Admissibility of Claims under the National Land Registration Act 1977

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Introduction

Between 1999–2000, the National Lands Commission admitted a number of claims for settlement payment over land declared as 'national land' pursuant to the *National Land Registration Act* 1977 (NLR Act). The then Commissioner admitted such claims, where in most instances, he issued a second award to replace an existing award which was contrary to the statutory threshold provided for under Schedule 2 of the Act. The State then sought judicial review of 52 cases in *Sao Gabi v Kasup Nate & Ors* (Unreported) N4020, challenging the powers of the Commissioner in awarding excessive amounts contrary to the statutory limit. The National Court quashed the decisions of the Commissioner and remitted all matters back to the National Lands Commission for re-hearing.

As a result of this judicial review, the Act was amended in 2006. While the policy intention is clear, it has also created some ambiguity in the administration of the Act when applying the admissibility test. Issues related to the requirement to give notice under the *Claims By and Against the State Act* 1996 (CBASA), the definition of a prescribed time to make a claim, and the discretion provided to the Commissioners, and ex gratia payments, are but some issues that require discussion in the context of admissibility of claims for settlement payments.

In addition to the above policy issues, there is also the need to understand the underlying concept of "settlement payments" as opposed to 'compensation' when claims are submitted. Ideally, claims for settlement payments are submitted by "former customary landowners" and claims for compensation are submitted by customary landowners.

This paper focuses on the issue of 'admissibility of claims' under Part VI of the NLR Act. The intention is to discuss how claims were and are being admitted, the total number of claims admitted since 1978, and a discussion on a few recent cases on how the admissibility test has been applied by the Commission. In discussing such cases, I will also consider in brief some possible way forward. I am also mindful that this is a matter that is best covered through the proposed merger of the National Land Commission and the Land Titles Commission. This paper is therefore focused primarily on creating awareness on the admissibility of claims for settlement payments under the NLR Act.

The Historical Legal Context

The need to address customary land matters in Papua New Guinea (PNG) goes way back before PNG achieved independence in 1975 as can be noted from several land related legislation. In 1952 the *Native Land Registration Ordinance* established the Native Land Commission with authority to determine ownership of customary land if disputes arose during the registration process. This mechanism is important for the purposes of this paper as one would assume that a proper registration process would have been completed before an acquisition was made by the colonial administration over the respective customary land.

The Native Land Commission was replaced by the Land Titles Commission (LTC) in 1963. In its early years the Land Titles Commission, had exclusive jurisdiction to hear disputes over customary land and applications for ownership of that land, but over the years, the jurisdiction of the Land Titles Commission was reduced.

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The Commission of Inquiry Into Land Matters (CILM) of 1973 concluded that the introduced system of deciding land disputes under the Native Land Commission and later the Land Titles Commission had not worked effectively and it recommended replacing it with a '*decentralized system of village-based courts with powers to dispense justice based on local customs and sanctions'* and with support from the government. The LTC has had a long history of having amendments made to it but it is not my intention to discuss this aspect other than to note that it would have had a part to play in the colonial acquisitions made prior to Independence.

The Commission of Inquiry into Land Matters 1973

Land issues featured prominently in Papua New Guinea's legislature during the period leading up to independence. Oliver and Fingleton noted that four administration-sponsored Land bills were rejected by the House of Assembly from 1968 to 1972.[1] This rejection was considered by many as a turning point in the nation's history as an early expression of growing independence. The CILM was established by the subsequent House of Assembly (1972–75), which was the first Parliamentary Committee fully constituted by elected members, to inquire into an increase in tribal fighting in the early 1970s. It was strongly suggested by the CILM members in 1973 that most fights were connected with land disputes and that pressures on land, created by population increases and the planting of permanent cash crops (coffee in particular), had produced high levels of anxiety about land and undermined traditional authority.[2] The undermining of traditional authority has become one of the main grounds of argument relied upon by present day former customary landowners when submitting claims for settlement payments under the NLR Act.

The CILM Report of 1973 made numerous recommendations, including recommendations on basic principles of land policy, customary land, rural land, urban land, dispute settlement, land administration, surveying and forestry. The CILM's guiding philosophy was that land policy *'should be an evolution from a customary base, not a sweeping agrarian revolution'*. It recommended an entirely new system for settling land disputes, based on the principles that:

- people should settle their own disputes (and not pass that responsibility on to officials);
- the process of dispute settlement should be brought much closer to the people;
- hearings should not be confined solely to who owns the land, but should also consider the rights of others to use the land and the needs of the parties in dispute.

The CILM Report recommended the abolishment of the Land Titles Commission as an agency for settling disputes over customary land and be replaced by a three-tiered system of mediation, arbitration and appeal that was a part of the national judiciary and was decentralized to the provinces and the districts. The current *Land Disputes Settlement Act* 1975 therefore was drafted in accordance with these recommendations and is one of the earliest pieces of legislation to result from this inquiry. As a result, the Local Land Courts now have jurisdiction to hear land ownership disputes under the *Land Disputes Settlement Act* over matters emanating from the Land Titles Commission and the National Land Commission.

Titles to Pre-Independence Acquisitions

Pre-Independence acquisitions over customary land made by the colonial administration were also subject to some challenges. The State's ownership over such colonial acquisitions was confirmed by the *Evidence (Land Titles) Act* 1969. This legislation was enacted to provide clarity on those titles which were not registered under the Torrens system but were the subject of an acquisition through some method of payment. Under this legislation, the existence of a purchase document was adequate to establish ownership of title by the State. The *Evidence (Land Titles) Act* was repealed by the NLR

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1 Oliver, N and Fingleton, J, "Settling customary land disputes in Papua New Guinea", MLW, Vol 2, p.227 at http://dfat.gov.au/about-us/publications/Documents/MLW_VolumeTwo_CaseStudy_11.pdf.

2 Fingleton, JS, "Policy-making on lands", in Ballard, AJ, (ed.), *Policy-making in a new state: Papua New Guinea 1972–77*, (Brisbane, University of Queensland Press, 1981) 225.

Act. The provision of purchase documents by former customary landowners is still being considered by the Commission as evidence that the subject land was purchased by the colonial administration.

As noted above, the NLR Act and the *Land Disputes Settlement Act* were a direct result of the recommendations from the CILM Report. The CILM provided the policy rationale for most of the provisions under the *National Land Registration Act*.[3]

Overview of the National Land Commission

The National Land Commission (the Commission) is established under Section 25 of the NLR Act. It was established as a result of the CILM to act as a mechanism to address indigenous peoples' concerns on the inadequacy of payments by the colonial administration upon the acquisition of their land for State use and other public purposes. The primary purpose of the Commission is set out in the preamble to the Act. The preamble reads:

> *Being an Act to–*
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> *(a) establish a Register of National Land; and*
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> *(b) make provision for the registration in the Register of National Land of all land acquired or to be acquired by the State on or after Independence Day; and*
>
> *(c) make provision for the registration in the Register of National Land of land acquired before Independence Day by a pre-Independence Administration in Papua New Guinea and which is now required for a public purpose; and*
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> *(d) give effect to Section 54(a) (special provision in respect of certain lands) of the Constitution by providing for the recognition of the title of the State to certain land that is required for public purposes, the title to which may be, or may appear to be, in doubt; and*
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> *(e) settle grievances in relation to the land described in Paragraph (d) by providing for certain settlement payments; and*
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> *(f) declare and describe, for the purposes of Section 53(1) (protection from unjust deprivation of property) of the Constitution, certain matters as public purposes and justified reasons for the acquisition of property,*
>
> *(g) give effect to Section 53(2) of the Constitution that just compensation must be paid by the expropriating authority, giving full weight to the National Goals and Directive Principles and taking into account the interests of the State as well as the person or persons affected,*
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> *and make provision for those and related purposes.*

Paragraph (g) was inserted as an amendment in 2006, probably as a result of arguments raised before the courts on the issue of just compensation under the *Constitution*. What was paid in exchange for the acquisition of land at that material time may amount to just compensation and it must be viewed differently to settlement payments awarded under the NLR Act. The intention of the NLR Act and the primary focus of the Commission therefore will attract differing views.

Lawrence Kalinoe argued that the primary focus of the Commission is to establish a Register of National Land and provide for the registration in the Register of National Land of all land acquired or to be acquired by the State on or before Independence Day, and that are intended to be retained by the government and or its instrumentalities. He further argues that the settlement of grievances by aggrieved Papua New Guineans as former customary landowners is secondary to the need to keep a Register - which indicates State ownership over such acquired land.[4] There is merit in this argument when one looks at the rationale behind having an admissibility test before settlement awards are issued. It can be argued that land has already been acquired and the need for such a declaration is to preserve the State's ownership and title over the said land. The focus should be in keeping a Register of all such acquisitions.

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3 The CILM Report of 1973 is a great read for those who wanting to know more about the policy rationale for the country's customary and national land administration.

4 Kalinoe, L, "Compensating Alienated Customary Landowners in Papua New Guinea: Rethinking the rationale and the regime" [2005-06] MLJ 63 (1 January 2005). http://www.paclii.org/journals/MLJ/200513.html.

Functions and Procedures of the Commission

Section 33 of the NLR Act provides for the functions of the Commission. It states that the Commission has such jurisdiction, privileges, powers, functions, duties and responsibilities as are conferred or imposed on it by or under this or any other Act.

Section 34 of the NLR Act deals with the procedures of the Commission. It provides that subject to this and any other Act, the procedures of the Commission are as determined by it. It also states that the Commission shall comply with the principles of natural justice and that all hearings of the Commission shall be conducted in public and heard before one Commissioner.

It also provides that the Commission is not bound by technical rules of procedure and shall–

1. investigate, and inform itself on, any matter before it in such manner as it thinks proper; and
2. admit and consider such relevant information as is available.

In the absence of any set of guidelines or the development of practice directions[5] by the Commission in the conduct of its proceedings, it is always difficult to ascertain the extent to which a Commissioner would conduct the proceedings. However, in the absence of such guidelines and or practice directions, it is envisaged that Commissioners would look towards similar quasi judicial entities or tribunals to seek guidance from.

The Commission would only have jurisdiction to settle a grievance when such an acquisition has been declared as national land under Section 9 or Section 13 of the NLR Act. Section 9 of the NLR Act follows on from a Notice of Intention issued under Section 7. Similarly, Section 13 declarations follow on from a Notice of Intention issued under Section 11.

Sections 7 and 9 relate to acquisitions made prior to Independence Day whereas Sections 11 and 13 relate to acquisitions made on or after Independence Day. The required processes and procedures are similar in nature for both types of acquisitions.

Acquisitions Prior to Independence Day

All land acquired before Independence Day are dealt with under Division 2 of the NLR Act which comprises Sections 5 to 10. Section 5 deals with the application of Division 2 and provides that it does not apply to rights in respect of land that–

1. were acquired by the State on or after Independence Day; or
2. are the subject of a decision as to title the effect of which is that the land is customary land.

Section 7 is the trigger mechanism for declarations over acquisitions made prior to Independence Day. It provides that where the Minister is of the opinion that (1) any land was acquired before Independence Day by a Pre-Independence Administration in Papua New Guinea, or the land is required for a purpose or a reason that is declared or described by Section 3 or by an Organic Law or another Act to be a public purpose; or a reason that is reasonably justified in a democratic society that has a proper regard for the rights and dignity of mankind, the Minister may, by notice in the National Gazette, intimate his intention to declare, not earlier than the expiry of three months following the date of publication of the notice, that the land is National Land.

A pre-Independence administration in PNG is defined under Section 1 of the NLR Act to mean:

1. the Administration or Government of a former Territory or the Government of Australia acting in relation to any such Territory; or
2. the British Military Administration of the former colony of German New Guinea (also known as the Territory of New Guinea); or
3. the Administration or Government of the former Possession of British New Guinea; or
4. in relation to the former Colony of German New Guinea–the German Imperial Government or the German Government or the Fiscus of that Colony.

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5 Section 34(6) of the *National Land Registration Act.*

Section 7(2) further requires that such a notice shall:

(*a*) contain a description of the land; and
(*b*) where the Minister is of the opinion that there may be a genuine dispute[6] as to whether the land was acquired validly, or at all, from the customary owners–refer to the fact that there may be a genuine dispute as to the acquisition of the land, but the omission of such a reference shall not be deemed to imply that such a genuine dispute does not exist; and
(*c*) state that any person aggrieved by the notice may make representation to the Minister within 60 days of–
  (i) the date of publication of the notice in the National Gazette; and
  (ii) compliance by the Minister with the requirements of Section 52; and
(*d*) specify the estate acquired in the land.

Section 8 of the NLR Act provides an avenue for persons aggrieved by such notice to make a representation to the Minister. It provides that any person aggrieved by a notice under Section 7(1) may, within 60 days of the date of publication of the notice in the National Gazette, and compliance by the Minister with the requirements of Section 52, make representation to the Minister. Where the Minister has published a notice under Section 7 in respect of any land, he may, pursuant to Section 9(1), declare, by notice in the National Gazette, that the land, or any part of the land, is National Land. Section 9(2) further provides that a declaration made under Subsection (1) shall contain a description of the land and specify the estate in the land acquired by the State.

Section 10 allows for an appeal against a declaration of National Land. Subsection (1) provides that subject to Sections 57 and 155 of the *Constitution*, and to Section 6, a declaration under Section 9 is not subject to appeal or review, and shall not be called in question in any legal proceedings; and compensation is not payable in respect of or arising out of any such declaration, except as provided in the section. Subsection (2) provides that a person aggrieved by a declaration under Section 9, may in accordance with and subject to Part VI, make a claim for a settlement payment.

What is not clear is the process and procedures by which any representations can be made to the Minister by aggrieved person(s) within the 60 days period. While the rationale for such a representation is not clearly spelt out, one would think issues relating to the demarcation of boundaries, and whether the acquired land is still customary land would be grounds for such representations. It is also interesting to note that aggrieved persons are still allowed to make claims for settlement payments after the three months period – even raising the same representations that would otherwise have been raised with the Minister prior to a declaration. While there is reference to a prescribed time to make a claim, it is not defined, and as such, claimants have submitted claims even after a year. These issues will be discussed below.

Acquisitions on or after Independence Day

All land acquired on or after Independence are dealt with under Sections 11 to 13 of the NLR Act. Similar to acquisitions made prior to Independence Day, Section 11 provides that where for any purpose the State has acquired land on or after Independence Day, the Minister shall, by notice in the National Gazette, intimate his intention to declare, not earlier than the expiry of three months following the date of publication of the notice, that the land is National Land.

Section 11(2) provides that such a notice shall contain the following:

1. a description of the land;
2. state that any person aggrieved by the notice may make representation to the Minister within 60 days of the date of publication of the notice in the National Gazette;
3. compliance by the Minister with the requirements of Section 52; and
4. specify the estate acquired in the land.

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[6] Section 6 provides that, a genuine dispute concerning any land may exist notwithstanding the fact that the land is, as a matter of law, vested in one or more of the parties to the dispute.

Similar to Section 8, Section 12 does allow for a person aggrieved, to make representations to the Minister by notice. It provides that any person aggrieved by a notice under Section 11 may, within 60 days of the date of publication of the notice in the National Gazette and compliance by the Minister with the requirements of Section 52, make representation to the Minister.

Where the Minister has published a notice under Section 11 in respect of any land he may after three months declare, by notice in the National Gazette, that the land, or any part of the land, is National Land. Such a declaration shall contain a description of the land and specify the estate in the land acquired by the State.

Effect of Ownership of National Land and Title to Land

A National Land granted by the State or a pre-Independence Administration vests in the State on the date of a declaration under Section 9 or 13 to the extent of the estate declared, and may be dealt with in the same way as other land the property of the State.[7] Section 16 requires the Minister to advise the Registrar[8] of such declarations he makes. It provides that where the Minister makes a declaration of National Land under Section 9 or 13, he shall immediately send to the Registrar a copy of the declaration. Section 18 also provides that where a copy of the declaration is received by the Registrar under Section 16, he shall register the land as National Land.

Section 19 further provides that an entry in the Register is conclusive evidence that the State has title to the land the subject of the entry. Therefore, the combined effect of Sections 14, 16 and 19 is that State only needs a declaration under Section 9 or 13 to effect ownership and title to the land so acquired. The keeping of a Register is conclusive evidence of State's ownership and title to the respective land.

The Commission's Registrar therefore does not have the mandate to keep records of the declarations as it is supposed to be kept by the Registrar of Titles appointed pursuant to the *Land Registration Act* 1981.

Admissibility of Claims

Once a declaration has been made by the Minister pursuant to Sections 9 or 13 of the NLR Act, the process for settlement hearing pursuant to Section 39 commences. Section 39 (1) provides that within the prescribed time after the publication of a declaration under Section 9, or within such further time as the Commission, in special and unusual circumstances, allows, a person who is aggrieved by the declaration under Section 9 or Section 13[9] may make a claim to the Commission for a settlement payment in respect of the land the subject of the declaration. Section 39(2) further provides that a claim under Subsection (1) shall be made in the prescribed manner, but this subsection does not prevent the Commission from accepting, on such conditions as to notice or further particulars or otherwise as it thinks proper, a claim made in any manner. Section 39(3) further provides that 'a copy of the notice of claim under Subsection (1) shall be served on the Attorney General or Solicitor General'.[10]

However, before proceeding any further with a claim under Section 39, Section 41 requires the preliminary issue of admissibility to be satisfied first. It provides that before proceeding further in the matter of a claim under Section 39, the Commission shall decide whether the claim is admissible in accordance with Section 40.

It is in this context that claims are admitted pursuant to Section 40 requirements. This provision therefore acts as a filtering mechanism to screen such claims. It starts off by defining who a 'prescribed person' is for the purposes of submitting a claim. It provides that a prescribed person means:

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7 See s14 of the NLR Act.

8 Registrar is defined to mean Registrar of Titles appointed in terms of the *Land Registration Act* 1981.

9 Amendment No 25 of 2006.

10 Section 39(3) is a new inclusion pursuant to Amendment No. 25 of 2006.

1. A claimant; or
2. A customary group which the claimant represents or by virtue of his membership of which he makes the claim; or
3. A person or customary group who or which is the predecessor in title of the claimant or of the group; or
4. A person or group acting on behalf of, or claiming as co-owner of a right with any such person or group.

A 'claimant' is defined under Section 1 to mean a person making a claim under Section 39 to a settlement payment under this Act, and includes a person who is joined as a claimant under Section 42, or is deemed by Section 47(2) or 49(2) to have made a claim under Section 39.

These definitions need to be understood in the context of admitting claims for settlement payments. In particular, Section 40 (2) provides that a claim under Section 39 is admissible only if a prescribed person had made, before Independence Day, a previous claim to the land or to the right the subject of the claim, under a law by virtue of which a claim to the land might have been made, and no payment (including *ex gratia* payment) for the land or for the right was made to the prescribed person in respect of a purported acquisition by a pre-Independence Administration in PNG. Subsection (3) also provides that where, in the opinion of the Commission, there were special reasons which made it reasonable that no previous claim referred to in Subsection (2) was made, and in the circumstances of the particular case, it would not be just to enforce the provision, the Commission may admit a claim which is otherwise inadmissible under Subsection (2).

Section 40 therefore establishes three fundamental principles in admitting a claim for settlement. It provides that for a claim to be worthy of being awarded settlement payment, it must be made:

1. By a prescribed person;
2. No payments, whether ex gratia or not were made at the time of acquisition of the land; and
3. There were special circumstances that made it reasonable to say that no claims were made previously, and in the circumstances, it would not be proper or just to enforce those special circumstances.

While reference is made to the need for a prescribed person to make a claim prior to Independence Day, the Commission has been given wide discretion to disregard the need for a claim to be made prior to Independence Day due to special reasons or circumstances. This discretion has been used widely by Commissioners when admitting claims for settlement payments.

To improve the process, the Commission has developed a Guideline (or an Information Brochure)[11] that summarizes the issues for consideration during hearing. This Brochure assists claimants to ensure their submissions reflect such requirements. The issues identified for consideration by the Commission include but are not restricted to the following:

1. Requirement to give Section 5 Notice under the Claims By and Against the State Act.
2. Requirement to make a claim within a reasonable time.
3. Claim must be made by a Prescribed Person.
4. Claim must be admissible in accordance with Section 40.
5. Whether or not any person or group could be joined in the Proceedings.
6. Conflicting Claims.

The development of the Guideline has greatly assisted the Commission to concentrate on these pertinent issues when attempting to decide whether or not a claim can be admitted. However, as we shall see, some of the issues, though equally important are not considered by the Commission for admissibility purposes.

The Commission also conducts awareness on the requirements of the Act through Pre-Hearing Conferences. It is emphasized that the claimants must understand that if there were some kind of payments made at the time of acquisition of the land, it is not good enough or relevant to say that the

[11] The Information Brochure was developed in 2016.

payment was not made in cash, but in some other form. For these kinds of claims, any payment, whether it was made in cash, or not, is sufficient payment. It is also irrelevant for the claimants to say that the value of payment was too small at the time of the purchase.

The Commission has applied the admissibility test in cases it has presided over. However, while most claims do not strictly meet the admissibility test, the discretion allowed under Section 40(3) has enabled the Commission to admit such claims, using the Constitutional provisions as a guide.

Application of the Admissibility Test: An analysis of some recently decided cases and options on the way forward

Since 1978, there had been a total of 251 Declarations with 232 relating to acquisitions made prior to Independence Day (Section 9) and 19 relating to acquisitions made on or after Independence Day (Section 13). Out of the 251 Declarations, the Commission had conducted 162 hearings where 110 claims were admitted while 51 claims were rejected. According to the Commission's records, the total amount of awards it made since 1978 is K2,245,992.92. A further recommendation for 50% top up by the Minister amounts to K854,550.95. The total amount payable by the State (with the 50% top up) is K3,182,021.35. However, the Commission is unable to verify if the State has honored all settlement awards by the Commission and whether or not the respective Ministers had approved the recommended 50% top up.

It should also be noted that the above figures do not include the excessive awards made by Commissioner Marum. These include a total of 52 matters that were subject of a judicial review application by the State that resulted in the awards being quashed and the matter referred back to the Commission for re-hearing.[12] Interestingly, there are some matters that were deliberated by Commissioner Marum but were not included in the 52 matters listed for judicial review. Whether the State honours those awards or take further action before the Courts is a matter for the State to decide. The Commission does not have any powers of review or appeal and can only guide the State in honouring such awards. It therefore calls for an appeal process to be included within the existing legislative regime for such excessive awards to be reassessed prior to payments being made. Different Commissioners have had different approaches in admitting claims for settlement awards.

One of the issues emanating from the cases is the definition of a 'claimant'. The problem with the definition provided under Section 1 of the NLR Act is that it does not make reference to a person who had some connections, directly or indirectly to the customary rights to ownership or interest over the said acquired land. It only makes reference to a claim being submitted for settlement awards and a claimant is one of the prescribed persons as defined under Section 40(1). There is a need to expand the definition of 'a prescribed person' to have some connection or interest to the ownership of, or interests, in relation to an acquired land. At the moment individuals have come forward to make claims as a descendant of the person who initially dealt with the colonial administration during the acquisition. In some cases, claimants have argued that the person who dealt with the colonial administration was not a landowner but was someone who had close association with the colonial administration or was someone who could speak and understand English at that time resulting in him representing the former landowners during the transaction.

In *Matter of Land Called Manpolka, Portion 905 (UAL 1307), Milinch Hagen, Fourmil Ramu, WHP* (2017), (Manpolka case) concerning a land area of 21.03 hectares, the Commission noted that there was only one claimant who submitted the claim on behalf of his father although his application made reference to him representing the Kauglapka clan. However, the Commission accepted his claim noting that the definition of a "prescribed person" under Section 40 was wide enough to cover him as a claimant as a prescribed person. The Commission also accepted the payment of one spade as sufficient payment for the land and found that no previous claim was made pursuant to Section 40(2). Two requirements were not met but yet the Commission admitted the claim under Section 40(3).

[12] *Gabi v Nate et al* (2006) N4020.

It is also interesting to note in this matter that the Commission discussed at length the application of the *Claims By And Against the State Act* (CBASA) by making references to *Daniel Hewali v PNGDF*,[13] *Laime v MVIL*, [14] and *Niule No.16 Ltd v NHC*[15] and held that although there was no notice given to the State, it was not a requirement under Section 40 and could not affect the claim being admitted. It also discussed the issue of a reasonable time to lodge the claim, making reference to 60 days as the ideal period to make a claim after the declaration of a national land. Although the claim was submitted after three months it could not dismiss the claim because the prescribed time is not defined under Section 39 and is not a requirement under Section 40 for admissibility purposes.

In *The Matter of Hunja, Portion 1 and 2, Milinch Mendi, Fourmil Kutubu* (2017), the Commission tried to define the issue of a prescribed time to lodge a claim under Section 39 and was of the view that six months from the date of the declaration of a national land is reasonable for such purposes. It held that although there was no Section 5 notice required under the CBASA, it was not a requirement under Section 40 and therefore was not relevant for admissibility purposes. However, the Commission discussed the implications of not adhering to the requirements to give notice under the CBASA. It stated that there is a big difference between claiming for damages for portions of land generally and claiming for settlement payment under the NLR Act because in the case of the former the plaintiff would have claimed damages for the value of the land whereas in the case of the latter the amount claimable is very much restricted by the NLR Act, particularly Schedule 2. The Commission concluded that in such circumstances, the claimant could not enforce his claim as damages under any law other than as settlement payments under the NLR Act.

On the issue of whether or not payments were made during the initial acquisition, there were two alleged payments. One was a payment of 300 pounds by the State agents and the other a payment of 10 pounds by the London Missionary Society who initially settled on the land. With no supporting evidence provided by the State, the Commission accepted the 10 pounds paid by the LMS and held that no payments were made by the State or its agencies. Having being satisfied that the claimant is a prescribed person and no previous payments were made, the claim was admitted even though no previous claims were made under Section 40(2)(a). Although it is not specifically stated, such a decision would have been made by the Commissioner pursuant to Section 40(3) of the Act.

In *The Matter Re Portion 317, Milinch Kukipi, Fourmil, Yule, Gulf Province* (2018), the matter was remitted to the Commission for rehearing by the National Court. The case commenced in May 2015, and after a long adjournment for submissions, the hearing re-continued in July 2018. A preliminary issue for consideration by the Commission, involved the joining of two parties, but having being accorded the opportunity, they failed to file submissions, and as such their claims were struck out. The Commission was satisfied that the claimant was a prescribed person and the claim was made within the prescribed time of six months under the CBASA. It was satisfied that the claims were initially made to the colonial administration in Kerema and no payments were made. The claim was therefore admitted on that basis. An important issue for consideration by the Commission was that relating to the issue of 'prescribed time' under Section 39. In this case, reference was made to the six months time limitation required by the CBASA, but the State took no issue with the fact that the claim was made two years after the declaration. Whether or not the claim would still be admissible even if the State objected, is anyone's guess, noting also the discretion accorded to Commissioners under Section 40 of the Act.

However, in the *Matter of Madan and Kora, Portions 3057 and 1434, Milinch Hagen, Fourmil, Ramu (WHP) (UAL 331 and 332)* (2017), the Commission did not admit the claim on the basis that there was sufficient payment of 102 pounds and 8 pence and that no claims were made previously over the same land. The Commission noted that the claim was made more than a year after the declaration, and it was not satisfied that special and unusual circumstances existed, to warrant an extension of time under Section 39 of the Act. The Commission stated that being unaware of the procedure is not good enough a reason that would be considered as a special or unusual circumstance, to grant an extension.

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13 [2002] PNGLR 146.
14 [1995] PNGLR 224.
15 [2015] PNGLR 246.

The Commission was of the view that 60 days would be the ideal time to make a claim after it was declared in March 2014 and not in April 2015.

Similarly, in the *Mt Ambra*[16] matter, the Commission did not admit the claim because sufficient payment was made to a value of $25,410.00 and a further $6702.00 for improvements. This case initially involved four claims which were later consolidated into one claim of which two claims were outside of the 60 days prescribed time, one claim was within the prescribed time and another was made well before the declaration. Although the Commission accepted the consolidated claim as having being made within the prescribed time and having being satisfied claimants were prescribed persons, it was of the view that the payments were sufficient at the time of the acquisition.

A similar approach was also taken in the *Poroma Government Station*[17] matter where the Commission was satisfied that there was a payment made during the initial acquisition for an amount of $1995.00 in 1968 for an area of 141 hectares and therefore did not admit the claim. However, in this case the prescribed time within which to lodge a claim for settlement payment was held to be within six months from the date of the declaration of the land as national land. The claim was held to be made within the prescribed time (6months), that it was made by a prescribed person, and that although no claims were previously made, the amount paid was a big amount of money which was sufficient for it to be inadmissible.

In all these cases, although claimants were prescribed persons and had made a claim within the prescribed time, the fact that they had received some payment during the initial acquisition rendered their claims inadmissible and therefore not subject to further settlement awards. This admissibility test should also be extended to cover ex gratia payments made by the government over certain national land matters. The University of Goroka (UOG) matter is a classic example of interference by the government over the jurisdiction of the Commission. While the matter was pending before the Commission, disgruntled former landowners threatened the government to shut down the University, and were paid an ex gratia payment. The land area for UOG is a small percentage of the Goroka township land area, but since they were paid quite a substantial amount by the State, other claimants who have a bigger percentage of Goroka township are now demanding similar payment for the land area equivalent to that of UOG. This is a matter that is before the commission and a decision is yet to be made, but it should address the issues relating to ex gratia payments.

Most claims have not met the requirements for admissibility other than claimants being prescribed persons, yet these claims were admitted based on the discretion of the Commissioner under Section 40 of the NLR Act. Commissioners have used this discretion to determine each claim on a case by case basis. However, there seems to be no reference to case precedents used by Commissioners over similar issues faced in previous hearings and as such, it is difficult to identify some best practices.

The discretion has been used sparingly. In one matter even a spade was considered to be sufficient payment for 21.03 hectares in the *Manpolka case*, yet the claim was admitted for settlement payment. While the Commissioner cannot make an opinion as to whether or not a payment was insignificant under Section 40 of the Act, there should be some clarity on how such a discretion can be invoked to deal with a case. Ideally, payment should have been held to be insufficient for it to be admitted to warrant award of a settlement payment. However, it is suggested that the restriction placed under the Act compelled the Commissioner to exercise the discretion under Section 40 of the Act. Legally, if payment was considered to have been made, then the claim should not have been admissible.

Generally, the grounds for admissibility must be further reviewed to include issues such as:

1. The requirement to give Section 5 Notice under the CBASA.
2. The requirement to make a claim within a defined period (reasonable time).
3. Clarity on the definition of a prescribed person with linkage to the ownership or interests in relation to the former customary land (now declared as national land).

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16 *In the Matter of Mt Ambra, Portions 391, 864-871,894-895, 906, Milinch Hagen, Fourmil Ramu, WHP* (2017).

17 *In the Matter of Poroma Government Station, Portion 67, Milinch Mendi, Fourmil Kutubu, SHP, (NLD 1233)* (2017).

The application of the CBASA was part of an amendment in 2006 but it plays no part in the admissibility of claims for settlement payments. While Commissioners have written lengthy decisions on the application of the CBASA, the end result has been that since it is not a matter identified under Section 40 of the Act, it could not be used as part of the admissibility test. A similar approach has been made on what is the prescribed time to make a claim. There had been references to 60 days and six months in the matters discussed so far and while six months would be the ideal period under the CBASA, it must be reflected in the legislative regime for purposes of claims for settlement payments.

While the application of the CBASA has had some positive effect on determination of claims for settlement payments, what is further required is a provision to clarify that such a claim is targeted towards settlement payment as opposed to a claim for general compensation (damages). This is further supported by the need to define a prescribed person to have some linkage to the ownership or interests in relation to the former customary land (now declared as national land). The fact that customary land is communally owned in PNG cannot be claimed to be owned by one person through the immediate relative of the person to whom payment was made during colonial acquisition. Such a person must have some direct relationship as to ownership or interests over the said land. This would hopefully address the generational pursuit of compensation frenzy claims as alluded to by some critics.

Finally, the State through its representation must vigorously defend its ownership to national land pursuant to Sections 14 and 19 of the NLR Act and insist the claim should not be admitted if payment was made during acquisition. This would ultimately address the CILM concerns on State land – to secure and safeguard the State's interest over acquisitions declared as national land.

Conclusion

Section 40 of the NLR Act is a significant vetting process, designed to separate spurious claims from genuine outstanding claims to be properly and fairly handled by the Commission. Sections 40 establishes three fundamental principles in admitting a claim for settlement. It provides that for a claim to be worthy of being awarded settlement payment, it must be made:

1. By a prescribed person.
2. No payments, whether ex gratia or not were made at the time of acquisition of the land.
3. There were special circumstances that made it reasonable to say that no claims were made previously, and in the circumstances, it would not be proper or just to enforce those special circumstances.

The Commission has also introduced certain additional issues to assist in the determination of claims for settlement payments. These include:

1. Requirement to give Section 5 Notice under the CBASA;
2. Requirement to make a claim within a reasonable time;
3. Whether or not any person or group could be joined in the proceedings; and
4. Whether or not there are conflicting claims.

These additional issues are equally important and must be considered as part of the admissibility test. While the Commission has considered these additional issues in recent cases, it has stopped short of applying these as part of the admissibility test since these are strictly outside of Section 40 of the NLR Act. Perhaps these can be considered as part of the policy reforms under the merger of both the Land Titles Commission and the National Lands Commission. But until such issues are addressed, we will still face the same difficulties in the administration of the NLR Act.