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THE ADMINISTRATION OF SPECIAL PURPOSE AGRICULTURAL AND BUSINESS LEASES

Customary Land and the Lease-Lease-Back System

by

Elizabeth Moore

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ACRONYMS

CELCOR	Centre for Environmental Law and Community Rights
DCJ	Deputy Chief Justice
DLPP	Department of Lands and Physical Planning
DNPM	Department of National Planning and Monitoring
ELC	Environmental Law Centre
ILG	Incorporated Land Group
NLDP	National Land Development Program
NGO	Non-governmental organisation
PGNC	Papua New Guinea National Court
PNSC	Papua New Guinea Supreme Court
SPABL	Special Purpose Agricultural and Business Lease

FOREWORD

The Acting Prime Minister announced, through newspaper and media reports on 6 May 2011, a moratorium on the issuance of Special Purpose Agriculture and Business Leases (SPABLs). The Government also announced the establishment of a Commission of Inquiry to look at how SPABLs had been issued, whether legal procedures had been followed, and whether the interests of landowners had been protected.

This followed ongoing concerns that have been raised by non-governmental organisations (NGOs) and academics, but there has never been any response from the Government, even though the matter has been brought to the attention of the National Land Development Program Management Committee. The NGOs have taken the matter up with the United Nations, claiming that the SPABL process is flawed. The NGOs have alleged that the ultimate result has led to the disempowerment, rather than empowerment, of customary landowners. The granting of 99-year SPABLs effectively removes all customary land user rights over the land for up to three generations. In comparison, the normal lease-lease-back arrangement removes customary land user rights for only 25 to 40 years. The NGOs are calling for the immediate suspension of the granting of SPABLs.

Records provided in various issues of the *National Gazette* attest that Special Purpose Agriculture and Business Leases (SPABLs) have been granted for a total of 5.2 million hectares of customary land. These SPABLs have been executed since March 2003 by the Secretary for Lands and Physical Planning, as the delegate of the Minister for Lands and Physical Planning.

The National Research Institute had also been concerned that SPABLs have been issued to individuals and business entities. The National Land Development Program advocates for customary land to be registered by Incorporated Land Groups (ILGs), which recognise communal landownership and user right systems, as practised by Papua New Guinean societies. The ILGs can then lease the land to a developer.

Two new laws — the *Land Registration (Customary) (Amendment) Act* and the *Land Group Incorporation (Amendment) Act* — were passed by Parliament in 2009 to facilitate this process. However, the latter has yet to be gazetted and come into operation. The *Land Group Incorporation (Amendment) Act* is very comprehensive, as it will bring more accountability to the management of the ILGs and the revenues generated from land leases. It also prevents the sale of land registered by ILGs, as only the land lease can be sold or traded for a specified period of time.

The continuous granting of SPABLs is regrettable, as this action contradicts the goals and objectives of the National Land Development Program (NLDP); that is, the Government is sending out mixed signals. While the NLDP places considerable emphasis on developing and empowering customary landowners, the continuous granting of SPABLs by the Department of Lands and Physical Planning is bringing about their disempowerment. Understandably, this is very confusing for the common villager.

The Department of Lands and Physical Planning states that it is freeing-up land for development and also maintains that it is the leaders of customary landowning groups who are directly deceiving the members of their own clans by signing off their user rights through SPABLs.

This argument needs to be placed in the perspective of growing dissent. In June 2009, the National Court upheld an appeal by Musa Valley Management Company Ltd. and revoked

the decision of the Secretary for Lands and Physical Planning to issue a lease-lease-back title to Musida Holdings Limited for a large area of land in Oro Province.

Furthermore, unless the Secretary for the Department of Lands and Physical Planning can prove, in no uncertain terms, that more than 95 percent of SPABLs which have been granted to date are genuine, and/or there is no existing dissent among parties or landowners or legislative flaws, it would make a great deal of sense to revoke all land leases that have been issued so far. This would be consistent and similar to the ruling on the appeal by the Musa Valley Management Company Ltd. in Oro Province. The proposed Commission may provide directions on this issue.

This particular research was undertaken by Elizabeth Moore in 2010 as part of the land research activities to analyse the legal, policy, and administrative procedures relating to the issuance of SPABLs and identify corrective measures, if any.

We hope the findings, discussions, and recommendations of this study will provide useful background information to any investigations and actions taken by the Government.

Dr. Thomas Webster
Directo*r*

INTRODUCTION

Overview

Since 2005, the Government of Papua New Guinea has carried out a progressive land reform program. The goal of the National Land Development Program is good governance of customary land and alienated land in support of tenure security and sustainable, equitable, and broad-based development in rural and urban areas (National Land Development Program Management Committee 2010:iii). In order to achieve good governance of customary land and alienated land, the land administration processes must be critically reviewed and analysed. This paper documents the current administration of the lease-lease-back system in order to initiate further analysis and discussion.

The *Land Act* 1996 states that customary landowners may lease their customary land to the State in return for the State granting a Special Purpose Agricultural and Business Lease (SPABL) over the land (*Land Act* 1996 [ss.11and 102]). This lease-lease-back system was designed to enable customary landowners to access credit for agricultural ventures on their customary land.

There have been various media reports criticising the government's administration of the lease-lease-back system (Barker 2009:22; Joku 2009:44; Barker 2010(a):12; Barker 2010(b):12). It has been alleged that, in many instances, customary landowners have not consented to the State leasing their customary land and subsequently granting SPABLs (*ibid.*). There have also been allegations that the SPABLs have been granted for 'agro-forestry' projects to predominantly internationally controlled companies which are merely interested in carrying out logging ventures in a manner that avoids the requirements of the *Forestry Act* 1991 (Barker 2009).

This paper analyses the processes employed by the Department of Lands and Physical Planning (DLPP) in administering the lease-lease-back system in light of various National Court and Supreme Court decisions. The discussion highlights the importance of procedures being clarified and complied with by the department. It also considers some of the consequences that the poor administrative practices may have on the general purpose of the lease-lease-back system. In reviewing the current legislative and procedural framework of the lease-lease-back system, anomalies with the drafting of relevant sections of the *Land Act* are also discussed.

Framework of Special Purpose Agricultural and Business Leases

The *Land Act* 1996 outlines a two-step process for issuing a SPABL over customary land. In the first instance, the State needs to acquire the customary land by leasing it (the head lease). This lease is executed between the Minister for Lands and Physical Planning and the customary landowners or their representative(s) (*Land Act* 1996 [s.11 (2)]). The requirement for the customary landowners to sign the lease implies that they are aware of, and consent to, the state's acquisition of their land.

After the State has acquired the relevant customary land, the Minister for Lands and Physical Planning may lease the land to a lessee for a special agricultural and business purpose *(ibid.* [s.102(1)]*)*. The *Land Act* 1996 states that this lease (the SPABL or sub-lease) shall only be granted to a person (whether natural or corporate) to whom the customary landowners have agreed *(ibid.* [s.102(2)]*)*.

Apart from specifying that the customary landowners must consent to the State acquiring their land and then leasing it to a nominated lessee, the *Land Act* 1996 is silent on the procedures to be employed in granting SPABLs. The DLPP has no formal written policy on the procedure to be undertaken. However, the department has advised that it uses the same process as when it conducts general customary land acquisitions (personal communication, Ian Kundin, 2010).

Application Form

In summary, the process is initiated by the customary landowners when they submit an application form and pay an application fee (Department of Lands and Physical Planning 2010(c)). The application form is a standard form for all state leases. The information required includes:

- details of the applicant and the type of lease being applied for;
- the proposed purpose of the lease;
- a description of the land; and
- a sketch map of the land *(ibid.* 2010(b)*)*.

Preliminary Checks

After receiving an application, the DLPP officers should conduct checks to verify that the land is customary and free from encumbrances, such as mining leases or, petroleum development licences, or a designated logging concession area, protected wildlife habitat area, or forest management area *(ibid.* 2010(a)*)*. The importance of such checks is demonstrated by the decision in *Ramu Nickel Ltd* v. *Temu*[1] where a SPABL was issued over land that was already the subject of a special mining lease. The court subsequently quashed the decision to grant the SPABL on the basis that two or more registered leases in respect of the same land cannot coexist.

The need for preliminary checks is further supported by media reports that companies have obtained SPABLs in circumstances where the agricultural purpose of the lease is simply a front for logging an area, without complying with the *Forestry Act* 1991(Barker 2010(a)). Such issues highlight that, on receipt of an initial application, the DLPP should consider the proposed use of the land and whether it may involve the jurisdiction of other government agencies, such as the Department of Forestry, Department of Agriculture and Livestock, and the Department of Environment and Conservation. The DLPP needs to consider how it may partner with these other government agencies to ensure that the relevant statutory requirements are met, before a SPABL is granted. It is appropriate that the potential jurisdiction of other government agencies should be considered at the preliminary checking stage. When a SPABL application does raise the jurisdiction of other government agencies, further work may be involved in the next stage — the land investigation.

[1] [2007] PGNC 113 N3252 (unreported, Injia DCJ, 5 April 2007).

KEY CONCEPTS AND ISSUES

Land Investigation and the Land Investigation Report

After the preliminary checks have been conducted, the application is referred to the provincial administration in the province where the land is located. A provincial lands officer is responsible for conducting a land investigation and compiling a Land Investigation Report. The provincial administrator vets the report and issues a Certificate of Alienability. A cadastral survey of the land is also acquired and the Valuer-General conducts a valuation of the land. These documents are all forwarded to the Manager, Customary Lands in the DLPP (Department of Lands and Physical Planning 2010(a)). The department then considers the documents and decides whether or not the State will acquire the land and grant a SPABL. A review of the *National Gazette* has indicated that, generally, the Secretary for Lands and Physical Planning, as the delegate of the Minister, exercises this power (Minister's Delegation Regulation 1976 r 25).

A prominent issue in the media, which is reflected in matters before the National Court and Supreme Court, is the failure of the DLPP to obtain the consent of the customary landowners before granting a SPABL. The most quoted example is the 2002 National Court decision commonly referred to as *Collingwood Bay* (Elaw 2002; personal communication, Mary Bonni, 2010). [2] In the *Collingwood Bay* matter, the National Court was satisfied that, in 1988, the Government had acquired title to 38 000 hectares of land belonging to the Maisin people. The Government subsequently granted a SPABL to two companies. These companies included a landowner of some of the land which was the subject of the lease (personal communication, Mary Bonni, 2010).

These companies entered into an agreement with a Malaysian logging company to clear-fell the forests for the purposes of developing an oil palm plantation. The Maisin people were unaware of these dealings until, in June 1999, barges arrived in Collingwood Bay carrying bulldozers and other logging equipment. Subsequently, the court was satisfied that the Government had acquired the land without the knowledge or consent of the Maisin people. The court cancelled the government's lease and also issued an order enjoining the companies from entering the land without the written consent of the Maisin people (Elaw 2002).

The *Collingwood Bay* case demonstrates that, in order to obtain consent, the DLPP first needs to identify and contact the relevant landowners and/or landowner groups. It is intended that the provincial lands officer does this during the land investigation. The DLPP has no formal policy that guides the conduct of the land investigation. However, the department's Land Investigation Report template provides some guidance. This document requires the officer to identify the landowning group, the population, an estimate of the area owned by the group, the villages of the landowning group, and a genealogy (if available). The report includes a schedule that requires the identification of each landowner and the nature of his or her rights.

The identification of these landowners is likely to be assisted by the provincial lands officer who must complete the Land Investigation Report's '*Declaration of Recognition of Customary Landownership of the Land'* (Declaration) and '*Certificate in Relation to Boundaries'* (Certificate).

The Declaration is to be completed by the customary landowners of land that is contiguous to the land which is the subject of the application. The Certificate involves the provincial lands

[2] A written decision was unavailable from the courts. The case summary is from a personal interview with Mary Bonni, Environmental Law Centre, 29 August 2010.

officer certifying that he or she together with the landowners or their representatives, have traversed the land's boundary, 'as far as practicable'.

The Declaration and Certificate both require actions which may assist the provincial lands officer to identify the customary landowners. However, the likelihood of such actions to identify all landowners depends on the honesty and integrity of the participants and the professional thoroughness of the provincial lands officer. For example, a review of the 2010 *National Gazette* indicates that SPABLs are often granted over significantly large areas of land. The DLPP has advised that, at times, where the land is significantly large, provincial lands officers may not traverse the whole boundary (personal communication, Ian Kundin).

This incomplete action could result in the lands officer not identifying all relevant customary landowners. The identification of all relevant customary landowners could be assisted by the DLPP, if it adopted a more transparent approach to the processing of SPABL applications. For example, if the department advertised all applications that it receives for SPABLs, as well as the details of any intended land investigation, the potential of customary landowners being unaware of an application may be reduced. The publication of such details could occur through the *National Gazette*, the district and provincial administrations, village officials, or through local community mediums, such as radio. Such measures would assist the DLPP to avoid a repeat of the *Collingwood Bay case*.

The Land Investigation Report includes a question as to whether (or not) ownership has been investigated or determined by the Native Land Commission or the Land Titles Commission. It does not require a provincial lands officer to make enquiries with the Land Courts or the Land Titles Commissioner concerning any pending customary ownership disputes. The issue of land disputes was identified by the courts in the decisions of *Yanta Development Association Inc.* v. *Piu Land Group Inc.*[3] and *Ramu Nickel Ltd.* v. *Temu*.[4]

In both matters, the courts noted that the decision makers had failed to consider customary landownership disputes which were pending and/or heard before the Land Courts and the Land Titles Commissioner, over the land the subject of a SPABL application. In the decision of *Ramu Nickel Ltd.* v. *Temu*, the court stated that the Minister 'knew or ought to have known' of the pending rehearing at the local Land Court over customary ownership. In granting the SPABL, the court argued that the decision maker was depriving landowners of their customary interest in the land. If a decision maker grants a SPABL, without giving the landowners an opportunity to be heard on the matter, the decision maker will be breaching the principles of natural justice.

Given the court's consideration of these matters, it would be prudent for the DLPP to include a check of the Land Courts' and/or Land Titles Commissioner's registries regarding past and pending customary ownership disputes in its land investigation. When completing a Land Investigation Report, the provincial administrator is required to make a 'recommendation as to alienability', with respect to the land. This requires the provincial administrator to certify, *inter alia*, that there is no dispute as to landownership. A commonsense approach to the provincial administrator's decision in this regard calls for the land investigation to include a review of the relevant registries for both past and pending landownership disputes.

After the customary landowners have been identified, the provincial lands officer must ascertain whether or not the customary landowners consent to the State acquiring the land and then granting a SPABL to the nominated lessee. The National Court and the Supreme Court

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3 [2005 PGSC 24 SC798 (unreported, Kiriwom, Batari, Mogish JJ, 29 August 2005).

4 [2007] PGNC 113 N3252 (unreported, Injia DCJ, 5 April 2007).

have accepted that ss.11 and 102 of the *Land Act* 1996 require landowners' consent in order for the Government to validly exercise its powers.[5] In the decision concerning *Yanta Development Association Inc.*, the Supreme Court stated that the meaning of consent was 'the consensus of all the landowners within the subject land area being first obtained'.[6]

The recent National Court decision in the case of *Musa Valley Management Company Ltd* v. *Kimas*, is another example of the court declaring the head lease and SPABL null and void because the process employed in the granting of the leases did not involve sufficient landowner consent.[7] In this matter, the court was not satisfied that the majority of customary landowners had agreed to the State acquiring the land and then leasing it back to Musida Holdings Ltd. This was despite two Land Investigation Reports having been completed, and a meeting with the landowners. Of significance to the court was that the head lease was signed by representatives from ten incorporated land groups (ILGs)

The court found that there were 63 ILGs representing the landowners, and that there was no instrument or other document authorising the ten ILG representatives to sign on behalf of the other 52 ILGs [OS (JR) No.10 of 2009:7]. The court also held that the Land Investigation Reports did not clarify that there was agreement by all or even a majority of the landowners (*ibid.*). In commenting that the *Land Act* 1996 was silent on how the customary landowners' agreement to the State acquiring their land was to be effected and evidenced, Justice Cannings stated:

> I suggest that the minimum requirement would be that a substantial majority of the customary landowners indicate their agreement by signing the lease under which the land is acquired by the State (*ibid.:*8).

In circumstances where a lease does not indicate the person to whom the SPABL will be granted, Justice Cannings suggested that at least a substantial majority of the customary landowners should also be signing a separate document indicating to whom they agree to assign the SPABL (*ibid.:*10, 11).

The decision in the case of *Musa Valley Management Company Ltd* v. *Kimas* suggests that the agreement of the landowners may be evidenced by the signing of the lease documents. In the event that only representatives sign the lease document, the landowners need to sign a document verifying the approval of the individuals nominated to represent them. The Land Investigation Report contains a document titled 'Agency Agreement'. This document contains columns for the names and signatures of the landowners to nominate particular individuals as their representatives and agents for the purposes of executing a lease over the land.

Given the decision in the case of *Musa Valley Management Company Ltd.* v. *Kimas,* it would be prudent for the DLPP to ensure that this document is utilised by land investigators. Furthermore, land investigators need to ensure that all landowners, or at least a substantial majority, sign the Agency Agreement.

In the decision concerning *Musa Valley Management Company Ltd* v. *Kimas,* Justice Cannings stated that the *minimum requirement* for evidencing consent was the signing of the

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[5] [2009] *Yanta Development Association Inc.* v. *Piu Land Group Inc.* [2005] PGSC 24 SC798 (unreported, Kirriwom, Batari, Mogish JJ, 29 August 2005); *Musa Valley Management Company Ltd*. v. *Kimas* [2009] OS (JR) No. 10 of 2009 (unreported, PNG National Court of Justice, Cannings J, 22 January 2010).

[6] *Yanta Development Association Inc.* v. *Piu Land Group Inc.* [2005] PGSC 24 SC798 (unreported, Kirriwom, Batari, Mogish JJ, 29 August 2005).

[7] [2009] OS (JR) No. 10 of 2009 (unreported, PNG National Court of Justice, Cannings J, 22 January 2010).

lease by a substantial majority of the landowners (*ibid.*:7). A minimum requirement suggests that there may be more effective ways to ensure that consent has been obtained from all landowners. The land investigation phase is crucial in determining that landowners give consent to the application. The Land Investigation Report requires the provincial lands officer to answer a question concerning the number of years that the landowners are willing to lease the land. However, the report contains no questions which specifically ask the provincial lands officer to confirm that the details of the application have been explained to the customary landowners in their preferred language, that they understand the nature of the proposed application, and that they give their consent. There is also no document for the landowners to complete and confirm the same.

In the 'Recommendation as to Alienability', the provincial administrator is required to certify that the native owners are willing to lease the land. It may be that some individual provincial lands officers do conduct a rigorous community consultation session with the customary landowners. However, given the lack of formal departmental policies on the nature of the land investigation, this is something that can only be identified by reviewing individual cases. A good example is the activities of New Britain Palm Oil Ltd. which works with the government representatives, and has built a reputation for ensuring rigorous consultation with landowners before the government makes a decision to grant any SPABLs.

Such examples may exist in other areas. However, consultation with the Centre for Environmental Law and Community Rights Inc (CELCOR) and the Environmental Law Centre (ELC) suggests that, in general, the DLPP fails to ensure that the free, prior, and informed consent of the landowners is obtained before a SPABL is granted. Both CELCOR and the Environmental Law Centre continue to assist landowners in lodging applications for judicial review of the DLPP's decision to grant a SPABL on the basis that the department failed to obtain the landowners' consent (personal communication, Mary Bonni, Damien Ase, and Paula Bariamu, 2010).

Given that the valid exercise of the power to grant SPABLs relies on the consent of the landowners, it would be prudent for the DLPP to develop formal policies and practices which require consultation with the landowners to obtain their informed consent at the land investigation stage. If the DLPP conducted a rigorous consultation process at the land investigation stage and documented this process, it would provide strength and weight to the provincial administrator's Certificate of Alienability. In turn, this would provide a sound basis for the department to exercise its powers to acquire the land and grant an SPABL by executing the leases.

FINDINGS

The Need for Procedural Compliance

The earlier discussions highlight the need for more regularity in the procedures which are undertaken by the DLPP when administering SPABLs. Some of the stakeholders who were consulted stated that the process for granting SPABLs needs to be set out in the *Land Act* 1996*,* or appropriate regulations (personal communication, Ian Kundin and Mary Bonni, 2010). An alternative would be the development of departmental policies and guidelines for processing SPABL applications, including the land investigation process. However, legislative amendments or regulations will not singularly provide a better solution to the misuse of the granting of SPABLs, anymore than departmental policies and guidelines.

In order for either to be effective, there is a need for extensive awareness and training of the staff in the department and the provincial administrations. Furthermore, the decision makers must be rigorous in reviewing the documentation provided to him or her for consideration when deciding whether (or not) to grant a SPABL.

Where the decision maker is not satisfied that the land investigation has been sufficiently thorough, the matter should be referred back to the department for further action. It is also essential that compliance with procedural requirements, whether legislative or policy based, are continually monitored and evaluated.

In summary, a culture that encourages sound decision making and administrative practices must be cultivated and encouraged with regard to staff who deal with SPABL applications. The necessity and urgency of the DLPP undergoing a cultural shift, where procedural policies exist and are consistently implemented, is demonstrated by the fact that the department's website stating the [SPABL] lease to the State should not be more than 10 to 20 years (Department of Lands and Physical Planning 2010(c)). A review of the *National Gazette* over the last twelve months shows that the majority of SPABLs have been issued for a period of 99 years.

Some Consequences of Current Practices in Granting Special Purpose Agricultural and Business Leases

The *Land Act* 1996 indicates that it is possible for the State to grant a SPABL (the sub-lease) direct to an incorporated group which is not a customary landowning group (*Land Act* 1996 [s.102 (2)]). A review of the *National Gazette* since 2004 reveals that 4 287 239.85 hectares across 68 separate SPABLs have been granted to incorporated companies that are not necessarily landowning groups.[8] Stakeholders have expressed the opinion that decisions to grant the SPABLs direct to third party companies are outside the original intention of the lease-lease-back scheme (personal communication, Brian Aldrich, Damien Ase, Paula Bariamu, and Ian Kundin, 2010).

Despite being strictly legal to grant a SPABL direct to a third party company, in light of the many situations where SPABLs have been granted without the consent of the customary landowners, it would be preferential for the DLPP to cross-check whether the nominated lessee is a customary landowning company that represents the landowners. In situations where the nominated lessee is not a customary landowning company, the department should satisfy itself that the customary landowners fully understand the ramifications of granting the lease direct to a third party. If the customary landowners have not successfully negotiated a

[8] Email from AKT Associations Ltd. to Esekia Warvi, 7 October 2010.

compensation agreement for the use of their land, they will lose the use of, and entitlement to, their land for the period of the SPABL, in addition to any financial benefits deriving from the use of their land.

Given the recent national land reforms for incorporated land groups, it may be prudent to consider whether the State should only be dealing with the newly formed ILGs when granting SPABLs. If the SPABL is granted to a representative ILG, then the decision to grant a sub-sub-lease to a third party company or individual, will hopefully represent the wishes of the customary landowners. With the landowners entering directly into a sub-sub-lease with a third party, it also provides them with an opportunity to negotiate the nature and type of compensation that they will receive as a result of a third party using their land.

If the new ILG regime truly reflects genuine landowners and empowers them with the mechanisms to make collective decisions about the use of their land, and if the State only grants SPABLs to such ILGs, the State will be taking positive steps to ensure that the customary landowners retain control over the use of the land, as well as the benefits which they will receive from such use. In summary, the granting of SPABLs direct to third parties would be less alarming, if the DLPP had clear procedures which ensured that landowners consented to the leases and were aware of the implications of the SPABL being granted direct to a third party.

In considering the appropriateness of granting SPABLs direct to third-party incorporated groups, consideration needs to be given to the potential loss of revenue. Currently, no stamp duty attaches to an SPABL granted by the State (personal communication, Mary Bonni and Brian Aldrich, 2010). This seems reasonable and appropriate in circumstances where a lease is granted to the customary landowners, who will then sub-lease the land to a developer. However, in circumstances where third-party companies are being granted the SPABL direct from the State, consideration needs to be given to the potential revenue loss incurred by the State, as well as whether such action is consistent with the intention of the lease-lease-back system. Granting stamp duty exemptions for SPABLs direct to third-party corporations may also provide a disincentive for non-landowning companies to engage in land dealings with customary landowners who have registered portions of their customary land, following the recently passed *Land Registration (Customary Land) Act.*

Miscellaneous Drafting Errors

The sections relating to the SPABLs in the *Land Act* 1996 need to be reviewed to rectify drafting errors. For example s.102(6) lists various sections of the *Land Act* 1996 which do not apply to, or are in relation to, the granting of a SPABL.

Section 72 is included in the s.102(6) list. Section 72(c) states that the Minister may grant — on application or otherwise — a lease granted under s.102 without referring the matter to the Land Board. The current reading of s.102(6) means that this does not apply, and the Minister does not have discretion to grant a lease under s.102 without referring the matter to the Land Board. It appears that the inclusion of s.72 in s.102(6) is a drafting error.

Sections 68 and 69 are also included in the list at s.102(6). Section 68 requires the DLPP to advertise in the *National Gazette* all land available for leasing under the *Land Act* 1996. This requirement does not apply if land has been exempted from advertisement under ss.69. Section 69(2) provides that the Minister may exempt land from advertisement for application or tender, where a lease is to be granted under s.102. Again, the inclusion of ss.68 and 69 in s.102(6) appears to be a drafting error. The intended combined effect of ss.68 and 69 occurs,

without the need for inclusion in s.102(6). Alternatively, s.69(2) could remove references to SPABLs and be removed from s.102(6).

Section 76 is also exempt from application to SPABLs, arising from s.102(6). Section 76 requires the Minister to execute three copies of a state lease and forward the original and a duplicate to the Registrar of Titles for registration. Despite this exclusion, it is understood that the DLPP's practice is for the sub-lease, or the SPABL, to be lodged with the Registrar of Titles. Consideration should be given as to whether this legislative exclusion should be removed.

CONCLUSION

This paper has highlighted the need to establish formal procedural guidelines for administering SPABLs. Without a set procedure governing administrative decision making, there will continue to be a pattern of questionable decisions which are subsequently quashed by the courts. Given the state's failure to administer SPABLs in a transparent and accountable manner, there is a basis for arguing that a single process for customary landowners to utilise portions of their land for economic development would be preferable — such as the new voluntary registration model. A more indepth analysis of individual SPABLs would assist in forming conclusions about the future of SPABLs.

If SPABLs are to continue, the issues discussed in this paper highlight the importance of undertaking a review of the relevant sections of the *Land Act* 1996, as well as the development of a formal framework for guiding the administration of the SPABLs.

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