THE RESTORATION OF LOST TITLES TO LAND IN NEW GUINEA

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The *New Guinea Land Titles Restoration Ordinance* 1951 ("the *Restoration Ordinance*") was enacted to restore titles to land as well as to mining and forestry rights lost during the Japanese invasion of New Guinea. In operation for twenty years, the restoration of titles is now within a year or two of completion. It is therefore appropriate to review what has been done and its interpretation in the court.

When, during the Japanese occupation, the Registry of Titles in Rabaul was destroyed, an estimated 1250 certificates of title for freehold and 1000 Administration leases were lost. In addition, many duplicate titles were lost when landowners were killed or forced to escape without their possessions. Already in 1944 an attempt was made to deal with lost titles by the *National Security (External Territories) Regulations* (Reg. 21A) which enabled the Minister or an official authorised by him to register someone in a land register if satisfied that the applicant could be "reasonably presumed to have been entered in the lost register". These Regulations, and those which superseded them under the *Lost Registers Ordinance* 1950, did not invite applications for restoration, nor did they impose on the Minister or authorised official an independent duty to reconstitute the lost registers apart from such applications. In consequence, very few titles were restored under the Regulations or the *Lost Registers Ordinance*.

The *Restoration Ordinance* which came into force in November 1951 aimed at restoring all titles to land which were registered when the registers were destroyed in 1942, and all those which were "entitled to be registered" (Sections 9 & 10). The Ordinance sought to restore titles as at the appointed date (Section 4) which was fixed as the 10 January 1952. The aim of this was to take into account transactions in land which had taken place between 1942 and 1952. During this decade it was not possible to convey title, nevertheless with the disruption caused by war a number of properties had been sold by contract of sale, others had passed to executors and heirs, and a few properties owned by Japanese had vested in the Controller of Enemy Property. Only claims to be registered as at the appointed date in 1952 could be entertained. Persons who acquired an interest after that date could only claim if their predecessor in title, i.e. the person entitled to claim, failed to do so (Section 11). Otherwise they had to protect themselves, for example, in a contract by a covenant from the vendor in that he had claimed and would diligently pursue his claim under the *Restoration Ordinance*. With

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the exception of the Administration (Section 14), all claims had to be lodged by 11 October 1952.[1]

The task of restoring titles was entrusted to a Commissioner of Titles who for this purpose was given the same powers as a Judge of the Supreme Court. He became the Chief Commissioner of the newly created Land Titles Commission in 1963 but continued to exercise sole jurisdiction in restoration cases. Between 1968 and 1972 the jurisdiction was exercised by the Chief Commissioner sitting together with two Senior Commissioners. In 1972 the jurisdiction was again vested in the Chief Commissioner and Deputy Chief Commissioners who can be stipendiary magistrates. The Chief Commissioner or his Deputies sit alone when hearing restoration cases.

The Ordinance provides for a claim to be lodged by a person claiming an interest in land and to be registered or entitled to be registered in a lost register (Section 9). The Commission then issues a provisional order declaring, for example, that the claimant is entitled to a freehold or leasehold interest in the land. The provisional order is advertised and served on interested parties. A copy is served on the Director of Native Affairs[2] who has a duty to investigate whether natives assert any native customary rights in respect of the land. If native customary rights are asserted, the Director must refer them to the Commission (Section 36) which must "investigate, hear and determine" the claim to restoration and the native customary rights referred to it. The Commission must determine the matters in issue judicially at a public hearing (Sections 16 and 42). The native customary rights may be of a minor nature such as the right to collect sago from a swamp, or to fish in a stream, or use a certain waterhole within a plantation; or the rights may be a complete denial of the title of the claimant to restoration. For example, frequently the native customary rights are asserted in the form "the natives of X and Y villages assert full customary rights of ownership over the whole of the land and assert that the land was never acquired from them by non natives". Where native rights are not asserted the Commission can make a final order without holding a hearing (Sections 37 and 42). Native rights were asserted in an estimated ten per cent of the cases determined to date.

When a provisional order is made any person may lodge an objection to it under Section 39. For example, an adjoining landowner may object if he considered the boundaries of the land set out in the provisional order encroached upon his land. There is nothing to stop a native, or the Director of Native Affairs on his behalf, lodging an objection in respect of native customary rights. However objections of any kind are rare, and native customary rights are normally referred to the Commission by the Director of Native Affairs under Section 36. The major disputes which are determined by the Commission are thus between a claimant to restoration such as a planter, a mission, or the Administration, and the Director of Native Affairs on behalf of natives who assert customary rights of ownership in full or partial denial of the claimant's title. In these disputes, the parties are normally represented by counsel. The natives receive free legal aid, and

1 See Ewart Smith: *The Restoration of Lost Titles to Land in New Guinea* (1951) 25 *A.L.J.* 712, for a general review of the Ordinance.

2 The name of this official has been changed many times in the legislation—e.g. Commissioner of Native Affairs, Director of District Services and Native Affairs, Director of Native Affairs, Director of District Administration, and First Assistant Secretary, Department of the Administrator. For consistency I have used the term Director of Native Affairs in this article.

a successful claimant recovers his legal costs under Section 64B, the idea being that neither private land owners nor native should have to pay for the restoration of titles destroyed during the War.

Delays in restoring titles

Great delays have occurred in restoring titles over the past twenty years. As already noted all private claims to restoration were received in 1952, yet eleven years later only fifty two per cent of them had received provisional orders and only eighteen per cent had received final orders.[3] The Table appended to this article shows the slow progress of the work. The first Chief Commissioner (Mr C. P. McCubbery 1952-January 1965) was constantly dogged by lack of clerks, draftsmen, and field officers to locate on the ground some plots claimed which were inadequately defined by a plan or map. The production of final orders accelerated dramatically during the period of the second Chief Commissioner (Mr D. J. Kelliher 1965-1968). In two years 1965-1967, he made more final orders than in the preceding thirteen years. He achieved this progress in the uncontested claims by revised clerical procedures and additional staff. In cases where claims to restoration had not been adequately defined by a plan, he called on the claimant to produce a plan failing which he dismissed the claim. In contested cases, he listed hundreds of matters for hearing in 1965 and refused most applications for adjournment. Despite his very rapid determination of disputed cases, the proportion of appeals lodged to the number of final orders made was not unduly high (less than seven per cent), and of these only a few cases on appeal were sent back to the Commission for rehearing due to errors caused by the great speed at which he worked.[4]

Few final orders were made between 1968-1972 by the panel of three Commissioners. This was partly because the panel proved difficult to convene when each member of it resided in a different town and could only devote part of his time to restoration work; partly because it was engaged in hearing a number of lengthy and important non-restoration disputes between natives and the Administration; and partly because an increasing number of restoration claims were disputed by natives.

The determination of restoration appeals by the Supreme Court also showed great delays. By 1968 only four appeals had been determined, and a hundred were outstanding.[5] The majority of these appeals had been lodged in 1965 by Tolai of the Gazelle Peninsula, where Tolai land shortages and grievances against alienated land were an acute political problem. However since 1969 the determination of appeals has improved: five appeals were decided by the Supreme Court in 1969, nine in 1970 and ten in 1971.[6] Probably twice this number have been settled and determined since 1969

[3] R. Crocombe (ed): *Land Tenure in the Pacific* (OUP 1971), 316.

[4] One case on appeal was returned to the Commission for rehearing because the Commission failed to notify one of the parties (*Re Kasalok*, unreported, 1967). Five cases were returned to the Commission for rehearing through obvious errors of fact. For example, Clarkson J. in *Re Volupai* [1969-70] P. & N.G.L.R., 303 at p. 316 said:

> "The simple and much more probable explanation of what occurred is that the Chief Commissioner, acting under pressure and with the facts of many similar cases in his mind, confused land which had been referred to as 'Volupai Swamps' and to which the notice did not refer, with land called 'Volupai Portion 161' to which the notice did refer. In the circumstances this was no doubt an unfortunate but nevertheless understandable error and it should be treated as such."

[5] *House of Assembly Debates* 1968. Vol. 2, No. 2, 516.

[6] These figures omit approximately ten decisions of the Supreme Court on procedural points.

by consent orders. The hearing of the appeals in 1969-1971 was expedited firstly by the creation of the *Supreme Court Appeal (Land Titles Commission) Rules* in July 1968. These applied to all pending appeals as well as future ones and imposed time limits on the various procedural steps necessary in the prosecution of an appeal. Secondly, the appointment of a sixth and seventh judge in 1970-1971 strengthened the Supreme Court to deal with land appeals. As at the end of 1971, there were 128 restoration matters outstanding in the Commission, 63 of which were contested and were awaiting hearing. The majority of the others were awaiting the investigation of native customary rights. There were 35 restoration appeals outstanding as at the end of 1971.

As already noted, an estimated ninety per cent of the claims to restoration of title were not contested, and in these cases the making of a final order was purely an administrative task. The long delays caused hardship to the claimants, especially to the planters who were thereby prevented from mortgaging their land for long periods. In those cases which were disputed by natives, the natives also suffered by the delays. Many of their witnesses who had knowledge of land transactions between 1885 and 1942, had died by the 1950s and 60s. Although hearsay evidence was admissible before the Land Titles Commission, it was naturally weaker than direct evidence. Similarly, many European witnesses with knowledge of pre-war land matters had died. However the delays hurt the European claimants less than the natives, because although key records were destroyed in the war, the Europeans could frequently rely on some written evidence (e.g. a pre-war Gazette entry), whereas the natives were entirely dependent on oral testimony. Moreover the European claimants were generally in possession of the land having simply resumed possession after the war. In some cases natives asserting customary rights benefited from the delays. For example in a number of cases, the Director of Native Affairs had certified to the Commission, after investigation, that there were no native customary rights asserted. The Commission delayed in acting on that certificate and issuing a final order restoring title to the claimant free of native customary rights. The natives later asserted customary rights and the Director of Native Affairs was able to place these rights before the Commission by way of objection thus cancelling his previous certificate.

The lost registers

To facilitate an understanding of the judicial interpretation of the *Restoration Ordinance,* it is convenient to describe the two main land registers established under the *Lands Registration Ordinance* 1924, which the Restoration Ordinance sought to restore.[7] The first was the register book of certificates of title which as noted before, comprised an estimated 1250 titles when it was destroyed in 1942. These titles stemmed from three sources. The first were freeholds granted by the pre-1914 German Government of New Guinea. An elaborate procedure for the initial registration of these titles in the register book was provided in the *Lands Registration Ordinance.* It included the preparation and advertisement of a draft certificate of title to ensure that any conflicting claims to ownership, especially by natives,

7 Twelve other registers were declared to be lost under Section 4 of the Restoration Ordinance under definition of "lost register", see *Papua and New Guinea Gazette* No. 42, 15 July 1952, 296. Of these, four related to land, seven to mining rights and one to forestry rights.

were resolved prior to registration (Sections 16 to 43). The second source of freehold titles were those acquired by the Australian Government between 1914 and 1942 chiefly by purchase from natives. These too had to comply with a specific procedure prior to initial registration (Sections 43A and 42(2)). The third were a few Administration grants of freehold, which unlike the other two kinds of title, were registered immediately on submission to the Registrar of Titles (Sections 14 and 56).

The other major register destroyed in 1942 was the register of Administration leases. It contained approximately 1,000 leases at that time. The bulk of these were leases for 99 years granted to missions, planters and business men under the *Land Ordinance* 1922 (Sections 44, 84-86). The others consisted of leases granted by the Fiscus (i.e. Treasury) of German New Guinea prior to 1914. These leases were for 30 years or less. This meant that any such lease had expired by the appointed date in 1952 allowing for the five years suspension of the term provided for in the National Security Regulations because of the War. The exceptions were some Fiscus leases with an option of renewal for a further term of 30 years. The Fiscus leases were simply translated into English and registered as Administration leases (Sections 45-52). Both kinds of Administration lease were registered without any scrutiny into possible conflicting rights by natives or others. The effect of registration of an Administration lease was to give it the same protection, or indefeasibility, as a certificate of title (Section 85).

The relationship between Administration freeholds and Administration leases under the *Lands Registration Ordinance*, was curious. The Administration was in the same position as a private landowner in respect of its freehold titles: it had to get them registered as certificates of title. In the case of freehold land which the Australian Mandate Government of New Guinea held as successor to the German Government, it had to comply with the elaborate procedure for initial registration of title including a close scrutiny into native customary rights possibly in conflict with its title. In the case of freehold land acquired by the Australian Government between 1914 and 1942 chiefly by purchase from natives, the Government had to comply with a shorter procedure for initial registration (Sections 43A and 42(2) *Lands Registration Ordinance*) which possibly involved a scrutiny as to native customary rights. In both cases an Administration lease, which was indefeasible, could be registered despite the fact that the Administration's title to the freehold land covered by the lease, was not registered. This was a common occurrence pre-war. This would not have mattered in Australia where the Crown owns all the land and does not need to have its ownership registered before it grants a lease or, for that matter, a Crown grant, which is to be registered. However, in New Guinea the position was fraught with legal difficulty for the Administration. The Administration only owned land which it had purchased from natives or acquired as ownerless under an appropriate Ordinance, and its titles thus obtained were defeasible. Natives could well challenge a purchase by the Administration on the ground that the vendors were not the owners of the land, or an ownerless acquisition on the grounds that the land was in fact owned by native custom, and the proper enquiries as to this question required by the relevant Ordinance were not carried out. Thus it was possible pre-war for the Administration's application for initial registration of freehold land to be defeated by a contrary native claim; whilst an indefeasible Adminis-

tration lease was registered against the land. The analogy with the Australian Torrens system would be of a private owner of unregistered freehold land granting a lease and having it registered under the Torrens system. This would be unthinkable because the creation of registrable interests in land, such as a lease, can only be registered when the land itself (i.e. the freehold) is registered. Fortunately, as far as is known, the difficulty did not arise pre-war.

The judicial interpretation of the Ordinance

There are four kinds of claim that can be made under the Restoration Ordinance. The first is a claim to have been registered in a lost register as at the appointed date (Section 9 part). The other three are claims to entitlement to registration at the appointed date (Sections 9 part, 10 and 67(3)). All four kinds of claim must also show an interest in the land (Section 9(a)). Each kind of claim will be considered in turn.

The first type of claim to have been registered in a lost register as at the appointed date, can be proved in one or two ways. The first is by production of a duplicate certificate of title or Administration lease, in which case title is restored without any investigation of native rights (Sections 17(5), 35, 37 and 42). Alternatively, a person who has a duplicate title need not apply for restoration at all, but simply produce his title to the Registrar who is empowered to make a copy of it for his register under Section 73(5) of the *Lands Registration Ordinance.*

The second way of establishing a claim to registration is by producing secondary evidence of a certificate of title. For example in a large number of cases the Custodian of Expropriated Property was able to produce a typed copy of a certificate of title prepared by his Delegate in Rabaul prior to 1942 and sent to him in Canberra. These copies and the correspondence accompanying them thus survived the destruction of records in New Guinea. In *The Custodian of Expropriated Property* v *Tedep* (1964) 113 C.L.R. 318, the Custodian had a typed copy of a certificate of title showing that he had become the registered proprietor of freehold land known as Varzin Plantation, free of native customary rights, in 1928.[8] This secondary evidence of title was not disputed. The case turned on the legal effect of the destruction of the register, and the interpretation of the *Restoration Ordinance.* Tedep and other Tolais claimed native customary rights over the land, *inter alia,* on the basis that part of it was illegally confiscated from them by the German government as punishment for the murder of a planter's wife and child in 1902. In the Supreme Court, Mann C.J. on appeal from the Chief Commissioner, had held that the native customary rights were not extinguished by the issue of a certificate of title in 1928 but were merely dormant and rendered harmless. This was because Section 41 of the *Lands Registration Ordinance* provided that registration did not affect native customs of land tenure. Further the *Restoration Ordinance* in his view was enacted on the basis that the destruction of the registers not only destroyed the

8 For a good discussion of this case and the historical facts surrounding it see J. Leyser, "Title to Land in the Trust Territory of New Guinea", in 1965 *Australian Yearbook of International Law,* 105 at 111-17. The late Dr Leyser was engaged as a consultant in this case by the Custodian of Expropriated Property and in that capacity went to the German Central Archives Office in Potsdam, East Germany, and brought back a microfilm of valuable land records on German New Guinea. One copy of this microfilm is held in Commonwealth Archives Office, Canberra.

evidence of title but destroyed the "statutory legal title". Thus to restore a title was not simply a matter of proving by secondary evidence what was previously registered, but required a fresh examination of the correctness or otherwise of the pre-war registration—"to make up the deficiencies of the old register". Thus he restored title to the Custodian subject to an encumbrance in favour of Tedep and others in respect of the confiscated area.

The High Court in a unanimous judgment declared these views to be "plainly erroneous". It held that the indefeasibility of a title under the *Lands Registration Ordinance* (which is akin to the Australian Torrens statutes), does not depend on the ability to produce the register or duplicate certificate of title, but on Section 68 of that Ordinance which declares that upon registration the estate of the registered proprietor becomes absolutely free of any prior asserted legal interest not noted in the register. The High Court examined the objects and provisions of the *Restoration Ordinance* in detail and concluded that it was intended to replace the lost registers in the condition in which it was presumed that they would have been prior to destruction, and not to prepare new and different registers. Thus, because the Custodian could establish by secondary evidence an entitlement to a clear certificate of title, and the Tolai claimants could not show that he had dealt with the land in such a way as to create native rights over it, he was entitled to be restored free of native rights.

Tedep's case was applied by the Full Court of the Supreme Court of Papua New Guinea in *Re Wangaramut* [1969-70] P. & N.G.L.R. 410. In that case the Custodian's evidence of title again consisted of a typed copy of a certificate of title which had issued to him in 1925 free of native rights, other than the right to use a waterhole within the land. Unlike *Tedep's* case however, the natives sought to challenge the Custodian's documentary evidence on the basis that the copy title was not sent to the Custodian in Australia until 1928. The Full Court of Papua New Guinea rejected this challenge and held that the delay in sending down the copy title was merely unexplained.

In the *Tedep* and *Wangaramut* type of case where the claimant has good secondary evidence of title, and native rights were asserted, the natives had almost no chance of preventing restoration of title to the claimant, or having their rights recognised by an encumbrance on the title, because they had no evidence to challenge the claimant's documentary evidence that he was registered prior to 1942. In such cases the native evidence invariable related to the circumstances of the original acquisition usually by the Germans between 1885 and 1914. Their evidence was usually of the kind that their ancestors were not paid for the land, or if they were that they thought the payments were gifts; or that they misunderstood the area of land involved; or that the wrong natives were paid.[9] This kind of evidence was irrelevant to the legal issue in dispute, viz., was the claimant registered at 1942 and did he retain that registration until 1952?

This kind of case must have been extremely frustrating to the natives. They gave their version of the original acquisition to an investigating officer sent out by the Director of Native Affairs, and later to the Commission where it was listened to politely, but could not affect the result because it was legally irrelevant to the issues in dispute. Any evidence of occupation

9 For an analysis of the kinds of native rights asserted in restoration cases see P. G. Sack, "Early Land Acquisitions in New Guinea—the Native Version", Vol. 3, No. 2 (1969) *Journal of the Papua and New Guinea Society*, 7-16.

of such land was also legally irrelevant because there is no adverse possession against registered Torrens title in New Guinea.[10]

In two other appeals, findings were upheld under Section 9 of the Restoration Ordinance that certificates of title were registered pre-war on weaker secondary evidence than that produced in *Tedep's* case and *Re Wangaramut*. In *Tolain & Ors* v *Administration* [1965-66] P. & N.G.L.R. 232 at 258 the evidence for registration in respect of part of the land consisted of a draft certificate of title issued in 1931 which was duly advertised under the *Lands Registration Ordinance* and statistics on land registration from the Annual Reports on New Guinea to the League of Nations which indicated that ninety-one per cent of the draft certificates of title issued to 30 June 1940 had matured into registration by that date. On this evidence Minogue J., as he then was, held that a certificate of title had issued prior to 1942. In *Re Vunagamata*,[11] the evidence for registration consisted of a 1933 draft certificate of title (based on a Groundbook entry) which was properly advertised; evidence of long occupation by the claimant, the Methodist Mission; evidence that the Director of Native Affairs had certified that there were no native claims in 1957; and conflicting native evidence. One witness believed that the Mission had paid the native owner for the land—but had no independent knowledge; another did not know, but wished to find out; another knew of no payment; and a fourth had "never been told" of payment. On this evidence Prentice J. was prepared to uphold the final order which restored freehold title to the Mission made by the Chief Commissioner, on the basis that a certificate of title had issued prior to 1942. In other words the claim was upheld under Section 9 of the *Restoration Ordinance* that the claimant had an interest in the land, and was registered in respect of that interest at the appointed date.

Entitlement to registration

The second kind of claim to restoration is to have been entitled to be registered before the destruction of the registers in that nothing remained to be done but for the Registrar of Titles to register the certificate of title or Administration lease (Section 9 part). The claimant must also show that he continued to be so entitled from the destruction of the registers in 1942 to the appointed date in 1952. An example of this kind of claim would be a purchaser of registered land who lodged a transfer in registrable form on the eve of the destruction of the registry. Another example would be a claim by an ex German mission to a property vested in it by a vesting order under the *German Missions Ordinance* 1926. *In re Toriu Residue*,[12] the Full Court held that a vesting order made under that Ordinance had to be registered as if it were an Administration grant of freehold, i.e. without any investigation as to possible native rights and without giving adjoining landowners and to other persons claiming contrary interests an opportunity to object to initial registration.

The third kind of claim is by one who would not normally be entitled to registration but who is assisted by Section 10 of the *Restoration Ordinance*. That section provides that if a person is otherwise entitled to be registered

10 *The Administration* v *Tirrupia & Ors*, unreported Full Court decision, 1971, judgment No F.C. 20 at 9.
11 Unreported decision 1971, judgment No. 609.
12 Unreported decision 1972, judgment No. F.C. 29. This decision is on appeal to the High Court of Australia.

he is not handicapped by the loss of any document, or informality or misdescription in a document, or the failure of some person to execute a document which the claimant is entitled in equity to have executed. An example of this kind of claim would be a person who was purchasing registered land on a terms contract of sale prior to the appointed date and had paid all the instalments but had been prevented by the War from having the vendor execute a transfer to him. In the *Director of District Administration* v *Dowling* [1969-70] P. & N.G.L.R. 398, the claimant failed to bring himself within Section 10. The evidence showed that the claimant to restoration had government authority to occupy land on payment of rent but that no lease had issued, or could have issued, because the land was not surveyed. Minogue C. J. held that the survey was not a "record, certificate, or document" which had been lost or destroyed (Section 10(a)). It was an essential step in registration and had not been made. Likewise the lack of survey was not a "misdescription in a document" (Section 10(b)) but something which prevented the lease instrument being prepared. Further the claimant could not in equity compel the Administrator to grant him a lease (Section 10(c)), because the *Land Ordinance* 1922 expressly provided that an Administration lease, as distinct from a granted application for a lease, could not be granted over unsurveyed land. The claimant could not take advantage of Section 67(3) of the *Restoration Ordinance* which, as will be seen shortly, only applies to claims to freehold registration.

The second and third kinds of claim were not of much practical significance in that the vast bulk of the claims lodged came under the first and fourth categories.

Section 67(3) of the Restoration Ordinance

The fourth kind of claim is entitlement to registration under Section 67(3) of the Ordinance. Over the last five or six years as the restoration of titles draws to completion, this is the most common type of claim. It is the most difficult to prove and unlike the first claim to actual registration, it allows a reasonably open contest between the claimant and any natives who assert conflicting customary rights.[13] Most of the recent appeals to the Supreme Court have turned on the interpretation or application of Section 67(3).

Section 67(3) provides:—

> "For the purposes of this Ordinance, a person shall be deemed to have been entitled, at the appointed date, to an interest in land, and to be entered or registered in a lost register as the owner of, or person entitled to, that interest if, in the opinion of the Commission, he would have been so entitled if—
>
> (a) the provisions repealed by this section [i.e. Sections 16-43 Lands Registration Ordinance 1924] had remained in force;
>
> (b) no relevant document or register had been lost or destroyed; and
>
> (c) the procedure prescribed by those provisions had, before the appointed date, been completely applied in relation to that land."

13 The conflict was tilted in favour of the claimant to restoration by the *Evidence (Land Titles) Ordinance* 1969 which gives the claimant the benefit of a number of evidentiary presumptions. In *Re Madina*, unreported decision 1971, judgment No. 654, it was held that this Ordinance applied to restoration cases.

Section 67 is found in "Part VI—Miscellaneous" of the Ordinance. Subsection (1) chiefly repeals Sections 16-43 of the *Lands Registration Ordinance*. These sections provide for the initial registration of German freeholds with one exception discussed later in this article.[14] Subsection (2) re-enacts Section 41 of the *Lands Registration Ordinance* repealed by Subsection (1). Subsection (3) would appear to be procedural provision to get over a difficulty caused by the fact that Sections 16 to 43 were repealed on 1 November 1951 but the appointed date for the *Restoration Ordinance* was fixed as 10 January 1952. Without Section 67(3), a person who claimed entitlement to initial freehold registration under Sections 35 to 36 of the *Lands Registration Ordinance* would claim under the second and third kinds of restoration claim already considered. For example a claimant might be able to show that a draft certificate of title issued to him pre-war, no caveats were lodged against his proposed registration, and that the Director of Native Affairs had certified that there were no native claims. He might also show that only the disruption of war prevented his actual registration under Section 35 and he had not dealt with the land in any way after the war so as to lose his entitlement to registration. Such a person could show entitlement to registration under Section 9 or, if necessary, under Section 10(c) of the *Restoration Ordinance* he could claim that he was entitled in equity to have the Registrar of Titles issue a certificate of title to him. But he could only show this entitlement to registration as at 1 November 1951 when the *Restoration Ordinance* came into force and when Section 35, included in Sections 16 and 43 of the *Lands Registration Ordinance*, was repealed. He would be unable to show entitlement to registration as at the appointed date 10 January 1952. His entitlement to registration would cease some two months short of the appointed date. Section 67(3) was probably intended to keep on foot claims under Sections 9 and 10 of the *Restoration Ordinance* of entitlement to initial registration under Sections 16 to 43 of the *Lands Registration Ordinance* which would otherwise have stopped short of the appointed date.

Nevertheless whatever may have been intended, Section 67(3) has been judicially defined as an independent basis for restoration of freehold titles. As noted, the majority of claims determined in recent years have been based on this section. It is quite clear that Section 67(3) has no application to the restoration of Administration leases. This is because the repealed sections of the *Lands Registration Ordinance* only relate to freeholds.[15]

The section was first considered by Minogue J., as he then was, in *Tolain & Ors* v *Administration* [1965-66] P. & N.G.L.R. 232 at 263-4. In that case land arose out of the sea following a volcanic eruption in May 1937 which joined the small Vulcan Island to Simpson Harbour at Rabaul. The Administration promptly declared the land to be Administration land as waste and vacant and with no apparent owner under Section 11 of the Land Ordinance 1922. The title so acquired received no processing under the *Lands Restoration Ordinance* before the appointed date, but the Administration claimed restoration of title. After a lengthy examination of the Ordinance, His Honour held that Section 67(3) enabled the Commission to consider applications for initial registration of title by persons who could not bring themselves under Section 10 of the *Restoration Ordinance*

14 This discussion is under the heading 'Section 67(3) and Administration acquisitions 1914-1952'.

15 *Director of District Administration* v *Dowling* [1969-70] P. & N.G.L.R. 398 at 405.

because no steps, or very few steps, had been taken pre-war towards registration. The section envisaged that the procedure prescribed by the repealed sections, might not have been completed or even begun. He rejected the argument based on a passage in *Tedep's* case that the *Restoration Ordinance* was confined to claims under Section 9 and 10, i.e. the three kinds of claim already discussed in this paper.

This interpretation was followed by Clarkson J. in *Re Tonwalik* [1969-70] P. & N.G.L.R. 110. In that case the procedure of the repealed sections had been commenced. The Registrar had issued a draft certificate of title under Sections 19 and 20 in the name of the Custodian and advertised it under Section 21. The Director of Native Affairs had published a notice in the New Guinea Gazette calling for native claims under Section 22. The draft certificate of title showed an encumbrance requiring the owner to improve the land and in 1931 the Custodian sought to get the Registrar to delete it. This question remained unresolved and no certificate of title was registered. The Chief Commissioner found that no title issued prior to the appointed date, which was a correct finding on the facts, and therefore that the Custodian was not entitled to registration. Clarkson J. held that the Commission had failed to apply Section 67(3) which was mandatory. The Commission had to apply the procedure prescribed in the repealed Sections 16 to 43 notionally, and then form an opinion as to the claimant's entitlement to registration.

To apply Sections 16-43 of the *Lands Registration Ordinance* notionally, is a difficult task. The Commission has to indulge in a number of necessary speculations as to what would have happened prior to the appointed date if the procedure for initial registration had been fully applied. In a case where a property was registered in the Groundbook[16] the Commission has to presume that a draft certificate of title was issued (Sections 16 and 19). If a German property was not registered in the Groundbook the Commission has to decide whether the Commissioner of Lands would have certified under Section 17 that the property was entitled to be registered in the Groundbook before 9 May 1921, i.e. under the German law then in force. This is a matter which has to be decided judicially and not by the principles of right and good conscience[17] and involves an examination of the German law in force as at 1914,[18] which was kept in force under the Australian Military occupation until May 1921.[19]

16 The German Groundbook is called the Land Register in the *Lands Registration Ordinance* 1924 and the *Restoration Ordinance*. This is similar to the Register Book i.e. the Torrens register of freehold titles kept under the *Lands Registration Ordinance*. To avoid confusion I have used the term Groundbook in this article.

17 *Re Adolfhafen Virginland*, unreported decision 1971, judgment No. 653, per Frost S.P.J. at 5-7.

18 The German law is summarized by Phillips J. in the *Mortlock Islands case*, 1930, which is printed in B. J. Brown: *Fashion of Law in New Guinea*, (Sydney 1969), 237-48. A useful short account of the land law and policy is given in P. G. Sack, "Land Law and Land Policy in German New Guinea", *The History of Melanesia* (Second Waigani Seminar Papers) 1969 ANU, Canberra, 101-12. For a more detailed account see the same author's: 'Traditional Land Tenure and Early European Land Acquisitions', 1971, ANU Ph.D. thesis. Dr Sack is shortly publishing a book on this subject.

19 The military proclamation keeping German laws in force dated 12 September 1914 is printed in S. S. Mackenzie, *The Australians at Rabaul* (Vol. 10 of the Official History of Australia in the War of 1914-18) (Sydney, 1927) 76-8. The relevant part, paragraph 3 provides:

> "The lives and private property of peaceful inhabitants will be protected, and the laws and customs of the colony will remain in force so far as is consistent with the military situation."

In two cases on appeal, the application of Section 17 was considered, and in each case the Supreme Court declined to find that the Custodian of Expropriated Property was entitled to a certificate under that section. In *Re Adolfhafen Virgin Land*,[20] Frost S.P.J. had to consider the effect at German law of a purported acquisition of land by the New Guinea Company from natives between 1906-1908. His Honour referred to the strict regulations then in force governing purchases from natives which had an overriding requirement that acquisitions were not to be contrary to the interests of the natives. As part of this requirement, land needed for the livelihood of natives—in particular dwelling places, garden lands, and palm groves, were precluded from acquisition. The evidence was that in about 1910 a government surveyor reported that the boundaries of the property acquired by the New Guinea Company "were unusual and against the interest of the Fiscus", and that in 1911 the Governor required the District Officer to enquire into the matter and report on it before the acquisition could be registered in the Groundbook. There was no further evidence on the precise nature of the enquiries required, nor that they were ever made. His Honour held that it was probable on this evidence that the enquiries were directed because the regulations protecting the livelihood of natives were infringed. Indeed he suggested it was possible that the Company's application for registration in the Groundbook was not proceeded with after 1911 because after providing adequate living and gardening areas for natives in the vicinity, the balance of the land left to the Company was too small to make registration worthwhile. Alternatively, it was possible that the Government's requirements were more than the Company was prepared to grant and that no compromise could be reached. In any event the evidence was clear that the land was not entered in the Groundbook because pending Government enquiries were not resolved. His Honour therefore held that the Company was not entitled to a certificate under Section 17, i.e. it was not entitled to be entered in the Groundbook, and hence the application for restoration of title under Section 67(3) failed.

Re Admosin Island[21] was a similar case on the application of Section 17. In that case there was no contemporary documentary evidence that the New Guinea Company had acquired the land prior to 1921. The earliest documentary evidence was a note dated 1931 by the Custodian that permission to acquire the land had been given by the German Government, but no source for that statement was given. The only other piece of evidence was a letter from the Custodian's Delegate, also dated 1931, which stated that a relevant file had been located in the Lands Department at Rabaul from which "it seems fairly certain that a Section 17 Certificate will issue in due course". The letter went on to add that a German survey of the property had been made. The native evidence denied a sale, or any valid sale, to the Company. On this evidence, Williams J. declined to hold that the Custodian was entitled to a certificate under Section 17, and hence the claim for restoration failed.

If the Commission decides that a Section 17 certificate did issue, or would have issued, or if the land was entered in the Groundbook, to continue with the notional application of the repealed procedure required by Section 67 (3), the Commission must presume that a draft certificate of title would

20 Unreported decision 1971, judgment No. 653.
21 Unreported decision 1971, judgment No. 661.

have issued (Sections 19 and 20).. The Commission can further presume that notice of this draft would have been served on the specified parties and advertised under Section 21. The Commission must then presume that the Director of Native Affairs on receipt of a draft would have published a notice calling for native claims and caused to be made enquiries in the locality of the land as to the existence of any native claims (Section 22). The Commission then has to decide, again judicially, whether there would have been any native claims.

If the Commission decides that there would not have been any native claims the claimant to restoration would normally succeed. If the Commission decides that there would have been native claims, it has to decide further whether they would have been admitted by the owner named in the draft certificate of title;[22] or barred for non exercise over twenty years (Section 24A); or extinguished by compensation accepted by the Director of Native Affairs with the consent of the Administrator on behalf of the native claimants (Section 24B); or referred to the Supreme Court (Section 22(c) (ii) or Section 24). These questions again must be decided in issue judicially (Restoration Ordinance Section 42(4)). If the Commission decides that the native claims would have been referred to the Court, it must then decide whether the claims would have been allowed in whole or in part, or rejected (Section 26(3)), or extinguished by compensation under Section 27E. In deciding these questions the Commission can place itself in the position of the pre-war Supreme Court of New Guinea and need not be bound by the received common law and equity otherwise applicable, but

> "may be guided by such principles of right and good conscience . . . having regard to the tribal institutions, customs and usages of the natives of the Territory and to the conditions existing in the Territory since its occupation by persons other than natives (Section 27C)."[23]

It is the task of the Commission to apply Section 67(3). Although the Supreme Court on appeal has power to substitute its decision for that of the Commission "if the justice of the case so requires" (Section 38A(2) *Land Titles Commission Ordinance* 1962-1971) the Court has consistently remitted cases to the Commission for rehearing where the Commission has failed as a matter of law to correctly apply the section.[24]

22 The *Lands Registration Ordinance* did not provide an administrative procedure for admitting a native claim. Of course the native claim could have been referred to the Court by summons and there admitted, and embraced in a consent order. In addition to this method, the pre-war practice appears to have been for the Director of Native Affairs to advise the owner named in the draft certificate of title that he would issue a Section 22 certificate if the owner admitted the native claim. If admitted the Director would issue his certificate and the claim would be recognised by the imposition of an encumbrance on the registered certificate of title, or if the claim were to part of the land, by the registration of a title for a lesser area than that shown in the draft. Section 132A was enacted to legitimise this practice in part but failed to achieve that object, it is submitted, because it is limited to the registered owner of land, not to the owner of land named in a draft certificate of title.

23 For a judicial interpretation of these principles and their application to purchases made from natives by the New Guinea Company in 1887-88 see *In re Jomba Plain*, unreported decision 1932, Phillips J. (later Sir Beaumont Phillips C.J.) at 81-7; and with respect to purchases made from natives in 1901-02 see *In re Malala*, unreported decision 1932, Phillips J., at 31-2.

24 *Re Tonwalik* [1969-70] P. & N.G.L.R. 110 at 132, followed in *The Mission of the Holy Ghost (NG) Property Trust* v *Administration* [1969-70] P. & N.G.L.R. 365 and *Re Utuan*, unreported decision 1970, judgment No. 573, and *Re Waldow*, unreported decision 1970, judgment No. 592.

There are four kinds of orders that can result from an application of Section 67(3). The first is that the claimant would have obtained registration, in respect of the whole or part of the land, free from any encumbrance in favour of natives. The second is that the claimant would have obtained registration subject to an encumbrance in favour of natives. The encumbrance must be registered in the name of the Director of Native Affairs as trustee for natives, and need not be in a form known to English law (*Lands Registration Ordinance Sections* 38(c) and 40, 26(3)(b), 39, and 132A). The third form of order is that native rights exist but if the claimant to registration pays a specified sum of compensation under Section 27E of the *Lands Registration Ordinance,* they will be extinguished. Such an order was upheld on appeal by Prentice J. in *Re Toriu*[25] following dicta of Minogue C.J. in *The Mission of the Holy Ghost (NG) Property Trust* v *Administration* [1969-70] P. & N.G.L.R. 365.[26] Section 27E allows an award of compensation to be made when the enforcement of rights that are found to exist "may cause undue hardship to some other person, and that it is possible adequately to recompense the claimant for the loss of the right by some form of compensation". The section was applied by Phillips J. as he then was, in *Re Jomba Plain* (unreported 1932). In that case native rights were established land owned by the Custodian. In respect of land occupied by plantation buildings, coconut palms and rubber trees, he held that it would be a hardship to the Custodian to return this land to the natives, and he therefore extinguished the native rights by an award of compensation. He refused to apply the section to land not occupied by buildings or economic trees merely on the ground that the Custodian had sold the land on terms and would be liable to compensation to his purchaser for failure to convey title free of native encumbrances. Moreover he held that money compensation was not an "adequate recompense" to the natives in respect of this land as they had been living on it for many years.

The fourth kind of order is that the claims to entitlement to registration would have failed. Clarkson J. held in *Re Tonwalik* [1969-70] P. & N.G.L.R. 110 that once the Commission determined that a claimant was not entitled to be registered, the claim to restoration fails and it is not necessary for the Commission to consider what interest, if any, the claimant has in the land. This ruling is consistent with the whole aim of the Ordinance as considered in *Tedep's* case, to deal with registration and entitlement to registration at the appointed date, rather than with ownership. When a claimant fails under Section 67(3), the order is expressed, following *Tonwalik,* in the negative form of Section 17(1)—"it is not established that the claimant was . . . entitled to an interest in the land *and* to be entered or registered in a lost register". In many cases it is clear from the findings of fact that the claimant failed because he had no interest in the land. In other cases the claimant may have failed because he could not show entitlement to registration, but it may be that he can still assert an interest in the land. For example, a claimant may fail to show entitlement to registration because the Commission finds that he would not have received a certificate from the Commissioner of Lands under Section 17 of the *Lands Registration Ordinance.* He may still claim to own an interest in the land based on evidence of some purchase from natives. The purchase may well be hotly denied by

25 Unreported decision 1971, judgment No. 610. This case went on appeal to the Full Court but not in respect of this order. It is now before the High Court.
26 Of contrary dicta of Clarkson J. in *Re Nangumarum* [1969-70] P. & N.G.L.R. 26 at 34-5.

the natives. This means that the unsuccessful claimant to restoration and the natives have to take further judicial proceedings—usually before the same Land Titles Commission acting in its general jurisdiction under Section 15 of its Ordinance—to determine ownership. This unnecessary duplication of legal proceedings could be easily cured by a legislative amendment. However the problem is not common and the outstanding restoration cases are so few that an amendment is unlikely.

Section 67(3) and Administration acquisitions 1914-1952

The application of Section 67(3) to Administration land acquired otherwise than as successor to the German Government, merits special consideration. Administration land acquired in the inter war period, for example by purchase from natives, or resumption, was initially entered in the Index of Unregistered Administration Land under Section 43A of the *Lands Registration Ordinance*. Entry in that index conferred no indefeasibility on the acquisition (subsection (5)). Such land could then be registered in the name of the Administration under Section 42(2) of that Ordinance.

Section 42(2) provided that the Registrar could register a title in the name of the Administration "upon production of such evidence of title as he deems sufficient or as may be prescribed by any Ordinance, accompanied by a proper plan and description of the land". With reference to "evidence of title" it is clear that none was ever prescribed by any Ordinance. Although Section 42(2) is contained within Division 2 of Part III of the *Lands Registration Ordinance* the elaborate procedure of that Division for bringing German titles under the Ordinance, is not the procedure prescribed by Section 42(2).[27]

The section requires a "proper plan or description of the land". There was no legislative requirement that this should be a survey plan prepared to a specified standard of accuracy. A scale for plans was laid down for grants of Administration freehold (Section 14 and Regulation 2) and for subdivision of registered freeholds (Section 78(2)), and presumably the Registrar would insist on the same scale for Administration titles in order to get consistency with the various titles on the register. However the Registrar had no express power to prescribe a standard of accuracy for surveys. Section 20B empowered the Registrar of Titles to order a survey.

On being satisfied as to evidence of title and a proper plan and description, Section 42(2) provides that the Registrar "shall bring the land under this Ordinance by registering, in manner provided in this Ordinance, a certificate of title in the name of the Administration". The appropriate manner was to register a certificate of title under Sections 53 and 56 as if it were an Administration grant of freehold under Section 14. It was not appropriate to follow the elaborate procedure for initial registration of German titles under Sections 19 to 36, despite the common pre-war practice to the contrary.[28] It is clear that the Registrar's sole power to issue a draft certificate of title which commenced the lengthy procedure for first registration was limited by Section 19 to German titles.

Section 42(2) was one of the sections of the *Lands Registration Ordinance* repealed by Section 67 of the *Restoration Ordinance*. Thus in dealing with a restoration claim by the Administration under Section 67(3) to land acquired otherwise than as successor to the German Fiscus, the Commission

[27] *Tolain & Ors* v *Administration* [1965-66] P. & N.G.L.R. 232 at 276-7, and *Re Madina*, unreported decision 1971, judgment No. 654, at 6.
[28] *Re Madina, ibid.*

has to consider whether the Administration would have been entitled to be registered if Section 42(2) had remained in force, no relevant document had been destroyed and the procedure prescribed by that section had been completely applied before the appointed date. This means that the Commission must consider, firstly, if the Registrar of Titles would have regarded the evidence of acquisition put before the Commission as "sufficient". If there is actual evidence that the Registrar issued a draft certificate of title and advertised for possible caveats and native claims although not legally required to do so, the Commission must consider whether there would have been caveats and/or native claims and how these would have been resolved.[29] Secondly, the Commission must consider whether there was a "proper plan and description of the land". This is a question of fact. The commission cannot presume that if the procedure prescribed by Section 42(2) had been completely applied, that there would have been a proper plan, because that section does not prescribe a survey or the drawing up of a proper plan. It is a question of fact: was there a proper plan and description? As noted, what was proper was not spelt out in any legislation. It appears to have been left to the Registrar's discretion.

A Final Order based on a certificate that no native customary rights are asserted

When a certificate has been given by the Director of Native Affairs under Section 36(b) of the *Restoration Ordinance* that to the best of his knowledge and belief no native customary rights are asserted in respect of the land, the Commission is absolved from investigating the question of native rights further. If there are no objections, the Commission can proceed to make a final order without a hearing (Sections 42(2), 37 and 16(2)). A number of appeals have been lodged by natives against final orders made upon receipt of certificates under Section 36. It is difficult for these appeals to succeed because what the Ordinance allows is not normally an error of law, in excess of jurisdiction, contrary to natural justice, or against the weight of evidence.[30]

An initial difficulty in the path of an appellant seeking to upset a final order based in a section 36 certificate, is to establish that he is a "person aggrieved" under Section 38 of the *Land Titles Commission Ordinance*. Normally a person aggrieved must be a party who endeavoured to maintain in the court below the contrary of that which took place. However in two appeals it has been held that the term "person aggrieved" is not limited to parties in the Commission at first instance, and that natives who had no part in the Director's certification that no native customary rights were asserted, and claim a real and direct interest in the land, can competently bring an appeal.[31]

There are two ways in which an appellant can succeed in an appeal against a final order based on a Section 36 certificate. The first is where there is no evidence to support the final order. Such a defect is clearly an error of law and is not cured by a certificate from the Director of Native

29 *Ibid*, 6.

30 These are the four grounds of appeal under Section 38 of the *Land Titles Commission Ordinance*.

31 *Re Mindiri*, unreported decision 1970, followed in *The First Assistant Secretary, Department of the Administrator & Ors* v *Administration and Leahy*, unreported 1972, judgment No. 670.

Affairs that to the best of his knowledge and belief no native customary rights are asserted. The Commission is still under a duty to "investigate . . . and determine" the claim to restoration before making a final order (Sections 16 and 42(1)).[32]

The second way is where the apellant can show that there was something before the Commission at the time of making the final order which would indicate that the Director's certificate was given in error. In two cases the Commission received a report attached to the Director's certificate indicating that there were native claims to the land, albeit only faintly asserted. In each case the Commission simply acted on the certificate and issued a final order. In *Re Tol Foreshore Reserve* [1969-70] P. & N.G.L.R. 381, Frost J. said that it was unlikely that the Commission could ever question the Director's belief, but where the Commission had before it a certificate and a contradictory report it could question the Director's knowledge. Thus the certificate given in that case was not to the best of the Commission's knowledge as required by Section 36(b). To act on it was therefore an error of law. In a very similar factual case *Re Tol Extended* [1969-70] P. & N.G.L.R. 389, Clarkson J. allowed the appeal on a slightly different basis. He reasoned that the certificate merely allowed the Commission to make a final order without a hearing. It was still under an obligation to "investigate . . . and determine the claim" to restoration (Section 42(1)). If there was something on the Commission's file to show that native rights were asserted contrary to the claim, then in investigating the claim the Commission must also investigate the contrary native rights. The certificate was not conclusive evidence that there were no native rights.

Where the appellant suceeds in such an appeal the order made by the Court can vary. In the first case where the Court finds that there is no evidence to support a final order in favour of the claimant to restoration, it may well reject the claim, i.e. substitute the final order with an order that the claimant has failed to establish an interest in the land and an entitlement to registration. However there may be special reasons why a rehearing by the Commission should be ordered, for example, if the Commission failed to investigate the claim.[33] Presumably an important part of the Commission's investigatory function in such a case would be to call on the claimant to produce evidence to support his claim failing which it will be dismissed. In the second case the most likely result would be a rehearing before the Commission. This is because the Director's certificate prevented the native claimants from producing evidence in support of their claimed rights, and thus prevented the dispute between the claimant to restoration and the natives asserting customary rights, being determined on its merits. The Supreme Court has a very wide power to receive fresh evidence under an amendment to Section 38 of the *Land Titles Commission Ordinance* in force in 1972, and it could receive the evidence in support of the native customary rights, and determine the case on its merits. However the Court is more likely to follow the course taken with appeals allowed where the Commission misinterpreted Section 67(3), viz., that the determination of the merits of a case is a task imposed on the Commission by the legislation. Thus the more likely result is that the case be remitted to the Commission for rehearing as was done in the two *Tol* cases.

32 *The First Assistant Secretary, Department of the Administrator & Ors* v *Administration and Leahy, ibid,* at 12-15.
33 *Ibid.*

Conclusion

The numerous decisions of the Supreme Court on appeal in recent years have authoritatively settled the law and it should be possible for the outstanding restoration claims at first instance and appeals to be settled quickly. Delays are most undesirable for the reasons advanced earlier in this article. The first hand knowledge of pre-war land matters is diminishing all the time, and it is hoped that the parties, their counsel, the Commission and the Supreme Court will finalise the outstanding matters as soon as possible.

Table of orders made under the New Guinea Land Titles Restoration Ordinance 1951

	Provisional Orders	*Final Orders*
1951-30.6.1953	500	nil
1953-1954	182	58
1954-1955	228	81
1955-1956	116	153
1956-1957	29	45
1957-1958	80	116
1958-1959	55	67
1959-1960	157	47
1960-1961	203	22
1961-1962	186	35
1962-1963	223	9
1963-1964	161	64
1964-1965	67	276
1965-1966	153	898
1966-1967	263	339
1967-1968	23	256
1968-1969	21	57
1969-1970	12	49
1970-1971	5	7
1.7-31.12.1971	1	11
TOTAL	2,665	2,590

SOURCE: Government Gazettes and Annual Reports on New Guinea to the United Nations.
These figures omit orders relating to mining and forestry rights.