

PAPUA NEW GUINEA FOREST AUTHORITY



MINISTRY OF FORESTS

NATIONAL FORESTS BOARD

NATIONAL FOREST SERVICE

Forestry (Amendment) Bill 2005

The purpose of this advertisement is to continue educating the public about the purpose and basis of proposed *Forestry (Amendment) Bill 2005* which has been a subject of public discussions in the media and at various indoor forums in the last couple of months.

Given the diverging public views and comments, it is essential to provide more information and clarification to the most debated Sections of the Amendments, which include Sections 10, 57, 59 and 137.

The views and comments that have or are being aired appear to be promoting the notions that the proposed Forestry Amendment Bill 2005 is unconstitutional and removes, erodes, denies or marginalises landowners and the provincial authorities in which a forest concession is situated in the decisions and decision-making processes relating to acquisition and allocation of a forest concession. Also, there is the perception that powers of Provincial Forest Management Committees (PFMC) and the National Forest Board (the Board) are being removed and vested with the Minister for Forests.

In order for one to gain a full appreciation of the consultation and participating rights of landowners and the provincial authorities in the decision and decision-making processes of acquisition and allocation of any forest concession area, it is essential and advisable that Sections 57 and 59 are read in conjunction with other relevant Sections of the *Forestry Act 1991 (as amended)* which include Sections 58, 62, 63, 67, 68, 69, 70, 71 and 72.

The acquisition and allocation procedure of any new forest concession area is defined under Part III – Forest Management and Development, of the *Forestry Act 1991 (as amended)*. It is important to note that the *Forestry Act 1991 (as amended)* is premised on three key elements. These are;

- i) the need for wider consultation and involvement of key stakeholders in the resource acquisition and allocation process;
- ii) the decision and decision making process is vested with groups of people and not an individual; and
- iii) no one individual has unilateral power to make a decision or over rule a decision.

To ensure the legal requirements for resource acquisition and allocation are better understood and followed in a simplified form, the PNG Forest Authority (PNGFA) has translated the law into a sequence of thirty-four (34) step-by-step procedures. The 34-Step process is used to explain the complexity of legal requirements of resource acquisition and allocation to stakeholders such as landowners, provincial authorities, investors and other interested parties involved in the forestry sector.

In order to understand and appreciate the reasons for why the National Forest Board had decided to recommend the various amendments to the Act and particularly Sections 57 and 59, it is necessary for us to examine and understand where these two Sections appear in the 34-Step process.

Where does Section 57 appear in the 34-Step Process?

Section 57 is Step-3 of the 34-Step process. This Section deals with obtaining the consent of customary owners who are willing to enter into a forest management agreement (FMA). The two key elements of this Section are; qualification of the authenticity of the landowners claiming to be owners of the forest area by the PFMC, and the willingness of the customary owners to enter into the FMA.

A pre-requisite to the customary owners entering into a FMA is for the PNGFA to conduct awareness among all the clans or land owning groups of the new forest concession area. The extent of the awareness basically includes educating landowners about:

- i) the acquisition process - which includes land group formation and incorporation in accordance with the *Land Group Incorporation Act 1974*;
- ii) the allocation process - which includes a development option study, project guidelines, project advertisement, project proposals and evaluations, short-listing and selection of a developer, negotiation of a project agreement with a preferred developer, and the process of issuing a timber permit to the developer; and
- iii) the enforcement and monitoring - of the project agreement and the timber permit including all the other associated operational plans such as the forest working plans, PNG Logging Code of Practice, the environmental plan, the training & localisation plan, by the developer and the PNGFA during project implementation.

Following the awareness program, only willing clans or land groups enter into a FMA after having been incorporated as land groups under the *Land Group Incorporation Act 1974*. Clans or land groups that do not wish to enter into the FMA are excluded and their land area is demarcated and excluded from the forest development project area.

Where a forest management agreement has been entered into by the respective land owning groups, the PFMC is required under Section 58 to certify that it is satisfied as to the authenticity of the tenure of the customary land by land groups claiming to be customary owners, and the willingness of those customary owners to enter into the FMA.

Where does Section 59 appear in the 34-Step Process?

This Section appears as Step-23 of the 34-Step process. Under this Section, where the PNGFA has entered into a FMA with the customary owners, the Board is required to consult with:

- i) the customary owners who are parties to the FMA; and

- ii) the provincial government for the province in which the FMA is situated; and
- iii) the member or members of Parliament for the province and the electorate or electorates in which the FMA is situated.

in relation to the intentions of the Board in recommending the allocation of a timber permit over or in relation to the project area.

The consultation requirement under this Section takes place when the Board is satisfied that the final draft Project Agreement makes adequate provisions for all aspects of the Project, then the Board consults with the stakeholders and make its intentions known before it executes a Project Agreement.

During this process, the Board also seeks the approval of the Minister for Finance to execute the Project Agreement in accordance with section 61(2) of the *Public Finance (Management) Act*.

Upon receipt of the approval from the Minister for Finance, the Board proceeds to execute the Project Agreement.

Consequently, the Board makes its recommendation to the Minister for Forests to grant the Timber Permit to the Developer with who the Project Agreement has been entered into under section 72 of the *Principle Act*.

This requirement is considered unnecessary as landowners and provincial authorities rights and involvement in the decisions and decision-making processes of acquisition and allocation of a forest concession area are manifested under other relevant provisions of the Act. In order to gain a better appreciation of this, it is necessary to examine other relevant Sections of the Act that concern the resource allocation process.

Other Relevant Sections of the Act that enable Landowners and the Provincial Governments greater control and participation in the decision and decision making processes of forest resource allocation procedures in the 34-Step process.

- i) **Development Option Study (DOS)** – is referred to under Section 62 of the principle Act, and appears in the 34-Step process as Step-6. Under this provision, the DOS is carried out by the National Forest Service in accordance with directions given by the PFMC and among other things, includes means of landowner participation in the project development. During the study, landowners and the provincial administration are consulted regarding their development policy and aspirations.
- ii) **Project Guidelines** – is referred to under Section 63 of the principle Act, and appears in the 34-Step process as Step-8. After the completion of the development option study, the PFMC consults with the owners of the forest area and the provincial government and prepares draft guidelines on the manner in which the project area is to be developed. The guidelines serve as the basis for developers to prepare and submit their developmental proposals and also, serve the purposes of evaluating applications/proposals and setting conditions in the timber permit relating to the project.

- iii) **Project Proposals and Evaluation** – is referred to under Section 67 of the principle Act, and appears in the 34-Step process as Step-12. Following a project public tender required under Section 64, development proposal applications received are referred to the PFMC for evaluation. The proposals are evaluated against certain criteria defined under Section 67(2) including the project guidelines, provincial government policies and anticipated net benefits to the resource owners.
- iv) **PFMC may Seek Clarification of Proposal** – is referred to under Section 68 of the principle Act, and appears in the 34-Step process as Step-14. Under this Section, where the PFMC is conducting evaluation under Section 67, and where in its opinion that project proposals require further consideration, it may invite the proponent or applicant to provide more information to clarify or elaborate on the proposals. The additional information can be obtained at an interview or in written submission.
- v) **PFMC’s Recommendations to Proposals** – is referred to under Section 69 of the principle Act, and appears in the 34-Step process as Step-15. After the PFMC has carried out its evaluation under Section 68 and is satisfied with the results, it shall prepare a detailed report of its evaluations including a recommendation as to the proponent (if any) with whom further negotiation should proceed and submit to the National Forest Board.
- vi) **Board to Consider the PFMC Report** – is referred to under Section 70 of the Principle Act, and appears in the 34-Step process as Step-16. The Board having received the report by the PFMC, shall consider it and consult with the Minister. Where the PFMC has conducted its evaluation and selection of a developer diligently, there is no cause for the Board or the Minister to reject the recommendations of the PFMC but for the Board to direct the PFMC to enter into further negotiations with the recommended proponent or developer.

Also under this provision, the Board in conjunction with PFMC sets the negotiation parameters and establishes the State Negotiating Team (SNT). The SNT comprise of PFMC members, representative from the Provincial Government, National Forests Service and two Landowners.

- vii) **PFMC to Enter into Project Negotiations** – is referred to under Section 71 of the principle Act, and appears in the 34-Step process as Step-20. Under this Section the PFMC proceeds with negotiating a project agreement and where a successful negotiation is reached, it shall submit the final draft project agreement to the Board.
- viii) **Board to Consider the Project Agreement and make recommendation to the Minister** – is referred to under Section 72 of the principle Act, and appears in the 34-Step process as Step-21. The Board having considered the draft project agreement received from PFMC (Section 71) and where it is satisfied that the draft project agreement makes adequate provisions for all aspects of the project it (the Board) executes the project agreement and recommends to the Minister to grant a timber permit to the developer with whom the project agreement has been entered into.

- ix) **Board to Consult with Customary Owners and Provincial Governments** – is referred to under Section 59 of the principle Act, and appears in the 34-Step process as Step-23. Under this Section, where the PNGFA has entered into a FMA, the Board is required to consult with:
- i) the customary owners who are parties to the FMA; and
 - ii) the provincial government for the province in which the FMA is situated; and
 - iii) the member or members of Parliament for the province and the electorate or electorates in which the FMA is situated.

in relation to the intentions of the Board in recommending the allocation of a timber permit over or in relation to the project area.

Although this Section appears in the earlier part of the Act, Section 72 triggers its applications where the Board having considered a final draft Project Agreement to consult the customary owners, the provincial government and the member or members of Parliament regarding its intentions to recommend the allocation of a timber permit.

The Implications and Potential Liabilities of Section 59

When the intentions under Section 59 are closely examined, two important observations emerge.

The first is that the parties referred to can be considered to have already been adequately consulted. This is by virtue of their involvement in all the decisions and decision-making processes of the entire allocation process as clearly demonstrated under the various Sections of the Act referred to above. They are aware of which proponent is likely to be the timber permit holder (ahead of the Board and the Minister) because of their participation (at the PFMC) in the evaluation and deliberations of the project proposals under Sections 67, 68 and 69 of the principle Act.

The second observation is that the provisions of Section 59 have a huge potential for abuse. The Act does not adequately define the extent of the consultation. Even if it did, it provides no incentives whatsoever for investor confidence and national investment credibility. It is a recipe for legal suits against the State where a bona fide investor is denied development rights after it has complied with all the other requirements prior to the specific requirement under this Section. A classic example is the current legal impasse, which affects the allocation of the Asengseng Consolidated and Rottock Bay Consolidated timber concessions in the West New Britain Province.

Suffice to say, there are already sufficient safe guards and legal protection of landowners' rights to be consulted and involved in the decisions and decision-making processes of resource acquisition and allocation and therefore, the Board considers that there is no need for Section 59. Landowners and the provincial authorities are already taking leadership of the resource acquisition and allocation processes and they should not have "two bites to the same cherry".

The Rational for Amending Sections 57 and 59 under the proposed Forestry (Amendment) Bill 2005

The intention to amend Section 57 and to delete Section 59 as proposed in the Forestry (Amendment) Bill 2005 is not about denying or removing the rights of the customary owners and the provincial

authorities. The amendment is simply to improve and streamline the legal processes for resource allocation so that it becomes more user friendly, and removes any possibilities of questioning the credibility of our legal process and let alone the possibilities of legal suits.

The proposed subsection (3) to Section 57 is intended to include provincial governments, and members of Parliament who are not specifically mentioned, to be consulted of the Board's intention to enter into a FMA. This inclusion enhances the participation and consultation through out the Forestry Act and thereby makes the Act consistent with Section 115 of the *Organic Law on Provincial Governments and Local Level Governments Act*.

The rights of customary owners and provincial authorities are considered to be very well catered for under the various Sections of the Act and there should be no cause for alarm as is being perceived by the proposed amendments.

Who are the Members of a Provincial Forest Management Committee?

The membership of PFMC is referred to in Section 22 of the *Forestry Act 1991 (as amended)*. There are six (6) members altogether and consists of:

- i) a senior officer in the administration of the province who shall be the chairman, and in most cases is the Administrator;
- ii) an officer of the National Forest Service;
- iii) one person representing local or community governments and in most case is a President of such local or community government;
- iv) two persons representing land-owning groups in the province; and
- v) one person representing non-governmental organisations.

Under Section 28(3) of the Act, where the PFMC is deliberating in respect of a particular forest resource area, the landowners shall be entitled to be represented in the meeting of the PFMC by two (2) of their member selected by them.

This gives landowners increased representation and participation on the PFMC with four (4) landowner representatives.

The proposed amendment does not affect the appointment procedures and membership of the PFMCs.

Who are the Members of the National Forest Board?

The membership of the Board is referred to under Section 10 of the *Forestry Act 1991 (as amended)*. Currently, there are nine (9) Board members and this include:

- i) the Managing Director of the National Forest Service, *ex officio*;
- ii) the Head of the Department responsible for planning and implementation, *ex officio*;
- iii) the Head of the Department responsible for environmental matters, *ex officio*;
- iv) a representative of the PNG Chamber of Commerce and Industry;

- v) a citizen, being the President of the Association of Foresters of Papua New Guinea, *ex officio*;
- vi) a provincial administrator, to represent Provincial Governments;
- vii) a citizen, being the President of the PNG Eco-Forestry Forum, *ex officio*;
- viii) one member, to represent forest resource owners;
- ix) one member, to represent women affected by forestry operations.

The Proposal to Amend the Membership of the National Forest Board

Section 10 of the principle Act is proposed to be amended under the Forestry (Amendment) Bill 2005 to achieve the following objectives:

- i) to provide equal representation and strength in the membership of government and non-government members on the Board;
- ii) to ensure the government of the day has a representative on the Board who will ensure the government's development and implementation policy strategies are pursued diligently in a systemic and consistent manner;
- iii) to widen and provide equal opportunity for community based organizations involved in forestry activities to participate at the highest decision making body of the PNGFA being the National Forest Board.

The amendment to have a Minister's nominee on the Board is consistent with the government's policy for having its nominee in statutory bodies and sectoral Boards that deal with natural resource development in PNG.

The amendment to replace the Eco-Forestry Forum (EFF) with a representative of the community involved in forest activities is in recognition of the many other national and community based organizations involved in the forestry sector. They must be given equal participation at the decision and decision-making process of the Board and for this to be realised, the source of membership needs to be widened beyond the Eco-Forestry Forum. Of course the EFF is a community-based organization and the amendment does not exclude them from being appointed to the Board. The amendment basically broadens the baseline so that its membership can be drawn from a wider community.

Saving of Existing Timber Permits, etc. (Amendment to Section 137 of the Act)

Timber permits, agreements, timber rights purchase areas etc, issued under the *Forestry Act (Chapter 216) (repealed)* and the *Forestry (Private Dealings) Act (repealed)* prior to the enactment of *Forestry Act 1991 (as amended)* which became effective from June 1992 are saved under the provisions of Section 137 of the *Forestry Act 1991(as amended)*.

Before the proposed amendment to Section 137 is discussed, it is important for the public to understand the forest policy directions upon which previous and existing forestry legislations were formulated. The key forest policy directions that differ from previous and existing legislation is the requirement for 'Sustained Yield Management and Development'.

Timber permits and agreement formulated and issued under the *Forestry Act (Chapter 216) (repealed)* and the *Forestry (Private Dealings) Act (repealed)* were not formulated to reflect sustained yield forest management and development. They were approved in most cases for a shorter operation life of 10-20 years and the rationale for the operation was to deliver economic, social, infrastructure and other ancillary services as part of nation building. The projects were not designed to be sustainable.

On the other hand, those timber permits approved under the *Forestry Act 1991 (as amended)*, are formulated in accordance with the principles of sustained yield management and development as defined in the forest management strategies of the 1991 Forest Policy.

Because of the requirements for sustainability, timber permits and agreements issued under the previous legislation, and saved under Section 137 of the *Forestry Act 1991 (as amended)* face the challenge of being amended or varied to conform to the requirements of the existing legislation.

Section 137(1) of the *Forestry Act 1991 (as amended)* basically saves timber permits, licences, etc.. issued under the *Forestry Act (Chapter 216) repealed* **but not deemed to be timber permits or licences issued under this Act.** Therefore, although they are valid and remain in full force, they can only remain operational for the term for which they were approved until they expire. Subsection (2) of Section 137 however provides an opportunity for these timber permits to be varied by the Board to make them conform to the requirements of the *Forestry Act 1991 (as amended)* and if this so prevails, the opportunity then exists to have them extended under Section 78 when they expire. However, where the Board gives notice to have such timber permits varied, and the holder refuses for any variations to be made, then such timber permits will remain operational for the term for which they were approved until they expire. They cannot be extended under Section 78 of the Act.

Section 137(1A) of the *Forestry Act 1991 (as amended)* basically saves agreements issued under the *Forestry (Private Dealings) Act (repealed)* and although it deemed them to be timber permits issued under this Act, there is no way such timber permits can be extended under Section 78 of the Act. This is because Section 78 enables the Board to recommend to the Minister to extend any expired timber permit provided it satisfies the legal requirements of: social acceptability; satisfactory performance of the timber permit holder; and the available resource is harvestable in accordance with sustained yield management practices. When such evaluation is carried out, the experiences of the PNGFA is that none of the saved timber permits can satisfactorily meet the requirements of Section 78 and as such the timber permit cannot be extended and the operations shut down. Landowners have not been happy at all about this, as they wanted to see the operations continued as in most cases, the operations are considered their only source for goods and services.

In the last 5 years, Section 137 has attracted various opposing views and opinions from the legal fraternity regarding its application. In view of these diverging views, it was obvious that Section 137 as a transitional provision was totally inadequate to deal with the legal and practical aspects of the timber industry. Appropriate amendments need to be introduced to correct and improve its application so that it may be able to satisfy legally the intentions of the resource owners and the governments for having such timber permits extended.

Therefore, the proposed amendment to Section 137 aims to be a 'one stop shop' to deal with all matters relating to saved timber permits, licenses, etc. It is a transitional provision, which will limit its force and effect to saved timber permits, licenses etc. only and therefore, its application is being widened to include the issue of extension.

Under the proposed amendment, the basis for extending any expired timber permit has been defined to assure good governance in the decision and decision-making processes of the PFMC and the Board when dealing with such applications. The basis for any extension in brief includes:

- i) the social acceptability of the permit holder;
- ii) the satisfactory performance of the permit holder;
- iii) the amount of remaining resource to support the operation;
- iv) the rate of annual allowable harvest;
- v) the requirement for a performance bond; and
- vi) where applicable, amendments to the terms and conditions of the timber permit.

Concluding Remarks

We assured the public that the intentions of the proposed Forestry (Amendment) Bill 2005 are in the national interest, and there are no ultra motives by the Board or the Government of the day to promote illegal logging operations in this country.

The laws of any land for that matter is neither perfect nor definitive, and therefore any legitimate changing circumstances that affects the lives of the people or development of a nation will always prompt any responsible government to institute appropriate and responsible changes to its laws.

The Forestry (Amendment) Bill 2005 is **not unconstitutional** as it continues to conform with the two foundations of consultation and decision making powers being vested with groups of people at the PFMC and the Board.

The rights of the landowners and provincial representatives are being strengthened. PFMC's are being made more accountable for their actions in the administration of the Act.

The amendments do not give the Minister unilateral powers to make decisions or over rule decisions of the PFMC and the Board.

These amendments have gone through due process over a period of two years and this has provided opportunities for major stakeholders to make comments – which they have. Also they are the result of well over ten (10) years of practical experience of administering the *Forestry Act*.

These amendments will enhance, improve and streamline the work of the PNG Forest Authority to be more effective when dealing with existing and new forestry projects.

Approved for Release by:

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HON. PATRICK PRUAITCH, MP
MINISTER FOR FORESTS

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DR WARI IAMO
D/CHAIRMAN
National Forests Board

.....
TERRY WARRA
A/MANAGING DIRECTOR
National Forest Service