

**BOUGAINVILLE CUSTOMARY LAND BILL 2023****Arrangement of Clauses**

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DRAFT

**A BILL FOR AN ACT**

entitled

***BOUGAINVILLE CUSTOMARY LAND ACT 2023***

Being an Act to provide for—

- (a) the granting by customary landowners of registered interests in customary land; and
- (b) the transfer of responsibility for customary land from the customary landowners to the Bougainville Government; and
- (c) other matters relating to registration of interests in customary land.

MADE by the House of Representatives, to come into operation as set out in Section 2.

**PART 1 — PRELIMINARY****1 Short title**This Act is the *Bougainville Customary Land Act 2023*.**2 Commencement**This Act comes into operation in accordance when the *Bougainville Land Registers Act 2023* comes into operation.**3 Aims of Act**

(1) This Act aims—

- (a) to protect customary land for future generations; and
- (b) to facilitate appropriate use of customary land for public purposes and development purposes; and
- (c) to promote investment in infrastructure, business and services reliant on the use of customary land.

(2) This Act provides for processes that support customary landowners—

- (a) to transfer responsibility for customary land to the Bougainville Government to enable the land to be registered as Government land under the *Bougainville Land Registers Act 2023* and cared for, controlled and managed under the *Bougainville Government Land Act 2023*; and
- (b) to create interests in customary land that are guaranteed under this Act and the *Bougainville Land Registers Act 2023*; and

- (c) to deal with and, give consent for dealings related to, registered interests in customary land.
- (3) An interest in customary land guaranteed under this Act can be created through registration under the *Bougainville Land Registers Act 2023* of the following:
- (a) a lease (giving the lessee exclusive use and occupation of an area of land);
- (b) an easement (giving, for example, a right of access along a specified track or for specified utility services);
- (c) a charge over customary land (securing a loan against an area of land);
- (d) a mortgage of a lease of customary land (securing a loan against a lease).

#### 4 Interpretation

- (1) In this Act, unless the contrary intention appears—

**acquired (transitional) Government land** has the meaning assigned by the *Bougainville Government Land Act 2023*;

**Board** means the Customary Land Board established under Section 10;

**Bougainville** means the Autonomous Region of Bougainville;

**Bougainville Government** means the Autonomous Bougainville Government;

**Bougainville governmental body** has the meaning assigned by the Bougainville Constitution;

**land** includes—

- (a) a building or structure affixed to land; and
- (b) waters and airspace over land; and
- (c) the bed of any body of waters; and
- (d) subsoil and subterranean waters;

**registered Government land** has the meaning assigned by the *Bougainville Government Land Act 2023*;

**registered interest** means any of the following registered under the *Bougainville Land Registers Act 2023*:

- (a) a registered easement; or
- (b) a registered lease; or
- (c) a registered charge; or
- (d) a registered mortgage;

**Registrar of Land** has the meaning assigned by the *Bougainville Land Registers Act 2023*;

**Secretary** means a person holding or acting in the office of Departmental Head of the Department that is, under the Minister, responsible for the administration of this Act.

- (2) Notes in this Act do not form part of the Act.
- (3) An example in this Act—
  - (a) forms part of the Act; and
  - (b) is not exhaustive; and
  - (c) may extend, but does not limit, the meaning of the Act or the provision to which it relates.

## PART 2 — CUSTOMARY LAND

### 5 Customary land

The land that makes up Bougainville is **customary land** except for the following:

- (a) land that is registered Government land;
- (b) land that is acquired (transitional) Government land;
- (c) land that lies beyond 3 nautical miles from low water mark.

### 6 Dealing with customary land

- (1) Customary land may be transferred to the Bougainville Government for registration as Government land but must otherwise stay under customary ownership.
- (2) Subject to this Act, customary land is to be dealt with in accordance with customary law.

### 7 Limitations—Government land

While land is registered Government land or acquired (transitional) Government land—

- (a) it cannot be dealt with in accordance with customary law; and
- (b) the Bougainville Government is responsible for the care, control and management of the land under the *Bougainville Government Land Act 2023*.

### 8 Limitations—registered interests

- (1) Customary land cannot be dealt with in a way that is inconsistent with interests registered under the *Bougainville Land Registers Act 2023*.

- (2) Any transaction or action under customary law that is inconsistent with a registered interest is invalid to the extent of the inconsistency and of no effect.
- (3) A person who has the benefit of a registered interest may apply to the Land Division of the Bougainville Court for an order—
  - (a) declaring a specified transaction or action to be inconsistent with the registered interest and invalid to the extent of the inconsistency; and
  - (b) requiring action to be taken or refrained from being taken as the Bougainville Court considers appropriate to rectify or mitigate consequences resulting from the transaction or action.

## **9 Statutory or judicial powers for sale of customary land ineffective**

- (1) Statutory or judicial powers to sell or order the sale of customary land are ineffective except to the extent that the power may relate to a transfer under customary law.
- (2) A writ or warrant of execution after judgement in a court cannot be issued against customary land.
- (3) This section does not limit statutory or judicial powers in relation to a registered interest in customary land.

## **PART 3 — CUSTOMARY LAND BOARD**

### **10 Customary Land Board**

The *Customary Land Board* is established.

### **11 Functions**

- (1) The Board has the following functions:
  - (a) to perform the functions conferred on the Board by this or any other Act; and
  - (b) to provide advice to the Minister or the Secretary on any matter relevant to this Act at the request of the Minister or Secretary or on its own initiative.
- (2) The Secretary is to provide information to the Board as reasonably required for the performance of its functions under this Act.

### **12 Objectives**

The objectives of the Customary Land Board are—

- (a) to protect the interests of current and future customary landowners; and
- (b) to guard against deception and corruption (whether arising from a source external to a customary group or within a customary group).

### **13 Membership**

- (1) The Board is comprised of not less than 3 and not more than 5 members appointed by the Minister by notice in the Bougainville Gazette with the consent of the Bougainville Executive Council.
- (2) If there are 3 members, at least one of the members must be a woman.
- (3) If there are 4 or 5 members, at least 2 of the members must be women.
- (4) The Secretary or a person who is a Public Service officer responsible to the Secretary is not eligible to be appointed as a member of the Board.
- (5) Before a person is appointed as a member of the Board, the Secretary must cause—
  - (a) a public invitation for written applications for appointment (setting out the selection criteria) to be issued; and
  - (b) applications received within the time allowed in the invitation to be assessed on merit against the selection criteria; and
  - (c) a report of the assessment with recommendations for appointment to be prepared and provided to the Minister for submission to the Bougainville Executive Council.
- (6) When a member is appointed, the notice of appointment in the Bougainville Gazette must include the following:
  - (a) a statement of the selection criteria; and
  - (b) a summary of the basis on which the member was selected for appointment; and
  - (c) if the appointment does not accord with the recommendations in the report prepared by the Secretary, an explanation of the reasons for departure from the recommendations.

### **14 Terms and conditions of appointment**

- (1) Subject to this Act, members of the Board are appointed on terms and conditions determined by the Bougainville Executive Council.
- (2) The term of office of an appointed member commences when, following appointment, the member makes, before the Minister or a person nominated by the Minister, the following declaration of office:

*“I [name of member] promise that I will well and truly serve the people of Bougainville as a member of the Customary Land Board.”*
- (3) A member is appointed for 3 years or such shorter term as is specified in the notice of appointment.

- (4) At the expiration of a term of appointment, a member is eligible for reappointment.
- (5) A member may resign by written notice to the Secretary.
- (6) The Bougainville Executive Council may, by notice in the Bougainville Gazette, remove a member from office—
  - (a) for breach of a condition of appointment; or
  - (b) for misconduct; or
  - (c) for failure or incapacity to carry out official duties satisfactorily.

#### **15 Remuneration, allowances and expenses**

- (1) A member is not entitled to remuneration but may be paid an allowance and reasonable expenses as determined by the Bougainville Executive Council.
- (2) A member or former member must not be paid any other amount by the Bougainville Government, including by way of *ex gratia* payment on the completion of a term of office.
- (3) Subsection (1) does not prevent a member who is a Public Service officer receiving the member's usual remuneration as a Public Service officer.

#### **16 Procedures**

Subject to this Act and any directions of the Secretary, the Board may determine its own procedures.

#### **17 Conflict of interest**

- (1) This section applies if a member of the Board—
  - (a) has a direct or indirect financial interest in a matter being considered, or about to be considered, by the Board; or
  - (b) has a personal, professional, commercial or other relationship with a person and the nature of the relationship is likely to, or may reasonably be regarded as likely to, inhibit or prevent the member from exercising independent judgment about a matter being considered, or about to be considered, by the Board.
- (2) The member—
  - (a) must disclose the nature of the interest and how it relates to the matter to the other members; and
  - (b) must not take part in any deliberation or decision about the matter; and
  - (c) must be disregarded for the purpose of constituting a quorum for the deliberation or decision.



- (3) The member need not disclose an interest if—
  - (a) the interest is an interest shared in common with the public generally or a substantial section of the public; or
  - (b) the interest is of a kind exempted from the requirement for disclosure by the regulations.
- (4) The disclosure must be noted in the records of the Board meetings and decisions.
- (5) A failure by the member to disclose an interest in a matter does not, on its own, invalidate a decision of the Board about the matter.

## **18 Annual report**

- (1) The Board must, before 30 April in each year, give a report to the Bougainville Executive Council on the performance of its functions under this Act during the preceding year ending 31 December.
- (2) The report must be tabled in the House of Representatives within 2 sitting days after it is given to the Bougainville Executive Council.
- (3) The sitting days do not need to be in the same session or term of the House of Representatives.

## **19 Administrative assistance**

- (1) The Secretary must provide administrative assistance to the Board for the performance of its functions under this Act.
- (2) The assistance must include assistance—
  - (a) to keep accurate records of meetings and decisions of the Board; and
  - (b) to prepare the required annual report.

# **PART 4 — REGISTRATION AFFECTING CUSTOMARY LAND**

## **20 Registration affecting customary land**

- (1) Customary landowners may agree for a specified area of their land—
  - (a) to be transferred to the Bougainville Government for registration as Government land under the *Bougainville Land Registers Act 2023*; or
  - (b) to be made subject to the following registered interests:
    - (i) a registered easement (for example, to guarantee that access will be provided along a specified track or for specified utility services);
    - (ii) a registered lease (to give the lessee, who may be the Bougainville Government or a Bougainville governmental body, exclusive rights to use and occupy the area of land);

- (iii) a registered charge (to secure a loan against the area of land).
- (2) A registered lease may be made subject to a registered mortgage (to secure a loan against the lease).
- (3) Registration occurs under the *Bougainville Land Registers Act 2023* and requires an instrument of transfer, easement, lease, charge or mortgage.
- (4) The following may also be required to be registered under the *Bougainville Land Registers Act 2023*:
  - (a) an instrument of amendment of a registered interest;
  - (b) an instrument of transfer or transmission of a registered interest (transmission includes succession on death);
  - (c) an instrument of surrender, termination, discharge or extinguishment of a registered interest;
  - (d) an instrument modifying the priority of registered interests;
  - (e) associated instruments of consent.
- (5) For certain transactions, consent of the customary landowners is required under the *Bougainville Land Registers Act 2023*.

## **21 Application to Board**

- (1) If customary landowners propose to execute an instrument for registration under the *Bougainville Land Registers Act 2023* (including as lessor or chargor), an application must be made to the Board for a certificate recommending that the instrument be registered.
- (2) The application must—
  - (a) be in a form approved by the Secretary; and
  - (b) be lodged with the Board; and
  - (c) be accompanied by the fee fixed by the regulations.
- (3) The application must include the following:
  - (a) information about how the applicants have been authorised to make the application;
  - (b) a copy of the proposed instrument for registration;
  - (c) information about the grounds on which the persons are or claim to be customary landowners entitled to execute the instrument; and
  - (d) a statement of how it is proposed that the instrument will be executed on behalf of the customary landowners;

- (e) information about the processes that have been undertaken by the customary landowners—
  - (i) to inform customary landowners and affected communities about the proposal, including the short term and long term benefits, obligations and potential effects associated with the proposal; and
  - (ii) to get general agreement to the proposal; and
  - (iii) to authorise execution of the instrument for registration; and
- (f) information about how it is proposed—
  - (i) to manage rights, obligations and proceeds associated with registration or the registered interests; and
  - (ii) to resolve disputes that arise in relation to that management.

## **22 Referral to Minister for directions**

- (1) The Board must refer an application under Section 21 to the Minister (through the Secretary) if the Board forms the opinion that the proposal may—
  - (a) involve a foreign government or foreign governmental body becoming a registered lessee, chargee or mortgagee; or
  - (b) involve a registered lease for any of the following purposes:
    - (i) a military base;
    - (ii) a port;
    - (iii) an aerodrome;
    - (iv) a public road;
    - (v) some other purpose specified in the regulations; or
  - (c) give rise to concerns of national security or governmental responsibility for other reasons.
- (2) The Minister may, on the advice of the Bougainville Executive Council, direct the Board to refuse to recommend registration of an instrument on the grounds of national security or that the purpose of the interest is a matter of governmental responsibility.
- (3) A direction under Subsection (2) must be in writing.
- (4) The Board is bound by a direction of the Minister under this section.

## **23 Criteria to be applied by Board**

- (1) The Board must determine an application for a certificate of the Board recommending that an instrument be registered under the *Bougainville Land Registers Act 2023* by assessing the proposal against the matters set out in this section.

- (2) Because registration of an instrument in the Customary Land Register under the *Bougainville Land Registers Act 2023* binds current and future customary landowners under Bougainville law, it is important to make sure that—
- (a) the customary landowners entitled under customary law to take action in relation to the land akin to that effected by registration of the instrument are properly identified; and
  - (b) those customary landowners authorise the instrument for registration of their own free will with a good understanding and acceptance of the effect of registration of the instrument; and
  - (c) there is agreement about—
    - (i) the management of rights, obligations and proceeds associated with registration of the instrument and registered interests; and
    - (ii) a process for resolving disputes that arise in relation to that management; and
  - (d) rights and obligations associated with registration of the instrument and registered interests can be effectively enforced; and
  - (e) there are processes in place for holding responsible persons to account; and
  - (f) the effect of registration of the instrument will not unduly impact on the ability of affected communities to sustain their way of life into the future.
- (3) If there are a number of customary landowners and no unanimous agreement about the proposal, the Board must assess whether the customary landowners have authorised the instrument and reached agreement in the manner and to the extent appropriate according to relevant customs.
- (4) It is also important to ensure that—
- (a) the communities affected by a proposal for the use or development of customary land are informed about the proposal, including the short term and long term benefits, obligations and potential effects associated with the proposal; and
  - (b) those communities are given an opportunity to consider and discuss the proposal; and
  - (c) the proposal is adjusted, as appropriate, to meet community concerns.

## **24 Steps to be taken by Board**

- (1) This section sets out the steps to be taken by the Board to determine an application for the recommendation of the Board for registration of an instrument under the *Bougainville Land Registers Act 2023*.

- (2) The first step is for the Board—
  - (a) to take reasonable steps to investigate whether there is, or is likely to be, any dispute about relevant land boundaries or land ownership; and
  - (b) if, in the opinion of the Board, there is or is likely to be such a dispute, the Board must require the parties to the proposal to apply to the Land Division of the Bougainville Court to resolve the dispute as a land dispute.
- (3) If the instrument is an instrument relating to an interest that is already registered in the Customary Land Register, the Board can rely on the steps that were taken to investigate land boundaries and land ownership for registration of the interest.
- (4) The second step is for the Board to—
  - (a) forward a copy of the application to the Registrar of Land to check whether the instrument is suitable for registration and, in particular, whether the land is adequately identified; and
  - (b) if the Registrar of Land requires modification of the instrument, check that the instrument is modified as required.
- (5) The third step is for the Board to—
  - (a) consider whether any further information is reasonably required to enable the Board to assess the matters set out in Section 23 and determine the application; and
  - (b) if further information is reasonably required, request the applicant to provide the information or invite the applicant and others to a meeting to discuss the matter.
- (6) The fourth step is for the Board to—
  - (a) assess the proposal against the matters set out in Section 23; and
  - (b) decide whether to make the recommendation or refuse to make the recommendation; and
  - (c) if making a recommendation, decide how the customary landowners are to execute the instrument.
- (7) The final step is for the Board to—
  - (a) inform the applicant and the Registrar of Land of its decision; and
  - (b) if making a recommendation, issue a certificate to the applicant that—
    - (i) identifies the instrument for registration; and
    - (ii) recommends its registration to the Registrar of Land; and
    - (iii) sets out how the customary landowners are to execute the instrument.

## 25 Incorporated land groups

If there is an incorporated land group under the *Land Groups Incorporation Act 1974* of the National Parliament for customary landowners—

- (a) the incorporated land group must make the application to the Board under this Part; and
- (b) the incorporated land group must execute the instrument for registration, if registration is recommended by the Board; and
- (c) the processes of the incorporated land group are, in the absence of evidence to the contrary, to be accepted as adequate for the purposes of this Part.

*Note: Existing incorporated land groups remain subject to the National Act under Section 108(3) of the Bougainville Land Registers Act 2023. The Land Groups Incorporation Act 1974 does not otherwise apply in Bougainville.*

## PART 5 — REVIEW

### 26 Review of Customary Land Board decisions

- (1) A person aggrieved by a decision of the Board has a right to apply to the Administrative Division of the Bougainville Court for review of the decision.
- (2) Subject to this section, an application for review must be lodged with the Bougainville Court within 1 month after the making of the decision to which the application relates.
- (3) The Board must, on application by a person who could apply for review of a decision of the Board, give the person a written statement of the reasons for the Board's decision.
- (4) The time for making an application for review runs from the time when the person receives the written statement of reasons if—
  - (a) a written statement of the reasons for a decision is not given by the Board at the time of making the decision; and
  - (b) the applicant, within 1 month after receiving written notice of the decision, applies to the Board for a written statement of reasons for the decision.

### 27 Review of directions of Minister

- (1) A person aggrieved by a direction given under Section 22 by the Minister to the Board to refuse to recommend registration of an instrument has a right to apply to the Administrative Division of the Bougainville Court for review of the decision.

- (2) Subject to this section, an application for review must be lodged with the Bougainville Court within 1 month after the making of the decision to which the application relates.
- (3) The Minister must, on application by a person who could apply for review of a direction of the Minister, give the person a written statement of the reasons for the Minister's decision.
- (4) The Minister need not disclose confidential information or information that might jeopardise national security or the safety of an individual in the written statement but must disclose the information to the Bougainville Court in a closed hearing.
- (5) The time for making an application for review runs from the time when the person receives the written statement of reasons if—
  - (a) a written statement of the reasons for a decision is not given by the Minister at the time of making the decision; and
  - (b) the applicant, within 1 month after receiving written notice of the decision, applies to the Minister for a written statement of reasons for the decision.

## **PART 6 — MISCELLANEOUS**

### **28 False or misleading information**

A person commits an offence if the person makes a statement that is false or misleading in a material particular (whether by reason of the inclusion or omission of a particular) in information provided, or records kept, under this Act.

*Maximum penalty:*

- (a) if the person made the statement knowing that it was false or misleading—K10,000 and 3 months' imprisonment; or
- (b) in any other case—K2000.

### **29 Protection from civil liability**

- (1) Subject to this section, no civil liability attaches to a member of the Board for an act or omission in the exercise or purported exercise of official functions or powers.
- (2) An action that would, but for Subsection (1), lie against a person lies instead against the Bougainville Government.
- (3) This section does not prejudice rights of action of the Bougainville Government in respect of an act or omission of a person not in good faith.

### 30 Human rights

For Section 180(3) of the Bougainville Constitution, in the opinion of the House of Representatives—

- (a) this is a law restricting human rights in a manner that is reasonably justifiable for the purpose in a democratic society that has a proper regard for the rights and dignity of mankind; and
- (b) the human rights that are restricted are as follows:
  - (i) the right to privacy;
  - (ii) the right to freedom of information;
  - (iii) unjust deprivation of property;
  - (iv) protection from unjust deprivation of property; and
- (c) the restriction is necessary for the purpose of giving effect to the public interest in public safety, public order and public welfare, as referred to in Section 180(2)(o) of the Bougainville Constitution.

### 31 Act binds Bougainville Government

This Act binds the Bougainville Government.

### 32 Regulations

- (1) The Bougainville Executive Council may make such regulations as are contemplated by, or as are necessary or expedient for, this Act.
- (2) The regulations may make provisions of a saving or transitional nature consequent on the making of this Act or an Act that amends this Act.
- (3) A provision of regulations made under Subsection (2) may, if the regulations so provide, take effect from the date of certification of the Act concerned under Section 66 of the Bougainville Constitution or a later date.
- (4) To the extent that a provision takes effect under Subsection (3) from a date earlier than the date of notification of the regulations in the Bougainville Gazette under Section 68 of the *Interpretation Act 2005*, the provision does not operate to the disadvantage of a person by decreasing the person's rights or imposing liabilities on the person.