments, one other government representative and a representative that was to be nominated by the Minister. Under the 1996 amendment, membership was increased to 7 with the inclusion of a member to represent forest resource owners. The Minister's nominee was also replaced by the President of the Association of Foresters of Papua New Guinea. Under the most recent 2005 amendments to the Forestry Act, membership was further augmented by the inclusion of the Forest Industries Association and the reinstatement of a Ministerial nominee. The Eco Forestry Forum was also dropped as the NGO representative in favour of "one member from the community involved in forest activities". With these continuous changes, it is questionable how effectively the Board can perform its duties.

#### 1.2 National Forest Service

The functions of the National Forest Service are not spelt out under the Forestry Act, 1991. Rather, its role is subsumed within the functions of the Papua New Guinea Forest Authority (PNGFA) which, under S. 7 of the Act are defined as follows:

- 1. to provide advice to the Minister on forest policies and legislation pertaining to forestry matters:
- 2. to prepare and review the National Forest Plan and recommend it to the National Executive Council for approval;
- 3. through the Managing Director, to direct and supervise the National Forest Service; [This section now reads to direct and supervise the National Forest Service 2005 amendment];
- 4. to negotiate Forest Management Agreements:
- 5. to select operators and negotiate conditions on which timber permits, timber authorities, large scale agricultural or other land use and road forest clearing authorities [addition as part of the 2005 amendment] and licenses may be granted in accordance with the provisions of this Act;
- 6. subject to the *Customs Act*, *Customs Tariff Act and Exports (Control and Valuation Act)*, to control and regulate the export of forest produce;
- 7. to oversee the administration and enforcement of this Act and any other legislation pertaining to forestry matters, and of such forestry policy as is approved by the National Executive Council;
- 8. to undertake the evaluation and registration of persons desiring to participate in any aspect of the forestry industry;
- 9. to act as agent for the State, as required, in relation to any international agreement relating to forestry matters;
- 10. to carry out such other functions as are necessary to achieve its objectives or as are given to it under this Act or any other law.

Prior to the 2005 amendment, many of the above functions were delegated to the Managing Director of the National Forest Service to administer and implement. But with the removal of the term 'Managing Director' from S.7(1)(c) of the Forestry Act under the 2005 amendments, the mechanism by which the PNGFA (as embodied by the Board) can direct and supervise the NFS is left ambiguous.

## 1.3 Provincial Forest Management Committees

Sections 22-30 of the *Forestry Act, 1991* stipulate the functions and composition of the Provincial Forest Management Committee (PFMC). The Act clearly intends for the PFMC to play an important role in enabling consultation with provincial governments and customary owners.

Section 22 of the Act specifies that the PFMC members will consist of:

- a) a senior officer in the administration of the province chairman;
- b) an officer of the NFS;
- c) a representative of the local or community governments nominated by the provincial executive:
- d) two persons to represent landowning groups; and
- e) a representative of non-governmental organizations

Unlike the National Forest Board the composition of the PFMCs has not changed.

Section 30 of the Act defines the functions of the PFMC as:

- a) providing a forum for consultation and co-ordination on forest management between national and provincial governments, forest resource owners and special interest groups;
- b) undertaking continuous consultation with the provincial Minister responsible for forestry matters on matters relating to acquisition and allocation of forest resources;
- c) assisting the provincial government in preparing forest plans and forest development programmes consistent with national and provincial programmes;
- d) making recommendations to the Board on -
  - preparation and terms of Forest Management Agreements;
  - selection of operators and the preparation of timber permits;
  - enforcement of timber permit conditions and of the Act;
- e) making recommendations to the provincial Minister on
  - the issue of timber authorities:
  - the extension, renewal, transfer, amendment or surrender of timber authorities;
  - supervise extension services with respect to business management, agroforestry, silviculture, reforestation, environmental protection, processing and marketing;
  - overseeing the receipt and distribution of government levies and charges and other benefits due to landowners;
  - assisting in the early identification and resolution of land-owning disputes affecting forest resources;
  - carrying out such other functions as it is required to carry out by the Act or any other law.

Consequently, the PFMCs have a very important role to play, yet experience show that they often lack the capacity to perform their role independently.<sup>46</sup> Interestingly, S.30(2) stipulates that a PFMC may, by notice in writing, delegate to the National Forest Service any of its functions under s.39(1).

## 1.4 Provincial and Local-Level Governments

The allocation of roles and responsibilities under the Forestry Act (1991) seeks to bring forestry under the control of a single Authority, with PFMCs providing the basis for consultation with local-level stakeholders.

Forestry Act 1991 consequently vests little power in Provincial Governments themselves (defined under the Act as *Provincial Forestry Committees* as opposed to PFMCs). Their duties are subject to Board approval and only relate to:

- (i) Development of Provincial Forestry Plans under S.49 51 of the Forestry Act (1999), which must be consistent with the National Forest Policy and the National Forestry Development Guidelines; as well as
- (ii) Issuances of Timber Authorities under S. 87 90.

<sup>&</sup>lt;sup>46</sup> Eco-Forestry Forum, Workshop for PFMC NGO and Landowner Representatives, Lae, 24 – 26 October, 2006

While provincial administrations may chair PFMCs, there is no other functional link between these institutions. Unlike other natural resource sectors, the Provinces and LLGs also see no direct share in timber royalties, though they may receive negotiated levies.

This contrasts with the arrangements put in place under the Organic Law on Provincial Government and Local Level Government (1998). On the premise of enhancing local accountability, the Organic Law worked to redistribute authority across the three levels of government, including a substantial increase in the role of Local-Level Government in planning, regulation, taxation and service delivery. The Organic Law also vests substantial law-making powers in Provincial and Local-level administrations, including a number of areas relevant to forestry.

Under s.42(1) of the Organic Law, the Provinces may make laws on (amongst others):

- (r) Land and land development including provincial titles and leases;
- (s) Forestry and agro-forestry;
- (t) Renewable and non-renewable natural resources; and,
- (y) Parks, reserves, gardens, scenic and scientific centres.

S.44(1) grants LLGs power to make laws on (amongst others):

- (i) Dispute settlement;
- (p) Local environment;
- (s) Domestic animals, flora and fauna;
- (z) Protection of traditional sacred sites; and,
- (ab) The imposition of fines for breaches of any of its laws.

That said, S.42(2) of the Organic Law provides that powers to make laws on natural resource sectors do not apply to large-scale ventures declared by the Head of State. S.41(7) also provides that an Act of the Parliament on matters specified in Section 42 or 44 will prevail over any equivalent provincial or local-level law to the extent that there is any inconsistency with the Act. The issue of whether or not matters have been exhausted by an Act of Parliament, or remain for Provinces and Local-Level Governments to regulate, has consequently been the source of some tension within the forestry and fisheries sectors – given that they are both now governed by single-spine Authorities.<sup>47</sup>

Provinces and Local-Level Governments do, however, enjoy an implicit veto under the Forestry Act when it comes to the acquisition and allocation of resource – under both S.57 which requires the Board to consult with provinces as to its intentions to enter into an FMA, as well as S.67 on the evaluation of proposals by the PFMC; presuming, of course, that the basis of such is itself consistent with national law and policy.

#### 1.5 Other executive agencies

#### 1.5.1 Environment & conservation

The approval of the Department of Environment and Conservation (DEC) is required for all major development projects. The DEC is tasked to implement the *Environment Act 2000*, an Act

<sup>&</sup>lt;sup>47</sup> Van Helden, F. (2001) PNG/99/G41 Marine Conservation in Milne Bay Province, Papua New Guinea, A Policy and Planning Needs Assessment for the Milne Bay Marine Conservation Project. UNOPS Contract for Services Ref.: C00-1076

to provide for and give effect to the National Goals and Directive Principles (Natural Resources and Environment), and in particular –

- a) to regulate the environmental impacts of development activities in order to promote sustainable development of the environment and the economic, social and physical wellbeing of people by safeguarding the life-supporting capacity of air, water, soil and ecosystems for present and future generations and avoiding, remedying and mitigating any adverse effects of activities on the environment;
- b) to provide for the protection of the environment from environmental harm;
- c) to provide for the management of national water resources and the responsibility for their management.

Because of its mandate (listed above), the Head of the Department of Environment and Conservation has been a member of the National Forest Board since its inception. This also includes him being appointed as the Chairman of the National Forest Board on many occasions.

With references to timber, no actual development will take place – even after the Minister for Forest has issued a timber permit - until the Minister for Environment and Conservation has approved an environment plan. Unfortunately, while the DEC has an important role, it reportedly does not have the capacity (both personnel and financing) to perform its function.

#### 1.5.2. Department of Labour and Employment

The timber industry in PNG employs a large number of foreign nationals. The Department of Labour and Employment is responsible for issuing Work Permits but leaves NFS to supervise day to day operations. There is in fact little dialogue between the Department of Labour and Employment and the NFS, despite concerns over the high number of foreign nationals in jobs that could be easily undertaken by Papua New Guineans.<sup>48</sup>

#### 1.5.3 Departments of Health, Education, Transport and Works

The Departments of Health and Education are required to be involved in the provision of community health centres and schools. Unfortunately, there is little communication between these agencies and the National Forest Service, with the result that not all the required infrastructure to be provided by the timber company is necessarily constructed to standard. Lack of manpower and resources also means that these agencies are not able to meet the recurrent costs of maintaining such infrastructure. Similar problems beset the Department of Transport with respect to wharves and airstrips and the Department of Works with respect to roads and bridges.

#### 1.6 Landowner companies and incorporated land groups

The 1979 Forest Policy envisaged public involvement in decision-making through the institution of landowner companies, but this quickly proved to be an inadequate basis for equitable participation. More often than not, the landowner companies provided a means for individual clan agents to enter into business transactions without the consent of other members of their communities.

The new 1991 Forest Policy looked, rather, to Incorporated Land Groups (ILGs) which had been pioneered by the oil and gas sector as mechanisms for the distribution of benefits. This is

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<sup>&</sup>lt;sup>48</sup> Independent Forest Review Team 2002, 2004.

reflected in s.57(1)(a) of the Forestry Act 1991, which identified ILGs as one basis for resource acquisition under Forest Management Agreements (FMAs). ILGs were first introduced under the Incorporated Land Groups Act (1974) as a 'holding' mechanism for the registration of group titles (to be regulated under a separate act). As such, they provide a structure for collective decision-making governed by a constitution.

Although the Act excludes landowner companies for purposes of entering into FMAs, the companies continue to play a part as structures for the distribution of royalty payments held on trust by PNGFA and/or as clan agents in the acquisition of resources for smaller-scale Timber Authorities.

With respect to royalty payments, s.235 of the Forestry Regulation Act (1989), requires landowners to 'appoint or establish, and nominate for recognition by the Managing Director, a corporate body or Local-Level Government to represent them'. The relationship between this and ILGs incorporated under s.57 of the Forestry Act (1991) is not self-evident. However, for the purposes of the Regulation, an ILG could in theory be represented:

- (i) by a Local-Level Government where the ILG is a member of a Village Development Council;
- (ii) as shareholder to a Landowner Company incorporated under the Companies Act (1997); or
- (iii) by a business group incorporated under the *Business Groups Incorporation Act* (1974), passed for the purposes of 'working' group titles held by ILGs.

In any case, the Regulation requires the nominated body to operate a bank account through which royalties held on trust by the NFA are distributed to the body's membership. The body's managers are required to expend and invest moneys received subject to its articles and rules, for the collective benefit of resource owners. S.235(7) provides that the Forest Board may suspend operation of the bank account if, in its opinion, there are ground to believe funds have been expended or invested in breach.

#### 1.7 SGS

SGS was contracted in 1995 to operate an outsourced log export monitoring system in 1995. This responded to evidence of heavy transfer pricing and losses in export revenues. Under its contract, SGS monitors all log exports from the country (approximately 2 million m³ annually) through 30 export points. Further detail on the administration of log exports is contained in Annex 2.6.

#### 1.8 Ombudsman Commission

The Constitutional Mandate of the Ombudsman Commission is to the improve work of government bodies, and to eliminate unfairness and discrimination. The sole functions of the Ombudsman Commission are to investigate and report, as well as its duties under the *Leadership Code*. It does not have a judicial function.

Under S.219(1) of the Constitution, the Ombudsman is mandated to (among others):

(a) investigate, on its own initiative<sup>49</sup> or on complaint by a person affected, any conduct on the part of:

<sup>&</sup>lt;sup>49</sup> The Commission will act of its own initiative where, for example, a pattern of maladministration has been identified. Presentation by Ila Geno to 22nd Australasian and Pacific Ombudsman Regional Conference, Wellington, New Zealand 9 – 11 February 2005.

- (i) any State Service or provincial service, or a member of any such service; or
- (ii) any other governmental body, or an officer or employee of a governmental body; or
- (iii) any local government body or an officer or employee of any such body; or
- (iv) any other body set up by statute—
- (v) any member of the personal staff of the Governor-General, a Minister or the Leader or Deputy Leader of the Opposition; or
- (vi) any other body or person prescribed for the purpose by an Act of the Parliament,

... where the conduct is or may be wrong, taking into account, amongst other things, the National Goals and Directive Principles, the Basic Rights and the Basic Social Obligations...

- (b) investigate any defects in any law or administrative practice...;
- (c) to investigate, either on its own initiative or on complaint by a person affected, any case of an alleged or suspected discriminatory practice...; and
- (d) any functions conferred on it under Division III.2 (leadership code).

Under 219(2) wrong conduct is defined here as:

- (a) contrary to law; or
- (b) unreasonable, unjust, oppressive or improperly discriminatory, whether or not it is in accordance with law or practice; or
- (c) based wholly or partly on improper motives, irrelevant grounds or irrelevant considerations; or
- (d) based wholly or partly on a mistake of law or of fact; or
- (e) conduct for which reasons should be given but were not.

In line with enabling legislation, the Commission works to ensure integrity and fairness in the course of its investigations. Persons and authorities or institutions subject of the Commission's investigation are accorded fairness and natural justice at every step. <sup>50</sup>

#### 1.9 Enforcement agencies

#### 1.9.1 National Forest Service – Forest Inspectors

The Forestry Act clearly states that any forest industry participant who engages in forest industry activities except under and in accordance with a timber permit, timber authority or licence, held by the forest industry participant, is guilty of an offence (S.122 (2)). The forest inspector (who in most cases is the project supervisor) will establish what the offence is and advise the company and the head office of the NFS accordingly. Many project supervisors and even provincial forest officers have nevertheless commented that this never results in prosecution.

## 1.9.2 The Royal Papua New Guinea Constabulary (RPNGC)

The involvement of the RPNGC in timber development is a new phenomenon. RPNGC presence has been reported at Vailala Blocks 2 & 3 and Wawoi-Guavi timber areas. Their involvement or presence is not directly related to the enforcement of the Forestry Act, but allegedly to quell increasing law and order concerns due to the presence of a timber project.<sup>51</sup>

<sup>&</sup>lt;sup>50</sup> Presentation by Ila Geno to 22nd Australasian and Pacific Ombudsman Regional Conference, Wellington, New Zealand 9 – 11 February 2005.

<sup>&</sup>lt;sup>51</sup> A Catalogue of abuse. Officially documented abuses in Rimbunan Hijau's logging operations in Papua New Guinea, April 2006. Anonymous.

#### 2. FOREST MANAGEMENT AND CONTROL

The PNGFA's Planning, Monitoring and Control Procedures for Natural Forest Logging Operations Under Timber Permits (PMC) sets out in detail what is expected of the timber operators as well as the approval procedures to be administered by the NFS. However, based on interviews with field foresters for this study, understaffing and other resource constraints make it difficult to follow all that is contained within the PMC.<sup>52</sup>

## 2.1 Resource planning

Section 54 of the Forestry Act 1991 states that forest resources shall only be developed in accordance with the National Forest Plan. This was developed and approved by Parliament in 1996, and directs the Papua New Guinea Forest Authority (PNGFA) in its work programmes.

The provisions for the development of the National Forest Plan are specified under section 47 of the Act as follows. They should:

- (a) be consistent with the national forest policy and relevant government policies:
- (b) be based on a certified National Forest Inventory which shall include particulars as prescribed;
- (c) consist of -

Forest Sector Studies.

- (i) National Forestry Development Guidelines prepared by the Minister in consultation with the Board and endorsed by the National Executive Council;
- (ii) The National Forest Development Programme;
- (iii) A statement, prepared annually by the Board, of allowable cut for each province for the succeeding year which will ensure that the areas of forest resource set out in the Provincial Forest Plan, for present or future production, are harvested on a sustained yield basis.

NGOs have raised concerns about the 1996 National Forest Plan, arguing that it was not developed in strict compliance with the Act as set out above. The matter is presently before the Courts (see also Section 1.1.1 of the Analysis).

52 Vatabu M. (2006) *Makapa Timber Project Case Study Report – Western Province,* Papua New Guinea

## 2.2 Resource acquisition and allocation

Requirements for the acquisition and allocation of forest areas under The *Forestry Act 1991* are set out in Figure 1.

Figure 1: Forest Resource Acquisition and Allocation Process

Step 1: Forest Inventory (Forest Resources shall be developed only in accordance with the National Forest Plan)  Step 2: Landowner Awareness Programme  Step 3: Formation of Land Group  Step 4: Forest Management Agreement	Acquisition Phase		
Step 5: Development Options Study			
Step 6: Advertisement: Call for Project Proposals			
Step 7: Corporate Formation	Allocation Phase		
Step 8: Selection of Preferred Developer(s), Negotiations			
Step 9: Developer Feasibility Study			
Step 10: Project Agreement			
Step 11: Approval of Environmental Plan Under the Environment Planning Act			
Step 12: Timber Permit	Operations Phase		
Step 14: Harvest Authorization			

Source: Adapted from Turia (2005) Figure 4: 97

The two initial steps in Resource Acquisition involve: (1) a forest resource inventory; and (2) landowner awareness raising.

The forest area to be inventoried has to be in accordance with the National Forest Plan, meaning that it has been identified as a potential forest production area and listed in the National Forest Plan.

The landowner awareness program is intended to:

- (a) provide landowners with an information base to assist them in making decisions concerning the options for the use of their land and forest resources; and
- (b) present landowners with a general but realistic picture of the likely costs and benefits, impacts and responsibilities associated with a forest development project and possible alternatives; and
- (c) establish channels of communication which will enable landowners to truly participate in a project formulation process and ensure that it is sensitive to their needs and concerns.

If the landowners agree to their forest resource area being developed involving timber production, the PNGFA will proceed with the incorporation of all land groups within the forest resource area based on the *Land Group Incorporation Act, 1974*. This process is legally under the ambit of the Department of Lands and Physical Planning (DLPP), but is been performed by PNGFA for forestry projects.

The third step involves the formation of land groups (Section 57 of the *Forestry Act, 1991*). It is the land groups rather than individual landowners who will become the parties to the FMA. Landowners or any person or any organisation may assist landowners incorporate their land groups, however the PNGFA has insisted that all documents are lodged with them for inspection and further verification before such documents are lodged with the DLPP for processing and certification.

The fourth step is the execution of the FMA itself (Section 58 of the *Forestry Act, 1991*). In accordance with Section 58 of the Act, a Forest Management Agreement shall:

- (a) be in writing; and
- (b) specify the monetary and other benefits, if any, to be received by the customary owners in consideration for the rights granted; and
- (c) specify the estimated volume or other measure of quantity of merchantable timber in the area covered by the Agreement; and
- (d) specify a term of sufficient duration in order to allow for proper forest management measures to be carried out to completion; and
- (e) be accompanied by a map showing clearly the boundaries of the area covered by the Agreement; and
- (f) contain a certificate from the Provincial Forest Management Committee to the effect that it is satisfied as to
  - a. the authenticity of the tenure of the customary land alleged by the persons or land group or groups claiming to be the customary owners; and
  - b. the willingness of those customary owners to enter into the agreement; and
- (g) provide that a portion of the area covered by the Agreement
  - a. has been identified and dedicated; or
  - b. shall, after the Agreement has been entered into, as logging progresses in working plan areas, be identified, by the customary owners as areas for forest management purposes.

While these provisions are similar to the pre-1991 Forestry Act, they incorporate two new aspects:

- the explicit assumption on the part of the Government that it can 'manage' the land area over the entire life of the FMA 35 years; and,
- the involvement of the Provincial Government, through the PFMC, in verifying the ownership of land.

These are big demands on any of the Provincial Governments which do not have the capacity (manpower and financial) to perform such tasks.

As regards the PNGFA, this step involves its officers going out to the land groups and collecting signatures of the appointed chairmen of each land group. A certificate from the Provincial Forest Management Committee (PFMC) will be required to validate authenticity of tenure by those claiming to be the owners and their willingness to dispose of their rights is true in all respects.

The other steps that are important as regards landowners consent or consultation are in the Allocation Process, steps 5 and 6. Step 5 involves the carrying out of a Development Options Study (DOS) under Section 62 of the Act. This is normally done by the PNGFA and is separate from the feasibility studies that interested investors conduct when they are interested in an advertised timber area. The aim of the DOS is to investigate:

- 1. the possible environmental and social impacts of the project; and
- 2. the feasibility of the project including the feasibility of processing locally all or part of the timber harvested in the project; and
- 3. the level of investment required in the project; and
- 4. the prospects for marketing and the expected timber prices; and
- 5. options available for development and forest management; and
- 6. options for landowner participation in the project.

According to the Forestry Act and the Guidelines as developed by the Minister of Forests, it would appear that the DOS should take place straight after the landowner awareness program. However, in practice, the PNGFA conducts it after the FMA process.

The next step in the allocation process is Step 6, Advertisement of Project. This step involves the Provincial Forest Management Committee (PFMC) and the Provincial Government. As required by S.67 of the Act, the PFMC in consultation with the forest resource owners and the provincial government concerned prepare draft guidelines for how the project is to be developed. The draft guidelines are then forwarded to the National Forest Board for its consideration and if satisfactory, the Board will issue the final guidelines for the project. The guidelines will provide interested parties with general information about the project development area. It will also serve as the basis for assessing project proposals for compliance with the guidelines. This step (Advertisement of Project) is an improvement on the previous situation, in that all timber projects must now have a negotiated Project Agreement (PA). The Act does not define what a PA is, though Division 5 of Part III of the Act outlines the requirements for entering into a PA.

The Board in conjunction with the PFMC will define the parameters within which project negotiation shall be conducted and the composition of a negotiation committee. The Board will consider the draft project agreement and if it is satisfied with its contents, it can then execute the project agreement on behalf of the Authority. If the Board is not satisfied with the final draft

project agreement, it will return it to the PFMC with the details of any matters that will require further negotiations. The important aspects contained in the project agreement are the 'schedules' relating to log harvest, log export and other necessary infrastructure.

Section 73 (1) of the Forestry Act enables the person with whom the PNGFA has entered into a project agreement to make an application for a timber permit under Section 77, whereupon the Minister grants a permit within 30 days. The process can, however, be delayed if an Environmental Plan has not been improved or payment of a Performance Bond has not taken place.

## 2.3 Registration and tendering by forest industry participants

The Forestry Act clearly stipulates that no person can apply for a timber permit, timber authority or timber license (section 114) unless registered as a forest industry participant. However, it is difficult for the NFS to implement this provision under timber authorities where customary landowners are involved in the operation themselves with assistance from non-governmental organizations. This is because they own the land and the forest resources.

The tendering and negotiation of timber development projects come under the allocation process (part of the so-called 34 steps that the PNGFA follows) to approve a project. The tendering process follows immediately after the FMA has been executed by the Minister for Forests and a development options study (DOS) has been conducted by the NFS. <sup>53</sup> The advertisement (tender document) includes the name of the proposed timber area, estimated timber volume, the kind of industry that the PNGFA is contemplating and a feasibility study. This is determined based on the DOS.

#### 2.4 Harvesting

Harvest planning procedures are set out in the Procedures for the Planning, Monitoring and Control of Natural Forest Logging (PMC). The PMC aims to assist Project Supervisors in monitoring and control of logging operations in the field, so as to achieve the goals of sustainable forestry and the observance of appropriate environmental standards.

#### **2.4.1 5-year plans**

These plans are prepared by the timber operator and forwarded to the PNGFA. Once approved, they are sent back to the Project Supervisor for monitoring. Basically, a 5-year plan outlines the timber company's proposed activities for the five (5) year period, and includes such things as:

- A project statement
- Forest inventory data
- Permanent roads (if any) to be constructed
- Where log ponds and base camps are to be constructed.

#### 2.4.2 Annual logging plans

These are the plans that lay out the annual activities of the timber company, building on the 5-Year Plans. According to the PMC, annual logging plans are submitted to the Regional Office for evaluation and a recommendation may be made to the Managing Director for approval or

<sup>&</sup>lt;sup>53</sup> This feasibility study (DOS) is different to the feasibility study that the timber developer is required to conduct once it is selected as the preferred developer.

rejection. This is relatively straight forward when a timber company is just commencing its operations. But delays in securing approvals for new annual logging plan can be problematic once an operation is under way, and do occur when non-compliances have been identified, e.g. in the development of roads.

## 2.4.3 Set-up (harvest block) planning and monitoring

The PMC requires that logging companies submit their 'set-up plans' directly to the project supervisors who are supposed to evaluate and approve them. The set-up plans are more detailed than the 'annual logging plan' in that they must specify:

- the boundaries for harvesting of timber;
- the proposed forest roads, skid tracks, log landings;
- areas to be excluded from logging as marked out on a 1:5000 or 1:10000 map;
- a pre-logging 10 % inventory;
- a schedule of the number of trees tagged for felling;
- a schedule of planned water crossings; and
- a completed landowner cultural site identification form.

While the timber companies are able to comply with these requirements, some officers of the National Forest Service have indicated they do not have the capacity (in terms of manpower and finance) to monitor and evaluate all these planning stages, let alone the actual harvesting operations. Timber companies also have more than one set-up being harvested at any one time, which adds to the NFS workload. This includes assessing and giving approval (or otherwise) for the decommissioning and clearance of previously harvested 'set-ups'.

## 2.4.4 Timber administration at log ponds

Tagging and scaling takes place at the log pond. Tags are printed by SGS and provide a means to tally logs for export. Given that the tag number contains a site code, they enable traceability back to individual harvest blocks but not to individual stumps. PNGFA monitors tag numbers to ensure that they are roughly sequential. Tags may, however, be issued for logs from Timber Authorities, and there is a concern that they can therefore enter the export stream when they are supposed to be for domestic processing only. Scaling is undertaken at log ponds by accredited log scalers, subject to spot checks by NFS officers. Scaling data is also monitored by the chief scaler at NFS headquarters.

#### 2.4.5 Payment of royalties and levies

The logs are listed by clans as well as tag numbers. This assists in determining who owns how much timber from a particular set-up, and provides the basis for distributing royalties. Levies are generally paid to the community or the provincial administration for a specified purpose (e.g. a community hall) as negotiated between landowner representatives and the timber company. The experience of Makapa, however, shows how payments can lead to rapid fragmentation of ILGs.

## 2.4.6 Community development

In most cases, the community development work is undertaken by the operating timber company in the area. Some projects are now insisting that any community development (to be paid from the levies) should be publicly tendered and that landowner companies be given preferences to construct them.

## 2.5 Processing

To date, the National Forest Service has not shown much interest in the monitoring of throughput and recovery rates from processing plants. Much of its attention has been focused on log export monitoring as this is where the government generates most of its revenue. This area needs to be revisited and monitored closely given the growing importance of sawn timber exports.

## 2.6 Log exports

Under the PNGFA's Procedures for Exporting Logs, all impending log shipments are required to be notified to SGS. SGS's export monitoring process involves independent physical checks for species identification and log measurement before loading, as well as a tally of logs in each shipment. Vessel cargo details are also reported. Inspections are undertaken jointly with PNGA. For SGS to perform this service, an exporter must have PNGFA endorsement of the price at which the timber will be sold at, a Log Export License from the Department of Trade and Industry, as well as a Log Export Permit from PNGFA. SGS will then issue an Inspection Report. This is used to calculate the export tax and enables Customs to clear the shipment.

As originally intended in the PNGFA Procedures for Exporting Logs, an exporter would also be required to obtain SGS endorsement of commercial invoices against Letters of Credit issued by PNG Banks. But, this was rendered obsolete as a result of changes in foreign exchange controls. SGS has, however, taken the initiative in requesting exporters to submit copies of remittance invoices. SGS then recalculates the export tax by comparing volumes exported against approved prices on the export permit. Discrepancies are reported to the Inland Revenue Commission (IRC) for purposes of log export duty and company tax monitoring.<sup>54</sup>

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