

REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

PREPARED BY accessUTS **CONSULTANTS**

Professor Spike Boydell

Dr Hartmut Holzknacht

Emeritus Professor Don Paterson

Dr Garrick Small

Commissioner John Sheehan

DECEMBER 2007

Review of Customary Property Rights and Formal and Informal Institutions for Economic Development and Conflict Minimisation

[being subproject 2.3 of the Land Management and Conflict Minimisation Initiative]

Prepared for
Pacific Islands Forum Secretariat

Prepared by
accessUTS Consultants:
Professor Spike Boydell, Dr Hartmut Holzknecht,
Emeritus Professor Don Paterson, Dr Garrick Small
and Commissioner John Sheehan

With regional contributions from:

Stanley Waleanisia (Solomon Islands), Ratu Timoci Vesikula (Fiji), John Satekala (Solomon Islands), Genesis Kofana (Solomon Islands), Antonie Eggink (New Zealand), Josefa Dulakiverata (Fiji), Krishn Shah (Fiji), Leota Laki Sio (Samoa), Rebecca Wendt (Samoa), Patea Malo Setefano (Samoa), AHI Holdings Ltd (PNG), Lui Seru (Samoa), Dr Tanira Kingi (NZ), Radhika Murti (Fiji), Kaluwin Potuan (PNG), Chief Willie Tapisei (Vanuatu), Chief Jimmy Meameadola (Vanuatu) and Wycliffe Antonio (PNG).

Disclaimer

This is one of ten reports commissioned by the Pacific Islands Forum Secretariat that comprise of a review of national, regional and international literature, and country case studies including the review of national policies and systems on key thematic areas:

- a. Subproject 1: Role of land in conflict escalation in recent conflict situations
- b. Subproject 2: A review of sources and causes of land related conflict
- c. Subproject 3: Current land management and conflict minimisation
- d. Subproject 4: Conflict management process

accessUTS Consultants prepared two components, subproject 2.3 (Review of Customary Property Rights and Formal and Informal Institutions for Economic Development and Conflict Minimisation) and subproject 3.1 (Review of Financial Management of Customary and other Land in the Pacific), which were carried out in conjunction with each other.

This paper is based on a review of the relevant literature and in-country discussions with regional practitioners and experts. The views expressed by the lead consultants and regional contributors are their own, and are not necessarily the views of any particular organization or the organizations that they represent.

accessUTS Pty. Limited

PO Box 123

Broadway NSW 2007 Australia

Tel +61 2 9514 1916 Fax +61 2 9514 1433

ABN 55 098 424 312

DECEMBER 2007

Final Report dated: 05/12/2007

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

CONTENTS

SUMMARY	5
LAND TENURE SYSTEMS IN THE PACIFIC	6
Customary land 'ownership' in the region	6
Perceptions of land 'ownership'	6
Use and abuse of the language of land tenure	7
The inappropriate external push for privatisation	10
Effect of customary arrangements on land based conflicts	12
Boundary issues	13
Decision-making processes	15
The impact of absenteeism on the decision making process	16
Emergent pluralism	17
Benefit sharing arrangements	19
Summary	21
Formal and informal institutional arrangements Relating to Land	22
Facilitating access to land	22
Equitable Distribution of Benefits	27
Balancing expectation	28
Institutional conditions and enabling environments	29
Good governance	30
Property Rights	31
Recent innovative approaches	34
COMMERCIAL AND ECONOMIC USE OF CUSTOMARY LAND	38
Institutional conditions	38
Efficient access	38
Understanding Leasehold arrangements	39
Regulated rentals	39
Anticipating future events in leases	41
Improvements – A Residential Example	43
Improvements – A Tourism Example	44
Urban Pressures	46
Process Challenges	47
INSTITUTIONS AND GOOD GOVERNANCE	49
Complexity	49
The need for a robust theory	50
Moving forward with shared imaginings	51
Moving towards consensus – finding the will	52
LESSONS LEARNT	53
Education	53
Institutional arrangements	54
Clarifying Property Rights	54
Leasehold arrangements	54
KEY GUIDING PRINCIPLES AND POSSIBLE STRATEGIES	55
Practical Institutions for modern use of custom land	55
Clarity of ownership	56

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

Leasehold conditions	56
Zero rental leasehold (also known as 'rent upfront')	59
Development leases	60
Restitution	61
Use of Trusts	62
Enterprise frameworks	65
The One-Stop Shop	67
Education about Property Rights, Obligations and Restrictions	69
APPENDICES	71
COUNTRY CASE STUDY: FIJI ISLANDS	72
COUNTRY CASE STUDY: SAMOA	85
COUNTRY CASE STUDY: SOLOMON ISLANDS	92
COUNTRY CASE STUDY: VANUATU	105
COUNTRY CASE STUDY: PAPUA NEW GUINEA	122
COUNTRY CASE STUDY: NEW ZEALAND	135
REFERENCES	146

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

SUMMARY

This document comprises a regional review report providing:

- > An overview of property rights, formal and informal organizations and institutions, economic development and conflict minimisation in the Pacific;
- > Lessons learnt from recent experiences in the region;
- > Key guiding principles for designing effective land management and conflict minimisation in the region; and
- > Recommended elements for inclusion in the proposed overarching Regional Land Management and Conflict Minimisation Framework for Action.

This report builds on recent regional initiatives and plans that engage with institutional arrangements pertaining to customary land. These include the USP Solutions (2001) Land Tenure and Land Conflict in the Pacific, the FAO/USP/RICS Foundation South Pacific Land Tenure Conflict Symposium (2002), and the subsequent National Land Workshops / Summits (Fiji 2002, Solomon Islands / Melanesia 2005, PNG 2005 & 2006, Vanuatu 2006), and ADB Swimming Against the Tide 2004, Forum Secretariat Pacific Plan 2005, AusAID Pacific 2020 2006.

The report provides a detailed review of published and unpublished literature, providing rich context through six detailed country case studies: Fiji, Samoa, the Solomon Islands, Vanuatu, Papua New Guinea, and New Zealand, which are included as appendices.

The recommended elements for inclusion in the overarching framework for action are solutions-based, comprising guiding principles for Practical Institutions for the Modern Use of Custom Land: Clarity of ownership; Leasehold conditions; Zero rental leasehold (also known as ‘rent upfront’); Development leases; Restitution; Use of Trusts; Enterprise Frameworks; One-Stop-Shop; and Education about Property Rights, Obligations and Restrictions.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

LAND TENURE SYSTEMS IN THE PACIFIC

Land tenure is concerned with the conditions and institutional arrangements under which land is held. Land tenure systems are social constructs. They are constructed to accommodate the particular way of life of the people, laws, and the physical environment, and are subject to change and transmitted from generation to generation with efficient modification (Crocombe, 1968). The system evolves to accommodate the particular way of life of the people, laws and most importantly the physical environment.

There is a dichotomy between the desire to retain traditional identity and time-honoured social institutions, and the modern socio-economic imperatives that most nations strive to realise. The confusion over the role of land (socio-religious, economic and political) is at the heart of such conflicting realities, resulting in confusion in the formulation of land policies (Boydell, 2001).

CUSTOMARY LAND 'OWNERSHIP' IN THE REGION

What sets the Pacific region apart from other areas of land tenure conflict is that, post colonisation and subsequent independence, these nations retain a pattern of land ownership whereby between 85-98% of land is vested in the customary owners. Whilst the themes are common, the nature of land tenure varies significantly between Pacific island countries.¹

In the South Pacific, post independence constitutional legal parlance inadequately addresses customary land issues (Brown, 2000). In part, this explains why several of the Pacific nations have revised their constitutions on more than one occasion in an attempt to better protect indigenous interests in the era of decolonisation. A conflict exists between constitutional law and customary law. The complexity of common law reflects the dominance of individual property rights in capitalistic systems (Boydell, 2001).

In order to provide an understanding of land 'ownership' in the region the following sections will address perceptions of ownership, confused terminology and the external push for privatisation. It will then introduce the effect of customary arrangements on land-based conflict through a discussion on boundary issues, decision making, absenteeism, pluralism and benefit sharing.

Perceptions of land 'ownership'

Use of land is always managed through institutional arrangements – a set of conventions that the majority accept, willingly, by necessity or under a level of duress. For commerce and economic activity to develop, the conventions of land

¹ For a comprehensive summary of land tenure arrangements in the region, see Appendix 1 of Boydell, S. (2001) Land Tenure and Land Conflict in the South Pacific [background report for the 2002 FAO/USP/RICS Foundation South Pacific Land Tenure Conflict Symposium]. Food and Agriculture Organization (FAO) of the United Nations, Suva, Fiji, pp.43, <http://www.usp.ac.fj/fileadmin/files/faculties/islands/landmgmt/publications/faoreport.pdf>.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

tenure need to be consistent with ‘the requirements of the particular economic, agricultural and socio-political systems in operation’ (Ward and Kingdon, 1995, p.7). Further institutional layers of local authority, in the form of village or town meetings, chiefs or local government bodies, form part of the land administration decision-making system that serves to manage activity on and use of the land.

A particular parcel may have multiple stakeholders (individuals, groups, or entities) with overlapping interests (property rights). Colonial Europeans, in building empires for their respective sovereigns, forced the tenure systems of 19th century Europe onto many traditionally held natural resources and associated clan structures in the developing world². However, there is a view that the traditional institution or ‘custom’ is moving idealism. Evidence indicates that the institutional arrangements can be varied and may be recreated as needed to reinforce and support a particular historical or economic or political context (Ward, 1995; Lea, 1997).

Western society sees customary systems as backward, undeveloped, with Pacific institutional arrangements often derided as a major impediment to development. This common but naïve view fails to recognise that the customary self-embedded-in-community perception of Pacific life is challenged by the western value of individualism with its ideas of the self, the individual, as separate and separating from others (Boydell and Holzknecht, 2003, p.205).

Use and abuse of the language of land tenure

The formal institutions of post-independence Pacific Island Countries (PICs) have continued to use, or arguably misuse, a number of supplanted English words that were introduced during the colonial era. Three in particular, merit comment in the context of this report: *ownership*, *landlord* and *communal*.

What do we mean by *ownership*? Ownership seems to mean different things to different people. The dictionary definition is straightforward: if you own something, it is yours to with as you please. You have absolute right over it, to preserve it and even to destroy it. It is yours. This is the western perspective of fee simple absolute in possession, more commonly called a freehold³ interest (or estate) in land, albeit constrained by the institutional limitations of planning, taxation and other statutory requirements and obligations. This is not the essence of indigenous land ownership, with its spiritual connotations and enduring notion of inter-generational stewardship or guardianship.

² Imported tenure influences in the wider Pacific region, for example, include: *United Kingdom* on Fiji, Solomon Islands, Gilbert, Ellice (Tuvalu) and partly New Hebrides (Vanuatu); *France* on New Caledonia, French Polynesia, Wallis and Futuna, and partly New Hebrides (Vanuatu); *Germany* (until 1914) on north-eastern New Guinea, Western Samoa, Nauru, Caroline and Marshall Islands; *Netherlands* (until 1962) for West New Guinea (now called Irian Jaya); *Indonesia* (since 1963) for Irian Jaya; *Australia* on Papua (since 1906), north-eastern New Guinea (since 1914) and Nauru (1914-1968); *New Zealand* on Cook Islands and Niue (since 1901), Tokelau (since 1925) and Western Samoa (1914-1962); *Spain* on Guam, Mariana and Caroline Islands (until 1899); *Japan* on Mariana, Marshall and Caroline Islands (1914-1945); *United States* on Mariana and Caroline Islands (from 1945) and Hawaii; and *Chile* on Easter Island.

³ In the Solomon Islands, Perpetual Estates (PE) equate to freehold interests.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

In both customary and western societies, what is actually owned (individually, or as a family, group, clan or tribe) is a collection of property rights. Each of these 'rights' comes with various obligations and restrictions. This is explored in more detail in the property rights section.

The concept of *landlord* (i.e., property owner or proprietor) requires further explanation because under the customary institutional property right arrangements operating in the Pacific there are no landlords in the classic or western sense (Crocombe, 1983). 'Landlord', in the customary institutional context, refers to customary *landowners* whose property rights in land may be administered by an institutional trustee (e.g., the Native Land Trusts Board in Fiji or the Minister of Lands in Samoa) or by a customary landholding unit (e.g., Incorporated Land Groups in PNG or Village Land Trusts in Vanuatu). These arrangements provide an institutional interface between inalienable customary land⁴ and western systems, enabling the beneficial granting of subsidiary leasehold⁵ interests to support or encourage economic development.

The third classic misused term is *communal*, now used and abused to such an extent that its proper use is compromised and so rendered virtually useless - even in Fiji, where the word is enshrined in s20 of the Native Land Act, but is not used in the Native Land Trust Act. This term will not be used here because there is virtually no situation in any Pacific Island Country (PIC) where *all* members of a community have exactly the same property rights (= communal).

The variable interpretation of these terms has been an unfortunate and largely unnecessary development because it has tended to obscure and divert attention away from achieving a much better understanding of the complexities, as well as the potentials, of customary land tenure and resource use systems across the Pacific. The real situation of multiple understandings of tenure systems, of multiple values linked to land and natural resources, of multiple uses and linkages between people and resources is complex enough without the further obfuscation of using blurred and inaccurate terms as a means of apparently seeking, or wanting to be seen, to be trying to understand that situation.

The notion of tradition / traditional and custom / customary is also open to variances of meaning and interpretation, and when used in a Pacific context have nuances that may not be common elsewhere (Ward and Kingdon, 1995). Tradition emphasises customs or beliefs that have been passed from generation to generation, whereas custom is a way of behaving or doing something that is specific to a particular place, society or time. Custom is adapted and adaptable over time to meet prevailing conditions. Meanwhile, the Bislama word *kastom* can mean conspicuous

⁴ The word *inalienable* is also a source of confusion. What is inalienable is the superior interest (i.e., the ultimate or highest possible level of rights) of the customary landowners. It is quite common to 'alienate' land through the use of leases, which is where lesser time constrained property rights are alienated.

⁵ In the Solomon Islands, Fixed Term Estates (FTE) equate to leasehold interests.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

tradition or invented tradition, a discourse about the past that is ‘situated in the present and oriented towards the future’ (Keesing, 1993).

The diversity of indigenous land tenure arrangements have never been systematically codified in most PICs, including Samoa⁶, Papua New Guinea (PNG), Solomon Islands, Tokelau and Vanuatu, and they have evolved and adapted since times of pre-European contact. In Niue and Vanuatu, for example, all freehold land was abolished at Independence, with the alienated land being returned to its custom ‘owners’. Similarly in the Solomon Islands, where 13% of the land had been alienated under colonial rule, the Land and Titles Act 1969 [Cap. 133] specifies at 100.- ‘(1) With effect from the 31st December 1977, any perpetual estates registered in the name of, or on behalf of, any person who is not a Solomon Islander shall automatically convert to a fixed-term estate of 75 years at an annual rent after the first seven years (which shall be a rent-free period) calculated as a percentage of the unimproved capital value of such estate at a rate not exceeding 8 per-centum.’

The land reforms in Vanuatu that were introduced at independence are becoming undermined, with land alienation emerging on a scale that threatens livelihoods, and the social and political stability of the country (Lunnay *et al.*, 2007). The intent at independence was to restore alienated land to the custom owners (who are *groups* not *individuals*). However, initiatives like the recent Strata Titles Act 2000 have been taken as a substitute for land subdivision to authorise strata title developments over bare land, serve to undermine this intent. There are also current concerns over the authority of the Minister of Lands and Natural Resources to approve leases over customary land without the authority of the owners, tying up land for 75 years and allowing lessees to subdivide.

The example of the dissolution of the colonial dualism of customary and alienated land is important. Rodman (1995, p.65) suggests that this demonstrates that the inalienability of land was as fundamental to the leaders of the independence movement as the idea of land as the process for land acquisition had been to European colonial involvement in the region. The importance of customary ownership and the inalienability of customary land in the region is an acknowledged clash between indigenous values and western materialism.

However, there are also layers of understanding in the use of the word ‘alienation’, given that leases are used to alienate (i.e., transfer property rights) in customary land – recognising that the custom owners retain the superior interest.⁷ Long-term institutional solutions have to reflect the inalienability of the superior interest in customary land, respecting the different value systems of indigenous peoples.

⁶ For the purposes of this report, Samoa refers to Western Samoa.

⁷ The superior interest is the ultimate or highest possible level of rights. The equivalent in a western freehold model as applied in, for example, Australia, the UK and New Zealand, is that the superior interest vests in the Crown or State. Within an indigenous situation, the superior interest vests in the custom guardians of the land.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

The inappropriate external push for privatisation

This section investigates the relationship between customary ownership and economic development. There is a perception amongst industrialised nations and donors that customary tenure inhibits the ‘proper’ utilisation of land in the Pacific. In this kind of view it follows that ‘customary’ should be replaced with new and ‘better’ institutional arrangements that promote individualism. The common cited rationale to support the western individualised model include perceptions of inadequate security (and thus limitations under a western credit model), small uneconomic holdings, a constrained land market, increased litigation and ongoing tribal divisions / disputes. A close and critical examination of the evidence shows that each of these claims against customary tenure systems is unfounded and can be contradicted by potent counter-examples (Acquaye, 1984), or that any remaining limitations can be overcome by trust structures and leasehold institutional arrangements.

Most of the current push for privatisation is built upon a particular economic perception of land, which lacks any kind of understanding of the customary nature of privatised tenure systems. A contemporary (and economic) example is lending policies by banks in the Pacific, whereby risk managers located in Sydney or Melbourne, contextualised in an institutional footprint grounded on quite different expectations to those prevailing in say Honiara or Apia, apply policy decisions without adaptation to the local property rights framework.⁸ The external push for privatisation is largely being informed by what appears to be superficially attractive but simplistic solutions proposed by, amongst others, de Soto (2000). They tend to argue that the panacea for the world’s poor is to receive a title for an individual block of land that could then be mortgaged to finance other activities.

Though de Soto’s view on privatisation contains some interesting ideas, inherent in his argument is a move away from customary non-western systems towards individualism (Boydell and Holzkecht, 2003). It has also been criticised as too simplistic, grossly overestimating the cadastral and bureaucratic capacity of developing countries (Home and Lim, 2004). Thus, it is quite unsuitable to the currently existing and operating tenure systems across the Pacific. While the pro-privatisation literature correctly recognises problems with the quality of property rights in many developing countries, such as Pacific Island nations, its conclusion that privatisation and individualisation of title is the best, or only practical, alternative is largely an unproven claim.

A version of the de Soto model underlies the ongoing Hughes-Fingleton debate of recent times over privatisation of interests in customary familial or tribal property (Gosarevski *et al.*, 2004b; Fingleton, 2004; Gosarevski *et al.*, 2004a; Fingleton, 2005b; Hughes, 2004; Fingleton, 2007; Curtin and Lea, 2006). The Gosarevski *et al.* argument follows a similar line to de Soto, suggesting that individualised property

⁸ This view was reinforced by senior bank management interviewed in Sydney and PICs for this project.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

rights are the solution to development in the Pacific. In attempting to influence Australia's aid model to the Pacific they advocate the western individualised model that confuses land tenure and land use, conveniently overlooking the sacrosanct nature of customary institutional arrangements in the Pacific. Moreover, they add to the literature that inappropriately perpetuates the 'communal' myth (in this case in the PNG context). They demonstrate an unfortunate lack of understanding of property rights, and wrongly interpret leasehold arrangements as facilitating a transition to individual property rights.

The Hughes-Fingleton debate also approaches issues relating to customary tenure and possible ways to bring customary tenure into modern practice. Hughes comments on these through the narrow focus of strict economics, but without apparently understanding or wanting to understand the underlying features of customary systems or practice. Her argument is for replacement of customary tenure with the individualisation of land titles, preferably as individual freehold interests (Hughes, 2004).

Fingleton on the other hand approaches these issues from a much broader base, with respect for and knowledge of customary tenure, systems and practices. He advocates a hybrid solution to the general problem (captured in the AusAID Pacific 2020 Land Output Paper; see Fingleton, 2005a; Fingleton, 2007), through the 'adaptation' of customary tenure. Later in this report, we advance this view emphasising workable leasehold solutions that respect and operate within customary institutional arrangements.

However, a cursory knowledge of customary land institutions delivers the clear understanding that customary tenure systems (in Melanesia, for example,) already contain aspects of privatised systems. These systems are just not privatised according to Western principles but, naturally, according to Melanesian principles whereby there are land-linked informal institutional arrangements based on kinship groups, organized according to particular principles of descent (e.g., patrilineal, matrilineal, etc.). The balance in these systems between individual rights within kinship group ownership and holding of a wide range of rights varies somewhat from customary society to society across the Pacific.

Nevertheless, the private guardianship of customary land and other natural resources by a particular clan or familial group has all the hallmarks of privatised systems, including the permanent membership of such groups being limited and dependent on meeting certain criteria (including having particular kinds of ancestors and being in particular kinds of kinship relationship to others in the group). This is the way that customary institutions in most PIC countries are set up and operate. Citizens of PICs like and support such ways of organizing themselves and managing access to their resources. The goal is to find ways by which all members of such land groups can benefit from an active, informed, communicating, and exploring sets of activities that are built upon such a group's natural and human resources.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

Within the Pacific, the customary institutional arrangements provide the structure within which economic activity has to take place (and, indeed are already taking place). These customary institutional arrangements are what give participants in such systems the access to resources. They also provide the decision-making framework and provide the support in terms of labour. Finally, yet importantly, the prevailing customary institutional arrangements provide the socio-cultural frameworks through which land and natural resource rights pass in legitimate ways to the next generation.

Effect of customary arrangements on land based conflicts

Disputes over customary land are usually centred on interests, emotions and values (Fonmanu, 1999). They include, but are not limited to: issues of political interference; individualism; increase in population; misunderstanding over economic development; unregistered ownership; informal lease arrangements; lease money distribution; intergenerational dissatisfaction, with reference to pre-colonial practices and demand for restorative justice; rights of now extinct clan or tribal groupings; multiple rights, such as usufruct over forest land; landowners v land users; home sites; peri-urban land use pressure through urban expansion; and illegitimate child's rights (for a Fiji perspective, see for example Fonmanu, 1999, p.66).

As cited in the UNDP report on Peace and Conflict Development Analysis in the Solomon Islands (2004, p.10): "Land itself is not a 'problem'. The problem arises when land comes to be identified as a root cause of [violent] conflict. This immediately limits our focus to land [in a very physical sense] and the disputes over land – and distracts our attention from the breakdown of the traditional means of resolving disputes and from [the ways] traditional rules have been displaced by alien rules."

As Pacific Islanders engage with the monetary economy, different emotions and values come into play over respective parties interests in customary land. There is a need to formalise the multiple property rights that may apply over any land parcel, if governments are to support those rights. Customary land is often seen as an impediment to development initiated by governments, such as road widening which requires the taking of customary land. As an example from Samoa demonstrates, despite the coherent provisions of The Taking of Land Act (1964), disputes invariably arise – often pertaining to *matai* titles and authority - once economic value is placed on the land become protracted in the Land and Titles Court.⁹

Misunderstanding over the nature of property rights held by the various parties, confusion over lease caveats and the nature of leases as fixed term wasting assets, and restitution for prior perceived misdeeds can be found in all PICs. The Fiji Islands Constitution Amendment Act 1997 provides an example of confusion over terminology. Under *Ch2, 6(b)*, the ownership of Fijian land according to Fijian custom, the ownership of freehold land, and the rights of landlords and tenants

⁹ This is illustrated in the Apia airport road (Vaitele Street) example in the Samoa Case Study.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

under leases of agricultural land are preserved. This is not particularly helpful given that there is ambiguity in the meaning and understanding of the words 'land rights' and 'land ownership', which have not been defined in legislation (Fonmanu, 1999, p.21).

The situation is compounded by multiple and conflicting property rights claims over certain land parcels, such as the longstanding claim by various *mataqali* in Serua over extensive areas of freehold land in Pacific Harbour. Similarly, the current \$2 billion compensation claim pertaining to the impending decision in Ratu Kanakana and 11 others over the Suvavou claim for the restitution of Suva. Meanwhile, the expiry of 13,140 Agricultural Landlord and Tenant Act leases during 1997-2028 in Fiji led some indigenous owners to regain and retain their land, concerned that politics was dictating another thirty-year lease term. Compensation for lease expiry at \$28,000 per agricultural lease was initially proffered to tenants who did not want to be resettled in 2000 (as the government had seen resettlement of these tenants as its responsibility). This windfall compensation¹⁰ offered by the government was controversial since it represented, in most cases, significantly more in dollar terms than the accumulated total received by the landholders over the last 30 or 50 years of the lease (Boydell, 2000). The government subsequently offered a \$10,000 incentive for new entrants (mainly Fijian under an Affirmative Action policy) to commence farming on the vacated leases, and another form of politics dictated land policy.

Boundary issues

In the absence of formal land recording and registration, there are many examples of conflict stemming from boundary issues within the region. The situation in the Solomon Islands, where the majority of recorded land parcels (>11,000 of approx. 21,000) are situated in the capital, indicates an obvious correlation between land recording and economic activity. The UNDP report (2004, p.10) contests that strategies such as registration, commoditisation, commercialisation, overexploitation, use and sale that focus narrowly on the land itself may miss the point, instead becoming of themselves a cause for conflict. The UNDP report highlights that the social and economic concerns of landowners must be met in order to facilitate development and counter the risk of future conflict (p.3). It identifies the need for consultation with resource owners to shape evolving systems, as currently there is a lack of local acceptance and confidence towards land recording and registration.

At odds with the intent, there is a commonly reported fear that 'registration' will lead to a loss of rights and a takeover of land by the government. In Samoa, only the 197 parcels of customary land with leases over them are formally registered¹¹. This registration 'as needed' results in understandable delays when there is a proposal for a potential lease for commercial, hotel, residential or other purposes proposed over a

¹⁰ This compensation was unprecedented, with the authors unable to identify any other example of a government providing compensation to outgoing tenants on expiration of a legal lease.

¹¹ 2005 figures.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

parcel of customary land. There was recent profound reaction by the Samoa Umbrella of Non Government Organisations (SUNGO) against the Land Titles Registration Bill (2007) – amendment legislation currently before Parliament - highlights the level of confusion and misunderstanding over customary property rights in the country.

The Land Titles Registration Bill (2007) provides for an electronic record of the Register in Samoa, as well as far greater clarity in respect of leases, easements, licences, mortgages and other charges over (predominantly public and freehold) land. It merely builds on and supersedes the existing Land Registration Act (1992/1993) without, in any apparent way, limiting the sovereignty of customary land and Samoan custom. It also provides for electronic storage of information in a manner that was not foreseen at the time of the Land and Titles Act (1981), which deals with the Registration of Customary land in s.11, 12 & 13.

The reaction by SUNGO highlights the passion over custom land within Samoan society and culture (as in other Pacific Island countries), as well as demonstrating the need for a clear education policy at all levels of society, over the nature of property rights. It also conveys the power of the media to popularise myths and misunderstanding¹² over land management issues, by actually increasing the likelihood of conflict. The Director of Minerals, Natural Resources and the Environment (MNRE) welcomed the response¹³ as he saw the active engagement of SUNGO and other organizations in land issues, however misguided, to be a positive thing that could only lead to greater understanding of land issues by the wider population in the long term.

The recording of customary resource groups and their membership is addressed in the Land and Titles Act (1981), with Titles being considered under Part V. It is important to note the multiple uses of *Pulefa'amanu*. It is taken to mean the ownership of any customary land or the control of any Samoan name or title by a person either in their individual capacity or on behalf of any Samoan title, family, village or district.

In contrast, Fiji provides an example where the western individualised Torrens Titles Registration System is adopted for Freehold land, State lands and Native leases, requiring an accurate cadastral surveying and mapping system. The customary land tenure system is based on group ownership of land parcels recorded in the Register of Native Lands, surveyed at a lesser accuracy (as there is / was notionally no commercial value), and charted on Native Lands Commission maps. No individual titles are issued over Native land, with the parcels being registered under the *mataqali* and other levels of collective land units (*Yavusa*, *Vanua*, or at a lower level *i-tokatoka*). The ongoing genealogy of members of the *mataqali* is kept on the centralised register of landowners, the *Vola ni Kawa Bula* (VKB), which is linked to the Register of Births, Deaths and Marriages. After a series of Native Land Ordinances after Cession, and

¹² See headline (p.1 & 3) of the Samoan Observer, 10 May 2007.

¹³ Personal conversation.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

related Lands Commissions, the majority of the recording was completed over 50 years, although some (1235 mataqali parcels comprising 345,000 acres according to Fonmanu, 1999, p.43) are yet to be surveyed.

An example of a lateral and positive solution to boundary concerns is the voluntary participatory approach to land recording adopted in the Aluta Basin, in the Solomon Islands, in anticipation of possible Palm Oil plantations. This dynamic process with full stakeholder engagement allows for negotiation of boundaries, clarification of boundaries and stewardship under familial or clan land trusts.

Decision-making processes

Confusion over authority and decision-making processes over customary land are also a source of conflict. Generally, traditional decision-making consensus is vested with the informal institution of family, clan, kinship group or tribe – who may, or may not, have status as a legal entity within formal western based law. A Fijian example demonstrates this, where the notion of customary land being ‘owned’ by *mataqali* has been tested by the courts.¹⁴ The Supreme Court decision finding in *Native Land Trust Board v Narawa* (2004) agrees with the finding of the Court of Appeal, and now allows *mataqali* formal institutional recognition (*locus standi*) to bring a claim against their trustee, the Native Land Trust Board (NLTB).

The finding in *Native Land Trust Board v Narawa* (2004), referred to above, opened the door for *mataqali* to bring action against the NLTB if they are dissatisfied with the way NLTB has acted on their behalf as Trustee. The recent decision in *Tiva v Native Land Trust Board* (2007) HBC 81 OF 2006 has moved the goal posts in the advisory role of the NLTB. In delivering his High Court judgement, Justice Singh made the following significant comments on the role of the NLTB:

In considering what is best for the native owners, the Board is obliged to listen to their views. The Native Land Trust Act was passed in 1940 to protect the native Fijians from alienating too much of their land and probably for low prices to unscrupulous prospective purchasers. The Act ensured through the Board paternalistic protective measures so that the indigenous Fijians did not find themselves virtually landless in the long run. However more than sixty years later, there has been marked development in Fijian education and commercial expertise. There would be a lot of native owners who are just as educated as the decision makers in the Board. Hence there is no need for suffocating protection of the native owners. There needs to be more involvement of the native owners in considering what is in their best interests.'

¹⁴ The post independence decision in the Fiji case of *Timoci Bavadra v Native Land Trust Board* (Unreported) 11/07/1986, where Rooney J affirmed that not only could mataqali members not sue in their own personal capacities, but also that a mataqali in itself was not an entity which had legal personality in the formal court system. This decision was reinforced by *Naimisio Dikau v Native Land Trust Board* (1986) 32 FLR 179 where members of a mataqali brought an action both in their personal capacities as members, and in their representative capacity as representatives of other members of the mataqali. They were once again clearly declared as not having *locus standi* to bring a case seeking damages, declarations, and costs. The situation relating to the locus standi of Mataqali has now changed because of the finding in *Native Land Trust Board v Narawa* (2004) FJSC 7 CBV0007.02S.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

The *Tiva* case represents a landmark decision in acknowledging the authority of customary owners in relation to the statutory institutional arrangements (the NLTB) put in place by the colonial administration to, supposedly, protect customary interests. The provisions of the Native Land Trust Act (NLTA) of 1940 vested the NLTB with the duty to administer and *control* all customary land for the benefit of the native landowners. Hitherto, they had no requirement at law to seek consent for the Boards decisions from the customary owners on whose behalf they act.

In Samoa, below the role of the Head of State as ultimate high chief (*O le Ao o le Malo*) there is a hierarchy of several high chiefs (*Alii*), senior chiefs (*Sao*), chiefs and orators (*Matai*), women (*Sao'ao*) and untitled men (*aumaga*) within family groupings (*Aiga*). Women share rights to access customary land. Each title is associated with ancestral names, and is passed through families and ceremonially conferred allowing the chosen individuals to represent the family in public life. Titles provide the right to speak in family and village councils, to sit on councils (that collectively control 80% of customary land) and thus have access to land. At a village / familial level, the traditional decision making process is vested with the *Pulefaamanu*. The expectation is that the authority of the *matai* will be respected.

The impact of absenteeism on the decision making process

The accepted authority of the *matai* is not limited by location, so for any decision over the commercial development of familial land the support of all *matai* in the family must be obtained. Given that Samoa has a resident population of 180,000 (approx.) and there are 120,000 (approx.) Samoans resident in New Zealand alone, plus a significant population of kin resident in (but not limited to) Australia and the US, proctoring full *matai* support can be a time-consuming if not impossible task. The *matai* chiefly title brings a range of rights and obligations, and whilst the issue of leaving the management of land 'back-home' in Samoa to the resident family residents, this solution to facilitate the development decision-making process was not warmly received. There remains a politically strong view that once a *matai* always a *matai*, irrespective of global location. However, this is not always accepted and disputes emerge. Where there is dispute over land or title issues (chiefly title rather than the western notion of 'land' title) the matter is referred to the President of the Land and Titles Court for decision.

The challenge of *chiefly* or *matai* absenteeism in the decision making process is not limited to Samoa. Trends of globalisation, urbanisation and concentration in commercial centres affects land rights, both of absentee 'customary' land owners, as well as frustrating those who are left behind in semi-subsistence lifestyles on Pacific islands, reliant on remittance income from their urbanised overseas kin. As Crocombe (2001) identifies, there exists current legislation to cancel the rights of absentee land owners in some Pacific islands.

For example, Fiji law allows the clan to delete from joint ownership any person who has been absent for two or more years, yet this has never been invoked... indeed

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

many men will have been absent for at least that long. A similar law in Kiribati, albeit no longer applied, assumes that any man who has been absent for seven years is assumed to have been 'lost at sea', and his lands reallocated. Whilst some 91% of Cook Islanders do not live in the Cook Islands, nowhere is the issue of absentee landowners so clearly demonstrated than in the Polynesian raised atoll of Niue, with 93% of Niueans residing overseas (Levi and Boydell, 2003).

Restrictive attitudes of absentee owners (irrespective of their length of absence) are an impediment to land development projects. Absent Niueans often refuse, or are reluctant, to enter into negotiations, collectively or individually and attempting to negotiate with them is a consuming and frustrating process (Tongatule, 1981). Kalauni (1977) describes land negotiations on Niue as 'fiddling with feelings rather than reality'. As customary land titles represent 95% of land area, it is difficult to precisely define the rights of a descent group in any land. The claim of equal land rights for absentee Niueans to those who remain resident on the land is grounded in the 'descent group concept', ignoring criteria for use and residence.

Emergent pluralism

In New Zealand, informal and formal arrangements for customary property rights are being transformed to accommodate Māori cultural requirements and aspirations of the Māori land owning community. The majority of Māori landowners neither live or work on their ancestral lands, nor derive a sustainable income from the products of the land. Increasing numbers of owners for a fixed area of land reduces the likelihood of individuals gaining access to the land for their private use. The current institutional arrangements are the remnants of introduced legislation in the 1860s that codified and individualised Māori ownership in land – effectively to facilitate its alienation (Kawharu, 1977; Williams, 1999). This system of registering individual interests against Certificates of Title replaced the traditional systems of ownership and transfer of property rights. It has led to a cumbersome situation where ballooning numbers of landowners have an infinitesimal stake in the land. An interest in the land, no matter how small however, gives the owner a number of rights: one is the right to vote for representatives and to have their say in the administration and management of the land.

Under the current institutional arrangements governing Māori land (largely dictated by the Te Ture Māori Act 1993 - TTMA - and administered by the Māori Land Court) owners of Māori land have a limited number of options to overcome the problems stemming from the proliferation of registered owners (Boast *et al.*, 2004). The most efficient structure to administer and manage the land for the benefit of the entire collective of owners is one of two entities. The first is modelled on the corporate joint stock holder company (Māori incorporation) and the second on the trust structure (Ahuwhenua trust – there are other trust options as well under the current legislation to meet landowner requirements).

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

These organizations therefore have the difficult task of balancing the multiple viewpoints and values of a large and growing body of owners. The emergence in recent years of the institutional authority of traditional structures in decision-making raises the need for more subtle recognition of these ancient structures within a modern management framework that is conducive to the economic and social demands of New Zealand modernity.

In the Solomon Islands, research by the UNDP (2004, p.1) indicates that ‘Traditional authority (chiefs) has been undermined over time, initially by the Church, then by the Colonial Administration and now by politicians, government and international donors.’ As a result, there are now plural traditional and non-traditional land and justice systems operating in parallel. Violence is reportedly higher in areas where the traditional systems are weaker.

The plural systems are evident in other PICs with generalized systems breaking down as individuals began to leave their villages to work on plantations, in urban areas, or overseas, escaping control of the ‘*big men*’, chiefs and elders. This is matched by changes in leadership expectations and the rise and rise of individuals and entrepreneurs, often grounded on customary authority, has resulted in shorter term aspirations and impacted on equity (see next section). This has, in many cases resulted in a level of economic pluralism, grounded on urban wealth or resource control. Despite this, and the affects of absenteeism, strong traditional decision making processes prevail in most rural communities in the region. In these areas there is a heightened understanding that customary land is one of the few assets that rural people still ‘own’ and control, and they do not want to give up their customary land.

However, customary land law is generally not standardised nationally or at provincial level in countries such as the Solomon Islands, Vanuatu and PNG, largely because land rights are derived from localised culture groups. Lineal arrangements vary, with differing matrilineal, patrilineal, and bi-lineal descent groups in operation in different locations and provinces of each of the countries. Despite varying descent customs and traditional inheritance over land, control of access and other property rights is not widely shared and tends to rest with senior males even where access to land is claimed through the female line. As the rules are largely unwritten, they run the risk of exploitation by self-interested resource exploitation. An example of the institutional complexity of prevailing customary land tenure and decision making arrangements in the region is demonstrated by the Solomon Islands, where there are differing Melanesian, Polynesian and Micronesian customs and traditions amongst families, tribes and clans across the archipelago.¹⁵

¹⁵ An extreme example is in Vella Lavella, relating to a tradition of granting customary land to the descendants of a woman from outside the clan, who hangs herself on the land (source: pers.con. Gorapava, E). For a more detailed discussion refer to the Solomon Islands case study.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

Benefit sharing arrangements

With the move into the monetary economy, issues surrounding equitable distribution of benefits from land have become increasingly prevalent throughout the region. A range of examples follow, which demonstrate the diversity of approaches in the region from the discretionary to the prescribed. In Samoa, given the ongoing strength and respect afforded to the traditional *matai* system, in the limited examples of leases over customary land the remuneration is paid to the *matai(s)* as leader(s) of the family to distribute as they see fit. A *matai* could, for example, distribute 10% and retain 90% for himself. Obviously, as within any society, there are some benevolent *matai* and some less so. Many people are not happy with the way that *matai*'s have total control, as there is a lack of equity.¹⁶ The *matai* is supposed to be a governance role, a custodial role rather than a take-take economic function. In reaction to examples of inequity, more families are proposing a family trust, where money paid is deposited in a trust fund, and the trust will decide on family projects to best use the money.

The evolving leadership in PNG, with the rise of the individual and entrepreneur results, in many instances, in a lack of sharing in whatever (financial) benefits are forthcoming.¹⁷ The situation is compounded for women and children at village level, even in the case of lucrative mining schemes with formalised Incorporated Land Groups in place to supposedly administer the return to the landowning group (Yuyuge, 2003). The recent 'Women in Mining National Action Plan 2007-2012' has set goals to increase proportion of women's participation in planning and decision making in all levels of Government and other decision making bodies. The objective is to increase women's share of cash income to become more equitable and to empower women to actively participate in land and cultural decision making (Department of Mining, 2007).

The benefit sharing arrangements from economic returns on customary land are contentious throughout the region, even where formal institutional arrangements through trust structures are in place. In New Zealand the customary groups represented by Māori Incorporations and Trusts share the benefits of the various commercial endeavours that are undertaken. However, it is unclear if all parties are represented in a manner that reflects the proportionality of their traditional property rights and interests.¹⁸

In Vanuatu, land trusts were established at *Ifira* and *Mele* to manage the return of previously alienated land to the custom owners after independence. Despite the evident benefits that these arrangement at the nexus of customary and western institutions have had for the communities they serve, there remain perceptions

¹⁶ A common response from senior officials who discussed this issue during the preparation of the Samoa Case Study inferred that without a radical change in the *Samoa* way, the situation is likely to endure.

¹⁷ See Papua New Guinea Case Study.

¹⁸ See New Zealand Case Study.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

popularised in the media that rental income from trust leases may be distributed in a way that is unfair to beneficiaries.¹⁹

The Native Land Trust Board in Fiji is commonly misreported on its benefit sharing arrangements (see for example Rakai *et al.*, 1995; Lal and Reddy, 2002), with layers of complexity caused by a hierarchy of beneficiaries and the levy of a management fee. There has been ongoing reaction to this 25% management fee²⁰ and the fact that it has been reduced to 15% over the last five years is commonly overlooked. In addition, the NLTB now retains 5% of the income in a collective Trust fund. Therefore 20% is deducted from income before the balance of rents and purchase-monies is distributed in accordance with the Native Lands Trust Act 11.-(1). 'After deduction of any sums in accordance with section 14 of the Act, the balance of any monies received by the Board by way of rents and premiums in respect of native land shall be distributed, by the Board, as follows:

- (a) to the proprietary unit, seventy per cent;
- (b) to the *turaga ni mataqali*, fifteen per cent;
- (c) to the *turaga ni yavusa*, ten percent; and
- (d) to the *turaga i tankei*, five per cent.'

By way of clarification, a *proprietary unit*, in the case of native land, means the proprietary unit registered under the provisions of the Native Lands Act as being the owner of such land.²¹

There has been increasing grass-roots reaction to the remuneration distribution under the aristocratic hierarchy formalised by the Native Land Trust Act in 1940. With an increase in education, members of certain proprietary units are questioning the 30% allocation distributed between their chiefs. Moreover, in some proprietary units the *turaga ni mataqali* controls the total income of the proprietary unit (15%+70% = 85%) and administers it for the good of the *matagali*. From a customary perspective, there is an argument that this is appropriate if it allows for enhanced community facilities. The importance of this example is that increasing economic demands for food, school fees and health care result in an increasingly individualistic approach to financial resources by beneficial members of the proprietary unit.

The Guadalcanal Plains Palm Oil Limited (GPPOL) equity participation initiative in the Solomon Islands has built on experience with New Britain Palm Oil in PNG, and reaction to the approach taken by the earlier Solomon Islands Palm Oil (SIPL) and Gold Ridge mine projects. The return on leased (FTE) plantations provides for:

¹⁹ See Vanuatu Case Study.

²⁰ Native Lands Trust Act s14.(1)

²¹ A worked example is provided in the Fiji Case Study. An empirical study available in Lal & Reddy (2002).

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

- > Land rental component to named landowners;
- > Royalty paid to an Association, which is a cooperative of five tribal units with interests in 56 parcels of land. The royalty is based on 10% of the farm gate price. The Association comprises ten representatives (one senior female and one senior male from each of the five tribes) operating as a go-between for the company and landowners. Given past experience with SIPL there has been a lack of trust by some people in respect of the Association with a preference to deal direct with the company. Currently 50% of the royalties are distributed and 50% are held in a trust fund. The banks (particularly the ANZ bank) are advising the Association on possible passive investments for the intergenerational trust component given that SBD\$1 million has accumulated over the first year; and
- > The Association holds a 20% equity shareholding component of GPPOL; this will start to pay dividends once the PGK 220 million debt (SBD\$529 million) for establishment has been serviced (anticipated to be 7 years).

The intergenerational benefit of the GPPOL arrangements will take 20 years to manifest given the long-term nature of palm oil plantations, meaning that it will be the children and grandchildren of the current landowners who will be the major inter-generational beneficiaries of current negotiations. Whilst there is a clear equity participation in the Palm Oil venture between GPPOL, the Association, and the customary landowners, there is no clear evidence of equity sharing of the benefits within families and tribes – in line with equity challenges in other PICs. In certain examples, the land has been returned to a trust of custom owners, with the situation further confused by named parties on transfers being male in a matrilineal area.

This section on benefit sharing demonstrates the diversity of arrangements relating to benefit sharing from customary land. It also highlights a range of inequities embedded in the prevailing social structures.

Summary

This introductory section on land tenure systems in the Pacific has provided an overview of the diversity of land ‘ownership’ issues in the region through an exploration of perceptions of ‘ownership’, confused terminology and the external push for privatisation. It then introduced the effect of customary arrangements on land-based conflict through a discussion on boundary issues, decision-making, absenteeism, pluralism and concluded with the diversity of arrangements relating to benefit sharing by drawing on a range of issues drawn from the country case studies (that are provided as appendices). The next section builds on these diverse issues by analysing the formal and informal institutional arrangements that compound the pluralism between introduced western approaches to land and enduring customary constructs.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

FORMAL AND INFORMAL INSTITUTIONAL ARRANGEMENTS RELATING TO LAND

This section builds on the customary land ‘ownership’ issues in the region. It engages in access arrangements to land, issues of equity, expectation, enabling environments and good governance. It provides a robust framework that leads into the subsequent clarification of property rights.

‘Institutions are the humanly devised constraints that structure human interaction. They are made up of formal constraints (rules, laws, constitutions), informal constraints (norms of behaviour, conventions, and self-imposed codes of conduct), and their enforcement characteristics. Together they define the incentive structure of societies and specifically economies’ (North, 1993).

Institutional arrangements can be defined as the ‘rules’ influencing human behaviour – and these rules can be further broken down into two categories, formal (which tend to be enforceable) and informal (which are in many cases unenforceable; see Table 1).

TABLE 1: THE ‘RULES’ INFLUENCING HUMAN BEHAVIOUR (BOYDELL, 2007B)

Formal Institutional Arrangements	Informal Institutional Arrangements
Constitutions	Relationships
Statutes	Social expectations
Regulations	Family
Plans	Firm
Policies	Community
Title	Traditional Laws and Customs

Institutions are made up of components that are also attributes of individuals and societies (Greif, 2006, p.23). It is important to bridge the divide between understanding institutions as rules or contracts (as is common in economics) and understanding them as cultural phenomena (as is common in other social sciences).

When economic development of PICs is viewed from outside of the region, there is a risk that those looking in are influenced by (or are promoting/perpetuating) a particular *institutional footprint* based on their perception of institution-as-rules arrangements in a different society. The transplantation of institutional arrangements was a key driver in the colonization process, where institutions appropriate to one (geographic and social) context were transplanted into a new context (Smaijl and Larson, 2007). As a result, colonisers supplanted systems that were developed from a different heritage onto Pacific societies that had different perceptions of interests, emotions, and values. There many contemporary examples of perpetuating this approach (for example the Hughes push for privatisation discussed above) through aid driven attempts to apply neo-liberal models onto emergent Pacific economies.

Facilitating access to land

This section looks at enabling arrangements to liberate access to customary land to other parties for economic use. A useful illustration is provided by Fiji, where almost

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

88% of the land is held in trust for the benefit of indigenous Fijians. The residue is state land and freehold. As introduced above, this 88% is not ‘owned’ in the same way as formal legal systems would acknowledge ownership of a freehold interest in contemporary western society. This 88% of land is, in reality, merely held in a group trust. The ‘ordinary’ Fijian cannot sell it or use it as security for a loan. However, they retain a higher property rights claim over the land for their beneficial use for home sites or agricultural allotments than their mainly Indo-Fijian tenants (Boydell and Reddy, 2000). Moreover, the land that is not required for such purposes may be rented out to others under the guidance of the indigenous statutorily retained trustee that also takes the role of operational property manager, the Native Land Trust Board (NLTB).

This ‘native’ land, which represents 88% of the country’s land resource, is shared. It is not owned at an individual level and can never be considered as personal property for there is no individual legal title to it. Leasehold title, be it on native, crown (state) or freehold land is more commercially tradable and accepted as a security by banks and other lending institutions. The rationale is that there is a defined formal legal title for such interests, against which lenders can take a formal legal charge. Indigenous Fijians are just as free to own non-native land as anyone else, be it freehold or leasehold. Some regard indigenous Fijians as ‘advantaged’, given that they are the only group who can hold all land types.

Fiji’s example demonstrates how informal customary institutions can be harnessed to enable economic advancement (in relation to PIC counterparts) by liberating formal leasehold institutional arrangements to provide access to customary land through the auspices of a statutory trust structure (NLTB). Some land within each landowning unit’s total acreage is set aside as reserve for the use, maintenance and support of its members. Meanwhile, unreserved land is made available for leasing to anyone. The NLTB administers some 32,000 leases over customary land, with some 13,800 used for agricultural purposes, with the others including residential, industrial, commercial, hotel and resort, reforestation, educational religious and civic. This ensures that the land is both economically productive providing a return to custom owners, whilst being available for access (to lease) by the wider community.

This scale of economic development on customary land in Fiji contrasts sharply with Samoa, where there are only 197 active leases over customary land²². Of these, 80 relate to Government use, 85 for religious purposes and only 32 relate to commercial activity. However, Samoa is under increasing pressure from external interests to facilitate access to customary land for tourism development ventures. Current examples demonstrate a naivety in the drafting of lease arrangements, their value and administration through the Minister of Lands who acts as the intermediary trustee between the parties. The utilisation of the position of Minister of Lands as trustee creates a potential conflict of interest between the stakeholders – the various *aiga*,

²² Based on 2005 data.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

government departments, and the external investor / developer. There is a view that there is a role for government as a facilitator, but that the trustee should be independent. Independence is also an issue in Fiji; the structure of NLTB is often seen as political given that the Head of State is President of the Board and the position of Board Chairman vests with the incumbent Minister for Fijian Affairs.

Meanwhile in Vanuatu, the examples of village trusts in Ifira and Mele²³ successfully demonstrate, smaller village level trust structures with greater control in the hands of the landowning group can be equally efficient in facilitating access to land. Similarly, the development of Incorporated Land Groups (ILGs) in PNG provides an institutional mechanism to bridge the informal systems of customary land tenures, grounded in people and place, with the formal national laws of the land. This allows communities to relate to modern economics and organizational systems, as well as to the broader outside world. The formal institutional mechanism to support communities' development is the Land Groups Incorporation Act (1974) [LGIA], which provides the interface between informal and formal arrangements.

It is helpful to expand this discussion, by providing additional background to this PNG legislation. The Land Groups Incorporation Act (1974) was one of the few tangible legislative outcomes of the 1972-1973 Commission on Inquiry on Land Matters (CILM) in PNG. This legislation put forward the creation of incorporated land groups (ILGs), based on existing customary kinship groups (such as the clan) as a flexible way for PNG communities to manage their own natural resource development and an appropriate way to support development of communities right across the country. Other draft acts, also outcomes of the CILM, that followed gave further substance to this approach and to provide further support for land development.

While the Act was scarcely used for the next 12 – 15 years, it has since been used extensively by the resource development sectors of forestry, mining, gas, and petroleum. ILGs were seen by these sectors as a 'safe' method to externalise the payment of royalties and other such payments to customary landowner groups who occupied areas within which a major resource was being developed. Similarly they represented landowner groups, which were required by the new Forestry Act to become part of the structure for the commercial exploitation of forests.

In placing the burden of royalty distribution on ILGs, the public understanding of ILGs has been biased to believing that royalty distribution to customary landowners was the sole purpose of ILGs. As a result, the history and experience of ILGs in PNG has in the past been somewhat chequered, open to contention and dispute and not always successful.²⁴ In the forestry sector, the creation of ILGs by logging proponents in the lead-up to a forestry development agreement being signed has been creative at best and criminal at worst.

²³ Refer Vanuatu Case Study.

²⁴ Refer PNG Case Study.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

Much of this ‘creative’ use of ILGs has occurred largely because of the developers’ lack of understanding of the need for accuracy in this modern recreation of what are essentially privatised kinship groups. At a certain level, ILGs enable major decisions about customary land to be made without needing the approval of the broader customary group at a higher level (this is the definition of a ‘land group’). An operationalised method of carrying out ILG identifications and incorporation has also been in existence (Holzknecht, 1995) and widely circulated since that time. Forestry officers have undergone training in the processes involved and now work closely with customary landowners in carrying them out.

The recently completed PNG National Land Development Taskforce [NLDT] Report (NRI, 2007) has come out strongly in support the method of using ILGs. It further recommends the continuation of this approach by substantially amending and strengthening the Land Groups Incorporation Act (1974) and continuing to use Incorporated Land Groups as the vehicle for development. The meaning, intent, purpose, and related provisions concerning ILGs by amendment will be broadened to accommodate the application and use of ILGs to cover landowner mobilization in all resource development projects.

ILGs will make land available for development (by themselves or others) and so they will then continue to have management powers over their land (now in a more formal, modern, institutional sense), the use of land rents and the income generated from each ILG’s business activities. This also implies the requirement for capacity building of ILGs in terms both management and decision-making by members of each ILG and also in the proper and secure handling of such an income stream. The NLDT further recommends the introduction of a Customary Leasehold Bill as the instrument for the release of and access to customary land for development.

In addition, the NLDT recommends making appropriate amendments to the existing lease-leaseback, state land acquisition and state land lease provisions of the Land Act (1996) so that they become instruments for both the release of, and access to, land for development. The NLDT also recommends the promotion of the rental of customary land, in preference to outright purchase, largely because the latter has proven to be insecure in PNG (this recommendation links to the proposed introduction of a Customary Leasehold Bill).

The existence of the Land Groups Incorporation Act 1974 has been the envy of other nearby Melanesian PICs; an updated and amended Act, as recommended, will continue to draw this interest and attention. In the Solomon Islands, recent experience in Guadalcanal Plains has led to a positive approach to familial or clan ILG-type trusts to encourage land recording in the Aluta Basin area, to facilitate the potential expansion of future palm oil production to that part of Malaita.²⁵

²⁵ Refer Solomon Islands Case Study.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

The growth of ILGs is in line with increased discovery and exploitation of economic resources. A study on the status of ILGs confirms a perceived trend: prior to 1990s, ILGs were little known, with no more than 10 being registered annually. After the revision and enactment of both the Forestry Act (1991) and the Oil and Gas Act (1998), the number of ILGs registered annually rose significantly. These laws referred to the LGIA and used ILGs as the means to mobilize customary land owning groups. Used in these two sectors, ILGs largely externalise the distribution of financial benefits to the land groups in the project areas. ILGs have also been used in the lease-lease back arrangements (through the Land Act, 1996) in large agricultural project areas such as the New Britain Palm Oil project. More recently, Telikom PNG Ltd. has been offering community service packages to ILGs within the vicinity of telecommunication facility sites with the intention of encouraging these communities to reciprocate by looking after these facilities.

The perception of *efficiency* merits further discussion. Crocombe (1984) identified that the cultural constraints of land ownership structures results in the people of Niue (residents and absentees), the Solomon Islands, and others who do not effectively use their customary lands, are often reluctant to make them available to others who would. He goes on to suggest four possible policies that are in accord with *actual* traditional practices of island societies, as opposed to the system that are quite incorrectly *thought* to be traditional, *viz.*:

- > Fear of loss – provide restrictions on the size, value and retention by original landowners;
- > Reduce the number of persons in a landholding group (in essence, this could be achieved by determining ‘abandonment’ of the absentee owners after a given number of years);
- > Re-establish a more effective organizational structure for joint landholders; and
- > Ensure access to land on the basis of productivity potential rather than accident of birth.

There is still evidence to support that the greatest current land problem is to overcome the legacy of colonial tenures and, as Hann would call it, the *embeddedness* of property (Hann, 1998). Reform does not necessarily mean new legislation but rather different attitudes. What must change is the attitude of the people to the utilisation of their customary land (Levi and Boydell, 2003). In this respect, the parties to informal tenancy arrangements that still endure need to formalise the tenancy if they want to benefit from security (of both lease term and from the capacity to borrow against the lease) afforded by a formal lease. However, even if this were done, potential conflict over the equitable sharing of benefits will remain unresolved.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

Equitable Distribution of Benefits

The notion of equity is complex and multifaceted. It is a critical component in the process of minimising land related conflict. There is, however, an important caveat: achievements in commerce and individualised economic success, within contemporary western society, are rarely founded on aspirations or demonstrations of equity. For the purposes of this report, the notion of equity is interpreted as the equitable distribution of benefits and costs within landowning groups and between landowners and others stakeholders.

In the context of customary land, economic aspirations have to be balanced with the other sustainable social and ecological components, to ensure prudent intergenerational stewardship of the underlying land resource. This relates to equity of economic benefits between members of a particular landowning group and the parties who may want to access their land for productive purposes. It also relates to intergenerational equity, to ensure that the underlying land asset remains available to descendants of the landowning group. This creates challenges that must be appropriately addressed by the parties.

Firstly, the understanding of rent as a surplus of productivity, used to compensate the landowners for forsaking certain of their property rights for a fixed period under a formal lease arrangement. Ideally, a balance should be reached that operates to the benefit of both landlord (landowning group directly, or through a trustee) and the tenant who is using the land.

Equity is best achieved where the parties seek independent professional advice to analyse the value the potential income flow that a reasonable tenant may reasonably generate (ensuring that the tenants also produce an appropriate return from their labour or risk). Regulated rents tend to cloud the issue of equitable return, especially where comparison is made to a rental based on, say 6% of, the hypothetical unimproved capital value (UCV) of the land rather than its equitable productive capacity.

The reality is that parties rarely have adequate knowledge about property rights, obligations, and restrictions articulated in lease covenants. In major land resource deals in the Pacific, such as forestry and mining, the prospective tenants are often well represented and informed by professional advisers. This enables these outside interests to maximise their legal situation, which is often at the expense of the landowning group. A chief or senior family member often represents the landowning group. In many instances they are influenced in the short term by cash advances and 'key money' in the form of vehicles and similar forms of payment. Given the complexity of the property right arrangements, without the benefit of expensive independent professional advice there is a risk of chiefly representatives inadvertently committing their landowning group to long-term arrangements that may not be in the best interests of future generations.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

In order to avoid future conflict and demands to redress misdeeds, institutional aspects of intergenerational equity should be planned for. Leasehold structures go a long way to achieving this, provided they are appropriately drafted and the parties (and their successors) understand the terms, caveats and property rights detailed therein. Whilst there are some administrative and management benefits of rent-up front arrangements²⁶, these only demonstrate intergenerational equity if the premium is invested in an accumulating trust fund rather than being expended by the current generation. Alternatively, provisions need to be made for regular professional review of the rental, to ensure the return keeps pace with inflation and other expectations. There is a need for clear understanding by the parties over how any tenants' improvements will be managed on lease expiry (e.g., do they become the property of the landowner, does the tenant have a duty to remove them, or is the landowner expected to compensate the tenant for the improvements?)²⁷.

Balancing expectation

Institutional arrangements need to balance both the formal and informal institutional interests of traditional landowners and communities, investors, government and other stakeholders. Comprehensive stakeholder analysis is often overlooked in institutional arrangements, leading to the potential for conflict particularly where economic aspirations for customary land are concerned.

Stakeholders are those who have rights or interests in a system. They can include primary or secondary stakeholders; internal and external stakeholders; and interface stakeholders. In exploring the commercial use of customary land to achieve economic development, stakeholders can be identified through asking, amongst others, the following questions:

- > Who are potential beneficiaries?
- > Who might be adversely affected?
- > Who has existing rights?
- > Who is likely to be voiceless?
- > Who is likely to resent change and mobilise resistance against it?
- > Who is responsible for intended plans?
- > Who has money, skills or key information?
- > Whose behaviour has to change for success?

These questions can be refined by considering a range of parameters: *The basics* - men/women, rich/poor, young/old; *Location* - rural/urban dwellers, near to the

²⁶ Also known as zero-rent, see Key Guiding Principles later in this report.

²⁷ Again, see Key Guiding Principles later in this report.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

issue/far away; *Ownership* - landowners/landless, managers, staff; *Function* - producers/consumers, traders/suppliers/competitors, regulators, policy makers, activists, opinion-formers; *Scale* – small-scale/large-scale, local/international communities; and *Time* - past, present, future generations (for an expanded overview on stakeholder analysis and related tools see, for example, IIED, 2005b; Ramírez, 2002).

In the Pacific, as elsewhere, there are multiple stakeholders involved in any arrangement for the economic use of customary land. Each brings a different stake and level of power, and concern, to their relationship with other stakeholders (for an analysis of this see Vodoz, 1994; Walker and Daniels, 1996; Dubois, 1998).

Institutional conditions and enabling environments

Whilst the enabling environments of various trust structures in the region, described above, supposedly provide the appropriate institutional conditions for the administration of customary land, they are not without their challenges. The example of ILGs in PNG provide a nexus between informal customary and formal statutory arrangements, the ongoing problems with ILGs have been widely documented. Most of these problems are attributable to the additional purposes that ILGs have been expected to fulfil beyond the LGIA's original purpose. The inflated problems of ILGs have largely been a result of the 'rent-seeking' behaviour among customary landowners and fuelled by the substantial amounts of money in benefits distributed in the resource project areas.

Some of the problems at the ILG level include: proliferation of ILGs of which some are splinter groups and others are bogus urban based ILGs (most with the intention to split and maximize of the financial benefits); leadership struggles; lack of transparency and accountability by leaders; misuse of ILG funds; inequitable distribution of benefits (favouring mostly those in the circle of families and allies of group leaders); and benefits not reaching all the members, especially down to women and children in villages.

Most ILGs do not yet have the capacity to manage their corporations and hence do not function as they should; many do not hold meetings as they should or record the outcomes of those meetings, and the dispute settlement authorities of the ILGs do not function at all. In terms of administrative processes, the ILG office located in the Department of Lands and Physical Planning is not able to effectively and efficiently process ILG applications and administer the ILG register. The ILG processes have been defined by the LGIA, but are not followed due to lack of resources and capacity and sometimes by undue external pressures.

The increased involvement of other sectors in the process of ILG applications makes it increasingly susceptible to abuse as the applications go through different bureaucratic offices (so, for example, the files of a large number of registered ILG are deemed missing by the ILG registry office). The problem of limited file storage

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

space and facilities has impaired the ILG office's ability to check on multiple applications and monitor progress of applications. Consequently, the ILG office is not able to respond promptly or adequately to customer queries nor is able to undertake the preparation of other useful ILG information processing tasks. The ILG application process appears to lack proper regulatory mechanisms and costs very little. This has opened the process for numerous unnecessary applications. Finally, the LGIA does not cater well for the many new roles that ILGs are expected to perform, resulting in the process being greatly abused.

Similar challenges are evident in an investigation of the Native Land Trust Board, which has been operating for over 60 years (since 1946). The organization has undergone numerous structural reorganizations, a major one in 1978, and the most recent in 1998 – with a range of interim evaluations. These were aimed at making the organization improve its profitability by making it financially lean and fit to fulfil its many roles efficiently and effectively. Despite ongoing improvement, the Board continues to face many problems and challenges that have continued to affect its operation, resulting in stakeholder dissatisfaction. These include: legislative limitation; rental arrears; the difficulty of establishing new products; rigid human resource policies; entrepreneurial restrictions and lack of capital to undertake subdivisions; competition (undercutting of rental) by government land; political conflict; high operational costs; processing delays; and the absence of a special land court to resolve disputes.

The formal trust structure examples of PNG and Fiji enable existing institutional arrangements to facilitate economically productive access to customary land, but demonstrate operational limitations that are a product of weak administration.

Good governance

A *trust* is defined as “an arrangement where a person (a trustee) holds property as its nominal owner for the good of one or more of its beneficiaries” (Pearsall, 1998). In the Pacific context, there is usually more several trustees representing a clan or familial group. In Fiji, for example, the Board members of the NLTB act as trustees for all non-village and non-reserve customary land. As detailed above, formal trust structures provide necessary and sufficient institutional conditions for encouraging good governance for facilitating access to and release of customary land for commercial purposes. Trusts can provide a formal institutional interface between informal customary arrangements and the formal aspirations of lease security (both in term of use / occupation and as the basis for lending).

Trust structures have the potential for promoting equitable sharing of returns from customary land. However, distribution of returns is normally undertaken in accordance with custom that often leaves scope for the senior male(s) to benefit at the expense of other members of the landowning group. Human frailty is compounded by economic aspirations of the parties. Good governance in this regard would require a level of societal change and adaptation of customary control

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

and power arrangements. In Fiji, for example, the ‘customary’ hierarchy of land rent beneficiaries within the NLTB model would require a level of revolution to change. Instead, what is needed is a level of transparency within trust structures that will enable all parties to be aware of, and receive (directly or through reinvestment) their rightful return.

Whilst good governance in its broadest sense will limit conflict, arrangements are still needed in most PICs to facilitate cost effective land dispute resolution. Land disputes tend to be played out within both formal and informal structures, in a process that has reverted to custom if the outcome of a formal court does not satisfy a key stakeholder. These circumstances, and the authority of custom in many PIC constitutions do little other than protract the resolution of disputes.

PROPERTY RIGHTS

Property rights provide a coherent legal, economic, and social framework for the relationship between people, place and property. Unfortunately, they are often misunderstood and misinterpreted by the multiplicity of stakeholders sharing a particular space (Boydell *et al.*, 2007). Taken from a libertarian perspective, some see ‘ownership’ as the highest level of right to act, and that property rights vest only with the individual. In contrast, Lyons *et al.* (2007) view is that with property rights at any level come roles, obligations and restrictions.

There are few concepts in economics that are more central, or more confused, than those of property, rights and in particular property rights (Bromley, 1991). Recent property rights discourse is dominated by the Chicago School (Gordon, 1954; Alchian, 1965; Demsetz, 1967; Cheung, 1969; Umbeck, 1977) position and that of new institutionalists (such as Coase, 1960), that focus on property rights in the firm, rather than specifically in landed property and real estate.

More recently, Alchian suggested the purported conflict between property rights and human rights is a ‘mirage’, as property rights are human rights (Alchian, 2006). This concurs with Pejovich’s view that property rights are not physical things, but rather relationships between individuals surrounding scarce goods and their use (Pejovich, 1990). The emphasis on economics is balanced by the legal view that property rights are, “the creation of positive law whatever social or political theory may presuppose about their metaphysical origins in the natural or supernatural order of things” (Denman, 1978, p.3).

Property rights in the developing world are often formalised in ways suggesting significant misunderstanding of the needs of emerging economies (Home and Lim, 2004), highlighting deeply embedded flaws in notions of property rooted in colonial legacies. However, there was no misunderstanding by the colonisers that dispossession hinged on the use of the formal institution of law to create or negate property rights (Forman and Kedar, 2004).

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

The negation of customary and/or traditional land tenures and the transfer of control to the settler society not only confirms the imported property rights regime, but also as Kedar (2003, p.415) notes, "...[s]ettlers' law and courts attribute to the new land system an aura of necessity and naturalness that protects the new status quo and prevents future redistribution. Formalistic legal tools play a meaningful role in such legitimisation. Courts apply 'linguistic semantics, rhetorical strategies and other devices' to disenfranchise indigenous peoples." More importantly, the property of the conquered is often regarded as 'public land', which can be dealt with by the State without referral to the traditional owners. However, the colonial legacy of flawed property rights is nowhere more apparent than where PICs struggle to overcome this legacy in the most critical rights area of all, access to land.

Arguably, the ineffective land management and the resultant conflict over land in the Pacific region is a direct result of the dyschronous nature of the two streams of property rights that have emerged in many countries in the region. The New Zealand experience reveals starkly this dyschronous quality of property rights in that nation, and the differential management and/or respect accorded to some property rights. The heated debate over the recognition of Māori property rights in land below high water mark and in the sea bed arising from the decision of the New Zealand Court of Appeal in *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (Ngati Apa), reveals how conflict can arise so rapidly even in an albeit apparently settled land law regime.

All of the above is the undeniable aftermath of inappropriately applied property rights arrangements. No amount of settler pressure will transform the mixture of pre- and post-colonial property rights residing in the Pacific Island nations into a representation of English land law. The legacy of previously dominant settler society tenure models only has relevance and worth if it can provide overall utility to the whole of society. Indeed, such property rights are now so broadly problematic that they may need to be dispensed with, and arguably such relinquishment appears overdue.

These flawed rights, whilst a legacy of settler society, also expose a cultural and value divide between settler and indigenous societies, especially in the Pacific region. Settler society places great emphasis on 'fixity, absoluteness and systematicity' while traditional tenurial regimes appear to defy translation into 'terms intelligible' to the legal system of the settler.

As a result, there is a broad lack of understanding (and acceptance) of the property rights of various stakeholders (e.g., direct use & direct economic gain; indirect economic gain; control; transferability; residual rights; symbolic rights; duration; flexibility; exclusivity; exclusion; quality of title; divisibility; access; extraction; usufruct; chiefly rights; management; and alienation), along with their respective roles, rights, responsibilities, relationships and revenues (IIED, 2005a).

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

TABLE 2: PROPERTY RIGHTS SUMMARISED (ADAPTED FROM BOYDELL, 2007B; LYONS *ET AL.*, 2007) EVOLVED FROM: (CROCOMBE, 1975; PAYNE, 1997; RIGSBY, 1998; SHEEHAN AND SMALL, 2002; WORLD BANK, 2003; POWER, 2003; FARRAN AND PATERSON, 2004)

Right	Explanation
Access	Entry/ admission onto the land
Alienation	Transfer of an interest (right) in property to another, often mistakenly taken to mean 'in perpetuity', given that a lease is an acceptable alienation of lesser property rights
Chiefly Rights	Inherited by a headman in customary ownership (tribe, clan, village)
Compensation for tenants improvements	Who owns improvements on leased land? Do they revert to the landlord on lease expiry as compensation for using the land, or is the landlord expected to pay the outgoing tenant compensation for any buildings or agricultural improvements?
Control	Conditions of direct/indirect use, held by persons other than the user
Direct use	Rights to plant, harvest, build, access and similar, may be shared rights
Discoverability	All information on every right, obligation and restriction to be located on a public register, which is easily accessible
Divisibility	Property right can be shared over territories, according to season, for example, or subdivided into parts and each part held separately
Duration	Length of time property right is held, indicating profits and/or savings
Exclusion	Disallowing others from entry and use of resources – assets and rights are secure from involuntary seizure and encroachment
Exclusivity	Inverse of the number of people with shared or similar rights, more relevant to water property
Flexibility	Right should cater for modifications and alterations, specified as with or without consent
Indirect economic gain	Such as rights to tribute or receive rental income
Management	Be able to make decisions on how and by whom a thing shall be used
Quality of title	Level of security that is available as tenure shifts from the perceived optimum of notional freehold, protection from fraud, ability to use as collateral
Renewal	The ability of the lessee (tenant) to obtain a renewal (or extension) of the lease.
Residual rights	Remaining rights at the end of a term (such as lease, death, eviction), includes reversionary rights
Right of Appeal to Independent Body	A right of appeal to an independent body as distinct from that which defined and granted the rights
Rights of identification (symbolic rights)	Associated with psychological or social aspects with no direct economic or material function
Security	The degree of security afforded by a right to be very clearly defined, together with a higher - ranking securities / interests that may be in place
Spatial extent	The exact geographical extent where any particular property right has force
Transfer	Effective power to transmit rights-by will, sale, mortgage, assignment, underlet, gift, or other conveyance – and level of constraint(s)
Usufruct rights	Collection of fruits or produce
Withdrawal (extraction)	Extraction of resources by owner despite leasing property

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

The multiplicity of overlapping, competing and complementary, rights that can co-exist for a particular parcel of land are summarised in Table 2. On closer inspection, it will be noted that some of these ‘rights’ (e.g., duration and flexibility) are actually attributes of more fundamental rights, rather than separate individual rights.

Distinctions can be made between economic rights and legal rights; likewise formal and informal rights, some of which are in the public domain. Once we break property rights down into their component parts in this manner, we start to undermine the notion of private property rights, given the overlapping nature of these multiple rights with that which is often simplistically taken as the ‘private’.

Where owners and users of buildings assert their own economic rights in disregard of third party interests, an informal property rights equilibrium can emerge that has little regard to social or environmental well-being. As individuals combine their property rights with those of others to reduce the costs of co-operating in the market, organizational order follows. As economies evolve, property rights become fragmented and subdivided. ‘Property rights ambiguity is unavoidable since specification of all dimensions of rights over resources is impossible’ (Webster and Lai, 2003).

It is evident that an emerging array of property rights is now crystallising in natural resources such as water, biota (flora and fauna), and electromagnetic spectrum, and even in previously settled rights such as land and minerals. In many countries, because of their colonial history, such flawed property rights are inhibiting the development of regimes of titling, management and trading to the detriment of the sustainable use of various natural resources.

At the outset, property rights appear to be a homogenous legal notion in both the developed and developing world. This apparent homogeneity, as a legacy of colonialism, is grossly misleading in much the same way as the world is currently entranced by the aspiration of a homogenous economic and legal framework for international business investment.

RECENT INNOVATIVE APPROACHES

In considering property, as explained above, ‘rights’ cannot be taken in isolation from relationships, roles, responsibilities and revenues. The importance of incorporating these 4 R’s (IIED/Dubois, 2005) allows us to rise above a purely economic view of the world to incorporate the environmental (or ecological) and the sociological (or human) component into any analysis of property rights, which are fundamental to indigenous societies. Critical to the process is the realisation (in conjunction with Table 2) that just as there is a diversity of property rights, there is also a diversity of stakeholders influenced by any property rights situation. This multi-stakeholder reality of overlapping and competing rights is at odds with the concept of individualised property rights. Critically, the multi-stakeholder reality creates a market in property rights. The buoyancy of this market generates the economic value of property rights in customary land.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

The 4R's are not the only example of developmental stakeholder analysis in the area of property rights. Several studies have been carried out into the efficiency of the administration of property rights and restrictions. Lyons *et al.* (2007) suggest some areas for improvement and what might constitute good practice for the definition and creation of a property 'ROR' (right, obligation, restriction) framework. Similarly, from a legal perspective, Gray and Gray (2005) consider property as fact, property as right and property as responsibility. Within the accepted western model, clearly defined property rights are essential to any market economy. Property rights in their broadest sense (i.e., the incorporation of rights, relationships, roles, responsibilities and revenues) over a fixed timescale (leasehold) or in perpetuity (freehold) are economically quantifiable income streams.

Lyons *et al.* (2007) built on work on emerging land markets in former socialist East European countries (Baldwin *et al.*, 1999), considering the land market to be composed of the following elements: the legal framework; the regulating institutions; the participants (stakeholders); the goods and services; and the financial institutions. They developed Dale's (2000) conceptual model to unbundle rights and include links to social stability, capital formation and natural resource stability. The model (shown in Figure 1) is portable to PICs.

The European research (as summarised in Dale, 2000, p.37) provided a useful guide to PICs. It outlines the prerequisites for a stable and efficient land market that 'encourages sustainable development, which must include:

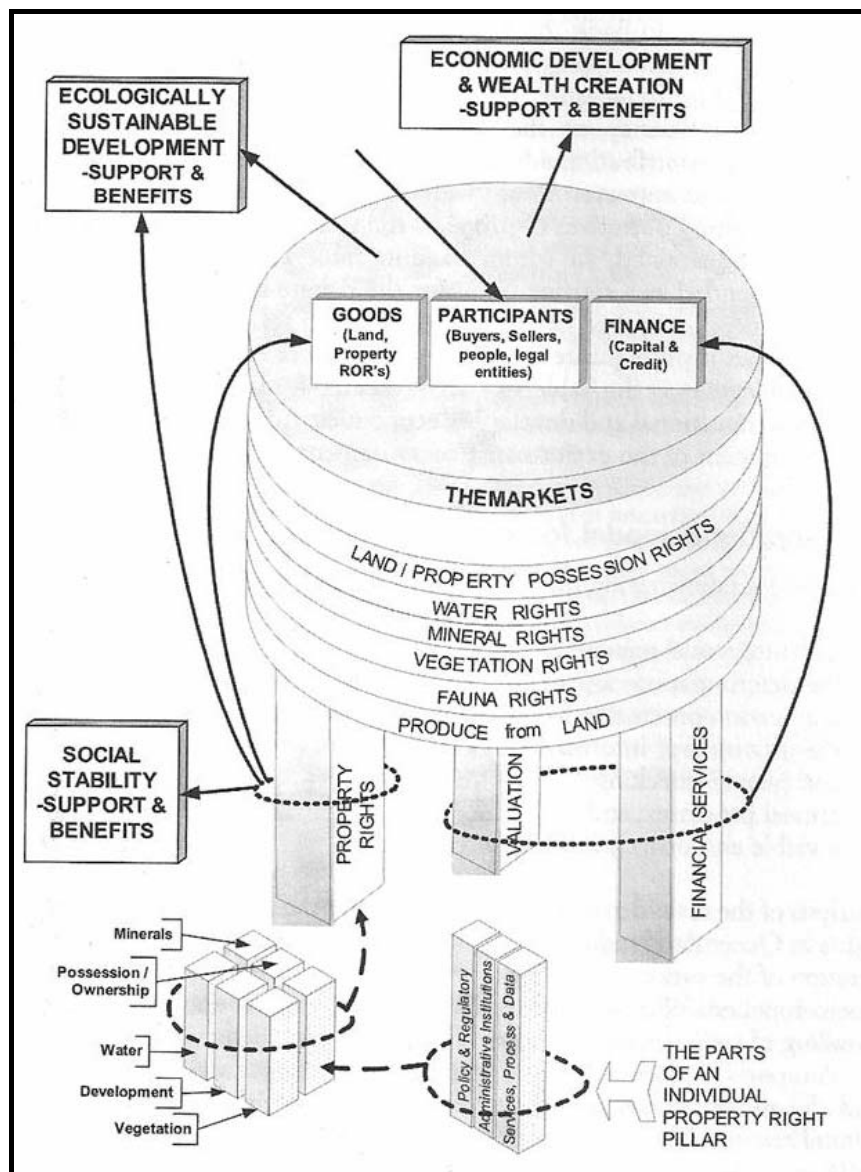
- > the clear definition and sound administration of property rights;
- > a minimum set of restrictions on property use consistent with the common good;
- > a simple and inexpensive way to transfer property rights;
- > transparency in all matters relating to the land; and
- > the availability of capital and credit.'

To be commercially effective from a western perspective, land-based rights do need to reflect certain characteristics, including being:

- > Spatially & temporally defined;
- > Legally certain & sound – warranted by the state;
- > Capable of being personally allocated and transferred; and
- > Capable of being subdivided and consolidated.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

FIGURE 1: CONCEPTUAL MODEL OF THE LAND MARKET STRUCTURE (LYONS ET AL., 2007)



The above list provides aspects of the process currently underway in the Aluta Basin region of Malaita, Solomon Islands. Land recording *per se* is still in its infancy in the Solomon Islands, as the tribal landowners are yet to realise its benefits and remain suspicious that it could result in them losing their land. Potential economic returns drove the Aluta initiative, in preparation for a proposed palm oil development as an expansion of GPPOL. Of significance, the secretary of the newly formed Tribal Lands Unit, Alex Rukia, decided against acquiring land as stipulated in the roles of an Acquisition Officer under the provisions of the Lands and Titles Act (1969).

Rukia identified that under current legislation, the acquisition process is prone to drag on beyond the expected timeframe for the proposed oil palm development. Such a process was considered unsuitable for the acquisition of Aluta and was likely to result in numerous conflicts (Rukia, 2005). The challenge provided an opportunity

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

to trial the Land Recording Act 1994 that has never been tested on any customary land. The Tribal Lands Unit (TLU) was given the responsibility to design the entire recording process. In doing so, the Secretary to the Tribal Land Unit, suggested that the 'process was designed with an ultimate aim of isolating and minimizing possible conflicts that may arise, in the course of acquisition'. The project was divided into four distinct but important phases: awareness, recording, acquisition and surveying. The inclusion of the awareness phase at the beginning played an important role in bringing together the tribes, identifying the stakeholders, and determining the level of interest in the proposed development.

Whilst the Solomon Islands Institutional Strengthening Land Administration Project (SIISLAP) supported this grass roots participatory approach to land recording (and potentially registration on demand), it is understood that the new Director of Customary Land Reform dismissed the pioneering work in the Aluta Basin. Maenu'u has previously been involved in similar initiatives in Malaita (see, for example, his 1979 report on the Fiu Kelakwai Scheme) and has taken a top-down legislative response.

However, from a Pacific perspective the above summary list (suggested by Dale, 2000) does not necessarily provide all the key characteristics when, taking an example from PNG, suitable arrangements can be made with a land group for use/lease of an area of land for a particular purpose if all members agree to such an arrangement. Then subdivision and consolidation fall away, as do the requirements for personal allocation and transferability. The new recommendations for strengthening Incorporated Land Groups (Webster *et al.*, 2007) have the potential to lead directly to such an example since such an arrangement will be legally certain and warranted by the state.

The need for clarification of property rights with sensitivity to local needs and custom is well articulated in current World Bank, Asian Development Bank and AusAID thinking on land policy (World Bank, 2003; ADB, 2004; AusAID, 2006a; PIFS, 2005).

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

COMMERCIAL AND ECONOMIC USE OF CUSTOMARY LAND

INSTITUTIONAL CONDITIONS

This section discusses necessary and sufficient institutional (formal, including legislative, and informal) conditions for promoting effective and efficient access to land for commercial use by members and non-members of customary land owning units. In order to minimise scope for future disputes and conflict, it is important to acknowledge at the outset the importance of a flexible and dynamic system. Appropriate systems need to be designed for local circumstances, given that “not only can institutions not easily be copied from one context to the other, the institutional arrangements might become ineffective over time as context, circumstances and desired outcomes change” (Smajgl and Larson, 2007, p.9).

Efficient access

Access in this context is the ability to use customary land productively. This relates to the economic use of land by the landowners themselves, or by third parties who want access to land owned by a customary group so that they can use it productively. For landowners to best use the land themselves, it may necessitate entering into formal institutional arrangements (trust and / or land recording and registration) to clarify ownership / membership shares and output allocation. Whilst banks look at an individuals business acumen in gauging lending risk²⁸, ability to use a lease over the land (such as a lease-and-leaseback arrangement) to raise capital against the property rights by using the lease as collateral²⁹ is also seen as an advantage.

Access can also relate to the provision of property rights over land by customary landowners (ideally through a legally constituted group or trust) to a third party, such as an agricultural, timber or mineral company, or individual, to use the land or remove resources from it. Often, in larger scale ventures, the government will also be a stakeholder in the process, but this does not limit the need for customary landowners to obtain their own independent professional property and legal advice. This is often an issue for the customary landowners, who may not have the financial resources to obtain independent professional advice in advance of a monetary settlement.

The use of leases over land is not merely a solution to providing efficient access to land in PICs, it is well established as a dominant form of tenure throughout developed countries. The World Bank acknowledges, for example, that land renting is fully consistent with modern agricultural practices and is widespread in developed market economies (such as the OECD countries of Western Europe) but varies

²⁸ See comments from discussions with lenders in the Case Studies.

²⁹ In Samoa, there is uncertainty over the legality of mortgaging customary leases and a declaratory order needs to be obtained from the Supreme Court (source: Leota Laki Sio, pers.com.)

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

strongly among countries (Swinen *et al.*, 2006). In some countries of the OECD around 70% of farmland is rented (e.g., Germany 68% and Belgium 75%), whilst the figure is less than 25% in others (e.g., Denmark 24% and Ireland 17%)³⁰. The variations in land renting have changed significantly over time, with institutional roots grounded in different landownership and rental regulations. Important for PICs to realise, the same policy objectives have led to different institutions and tenure situations across developed nations.

Understanding Leasehold arrangements

The simple dictionary definition of a lease is a ‘contract by which one party conveys land, property, services etc. to another for a specified time, usually in return for a periodic payment’ (Pearsall, 1998). A lease is a proprietary interest in land that provides certain property rights to temporarily pass on to another party for a term of years absolute (i.e., a fixed term estate) in the land/property, in return for equitable rental payment. The purpose of leases is to create an opportunity for those who hold a ‘superior’ interest in land to provide access to land for those who have the capacity to make it economically productive, whilst retaining their higher rights in the ‘reversionary’ interest in the land (Farran and Paterson, 2004). The equitable rent is, taking the Ricardian model, the surplus of productivity from the land having taken out the costs of production and labour on the part of the tenant.

The opportunity to liberate access to land for a term of years absolute to enable economic production through leasehold structures that retain the superior property rights in the custom ‘owners’ is the accepted solution in the Pacific. Leasehold structures are located between the extremes of the unacceptable ‘do nothing’ and ‘privatisation’ models. Leasehold models are, of course, already in place in the Pacific, ranging from 20+20 year residential leases, 30+30 tourism leases, and other variations for 50-, 75- and 99-year terms, as well as short-term leases.³¹

In the Pacific, there remain differences of public perception between leaseholds offered on government or freehold land (which are preferred), compared to those offered on customary land. This is a curious anomaly, given that it is the role of the State to guarantee all formalised property rights over registered or recorded land. This anomaly is compounded, in part, by the adoption of a regulated rental basis that is grounded on the hypothetical construct of unimproved capital value (UCV). In contrast, Samoa has no statutory provisions governing how the rental for a lease of customary land is to be calculated, which gives rise to uncertainty and confusion.

Regulated rentals

UCV is hypothetical to the extent that immature Pacific property markets, with small largely urbanised pockets of freehold land, do not have adequate comparative

³⁰ Source: Eurostat.

³¹ Examples of these variations are discussed in the Case Studies.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

transactional sales data on which to ground their analysis (which is quite understandable, given that the superior interest in customary / familial / clan / tribal land cannot be fully alienated and sold on the open market). The unimproved capital value process has been developed for both urban and rural land in Pacific Island Countries. Often, a panel of local valuers determines UCV on behalf of the Minister of Lands (e.g., Fiji) or external consultants as used (e.g., the model developed for Honiara, Solomon Islands). The UCV provides a convenient statutory benchmark, and is easy to apply in circumstances of limited valuation capacity where its application becomes a clerical task.

Examples of UCV models largely assume that the land has not been developed for economic gain, but in the models adopted locational factors (e.g., proximity to the central business area, quality of roads and access) are usually reflected, as are generalisations of soil quality, slope and productive capacity in providing a valuation 'tone' in rural areas. These models of UCV are reviewed periodically, usually at intervals of five or more years.

A discount rate is applied to the UCV of the land to determine the annual ground rent applied to a particular parcel. The statutory ground rental rates vary between 5% (e.g., PNG), 6% (e.g., Fiji), to 8% (e.g., Solomon Islands), and apply to both government and customary land. However, it is common to find that far lower percentages are applied than those permitted under various country legislation. For example, in Fiji the maximum rent under both the Agricultural Landlord and Tenant Act (ALTA) and the Native Land Trust Act (NLTA) is 6% of the UCV. In practice, the Native Land Trust Board (NLTB) as Trustee of the customary owners only collects 2½-3% of UCV, because the State as a matter of informal policy collects this much, or less, under their ALTA leases.³² The situation is similar in the recent UCV model developed in Honiara, Solomon Islands, where the Valuer General's office has charged as low as ½-3% of UCV on urban government land, based on reasonableness and affordability.

These variations in regulated rentals raise several issues:

- > A belief by some in government that 6% of UCV is not affordable;
- > Does this mean 6% is too high or the UCV is too high, and who could tell in a market skewed by limited access to freehold or perpetual estate title?
- > It opens potential for corruption if deals are negotiated at less than 6%, albeit that the benevolent actions of the government in charging less than the prescribed maximum serve to liberate access to land at a level that provides some social support. Complications, and resultant conflicts, will inevitably arise in the future (taking a 50-75 year time horizon) when available urban land is in short supply and the land value is at a premium;

³² Source: discussion with Government and NLTB representatives at the Institute of Valuation and Estate Management of Fiji CPD meeting "The Financial Management of Customary Land", Suva, 16 May 2007.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

- > Problems for trustees (e.g., NLTB) of customary land in attracting tenants if they are charging the statutory rate (6%) and the government is charging half of this (3%);
- > Risk of government or trustee being sued for charging less than statutory maximum rental; and
- > UCV is also adopted as the basis for municipal rates for services in certain urbanised areas in the Pacific, again with notional 5-6% being applied as the rateable component. This double application of the hypothetical UCV in the determination of both regulated ground rent and municipal rates adds to the confusion.

A criticism of the UCV approach from a landowner or landlord perspective is that the resultant regulated rentals do not keep pace with the increasing value of land over time, despite inbuilt review clauses. A solution to this is to move towards a valuation model that reflects an equitable share of the improved market value returns to the landowner, either at the end of the lease, or during the currency of the lease.

Anticipating future events in leases

It is one thing to generate leases to liberate access and related fixed term use rights to others, but it is also critical to think ahead about future issues that will affect the lease, use and rights of the parties, such as:

Default – under what circumstances can the trustee or landowner reclaim the land and any improvements thereon in the event of non-payment of rent or other charge on the property? There are cultural and value issues surrounding the repossession of customary land. Certain of the banks have also identified these cultural issues as impediments to lending on any title over customary land. Lending institutions see the risk of negative media attention associated with dealing with repossession over customary land as outweighing their financial gains in providing lending for this class of ownership.

Death – what provisions are in place for the passing of the tenant? Will the lease convey to their spouse (who is often not named as a joint-tenant or tenant-in-common) and / or their children? The circumstances surrounding the death of a landowner are not usually an issue, as long as the leasehold arrangement is formalised with a trustee, the land is registered or recorded in some way, and the arrangement is backed by the State. This highlights the potential risks experienced in informal lease or informal tenancy arrangements.

Expiry – this is a major issue and one that has already caused significant conflict (e.g., the recent expiration of sugar cane leases in Fiji). However, the sugar cane lease example is small scale compared to the impending expiration of residential leases in urbanised areas of Fiji. Whilst it has been accepted practice for the government or NLTB to negotiate an extension (arguably a surrender and renewal) of leases in the

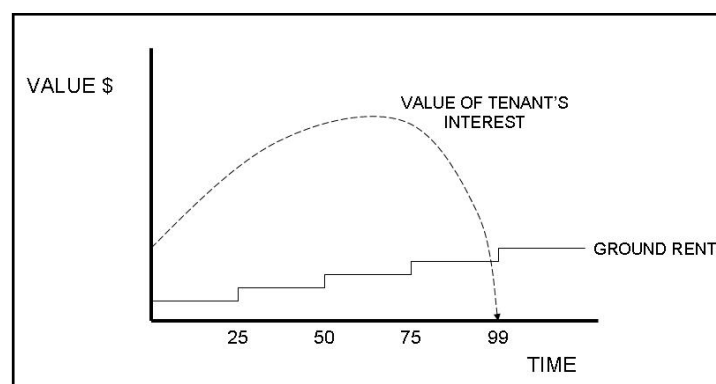
2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

latter part of their term, there is a major uncertainty about the ownership of tenants' improvements on expiration (see '*Improvements*' below). Hitherto, the only benefit in granting an extension of the lease term is to ensure a continuation of tenancy at a renewed ground rent (albeit at 3-6% of UCV). However, given the ownership of any improvements on the land being, in most cases, vested in the tenant, a legal challenge is impending over what rental should be charged on lease renewal [given that the landlord (e.g., NLTB as the trustee) could demand that the land be returned in the condition that it was in at lease commencement]. There is obviously a need to find an equitable legal compromise before expiration, to avoid potential conflict.

Improvements – the concept of improvements to land is a Western law concept and there is evidence (from the Case Studies) that indicates the concept may not apply to customary land in the Pacific, or may apply but not in the way in which it is applied to Western property. Given the extensive experience of lease expiration in England, the issue of improvements was specifically investigated in two of the country case studies (Samoa and Fiji). The issue surrounds a level of ambiguity evidenced in leases for land for both residential and tourism purposes, and how leases have arguably adopted more of an Australian legal interpretation rather than English approach in managing improvements.

Taking the hypothetical example of a 99-year lease³³, there is little concern in the early years of tenancy regarding the 'wasting asset' nature of a term of years absolute (see Figure 2). Indeed, given the time-preference of money, in valuation terms there is not a significant difference in the right to receive rental for 99 years or for perpetuity. This is not the case as the lease progresses, and particularly in the last 25-30 years of the term, when it becomes difficult to secure mortgage funding (with no lender prepared to lend beyond the expiration of a terminating lease).

FIGURE 2: LEASEHOLD INTERESTS AS A WASTING ASSET
(BOYDELL, 2007A)



For the purposes of this report, two types of lease in the Pacific are investigated: Residential and Tourism, as both of these are the inevitable causes of future conflict

³³ This example can be adapted for a 30- or 50-year lease term.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

unless intervening action and education can be used in the short term. The commonly adopted wording in the leases³⁴ is that any improvement erected by the lessee (tenant) on the land shall be removed within three months of the expiry of the lease. There is a provision for the lessor (landlord) to purchase the improvement (building) upon payment of fair value to the lessee (tenant). These clearly defined property rights (separating land as the landlords interest and the building as a tenants interest) will lead to inevitable confusion and uncertainty as the term of years absolute expires. This is quite different to, for example, Victorian building leases in England where the lease clearly places the onus on the tenant to return the property to the landlord in good condition at lease expiry.

Improvements – A Residential Example

A useful example is provided by the 18,000 (approx.) residential leases granted by the Native Land Trust Board over customary land in the predominantly urbanised areas of Fiji. The general perception of landowners (as opposed to their actual legal situation) is that they have received a very small rent whilst their land has been tied up for 60 plus years, and that the improvements will be their residual compensation on lease expiry. Their economic circumstances have not improved in line with the significant increase in value of the developed land, in which they have the superior interest administered in trust by the NLTB.

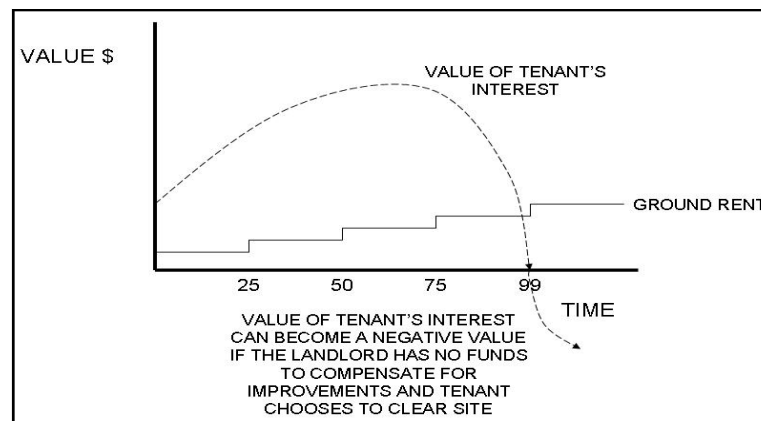
To date, as mentioned above, where a residential tenant has approached the NLTB for a lease extension, it has usually been granted without regard to any value attributable to the improvements. However, as witnessed by the reaction to the expiry of sugar cane leases, the landowners may assert their authority to take back possession of the land on expiration of residential leases. In Fiji, landowners are also aware that in 2000 the then Chaudhry Government took the unprecedented step of compensating agricultural tenants with the sum of \$28,000 on lease expiry to allow them to find alternative land and work. Following through the residential scenario, it is within the property rights of the landowners to retake ownership of their land on lease expiry. This results in one of two options:

- > the outgoing tenant has to clear all improvements off the land (and thus pay the expense of demolition and remediation) making the value of the improvements effectively a negative in the final days of the lease (see Figure 3).

³⁴ In the examples of Fiji and Samoa

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

FIGURE 3: TENANTS INTEREST BECOMES NEGATIVE AT LEASE EXPIRY (BOYDELL, 2007A)



- > the landowners have to compensate the tenant for the value of the improvements, and then they hypothetically have the opportunity to relet the land and improvements (as a single interest) at market rent. This assumes that the landlord (NLTB as trustee or the landowners themselves) has the money available to compensate the outgoing tenant for the improvements. Given that there have been no 'sinking fund' provisions made to accumulate capital for this circumstance, which is understandable as the ground rent model (up to 6% of UCV) bears no relationship to the market value of the land and improvements, no capital is in place to achieve this. If there is no capital available does this force the landlord (or trustee) to grant a lease renewal / extension? Not necessarily, as they can request that the site be cleared and remediated – a circumstance where all parties appear to lose. If the NLTB did have capital to compensate the existing tenant for improvements on expiry, there are further complications for what would follow. As far as granting a new lease is concerned, currently there is legislation in place for a short term tenancy arrangement, but not for a long lease with either a sale of lease (with improvements) with payment up-front, or a regularly reviewed residential tenancy to market rent.

Improvements – A Tourism Example

A poignant tourism example is provided in a recently negotiated lease for a new tourism development on customary familial land with multiple ownership (in terms of allocation of property rights) on the southern coast of Upolu in Samoa. The proposal relates to a prime tourism development site of some 7 hectares. The chiefs of the familial owners appear to have been seduced by a modest *ex gratia* payment (that could be equated to 'key money' or an initial premium) and, after a development grace period, a rental that equates to some 5% of a hypothetical UCV that was calculated at a nominal rural land use basis. Whilst the lease provides for first preference to be given for the future employment of 'suitably qualified' applicants from the families whose land is used, this relates to low-end service sector

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

employment in construction, maintenance, supply of goods, and handicrafts, as well as cultural demonstrations and car hire.

The lease, which is for 30 + 30 years, contains similar provisions relating to the tenant's ownership of improvements (and right to clear or be compensated on lease expiry) to those described above in the Fiji residential example. This means that the land is tied up for 30 + 30 years at a nominal ground rent, which if cautiously invested at an accumulative rate could never generate a sinking fund sufficient to compensate the tenants for their tourism infrastructure improvements on lease expiry.

The customary familial interests are represented in trust, and administered by the Minister of Natural Resources and the Environment as trustee. The lease was therefore drafted between the Honourable Minister of Natural Resources as lessor and the tourism developer / operator as lessee. Valuation advice was provided by the office of the Chief Valuer, in advising the Minister, as trustee.

In entering into such an agreement, at today's worth, the customary owners are tying up their land for at least the next sixty years for a capital value that equates to approximately SAT\$90,000 per hectare plus potential employment opportunities. This may seem significant to a poor subsistence community, but will inevitably be a source of intergenerational discord.

In real terms, if they had access to modest capital, the customary owners would generate a far higher income and maintain full control over their land if they were to build and operate a small-scale *fale* development.

There is no equity share provision in the lease, of the type that is now commonly adopted through experience in the Fiji tourism leases over customary land administered by NLTB, or through the conflict avoidance equity-sharing example in the palm oil venture discussed in Guadalcanal, Solomon Islands. The Fiji tourism lease model allows for the payment of a ground rent plus an equity turnover share of (variously) 1½ -3% of the tourism venture takings (albeit that this is difficult to verify, particularly in terms of offshore bookings and payments). The tourism turnover model, does however, provide a participatory arrangement whereby the custom owners have a stake in the success of the venture and a remuneration increase that is better than inflation.

On several levels, the Samoan example is likely to lead to infighting, political challenges (if the actions of the Trustee are challenged, which while not likely in the short term, given the chiefly nature of the Trustee, but could inevitably be the cause of *matai* distrust and infighting in future years), particularly as the expiration of the second lease term approaches.

The example, of course, provides a lease that appears to be highly advantageous to the tourism developers, given that they will realistically clear their development costs and be operating on pure profit by year 15. The reality is that financial deals that

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

appear to be too good to be true usually are. Achieving a deal that does not provide a fully equitable return to customary owners in the long-term will inevitably be a cause of future conflict and disruption to the business venture.

URBAN PRESSURES

Land markets in developing countries tend to flourish best in urban and peri-urban areas where the commercial opportunities are high and migration (including rural-urban drift) can stimulate the development of a land market (Dale *et al.*, 2002). This is evidenced in the Pacific by the increasing level of informal settlement on the fringe of urbanised areas. In PICs, people who are squatting know that they are in illegal occupation of land, but in many instances it appears to be condoned, especially by government. Moreover, extralegal ownership potentially creates a new level of 'legal' ownership if government intervene to formalise squatter or informal settlements in urban or peri-urban areas (Boydell, 2004).

A combination of urban drift, unsustainable wages, and a lack of both adequate available shelter and land has resulted in a housing and shelter crisis in several PICs. This has resulted in social, environmental, technical, and financial problems in all aspects of life. It is associated with the global trend of urbanisation, which brings an increasing number of people into urban centres with aspirations of employment, higher wages and associated improved health care and educational opportunities.

A squatter can be defined as a person who is in occupation of state, freehold or custom land illegally or without any form of security of tenure, or without consent of a landowner. Many so-called squatters are not actually squatters as they have quasi-authority/permission of the landowners by virtue of paying a one-off fee, or a weekly rent in informal tenant-at-will arrangements (such as *vakavanua* arrangements in Fiji). Such arrangements offer no security. They offer overcrowded conditions, with inadequate provision of electricity, water, sewage, and roads. With time, the number of squatters can increase and evolve into settlements, with landowners (state, private or native) losing track of the occupants (Brochu, 2002).

The Ahi residential project provides an example of a strategy for moving out of the 'squatter' mode of settlement. The Ahi comprise some 10,000 people in 33 clans living in six villages adjacent to Lae City, Marobe Province, PNG. In an attempt to preserve their cultural identity and their traditional land, they formed the Ahi Landowners Association in the 1980s as a registered incorporated body under the Associations Incorporation Act. They have an outstanding claim of AUD\$36 million over Lae City land. The Ahi have promoted land development through a lease and leaseback arrangement. By providing formal leases over recognised parcels of land, occupants can enjoy a level of social, spatial, and financial security that is not possible in squatter settlements. Social control will be more likely because there will be a clear line of relationship with the customary owners who will take the role of landlords in a traditional sense: applying a level of customary authority over the settlement that is

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

better aligned with traditions and likely to encourage more responsible behaviour amongst tenants.

Urban expansion places pressure on customary land in the peri-urban fringe, with change of use from subsistence farming to higher economic uses. The Salelologa case in Savaii, Samoa demonstrates how customary land can become a source of conflict with government. In this example, the government attempted to acquire 2,872 acres of customary land to facilitate township development. The conflict arose of the level of compensation to be paid and the amount of land included in the acquisition. Ultimately, the government only acquired 432 acres (at a higher compensation figure) for subdivision purposes.

Vanuatu currently lacks legislation to enable custom owners (as a group) to strengthen their rights in land, with no provision for custom land to be registered (Lunnay *et al.*, 2007). Whilst legislation requires leasehold interests of over three years to be registered, the superior custom ownership cannot be registered leading to an anomaly over the certainty of the lease. The Minister for Land and Natural Resources has the authority to enter into leases on behalf of the custom owners, with 233 such leases recorded in Efate (Farran, 2002). This is a power that was intended to relate to unresolved disputes over pre-independence alienated land, albeit regarded as unsafe to enter into a lease over disputed land.

PROCESS CHALLENGES

Critical to encouraging access to land for economic development is the streamlining of the process for registration, where a formal title is required. Generic research has been undertaken by the World Bank to examine the steps, time, and cost involved in registering property, assuming a standardized case of an entrepreneur who wants to purchase land and a building in the largest business city of each nation - already registered and free of title dispute. The situation is significantly more complicated (and the timelines extended) in the case of customary land that is currently unregistered, as it is for rural land.

The number of procedures, time and cost involved in registering property in the region are summarised in Table 3. The information is abstracted from the World Bank data on 178 countries, and is contrasts those PICs that have data available with the situation in OECD countries (IFC, 2007). The costs relate to fees, transfer taxes, stamp duties, and any other payment to the property registry, notaries, public agencies or lawyers. The cost is expressed as a percentage of the property value, assuming a notional property value of 50 times income per capita.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

TABLE 3: REGISTERING PROPERTY (ADAPTED FROM IFC, 2007)

Region or Economy	Procedures (number)	Duration (days)	Cost (% of property value)
OECD	4.9	28	4.6
Australia	5	5	4.9
Fiji	3	48	12
Kiribati	5	513	0.1
New Zealand	2	2	0.1
Palau	5	14	0.4
Papua New Guinea	4	72	5.1
Samoa	5	147	1.8
Solomon Islands	10	297	4.9
Tonga	4	108	10.2
Vanuatu	2	188	11

What is significant is the time (all PICs) and relative cost (particularly in Fiji, Tonga and Vanuatu) to register land in comparison to OECD countries, Australia and New Zealand. This highlights the need for institutional reform in this area to facilitate efficient transfer of property rights in land in the region. Moreover, this data relates to the transfer of property rights that are already registered. The complexity and length of transfer is understandably significantly longer where ownership of customary land is yet to be brought into formal institutional arrangements through recording and registration.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

INSTITUTIONS AND GOOD GOVERNANCE

The institutions that underpin land tenure systems, whether customary or western, are manmade social definitions. As emphasised in the introduction, land tenure systems exist to serve the needs of the people (Crocombe, 1968). The system adopted must accommodate the particular way of life of the people, their laws, and the physical environment. The institution has to be adaptable, evolving as it passes from generation to generation with efficient modification. Land tenure systems can only exist if a society is willing to enforce the institutions that they are grounded on (Marchak, 1998). Ongoing conflict that cites land as a causal factor implies that society is no longer willing to enforce the institutions.

Complexity

Land tenure arrangements are complex adaptive systems. They are complex in that they are diverse across the region, yet are made up of multiple interconnected elements (Waldrop, 1992). They are adaptive, in line with Crocombe's (1968) view that they have the capacity to change to accommodate changed expectations and learn from experience. The essence of this complexity was perfectly encapsulated by Siwatibau (2002, p.2): "They say that land, like financial and human capital, is a factor of production, which helps drive economic and social development, generates national income, wealth, jobs and government revenue, combats poverty, improves the standard of living of all and ultimately entrenches social and political stability in any country. Land tenure, like culture and tradition, stands to evolve organically over time within a society. As in all things, changes and solutions have to be made and formulated. Solutions must be formulated from within and must reflect national, family and individual needs and aspirations and the changing global, regional, national economic, social and political dynamics that determine our destiny".

This explanation of customary land as part of a complex system does not benefit from a purely reductionist inquiry, as at each stage of evolution entirely new laws, concepts and generalisations are necessary. Such a challenge is not new, or isolated to the Pacific. Research often isolates the different layers of a system and then analyses the impact of one institution in respect of, for example, a particular land resource in order to enhance the condition of that specific resource. This approach runs the risk of taking both the issue (resource) and the institution out of context. This is why we need a systems approach to examining Land Management and Conflict Minimisation in PICs.

Institutions need to be understood as a part of the institutional layer they are embodied within, as well as a part of. This includes the economic, ecological and social layers it might impact on or be impacted by (Smaigl and Larson, 2007). To achieve sustainable economic development, Pacific Island Countries have to balance the layer(s) of economic efficiency (defined in monetary value) with the manifold and

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

unknown (and usually unknowable in monetary terms) contributions of natural system layers (ecosystems) and complex layers of social structure (custom – social structure and process - and tradition). These multiple institutional layers evolve and adapt (often at a different pace) over time to contend with new scarcities, new tastes and preferences, new ethical premises, new technical opportunities, as well as aspirations of globalisation and societal expectation

The need for a robust theory

What Pacific Islands Countries need is not so much a mechanism for economic development, but rather a robust theory of to explain institutions and underpin institutional change. Such a theory could build on the concept of what Bromley describes as prospective volition. Prospective volition is the human will to action,

TABLE 4: GENERIC INSTITUTIONAL CHANGE PROCESS (ADAPTED FROM SMAJGL AND LARSON, 2007, P.7 AND; BROMLEY, 2004)

Institutional process	How individuals evolve changes
1. Perception of change	<i>Impressions</i> - individuals perceive a change in conditions they operate in – a change in environmental, social, economic or institutional conditions.
2. Identification of causality	<i>Meanings</i> - depending on their behavioural tendencies and attitudes, some individuals compare the perceived change with their mental models of why it might have happened, what its impacts could be, and come up with their own explanations of these causal relationships.
3. Communication of the opinion on change	<i>Expressions</i> - depending on their behavioural tendencies and attitudes, some individuals communicate their opinion of causal relationships within their social network; this may cause diffusion processes, depending on the individual's position / power relations within the network, as well as perceived relevance of the change.
4. Alignment of opinions	<i>Abduction</i> - individuals align themselves, based on their opinion of causal relationships and motivation factors.
5. Decrease of fitness of the existing institution.	<i>Reality</i> - acceptance that existing institution is failing to meet individual and societal aspirations. Consensus (based on fact, expectation, or myth) that changes are needed.
6. Formation of new institutions.	<i>Imaginings</i> - can be societal (informally) or through government policy and supporting legislation (formal), rather than at an individual level. An individual is involved through their engagement with particular society or democratic process.
7. Replacement or modification of existing institutions.	<i>Expectations</i> - as with 6, can be societal (informally) or through government policy and supporting legislation (formal), rather than at an individual level. Again, an individual is involved through their engagement with particular society or democratic process.

looking to the future, and deciding how the future ought to unfold for those who will inhabit that future, and for their descendents. The point here is that values and beliefs – some might even choose to call these the ruling ‘ideology’ – inform and shape the norms, rules, and entitlements (property relations) in an economy

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

(Bromley and Yao, 2006). The process of institutional change is summarised in Table 4.

Institutional incoherence refers to a situation in which the legal foundations of economic transactions are degraded and dysfunctional. The central challenge in collective action is for the decision group to reconcile the multitude of expressions and imaginings that individuals in the group hold about their expectations for the future. The decision group can be operating at family, clan, tribe, provincial or national level. If the institutional tier of the decision group is sub-national, the aspirations of that group will have to be reconciled with other layers (to enable change in formal institutions).

‘Studying institutions sheds lights on why some countries are rich and others poor, why some enjoy a welfare-enhancing political order and others do not. Socially beneficial institutions promote welfare-enhancing cooperation and action. They provide the foundations of markets by efficiently assigning, protecting, and altering property rights’ (Greif, 2006, p.4).

Moving forward with shared imaginings

Within the institutional context in the Pacific, the challenge is to explore and reach consensus on where people / citizens want to be located between the extremes of traditional customary ways (which promote and respect informal institutions) and Western materialism (which relies on formal institutions) ³⁵ (see S1. in Boydell *et al.*, 2002). The task is to focus on the various reasons for disparate expressions that cause disparate imaginings amongst the respective decision groups.

In Pacific Island Countries where formal and informal institutions often operate in parallel, this places the onus for institutional change on individuals – the people / citizens. External absolutism has not proven successful. Similarly, those leaders (of the various tiers of decision groups) who arrive at the question with their mind already made up tend to invoke *absolutes* where *reasons* are in order. Pragmatism enables individuals to do the hard analytical work of figuring out what seems the better course of action, at this moment in time, to take. ‘Pragmatists insist that those who advance absolutist claims share with us the reasons for their convictions’ (Bromley, 2004, p.83).

There is a significant hurdle to overcome in a pragmatic approach to determining where people / citizens want to be located on the custom-materialism continuum. Devolving responsibility for the decision to the level of the individual will automatically challenge the chiefly power and relationship issues inherent in customary and traditional institutions. ‘Chiefly landowners often resist land reform because it reduces their social and political power and so their ability to control and

³⁵ This was the first strategy in the Declaration and Resolutions of the 2002 South Pacific Land Tenure Conflict Symposium.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

dominate both land and non-land transactions and relationships' (Boydell and Holzknicht, 2003, p.204).

However, broad participation and shared imaginings will achieve a level of consensus that will minimise the risk of future conflict over the ensuing adapted / new institutional arrangements. To progress the notion of shared imaginings, joint action must result in a single choice (coordinated and coincident action). This explains why collective action – public policy – is so contentious in the region. Moreover, 'consensus' – the best thing to do under the circumstances - must be met with political acceptance by those charged with formulating a course forward.

Moving towards consensus – finding the will

Following a period of political instability for several PICs in 2000, there was evolving support for land management and conflict minimisation to be addressed at both the regional and national level. Building on the initiative of the South Pacific Land Tenure Conflict Symposium held in Suva, Fiji, 10-12 April 2002 (for all papers, see FAO/USP/RICS Foundation, 2002), there have been a range of ensuing workshops / land summits around the region. Each has investigated institutions and institutional change surrounding land, with differing levels of public consultation and engagement both before and after the summit. They included the:

- > Fiji National Land Workshop, Suva, 20 July 2002 (see CCF, 2003);
- > Papua New Guinea National Land Summit, Lae, 23-25 August 2005 (see Webster *et al.*, 2006; Webster *et al.*, 2007);
- > Melanesian Land Workshop, Honiara, 5-8 September 2005; and
- > Vanuatu National Land Summit, Port Vila, 25-29 September 2006 (see Government of Vanuatu, 2007; Lunnay *et al.*, 2007).

Each of these worthy investigations into the institutional arrangements surrounding land respected the customary nature of land ownership and control, acknowledging that it does not prevent optimum use or development (in its many forms). They accept that indigenous people of the Pacific Islands see their relationship as coming from the land rather than owning it as a commodity. There are many common issues, tempered by local institutional arrangements (such as patrilineal / matrilineal societies, communal / individual ownership). Differences remain evident between customary institutions that emphasise custom and traditional values, while the Governments and private sector stakeholders want land to be freed up for economic development.

Intergovernmental regional analysis (the Pacific Plan, see PIFS, 2005), along with external AusAID and Asian Development Bank reports (AusAID, 2006a; ADB, 2004) were delivered during the same period. The view of some of the indigenous Pacific contributors to this process concluded that when it comes to institutional

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

change, political leaders often take the ‘do no harm’ policy line. They identified that any legislative or policy changes will have impacts and there will be losers even when the greater good is being pursued (RPR Consulting, 2005, p.3).

The Symposium, Workshops and Summits each produced a significant number of worthy and well-intentioned resolutions. Leasehold institutional arrangements are identified as the common solution to retaining customary ‘ownership’ whilst enabling access to land for economic development, alongside trust structures to provide legal identity (formal institutional arrangements) to landowning groups. Guidance on how these may be implemented from an institutional perspective, and pitfalls to avoid, are explored in more detail in the following sections.

The process of institutional change has highlighted that whilst some financial and technical assistance is required in each country, the real challenge lies with administrative reform, public engagement (towards consensus) and political will.

LESSONS LEARNT

As the last section highlighted, there is societal expectation amongst the multiple stakeholders to make customary land work more equitably for the indigenous community in PICs. The national and regional land workshops / summits / symposia over the last five years demonstrate that significant advances have been achieved on multiple levels. A growing consensus that customary land can be operationalised at the nexus of traditional values and economic aspiration demonstrates a societal will that is yet to be matched by institutional advancement at a political level. This section provides a summary of key lessons in land tenure and land administration and formal and informal land management of economic growth and conflict minimisation in the Pacific Region:

Education

There is a need for education to overcome:

- > The myth and embeddedness of confused language surrounding customary land;
- > Western perceptions of customary systems;
- > The identification of customary land as the root cause of conflict;
- > Stakeholder power plays;
- > Insecurity that land recording and registration will weaken rather than strengthen the property rights of customary landowners;
- > Misunderstanding over the property rights, obligations and restrictions of various parties;
- > Inequity of decision making and benefit sharing; and

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

- > Confusion about the rules influencing formal and informal institutions.

Institutional arrangements

While respecting the reality and enduring importance of informal institutions in PICs, there is a need to engage with and accept the role that formal institutional arrangements play in both realising economic development and minimising conflict, through:

- > The use of trust structures, representative familial / village groups and incorporated land groups in providing a legal interface;
- > The negotiating power of such groups and potential for economic partnership;
- > Institutional change to overcome institutional incoherence;
- > Reaching agreement on the property rights of various stakeholders in the economic use of customary land; and
- > Providing greater intra- and inter-generational equity for landowning groups.

Clarifying Property Rights

Property rights are central to economic development and conflict minimisation. To achieve efficient land markets, stakeholders need to be clear about the potential multiplicity of overlapping interests over any particular parcel of land, through agreement over:

- > Roles;
- > Rights;
- > Responsibilities;
- > Restrictions; and
- > Revenues.

Leasehold arrangements

Leasehold tenure provides the enabling institutional framework to liberate access customary land for economic activity, while the superior reversionary interest remains vested in the custom landowners. A range of issues requires careful attention in drafting and administering leases:

- > Lease length;
- > Rental basis (market rent, regulated, turnover rent, up-front or percentage of UCV);
- > Future events (default, death, expiry); and

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

- > Tenants' improvements.

These lessons are integrated into key guiding principles in the next section.

KEY GUIDING PRINCIPLES AND POSSIBLE STRATEGIES

PRACTICAL INSTITUTIONS FOR MODERN USE OF CUSTOM LAND

Modern property rights are positive institutions. This means that they are conventions adopted within a particular community for the effective distribution of particular relationships with property, according to some accepted understanding of what the community is aiming to achieve with its property. Customary property is grounded on a view of property that is not a positive social institution because it follows from mythical events that are outside of society. These include the creation events that involved supernatural beings and from which the basic connections between people and land followed. In moving into a modern system of land use, it is therefore necessary to create positive institutional structures of property rights that are within the authority of the community to create.

The most fundamental aspect of land property that cannot be amended by the community is stewardship, as the various creation myths are agreed that stewardship must always rest with the traditional guardians in a way that makes the word 'ownership' inadequate. On the other hand, the time-constrained use of land may be delegated from the community to individuals or groups. The purpose of delegating property rights in land to individuals must be consistent with the objectives of the community / clan as a whole and the superior interest (title and property rights) must always revert to the community / clan.

Modern commercial use of land requires exclusive occupancy and a range of certainties pertaining to property rights to land. These can be effective for modern land use purposes even while circumscribed by temporal boundaries. The challenge is to design practical property institutions that provide the individual rights necessary for modern commercial use while maintaining effective respect for the underlying traditional obligations to the customary landowners.

Part of this obligation is participation in the material benefit of the productive uses of the land. Within this scheme of principles, several practical institutional structures are possible. Recognising the layers of institutional complexity in any Pacific Island Country, the following enabling guiding principles can be adapted to facilitate institutional change whilst retaining the dual goals of modern economic use of land under a customary framework. To succeed, and minimise the potential for future conflict, each requires administrative reform, public engagement (towards consensus) and political will:

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

- > Clarity of ownership
- > Leasehold conditions
- > Zero rental leasehold (also known as ‘rent upfront’)
- > Development leases
- > Restitution
- > Use of Trusts
- > Enterprise Frameworks
- > One-stop-shop
- > Education about Property Rights, Obligations and Restrictions

CLARITY OF OWNERSHIP

Critical to the use of customary land for economic purposes is clarity of ownership of the multiple property rights under the control of multiple stakeholders and beneficiaries. When land is used in economic context, clarity is supported by land recording and registration within a formal institutional framework and enforced by the state. Economic aspiration is often the catalyst to formalising property rights and land boundaries.³⁶ History is testament to the challenges and conflicts that can arise if there is not clarity of property right ownership at the outset of an economic arrangement over customary land.

LEASEHOLD CONDITIONS

Broadly stated, all PICs have lease forms that provide the potential to enable satisfactory results to both customary owners and tenants.

Linguistic considerations - in many cases the existing legislation is not being used effectively or is not fully understood by the respective parties. A lease is a legal document, which is a difficult writing style for most members of the public to read. When drafted in English, they have to be read and interpreted by second or third language speakers. When illiteracy and inexperience are added to this mix, it has the potential for volatile outcomes. As identified by several PICs, there is a need for leases to also be available in vernacular languages. To ensure the fact and intent of the lease is identical in more than one language requires a significantly higher level of bilingual or multilingual legal drafting expertise than is currently available.

Rental arrangements – the adoption of Unimproved Capital Value as a basis for rent setting results in a tendency for income to custom landowners to fall in effective terms. Regulated rentals, political rationale and perceptions that tenants could not

³⁶ As in the Aluta Basin example.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

afford to pay market rents have caused the actual level of rent to flounder. A transitional solution is to set a readjustment schedule to return rents to true 'market' levels over a period of years (e.g., 20-50 years), enabling the current extra-legal interests enjoyed by head lessees to be amortised at levels comparable to depreciation over assets such as buildings. Critical to this process is the need to support the development of valuation capacity. The control of rental default needs to be strengthened by both government and trusts. While enabling legislation is in place, it is too weak, insufficiently resourced or simply not actioned / enforced. Penalties sufficient to recover cost need to be imposed in practice.

Certainty - the rights, obligations and responsibilities allocated between the parties need to be explicitly specified. Tenants should be aware of exactly which rights are being transferred and what limits are placed on those rights. Similarly the responsibilities of both parties need to be explicit. Rights, obligations, and restrictions, must be capable of being supported through the legal system. This means that all leases must be made over land that is visible to the state. This usually means a land registration system or cadastre. The lease must be in a form that is intelligible to a law court; hence, it should be in the form of a written legal contract.

Term - the term of the lease must be explicit and reversion to the (customary) owners must be a real possibility. Perpetual leasehold violates one of the characteristics of customary ownership. When perpetual leasehold is the practical reality, especially when combined with nominal (e.g., peppercorn or shell) rents and the loss of effective land use control by the owners, the land is for practical purposes largely lost to the customary landowners, even if notionally they remain the legal owners of the superior interest. Nascent in the Pacific, there is a growing political pressure to give tenants on long term leaseholds the option to rollover their leases, effectively creating perpetual leases. The PNG Taskforce on Land Development (NRI, 2007) even advocated this option. In contrast, several PIC governments have not considered this issue in any depth. It is hugely political, and needs to be prioritised on the policy agenda of PIC governments, as the automatic rollover of leases does not protect or optimise the economic interests of the customary landowners.

Market rental - tenants should not have a capital interest in the land, as land. The tenant's economic interest should not extend past the value of improvements in the land. In limited examples of existing formulations of the lease arrangement, improvements constructed by a tenant become the property of the landowners. In particular, the practice of 'selling' leasehold interests through an auction or otherwise that causes a tenant to have a capital interest in the land should be discouraged. In practice, these capital interests (sometimes known as premiums or key money) tend to appreciate in value faster than the rent to the owners, thereby biasing effective economic ownership towards the tenant. It is no wonder that as leases come close to expiry tenants are concerned at the erosion of this capital interest and exert political pressure to defend it.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

Revaluation interval - closely related to rental levels is the question of rental revaluation. For leases on state and customary land in the Pacific nominal revaluation intervals of five to seven years are common, but due to political pressures and inadequate valuation capacity the actual intervals are far longer. The longer the revaluation period the greater the likelihood of political objections from tenants. Where these are successful, the outcome becomes a slow trend towards unrealistic rents and effective financial disenfranchisement of land owners. If the problem is a lack of valuation capacity and the outcome is a loss of rental revenue to owners, then the obvious solution is the explicit dedication of part of the rental income flow to funding valuation capacity to hold the problem at bay by shortening the revaluation period. It is possible to index rentals to general market movements between explicit revaluations (e.g., the consumer price index – CPI), thereby avoiding the sudden jumps in rents that an infrequent revaluation could produce. That way rents can move with the general market for several years and then be adjusted to market as a correction only after a period of some years.

Improvements - the ownership of improvements, especially at the termination of the lease is a major international property problem³⁷. Fixed improvements are assumed to form part of the property in most legal systems, and hence become the property of the landowner. This can penalise the tenant who is often compelled to make them in order to realise optimum use of the land but then lose them at lease expiry. It is usually assumed that a tenant will take a lease where the term is matched to the economic life of the improvements and factor in their construction and decommissioning. While this may happen in some cases, it seldom suits the efficient economic use of land because capital expenditure in improvements tends to be done on the basis of a recurrent life cycle to maintain efficient use.

In many cases a tenant will be prompted to let improvements run down towards the end of a lease, lowering productivity, making rental obligations burdensome and constricting the cash flows that may be necessary for decommissioning. Landowners face the prospect of a range of problems including rental default and expensive capital expenditure to either clear old improvements or renovate them to reasonable productive capacity.

The alternative approach is to include some form of compensation to tenants for the value of improvements at lease expiry, thereby acknowledging their property rights in them. This accords with the tenant's natural rights to the things they have made. It inclines tenants to maintain improvements consistently up to lease expiry and hence returns a more productive outcome to both parties and the community. The difficulty is that landowners may not have the immediate capacity to compensate outgoing tenants (this can be addressed by establishing an accumulative sinking fund, assuming the level of rent received is realistic / market based to enable this).

³⁷ This is exposed in detail in LMCM Subproject 3.1

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

Regardless of which approach is taken, the treatment of improvements on lease expiry should be considered within the design of the lease.

In general, there is no theoretical reason why leasehold title to land cannot provide the context for optimum economic utilisation and there are many examples of its effective use throughout the world. However, the distinguishing characteristic of successful instances is clear and legally binding formal lease contracts.

ZERO RENTAL LEASEHOLD (ALSO KNOWN AS 'RENT UPFRONT')

For some applications, especially for shorter lease periods, the structuring of leases so that the rent is received at commencement (up-front) as a one off payment³⁸ could provide a form of property right that may be more acceptable³⁹. Computation of the initial payment can be made using standard financial and property methods of discounting. This would relieve the tenant from the burden of making periodic payments and the uncertainty of escalating rental changes. Importantly, where rental levels are modest, it will also minimise the cost of collecting and administering rentals, and related issues surrounding arrears for late or non-payment. It can provide the customary landowners with capital that can be invested to generate a remunerative income flow and an accumulative sinking fund to compensate for tenants improvements. Assuming a portfolio of leases over customary land are appropriately managed by the trust, certain rent up-front components could provide an immediate and sizeable payment that could be more useful for development projects that the customary landowners might wish to pursue but which would be difficult to finance otherwise.

Some design principles that should be considered include:

- > The up front rental payment would represent the present value of the entire rental stream for the duration of the lease. For periods of more than about twenty years the one-off payment would begin to look very similar to the full sale price of the land, but it would have the advantage that the land would still revert to the customary landowners (their reversionary interest). This ensures that the customary landowners retain the residual economic value in the land as well as the superior property rights.
- > The term for zero rental leases should not be greater than one generation, or about 25 years. This is because intergenerational changes may cause subsequent generations of customary owners to believe that their parents / forebears had acted unwisely and that they do not adequately participate in the benefits from the partial alienation (lease). It also controls for the possibility that tenants might otherwise develop a belief that they should not return the land to its true owners -

³⁸ Such a payment is sometimes referred to as a 'premium'

³⁹ It is, for example, a theme that the NLTB have identified but not developed

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

sufficient to create future political tensions - so minimising the potential for future land related conflict.

- > This type of lease would provide a greater independence on the part of tenants from landowners, which may be considered attractive. Importantly, agreement (landlords consent) should be reached over any proposed improvements on the land. There are various options, such as discounting the future value of improvements from the annual equivalent rental – with the agreement that tenants improvements will vest in the landlord on lease expiry, and that they should be returned in good repair (a variation on the development lease model described below). Licensing provisions for tenants improvements exist in current legislation, but have been poorly administered.
- > It would provide an alternative to freehold and can be considered as a type of ‘terminating freehold’. Lending institutions should be guided to use these, and other, leasehold arrangements as collateral for loans with repayment periods as long as the unexpired term.

A rent up-front model that proposes a once only payment for a head lease by a trust or incorporation until a predetermined time for a rent review is both administratively attractive, and has an enhanced level of certainty for the customary landowning group. There is a reservation that the traditional landowning group may not invest the up-front rental payment wisely. This is a risk for any lessor who receives rent in this manner, and is not only a concern for indigenous trustees. The inherent risk can be minimised through education, seeking information and taking advice on how a given Trust can amortise the capital payment to ensure intergenerational equity and security of income.

Overall, zero rental leasehold has the potential to find a place in the Pacific in the same way that zero coupon debentures have been accepted in finance markets. In both cases the periodic payments are eliminated, giving the terminating beneficiary more autonomy. They may even be considered as a model for amortising existing freehold land where this tenure classification is now considered inappropriate.

DEVELOPMENT LEASES

These have been employed extensively in the UK where tenants contract to provide improvements and in return enjoy a low rent. The advantage of these for tenants is that they provide access to land at a lower price. For landowners they eventually provide improvements and so long as the land is excess to current or anticipated familial / tribal needs, the cost to the landowners is nil.

Consideration needs to be given to the following design issues when considering this type of lease:

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

- > The nature and condition of the improvements needs to be clearly specified in the lease contract. Consideration needs to be given to life cycle costs to minimise likelihood of default at, or near, the lease expiry.
- > The term should not be excessive and should be sensitive to the life cycle costs of the improvements. The ninety-nine year development leases common in the UK, for example, did not take sufficient account of life cycle costs and tenant turnover. For example, there would be no point in creating a lease over ninety-nine years if the improvements had an economic life of forty years. Likewise, the term should be long enough for the tenant to derive a reasonable benefit from the capital expenditure associated with the improvements.
- > The rental becomes difficult to compute since it notionally contains a discount sufficient to produce an implicit sinking fund with an end value equal to the anticipated value of the improvements at lease expiry. Although the financial mathematics is straightforward, there are many risks involved in estimating the various components of time, value and the markets that make precise determination hazardous. The shorter the term, the less problematic this computation becomes.
- > An alternative strategy could be developed that applies a discounted rental in the early part of the lease to compensate for the construction of improvements, followed by a higher rental in the latter part of the lease (more akin to a market rent) that is essentially for the land and improvements.
- > The balance between the worth of land and the worth of improvements needs to be carefully considered as the value of improvements for some enterprises, such as tourism, may significantly exceed the market value of the land.

RESTITUTION

There are ongoing and outstanding claims in many PICs over the return of land acquired by the state, or alienated to private individuals, under colonial administration. Society will not move past misdeeds until restitution of the superior has been resolved, and action is required to ensure security of subsequent land dealings. There is a role for post-independence land courts and land tribunals to formalise the property rights of the respective stakeholders.

The acceptance of traditional decision making structures as part of the normative process in negotiating has been recognised in New Zealand, where NZ\$1 billion was allocated in the 1994 fiscal envelope proposal for the negotiation and settlement of indigenous claims. The cost of negotiating and settling such claims in New Zealand will probably 'far exceed' the 1994 estimate (Scholtz, 2006, p.198), however it is recognised that these costs merely reflect the fact that, '...indigenous land grievances are not insignificant, [and are appropriate] in terms of the financial human resources allocated to the effort by all parties'.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

A variation of the zero rent lease (described above) may be considered as a model for amortising existing freehold land where this tenure classification is now considered inappropriate.

USE OF TRUSTS

Land trusts already operate, or have capacity to exist, in a range of formats in PICs. These include, amongst others, the long-established and sometimes maligned Native Land Trust Board (NLTB) in Fiji, Incorporated Land Groups (ILGs) in PNG, Māori trusts in NZ, village trusts in Vanuatu, evolving familial and clan trusts in the Solomon Islands, and development trusts administered by the Minister for Lands in Samoa.

Trusts provide an essential legal ‘personality’ at the interface of owners and tenants in providing access to land for economic development in its many forms. Trusts structures can play an important intermediary role. This is important in enabling access to land where there are many beneficiaries with multiple competing and complementary property rights.

The ability of NLTB to operate for the collective advantage of the indigenous population in Fiji is grounded in the formalised genealogical recording of clan structures that dates back to the early years of colonial administration. While land was contested at that stage, and continues to be today, the control of available customary land has been vested in the NLTB since it was established in 1946. The NLTB has the advantage of knowing, according to the maintained records, who the beneficiaries are. The detractors levy criticism at the administrative costs (which are passed on to the Trustees by deducting costs before distribution of rental and licence income) and the traditional Fijian hierarchy that makes for an unequal distribution of income.

In suggesting the most appropriate and flexible strategy, PNG’s ILG approach offers a range of workable and adaptable components that can be adapted, particularly for Melanesian countries. The ILG model as a complex adaptive system justifies further explanation at this point, drawing particularly on portability of adapting the PNG experience in other PICs. There is much material available on ILGs in PNG, though much of it is in ‘grey literature’ and thus not easily accessible. There is a great deal of angst among professional social scientists about what may be seen as at least partial essentialization⁴⁰ of customary systems and customary practice (see Weiner and Glaskin, 2007 for a sample of such material).

Given the general and increasing dissatisfaction with Fiji’s NLTB, with certain Fijian customary groups increasingly desirous of withdrawing their land domains from being managed by the NLTB, there is constructive potential for the creation of land trusts for each landholding group in Fiji or by the introduction of an adapted version

⁴⁰ In this context referring to reconciling generic notions of tradition with modernist hopes.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

of PNG's Incorporated Land Groups into Fiji. Similarly, they offer potential in Polynesia to resolve the challenges experienced in Samoa where a potential conflict of interests is created when the Minister of Lands (MNRE) acts as trustee for the beneficiaries and intermediary for all parties.

Operational ILG Issues - this section provides guidance on how ILGs could (and do) operate, their limitations and their potential for portability to other PICs:

- > The proper functioning of an ILG system, linked with specific areas of land and other natural resources (land group domains, etc.) is heavily dependent on transparency and 'trust', land group members all being involved in major decision-making in relation to the use of parts of their domain (including the use of any income stream from rents, premiums or up-front payments).
- > Land group members, by definition, are to varying degrees all related to each other and have ongoing mutual informal institutional obligations with each other (such as labour reciprocity). This is an excellent basis for trust. Other temporary rights holders also exist from the same land group (sometimes spouses fall into this category) or from neighbouring land groups or villages.
- > As with all land issues, there is a need for broad understanding by all the parties of what property rights are (as expanded on elsewhere in this report, it is not always able to assume that all land group members or government officers have an adequate understanding of the rights, obligations and restrictions of the respective parties).
- > An ILG structure consists of a body of members (those holding permanent rights, i.e., inherited rights along the lines of the group ideology) and, elected from that, a management committee. The latter's main task is to keep the administrative management of the ILG's activities ticking over. Major decisions cannot be authorised by such a committee in isolation. The committee can recommend a course of action to a meeting of its members, but only the members of that land group as a body can decide on major issues. In terms of the lease or other transfer of land, for example, a meeting of all members has to agree to this at three separate meetings (under current ILG constitutional requirements).
- > The proper functioning of an ILG system is based on two main measures, namely
 - *access to communications and information* to allow land group members to draw from and learn about what natural resource management options they have, how they can benefit from them, how they need to manage such resources for the long term. Based on access to such information, a land group can make appropriate, rational, and short- and long-term decisions about their domain to ensure a sustainable long-term future; and

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

- *capacity-building measures* to assist ILGs in improving and properly managing both the land group's domain as well as its financial aspects.

Both these measures are a significant challenge in any PIC, given that very little in the way of state funding is committed to strengthening access across a country. Likewise, there are limitations to communications and necessary infrastructure development, and little attention is focused on finding workable ways for encouraging the public to have access to broad-based information. In the colonial era of PICs, much of this work was carried out through extension services, connecting people/farmers to government, to private enterprise and to markets. This link is gone at a time when global markets are beginning to come into their own; to benefit from them land groups need both access to information as well as good communications. Increasing productivity from customary land is not sufficient on its own; the products coming from such increased productivity also need markets.

- > Once land group boundaries have been identified, demarcated, mutually agreed upon with all neighbouring groups, and the boundary coordinates transferred onto a digitised map, the basis for much of the ongoing low-level conflict over land matters will be minimised. In the NLDT recommendations, once a land group's boundaries have been surveyed (and transferred to a digitised base map), and final checks have been carried out that the correct group has been identified, a land boundary map and ownership document can be issued. The GIS/GPS technology already exists to carry out the required processes in the field and onto base maps⁴¹.
- > In the PNG context, the focus of the next steps for an ILG have been taken as detailed in the largely sensible recommendations of the NLDT report. The 'fine print' for these recommendations is yet to be developed or operationalised. Meanwhile, the challenge through proper consultations with local communities, local level governments and provincial administrations is to move these recommendations into a proper and achievable plan of action that will be taken through to careful and sensitive implementation.
- > The ILG approach contains many of the advantages of the NLTB without the shortcomings. State recognition and administrative support gives ILGs consistency and robustness. This allows intergenerational acceptance by capturing the dimensions of customary relationships to the land whilst enabling acceptance from the financial sector. While trusts may have a slightly different structure, in other PICs they would essentially have to operate in much the same way as ILGs in order to retain an essential level of familial engagement and control.

⁴¹ See also products such as 'Talking Titler' developed by Dr Mike Barry to film/record critical ethnographic data alongside GPS information (available in hand-held GPS format).

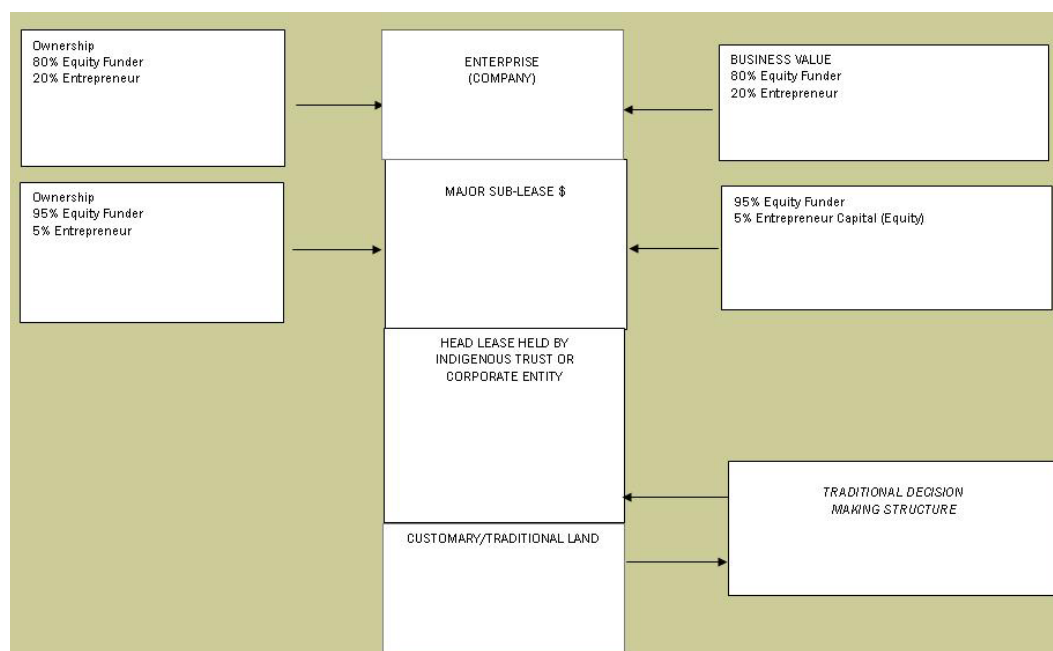
2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

ENTERPRISE FRAMEWORKS

Whether the traditional structures are capable or not of being embodied in a trust arrangement, which is representative of all of the various rights and interests held by the relevant land owning group, is problematic. For example, the return to traditional decision-making structures in New Zealand raises the prospect of increased conflict between the settler society (Paheka) and the Māori.⁴²

This issue is however critical to the creation of key guiding principles for firstly effective land management, and secondly to minimise conflict over access to land. A suggested model for the inclusion of traditional decision-making structures is shown at Figure 4. This model⁴³ reflects the maintenance or re-emergence by Māori of traditional decision-making structures, but at the same time still allows an entrepreneurial endeavour to occur on customary or traditional lands in a way that accommodates equity funding rather than debt funding. The proposed head lease is little more than a ground lease in legal terms, with the major sub lease being the primary property right upon which the enterprise is based.

FIGURE 4: TRADITIONAL DECISION MAKING WITHIN AN ENTERPRISE FRAMEWORK FOR EQUITY FUNDING (LEASEHOLD)



The relationship between the head lessee and the customary/traditional landowners is formalised in the terms and conditions of the head lease, which will have within its recitals the rent structure and the obligations of both lessee and lessors. Strictly speaking, the traditional decision making structure whether Māori, Fijian, Samoan, or Papua New Guinean will be the informal institutional process whereby the terms and

⁴² Refer to New Zealand Case Study.

⁴³ Developed by the authors.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

conditions between the lessee and lessors are agreed and drafted. Once drafted and embodied in the head lease, the traditional decision making structure (while remaining), will be supplanted for the term of the lease by the formal institutional terms and conditions of the lease, and those arbitral processes set out within the lease in the event of dispute.

This is not to say that those arbitral processes in particular should not mirror the traditional decision making structure in the event of a dispute between the head lessee and the customary/traditional landowners. It is just that the arbitral processes set out in the lease document are the written expression of the preferred dispute resolution processes that the lessee and lessors have agreed upon, which are also informed by the traditional decision making structure of the customary/traditional landowning group.

The introduction of a traditional decision making structure into the above model for leasehold equity funding is not difficult, given that significant decision making is a process that occurs prior to the execution of the head lease. Arguably, the traditional decision making structure may involve more time for extensive consultations between members of the land owning group, whatever their disproportionate rights and interests may be. However, once the decision-making has occurred, this results in the drafting of conforming terms and conditions by legal representatives of the lessee and lessors.

Once these terms and conditions as drafted are agreed on by the landowning group (of course the intending head lessee), the traditional decision-making structure is no longer active until a dispute arises between the lessee and the lessors. Indeed, such a structure is in reality not innovative at all, and merely reflects existing legal drafting practice for commercial leases.

In various PICs, the traditional decision making structure will obviously vary from land owning group to land owning group. This is not considered an institutional impediment and is not regarded to be a hurdle to the introduction of traditional decision-making structures into the leasehold equity funding model.

Given the special relationship between people and place in high-context indigenous societies, the resolution of disputes and compensation settlements pertaining to claims by traditional and customary landowners has never been swift. Such approaches to dispute resolution can also be accommodated within the proposed leasehold equity funding model referred to above.

Current PIC government agencies could conceivably view the introduction of traditional decision making as a potentially inefficient endeavour, given the prospect of extended time defrayed in negotiations. However, such a view is not in accord with the broad emergence of negotiation policies in Australia, Canada, New Zealand, and US, wherein it has been recognised that there is a need for, ‘...an internal reconfiguration of power where collective rights of indigenous peoples are

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

recognized and given force within philosophical and legal regimes that give normative priority to individual rights. At the heart of indigenous grievances, there is a call for a reallocation of power on the basis of collective rights. These grievances must be put in real world terms, in the form of political demands that can at once mobilize indigenous energies and be processed and understood within the real world political context. 'This requires policy demands that are actionable' (Scholtz, 2006, p.1).

The incorporation of traditional decision-making structures into the preferred leasehold equity funding model will almost certainly require some amending legislation in some PICs. Importantly, the maintenance and/or re-emergence of these traditional decision making structures is already in place in some PICs, such as New Zealand. In the New Zealand example, this structure currently informs the trusts or institutions as they initially negotiate with Māori landowning groups, who in any event are shareholders or members of the trusts or institutions.

THE ONE-STOP SHOP

The One-Stop Shop solution proposes the establishment of a suitably funded (via government or donor support) Land Resource Development 'quango'⁴⁴ of a small team of local and international planning, development appraisal, legal, anthropological, tourism, finance, management, marketing and agency specialists with the remit to:

- > Identify and investigate potential development sites;
- > Engage and gain support of land owning groups, families, clans in the potential development partnership;
- > Fast-track and resolve land ownership and title disputes (assuming customary landowners are supportive, in principle, of the potential development initiative);
- > Record and register land ownership;
- > Overcome any impediments to the provision of clear unfettered leasehold title and provision of finance;
- > Model development feasibility analysis to ensure that the highest and best use of the land is realised;
- > Market the available land internationally, through property and investment media, direct mailings, and the Internet;
- > Facilitate planning, building, environmental and other statutory obligations pertaining to the site and the proposed development (both pre- and post-tender / negotiation);

⁴⁴ A quasi non-government organization

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

- > Seek tenders or negotiate on behalf of custom owners, or their trustees, with prospective developers to ensure that a realistic and equitable residual land value is realised by way of premiums, rentals with appropriate review pattern and equity participation arrangements;
- > Draft leases to ensure intergenerational equity, precluding the risk of inadvertently creating perpetual leasehold interests (through clear covenants pertaining to tenants improvements) and ensure property rights and their respective rights, obligations and restrictions are clearly explained in both plain English and the relevant vernacular language;
- > Encourage, facilitate, and mentor complementary small-scale tourism ventures;
- > Act as Trustee on behalf of the customary landowners, as appropriate. This role is grounded on the preference expressed by financiers for a third party to act as intermediary, and the perceived conflict of interest that arises when the Minister of Lands or Natural Resources serves in this capacity. Obviously, the Trustee will have to charge an appropriate management that fully recompenses the services provided to the custom owners; and
- > Ensure the successful developer fulfils all their obligations under the lease, protecting the landowners' interests if there are any delays in the subsequent development process.

Obviously, in the first instance, such an initiative will favour landowners with high amenity customary land. The nature of development will ensure that secondary land will also realise economic benefit that follows on from the well-executed initial developments.

Where the economic potential of customary land is yet to be realised, there is a role for the government to assist with the 'One-Stop Shop' initiative. Uncertainty over secure access to land through clearly articulated leases over customary land guaranteed by the State creates investor uncertainty and limits the ability to secure finance. The situation is compounded where the potential to realise economic gain from land results in infighting both within and between landowning families holding land with resource potential (be it tourism, timber, copra, sugar cane or palm oil). Such infighting can take years to resolve through formal court structures.

The One-Stop Shop solution takes a very proactive focus, facilitating development in its many forms⁴⁵. Obviously, the activities will require funding, and it is realistic to recoup the cost of the professional services of the specialist One-Stop Shop team from the proceeds of the sale of the development lease, thus ensuring ongoing funding for subsequent initiatives. While such a project at national level lends itself to be a candidate for donor support in the first instance, there is also scope to operate at the provincial level.

⁴⁵ In this context, it has a very different remit to the Pacific Land Reform Unit advocated under a current AusAID initiative

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

The role of Trustee and land management are ongoing responsibilities. It is envisaged that this type of national development catalyst would have a limited externally funded duration of ten years, with appropriate review and reporting mechanisms to consider the need for continuance. During this time, the quango will provide capacity and skill exchange with both government officers and private property development practitioners, providing support for complex land and development activities.

The One-Stop Shop initiative will ensure the principles of sustainable development are adhered, so that landowners are fully aware of the social, environmental and economic trade-offs over the new financial management provisions of their customary land. The professional management of formal and informal institutional arrangements surrounding the economic development of customary land will enable a viable development partnership. It will achieve this with reduced risk of intergenerational dispute, whilst realising the most equitable return over customary land.

EDUCATION ABOUT PROPERTY RIGHTS, OBLIGATIONS AND RESTRICTIONS

Landowners are expected to make rational decisions regarding land development on their customary land, but the means to make more informed and rational decisions are not made available. Education is critical to the success of realising practical institutions for the modern use of customary land. Property rights should never be discussed without the critical links to obligations and responsibilities (RoR's, or the IIED 4R's model) being emphasised and linked into the discourse.

The need for this is high and becoming increasingly important as more and more children go to school during most days and do not spend their time walking around the land group's domain with their fathers / mothers, uncles / aunts, grandfathers / grandmothers in the ways that previous generations did. As a result, the opportunities to actually be located in the domain when hearing a myth, creation story, or migration stories have decreased significantly. This explains why some land groups want their land group boundaries to be formally demarcated and recognised.

People need to be educated (or, perhaps more appropriately, 'reminded') about property rights, obligations, and restrictions, through all levels of society and by any and every means possible. There is responsibility on government at all levels, schools at all levels, churches, media and NGOs (currently one of the few active sectors in terms of such education campaigns focused on local communities), to firstly accurately understand the RoR's and then actively convey them to the wider community.

Other relevant avenues for conveying accurate understanding include youth groups, theatre/drama groups going on tours through a particular area with plays around these themes to support the pervading oral tradition in the region. In this context, it is also very important to target leaders and leadership, as role models, as a key

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

component in property rights, obligations, restrictions, and responsibilities; similarly through scenarios in writing, in dramas, radio, TV, and any other medium available. It is essential that information is disseminated in an apolitical manner.

An educative processes of the kind mentioned here should not be a 'once only' measure. For important matters in the region, the role of story telling and repetition (using a variety of techniques) is an integral part of getting a message across, so minimising the risk of future conflict catalysed by uninformed 'opinion'.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

APPENDICES

The appendices comprise six detailed country case studies that provide a rich context to customary property rights and formal and informal institutions for economic development and conflict minimisation in Fiji, Samoa, the Solomon Islands, Vanuatu, Papua New Guinea, and New Zealand.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

COUNTRY CASE STUDY: FIJI ISLANDS

Caveat: the current political situation in Fiji impacted on respondents ability to speak openly about land related issues.

Informal and formal understanding of property rights

Under the *Fiji Islands Constitution Amendment Act 1997 Ch2, 6(b)* the ownership of Fijian land according to Fijian custom, the ownership of freehold land, and the rights of landlords and tenants under leases of agricultural land are preserved. This is not particularly helpful given that there is ambiguity in the meaning and understanding of the words 'land rights' and 'land ownership', which have not been defined in legislation (Fonmanu, 1999, p.21). The situation is compounded by multiple and conflicting property rights claims over certain land parcels. Moreover, Fiji has been in constitutional confusion since the military coup of December 2006, with uncertainty over the possible abrogation of the Constitution to protect troops who supported the removal of the Qarase led government by Commodore Bainimarama. The land allocation by tenure type is summarised in Table 5.

TABLE 5: LAND ALLOCATION IN FIJI

Land Classification	Proportion by Area
Native Land	87.9%
Freehold Land	7.94%
Crown (i.e. State) Land	3.91%
Rotuma Lands	0.25%

Native land

Native land cannot be sold outright and only licenses and leases are granted to individuals requiring land. Rental on native lease is regulated at 6% of the unimproved capital value of the land. Native land is classed as Native Reserve and Non- Reserve. The basic differences between these two types of land are:

- > that Native reserve can only be used by Fijians;
- > that the majority of land owning unit must approve to the granting of a license / lease on Native Reserve; and
- > that Native Reserves must not be subject to the Agricultural Landlord and Tenants Act.

Freehold land

Land held fee simple absolute in possession by an individual or corporations, subject to statutory law. It constitutes almost 8% of the total land area of Fiji. It is (mostly)

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

referred to as Native Grant, Crown Grant, and Certificate of Title on the Standard Sheets.

Crown (or State) land

Land that is administered by Government Lands Department and is governed by *Crowns Lands Act*, Chap. 113 and 132, and *Crowns Lands (leases and licenses) Regulation* 1980. This is described under Chap. 113, Laws of Fiji as:

“.. all lands in Fiji including foreshore and the soils under the water of Fiji and all lands which have been / may be thereafter acquired on behalf of the Government for any public purpose”.

There are different types of State land:

- > State Freehold – is land bought over the years either from holders of Crown Grants issued in consequences of the findings at Lands Claim Commission or directly from the Fijians during the period 1905-1908.
- > Crown land without title;
- > Crown *Tiri*;⁴⁶
- > Crown foreshore; and
- > Native land acquired by Crown.

Formal identification, recording and registering of customary resource groups and their membership.

Land tenure patterns were fixed at the time of Cession in 1874. The British Empire exercised its right of land ownership almost instantly. One of the first acts of the Colonial Government was to issue a notice to the effect that “no sale, transfer or assignment of land” would be recognised by the government until a decision had been made on the settlement of existing titles (Gazette; No.2, 12.10.74) (Ward, 1965).

After the signing of *Deed of Cession*, rights of Fijians to the land were guaranteed. Likewise, rights of Europeans and other foreigners who had acquired land in a *bona fide* manner before Cession were also recognised. This provided security of tenure and legitimatised what we today know as the freehold lands in Fiji. In 1874, during the time of Cession, there were many foreign occupiers and claimants to large areas of Fijian land. These claims mostly originated through dealings with Chiefs, traders, and settlers. A commission under V.A. Williams was set up to investigate all claims during a time when about 400,000 acres of land was registered as Freehold land (and the figure has risen to 415,000 acres) (Boydell, 2001).

⁴⁶ Both Crown *Tiri* and Foreshore are described as land permanently under water and rivers and streams, Rivers & Streams Act, Cap 136(2).

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

The current land tenure patterns are based on the views of Sir Arthur Gordon, the first substantive Governor of Fiji. He set up a framework, establishing the Lands Claims Commission, under which the validity of European claims were determined and the protection of native forms of tenure systems were recognised. Among other issues, the *mataqali* was accepted as the main land-owning unit in Fijian society. There were various ordinances and legislation following the Gordon policies. These included the *Native Land Ordinance* 1880 – under which alienation of all native land was prohibited, however under Sections XXII and XXIV provisions were made for *mataqali* land to be alienated to individual members of the clan if they desired to. Thus, after holding a ‘Native Certificate Title’ of the land for five years, the person is entitled to a Crown Grant of his land and after this it will cease to be native land and, with alienability ending, that land would then become freehold. During the 1880s, due to an increase in land transactions, there was a need for all recognised land owned by Fijians to be recorded and registered, together with settlement of issues such as boundary and ownership disputes. Thus under this governing Ordinance, the Native Lands Commission was established.

Native Lands Commission (1905 and 1907) allowed customary law to apply to Native land and ensured that Fijians could deal with native land in a customary manner. Tanner suggests that Im Thurm, who was Governor General from 1904 – 1910, tried to dismantle the system of customary ownership (Tanner, 2003). de Soto would have been proud of Thurm’s reasons, which were grounded on the perception that communalism was holding back modernisation and the lack of title precluded villagers from obtaining credit by using the land as security. In 1916, the Native Lands Commission failed again. The need for greater control over the leasing of native land and the provisions of greater security increased in 1930’s.

In 1940, the *Native Land Trust Ordinance* established a new system for the administration of native land known as the Native Land Trust Board. It was responsible for administering the unreserved native land on behalf of the owners, including the sub-division of land, issues of leases and collection and distribution of rent. The aims of the Native Land Trust Ordinance of 1940 were: (a) to ensure that sufficient land remained in Fijians hands for Fijian use; and (b) to make surplus land available for leasing to non-Fijians.

The framework below outlines the social structural framework of Fijian landholding. This structure was given recognition and regarded as the foundation for land policy in Fiji, especially for native land. It was formulated as recently as the 1939 sitting of the Native Land Commission and has been used since then:

Vannua - headed by *Turaga-i-Taukei*

Yavusa (tribe) – headed by *Turaga-ni-qali*

Mataqali (clan) – headed by *Turaga –ni- mataqali*

i Tokatoka (smaller clan)

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

This précis of the evolution of land tenure raises several pertinent questions. Senior chiefs who transferred a superior interest and lien to Queen Victoria were the signatories to the Deed of Cession. This commonly accepted view suggests that the chiefs had the authority over and respect of their subjects to act on their behalf. However, let us cast our minds back to this period and ask to whom the land belonged at that time? One assumes that the chiefs were the landowners, not the individual Fijians. Yet, this was the period in history when the concept of indigenous landowners came into being.

The 1939 Land Commission framework of ‘aristocracy’ is confusing. If parallels were to be drawn with other aristocracies around the globe, the superior interest would seemingly be vested in the *Vanua*, a word that has an apparent complexity of meanings. Accepting that the *Vanua* is headed by the *Turaga-i-Taukei*, this would lead to the assertion that in 1939 the *Turaga-i-Taukei* was the superior landowner, leaving it unclear what ownership ‘rights’ the individual member of the *Mataqali* or *i-Tokatoka* actually held, both then and now. What is clear is that individual members of the *Vanua* certainly do not appear to be landowners, although collectively they could be taken to be part of a group stewardship or co-guardianship.

Recording of land boundaries and land titling

The western individualised Torrens Titles Registration System is adopted for Freehold land, State lands and Native leases, requiring accurate cadastral surveying and mapping system. The customary land tenure system is based on group ownership of land parcels recorded in the Register of Native Lands, surveyed at a lesser accuracy (as there is / was notionally no commercial value), and charted on Native Lands Commission maps. There are no individual titles issued over Native land, with the parcels being registered under the *mataqali* or collective land units. The ongoing genealogy of members of the *mataqali* is kept on the centralised register of landowners, the *Vola ni Kawa Bula* (VKB). After a series of Native Land Ordinances after Cession, and related Lands Commissions, the majority of the recording was completed over 50 years, although some are yet to be surveyed.

Fonmanu (1999, p.43) estimates that some 354,000 acres of Native land are still to be surveyed and registered into the 1235 *mataqali* parcels that have claim to them. Some of the unsurveyed lands have high economic potentials like the Serua and Namosi hills, which are good forest and mining grounds while in the smaller islands there is a restricted land limit and most of the lands are used for subsistence farming. There is currently a longstanding claim by various *mataqali* in Serua over extensive areas of freehold land in Pacific Harbour.

When Fiji became a British Crown colony in 1874, the colonial administration attempted to legitimise claims of land by early European settlers. Land was surveyed and a Crown Grant validated, resulting in 400,000 acres of land being registered as freehold (this figure subsequently increased to 415,000 acres). The circumstances and intent surrounding arrangements made about land pre-Cession, and shortly after,

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

remain contentious. The *Indigenous Claims Tribunal* Bill proposed by the Qarase led government in August 2006 is testament to the ongoing dissatisfaction of a proportion of the Fijian community over the long history of land recording in the country. The intent of the Bill was restitution to address the long-standing grievances of native landowners who claimed that part of their land had been acquired by early settlers through means that were perceived as fraudulent, dubious or unjust (Government of Fiji, 2006). Progress of the *Indigenous Claims Tribunal* Bill, which along with the *Reconciliation, Tolerance and Unity* Bill, and the *Qoliqoli*⁴⁷ Bill, was suspended in late November 2006 to determine their constitutionality and subsequently terminated by the December 2006 coup.

The events of the last twelve months demonstrate that even though Fiji has the longest and most comprehensive system of land recording and land administration in the Pacific, long-standing grievances over historic land dealings endure. The ramifications of potential compensation issues pertaining to the proposed *Indigenous Claims Tribunal* Bill do not appear to have been fully considered. Whilst the extinguishment of Freehold title was not specified, there is an argument that it could resolve the grievances in circumstances that see the superior title restored to the custom guardians, with long-term head-leasehold provisions made for existing freeholders. Such an approach could provide a workable inter-generational solution that would not prejudice existing freeholders financially and would be workable provided rights, obligations and restrictions of the current parties and the reversionary situation are clarified appropriately.

It is clear that monetary compensation to the current generation is not a viable solution, as witnessed by the current \$2 billion compensation proposal pertaining to the impending decision in Ratu Kanakana and 11 others over the Suvavou claim for the restitution of Suva, which was taken when the capital relocated from Levuka in 1882. The decision on this case is due to be handed down by Justice Pathak on 30 October 2007. It is tied in with a *qoliqoli* claim, the concept of which is developed below. Meanwhile, there are many other high profile claims outstanding, which will be influenced by the outcome of the Suvavou claim.

Impact on economic development and conflict minimization

The controversial *Qoliqoli Bill* was introduced in the Fijian Parliament on 09/08/06. It was cited as one of the issues that led to a political impasse between the government and the military in the lead up to the December 2006 coup. The Bill proposed to extend the notion of land related property rights to the foreshore and customary fishing areas. In November the Fiji Law Society publicly opposed the bill on the grounds that it was unconstitutional, infringed the Native Lands Trust Act and it had the potential to create conflict among the *qoliqoli* owners (RNZI, 2006). The stated intention of the Bill was to vest with the NLTB the power and functions

⁴⁷ *Qoliqoli* refers to traditional fishing grounds.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

to control all dealings in land over *qoliqoli* areas, in consultation with *qoliqoli* owners and the Qoliqoli Commission (Lalabalavu, 2006).

Of particular relevance is the impact on Tourism operations, which saw this as reinforcing the issue surrounding ongoing demands from customary owners relating to tourism activity. It was seen as strengthening further claims, such as the highly publicised “Cloudbreak” surf break by the Mataqali of Tavarua. In this context, it also proposed to extend the responsibility of the NLTB under, amongst other, *Clause 20*: “This clause prohibits the undertaking of any non-fisheries commercial operation within *qoliqoli* areas without prior the approval of the NLTB after consultations with the Qoliqoli Commission and the *qoliqoli* owners. The Qoliqoli Commission and the *qoliqoli* owners may insist on conditions for such approval. This clause also clarifies that ownership of any lease or fee simple of any land abutting any *qoliqoli* area does not confer any rights to such owners except as may be authorized under this legislation. *Qoliqoli* owners may waive their usage rights as owners through conditions agreed with the commercial operators.”

Traditional decision-making processes

The notion of customary land being ‘owned’ by *mataqali* has been tested by the courts. The post independence decision in the case of *Timoci Bavadra v Native Land Trust Board* (Unreported) 11/07/1986, where Rooney J affirmed that not only could *mataqali* members not sue in their own personal capacities, but also that a *mataqali* in itself was not an entity which had legal personality in the formal court system. This decision was reinforced by *Naimisio Dikau v Native Land Trust Board* (1986) 32 FLR 179 where members of a *mataqali* brought an action both in their personal capacities as members, and in their representative capacity as representatives of other members of the *mataqali*. They were once again clearly declared as not having *locus standi* to bring a case seeking damages, declarations, and costs. The situation relating to the *locus standi* of *mataqali* has now changed because of the finding in *Native Land Trust Board v Narawa* (2004) FJSC 7 CBV0007.02S. This Supreme Court decision agrees with the finding of the Court of Appeal, and now allowed the *mataqali* to bring a claim against NLTB.

Formal organizational arrangements for decision-making

The Native Trust Board is vested with organizational arrangements for decision making over Native Land.

The Native Land Trust Board (NLTB) was established under the *Native Land Trust Act* (NLTA), 1940. It was created to:

- > Administer and control all customary land for the benefit of the native landowners;
- > Set aside some land within each landowning unit’s total acreage as its reserve and such land shall be for use, maintenance, and support of its members;

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

- > Make unreserved land available for leasing to anyone;
- > Support government development programme through leases or outright purchase under the state Acquisition of Lands Act for public purposes;
- > Ensure, at all time, that each landowning unit has sufficient land to support and maintain it; and
- > Provide sound financial management in all facets of its operation so that the landowners wealth continue to grow and guaranteed.

The Board of the Native Land Trust comprises: H.E. President of the Republic of Fiji as its President; The Minister for Fijian Affairs as its Chairman; 1 or 2 members appointed by H.E. President of the Republic of Fiji; 5 members appointed by the Great Council of Chiefs; and 3 members appointed by the Fijian Affairs Board.

The NLTB administers some 32,000 leases of different kinds. Amongst them are some 13,800 agricultural leases of which some 11,000 are leases granted under the provisions of ALTA and the others are leases on native reserved land that are outside the jurisdiction of ALTA. Other lease types are for: Residential; Industrial; Commercial; Hotel and resort developments; Reforestation (pine and mahogany plantations leases); Educational; Religious; and Civic purposes.

The Native Land Trust Board has been operating for over 60 years, since 1946. The organization has undergone a series of restructures, with a major one in 1978 and the most recent in 1998. These were aimed at making the organization improve its profitability by making it fit to fulfil its many roles efficiently and effectively. However, despite a range of institutional improvements, the Board is still faced with many challenges that have continued to affect its operation and displease its stakeholders. These include legislative limitations, rental arrears, inability to create new products / subdivisions, high operating costs, administrative delays, landowner disputes, and human resource challenges. The Board has also had a difficult relationship with government.

These issues are expanded within this project (and subproject 3.1).

The finding in *Native Land Trust Board v Narava* (2004), referred to above, opened the door for *mataqali* to bring action against the NLTB if they are dissatisfied on the way NLTB has acted on their behalf as Trustee. The recent decision in *Tiva v Native Land Trust Board* (2007) HBC 81 OF 2006 has moved the goal posts in the advisory role of the NLTB. In delivering his High Court judgement, Justice Singh made the following significant comments on the role of the NLTB:

In considering what is best for the native owners, the Board is obliged to listen to their views. The Native Land Trust Act was passed in 1940 to protect the native Fijians from alienating too much of their land and probably for low prices to unscrupulous prospective purchasers. The Act ensured through the Board paternalistic protective measures so that the indigenous Fijians did not find themselves virtually landless in the long run. However more than sixty years later, there has been

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

marked development in Fijian education and commercial expertise. There would be a lot of native owners who are just as educated as the decision makers in the Board. Hence there is no need for suffocating protection of the native owners. There needs to be more involvement of the native owners in considering what is in their best interests.'

Rules, regulations and cultural norms regarding facilitation of land markets and land management.

There has been an ongoing politicisation relating to access to land by the non-indigenous population (current estimates 51% population is indigenous Fijian, 44 % Indo-Fijian, with the residual 5% comprising mainly Chinese, European, and mixed race). The Native Land Trust Board was vested with liberating access to land primarily for the commercial use of the non-indigenous population and generating a commercial return.

Under Chapter 5, Social Justice, of the Constitution Amendment – 13 of 1997 states *"The Parliament must make provision for programs designed to achieve for all groups or categories of persons who are disadvantaged effective equality of access to: ... (b) land and housing..."*

Therein raises the dilemma as to what is meant by disadvantaged in terms of 'land'? Moreover, what do we mean by equality of access? At one extreme, there are those who may argue that an Indo-Fijian tenant farmer is disadvantaged because his ALTA lease has expired. Conversely, some would argue that the Fijian landowner is disadvantaged because the ALTA lease has precluded access to the land and the remuneration has been poor at an arbitrary 6% of unimproved capital value per annum.

Effects on commercial use of land by members and non-members land owning groups

The Native Lands Trust Board (NLTB) administers indigenous land that is not required for occupation by members of the *mataqali*; indeed, the NLTB has authority to lease the land without the consent of the clan. Prasad (Prasad, 1998) argues that the NLTB has a monopoly and a monopsony as far as the supply of land to non-Fijians is concerned. This is not strictly true in respect of the monopoly given the extent of non-formal *vakavanua* arrangements between willing landowners and tenants, outside the auspices of NLTB. Moreover, Prasad is spurious in arguing that there is a monopsony, given that there is more than one potential buyer, or potential tenant, for most of the land on offer. Some of the excess land historically has been used for growing sugar cane and other crops, commonly by descendants of indentured Indians (Indo-Fijians), and more recently, coastal land has been used for tourism schemes.

The native landholders retain ownership and the agricultural land is administered under the provisions of the Agricultural Landlord and Tenant Act (ALTA 1976). Agricultural land was held on a 30-year lease, under the provisions of ALTA, with rental set at 6% of unimproved capital value. UCV is a figure that is impossible to

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

quantify in today's largely improved market. There are some 13,140 ALTA leases expiring from 1997-2028 with the most (3,549) expiring 1999-2000 (Government of Fiji, 1999). Under the 1999 Chaudhry led coalition government, the first Indo-Fijian Prime Minister, some indigenous owners sought to regain and retain their land, concerned that politics was dictating a thirty-year lease term.

Compensation for lease expiry (a controversial and unprecedented action) at \$28,000 per agricultural lease was proffered to tenants who did not want to be resettled (as the government had seen resettlement of these tenants as its responsibility). This windfall compensation offered by the government was controversial since it represented, in most cases, significantly more in dollar terms than the accumulated total received by the landholders over the last 30 or 50 years of the lease (Boydell, 2000).

Is there a case that indigenous Fijians are 'disadvantaged' in respect of land in Fiji compared to Indo-Fijians under an ALTA lease? As cited above, almost 88% of the land in Fiji is held in Trust for the benefit indigenous Fijians. The residue is state land and freehold. Nevertheless, in what context is land really 'owned' by indigenous Fijians? It is not 'owned' in the same way as one would acknowledge ownership of a freehold interest in contemporary society. This 88% of land is, in reality, merely held in group trusts. The 'ordinary' Fijian cannot sell it or use it as security for a loan. However, they retain a higher claim over the land for their beneficial use for a home site or an agricultural allotment than their Indo-Fijian counterparts (Boydell and Reddy, 2000). Moreover, the land that is not required for such purposes may be rented out to others under the guidance of the indigenous statutorily retained property manager, the Native Land Trust Board (NLTB).

This 'native' land, which represents 88% of the country's land, is a shared resource. It is not owned at an individual level and can never be considered as personal property for there is no individual legal title to it. Leasehold title, be it on native, crown or freehold land is more commercially tradable and accepted as a security. The rationale being that there is a defined legal title for these formal legal interests. Indigenous Fijians are just as free to own non-native land as anyone else, be it freehold or leasehold. There is view that supports indigenous Fijians as 'advantaged', given that they are the only group who can hold all land types.

Effects on equitable sharing of benefits

The Native Land Trust Board in Fiji is commonly misreported on its benefit sharing arrangements, with layers of complexity caused by a hierarchy of beneficiaries and the levy of a management fee. There has been ongoing reaction to this 25% management fee⁴⁸ and the fact that it has been reduced to 15% over the last five years is commonly overlooked. In addition, the NLTB now retains 5% of the income in a collective Trust fund. Therefore 20% is deducted from income before the balance of

⁴⁸ Native Lands Trust Act s14.(1)

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

rents and purchase-monies is distributed in accordance with the Native Lands Trust Act 11.-(1). ‘After deduction of any sums in accordance with section 14 of the Act, the balance of any monies received by the Board by way of rents and premiums in respect of native land shall be distributed, by the Board, as follows:

- (a) to the proprietary unit, seventy per cent;
- (b) to the *turaga ni mataqali*, fifteen per cent;
- (c) to the *turaga ni yavusa*, ten percent; and
- (d) to the *turaga i taukei*, five per cent.’

By way of clarification, *proprietary unit*, in the case of native land, means the proprietary unit registered under the provisions of the Native Lands Act as being the owner of such land. This means that, for example, if the NLTB collects a rental of \$1,000 over a parcel of land, after they deduct their management fee of 15% (\$150) and trust fund component of 5% (\$50) the residue of \$800 will be available for distribution as follows:

- (a) to the proprietary unit, 70% = \$560
- (b) to the *turaga ni mataqali*, 15% = \$120
- (c) to the *turaga ni yavusa*, 10% = \$80
- (d) to the *turaga i taukei*, 5% = \$40

If, for example, there are 25 registered members of the proprietary unit over the age of 21, the \$560 will be divided between the 25 resulting in a payment of \$22.40 per person per annum. Obviously, the income per capita will be significantly less in larger proprietary units.

There has been increasing grass-roots reaction to the remuneration distribution under the aristocratic hierarchy formalised by the Native Land Trust Act in 1940. With an increase in education, members of certain proprietary units are questioning the 30% allocation distributed between their chiefs. Moreover, in some proprietary units the *turaga ni mataqali* controls the total income of the proprietary unit (15%+70% = 85%) and administers it for the good of the *matagali*. From a customary perspective, there is an argument that this is appropriate if it allows for enhanced community facilities. However, increasing economic demands for food, school fees and health care result in an increasingly individualistic approach to financial resources by beneficial members of the proprietary unit.

Effects on conflict minimization

As the, now suspended, *Reconciliation, Tolerance and Unity Bill*, the *Qoliqoli Bill* and the *Indigenous Claims Tribunal Bill* demonstrated in 2006, there is ongoing intergenerational dissatisfaction in respect of past land dealings in the country. Such legislative

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

proposals and the multiplicity of recent land restitution claims require resolution, if not restitution, in the eyes of a significant proportion of indigenous Fijians. In contrast, at a localised level, there are ranges of examples where the potential for intergenerational land resource conflict has been minimised through appropriate stakeholder and institutional engagement.

There is a lack of trust by landowners of staff from Government organizations to provide them with adequate information to make informed decisions, mainly due to initiatives failing to materialise in the past. There is lack of faith in the Native Lands Trust Board as the Government of Fiji is seen as the major stakeholder.

Government Ministries often work in isolation from each other, sometimes performing overlapping functions.

The Sovi Basin Conservation Project and the Drawa Sustainable Forest Management Project are two pioneering community based forest management projects currently being implemented in Fiji that can be termed successful in minimising current (and future) conflict. In both cases, two international organizations (Conservation International and the Pacific German Regional Forestry Project) played mediating roles to bring all stakeholders to the table. It was important that these organizations:

- > Provided sufficient training and awareness to all parties in sustainable management principles (including Government organizations);
- > Dealt with the NLTB themselves rather than leaving the landowners to do so, mainly due to the non-functional relationship(s) between the two parties;
- > Put a 'local face' to their organization through nationally recruited project managers so that the landowners do not feel that their property rights are threatened by 'overseas developers';
- > Involved all parties in the design of the management strategies rather than the implementation only (this has the added benefit of better understanding and ownership of the project);
- > Did not raise cash (and other) return expectations among all stakeholders. The Government of Fiji leased land in the 1960's from native owners to establish mahogany plantations as a public sector investment project. The Government promised landowners of employment opportunities and high returns, which has not materialised so far. This has led to extra-legal actions by landowners such as roadblocks during harvesting operations; and
- > Maintain engagement with all stakeholders. In the case of Mahogany land leases, the Government changed leasing arrangements (only NLTB, as the custodian of native land, was involved in the process). Lack of consultation with landowners has resulted in some landowning communities seeking court action against the Government.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

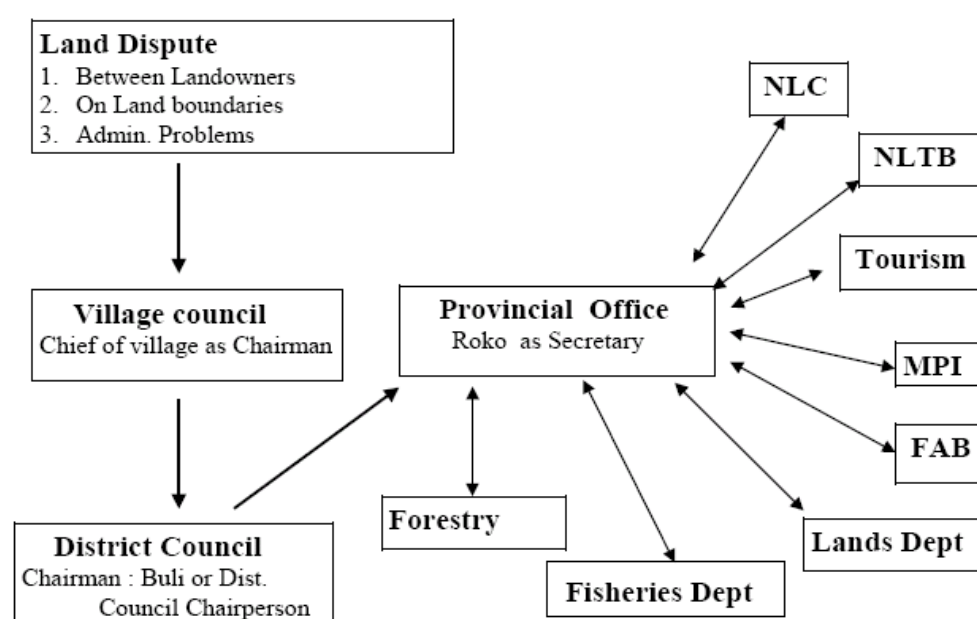
It is critical to discourage the traditional practice of *vakavanua* leasing. These are leases established verbally between the landowner and the lessee. These leases are favoured in rural areas due to lengthy processes involved in formal leasing arrangements. Resultant conflicts from breaching the verbal conditions are challenging to resolve due to difficulties in demonstrating accountability.

In accessing native land, making chiefs accountable by urging them to demonstrate that they have consulted the rest of the landowning unit will minimise future disputes within the landowning, encouraging unity and, in the eyes of potential investors, one voice. If a representative is nominated, it is also important to establish whether the representative has the support of most of the members, if not all. Landowners should be urged to express any concerns and seek clarification before consenting to any arrangements that may affect their customary land.

Effectiveness of mechanisms for formal and informal land dispute resolution

Formal protocols for resolving disputes over customary land are addressed in the *Native Lands Act* [Cap 133] s.16. Disputes over Native land include (Fonmanu, 1999, p.66) but are not limited to: individualism; increase in population; ignorance over economic development; unmarked ownership; lease money distribution; *vakavanua* (informal) leases; reference to practices before Cession; extinct *matagali* land; rights over forest land; dual ownership over reserve claims; landowners *v* land users; home sites; and illegitimate child's rights.

FIGURE 5: FLOWCHART OF PROCEDURE FOR CUSTOMARY LAND DISPUTE (FONMANU, 1999, P.102) KEY: NLC – NATIVE LANDS COMMISSION; NLTB – NATIVE LAND TRUST BOARD; TOURISM – MINISTRY OF TOURISM; MPI – MINISTRY OF PRIMARY INDUSTRIES; FAB – FIJIAN AFFAIRS BOARD.



2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

Customary land disputes (p.77) also arise over conflicting management interests; rigidity of land policies; jealousy over prosperity; confusion over administration responsibilities; leasehold security; ALTA leases, expiration and renewal; and absentee landowners.

Land boundary disputes (p.71) include boundary marks destroyed; redefinition survey; fencing; description of boundaries (general, village, unidentified and leasehold); abuse of sacred sites; increases in population; and unregistered boundaries.

Disputes are notionally resolved at village level, district level, or provincial level (see Figure 5). However, the growing trend is that disputes are taken to court, leading to protracted hearings.

The NLTA provides that the traditional head of each landowning unit such as *Vanua*, *Yavusa*, *Mataqali*, *Tokatoka* be entitled to share of the income due to that unit. Because of this, the headship of these units is always disputed. This resulted in social problems such as division within the unit and other units when people start to take sides. There is also difficulty in obtaining the unit's consent required by the Board to process a lease or license. As a result of these challenges, there is an increase in undistributed income that stays with the Board.

Effectiveness of institutional arrangements as a platform for providing cost effective, transparent and accountable decision-making

The post independence history relating to the political situation in Fiji, with recourse to plural customary and formal legal systems, indicates the nature of the ongoing challenge that this presents. While the recorded nature of indigenous Fijians relationship to the land through the VKB and the trustee role of the NLTB are held as an exemplar in facilitating the commercialisation of land dealings by its Pacific neighbours, it has many detractors and critics at home.

As stated above, there is ongoing intergenerational dissatisfaction in respect of past land dealings in the country. The multiplicity of recent land restitution claims require resolution, if not restitution, in the eyes of a significant proportion of indigenous Fijians to address past grievances. The institutional role of the trustee continues to come under question. This has not been helped by the recent findings of a taskforce led by Colonel Apakuki Kurusiga into fraud at the NLTB, which resulted in the termination of both the General Manager and Technology Manager. Subsequent to an audit report four board members of the Native Land Trust Board resigned (26/07/07) to allow investigations into the board by the military administration.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

COUNTRY CASE STUDY: SAMOA

Informal and formal understanding of property rights

As stated in the Constitution (s.101) 'Land in Samoa:

- (1) All land in Samoa is customary land, freehold land or public land.
- (2) Customary land means land held from Samoa in accordance with Samoan custom and usage and with the law relating to Samoan custom and usage.
- (3) Freehold land means land held from Samoa for an estate in fee simple.
- (4) Public land means land vested in Samoa being land that is free from customary title and free from any estate in fee simple.'

TABLE 6: LAND ALLOCATION BY TENURE TYPE IN SAMOA (SOURCE: MNRE)

Customary Land	81%
Freehold Land	4%
Government Land	11%
WSTEC Land (public land now administered by Samoa Land Corporation [SLC])	4%
Leasehold land with secure tenure	<1%

There is some contention over the land allocation data (see Table 6), which was the situation at Independence (1962) – different authors (e.g., Peteru, 2003; ADB, 2004) have suggested variations, but the above figures were confirmed by the Department of Minerals, Natural Resources and the Environment (MNRE). Since 1962, the Government has released several hundred acres for general public use.

There are only 197 active leases (2005 data) over Customary Land, with 80 relating to Government use, 85 for religious purposes and only 32 relating to commercial activity. The adoption of commercial development leases over customary land is in its infancy.

The creation of Freehold title is forbidden by the Constitution (s.102). 'No alienation of customary land – it shall not be lawful or competent for any person to make any alienation or disposition of customary land or of any interest in customary land, whether by way of sale, mortgage or otherwise howsoever, nor shall customary land or any interest therein be capable of being taken in execution or be assets for the payment of the debts of any person on his decease or insolvency:

Provided that an Act of Parliament may authorise –

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

- (a) 'The granting of a lease or licence of any customary land or of any interest therein;
- (b) 'The taking of any customary land or any interest therein for public purposes.'

The *Alienation of Customary Land Act* (1965) provides legal provision for granting leases on custom land (see below). This provides a workable, if time consuming, model for establishing leasehold title and provides for the mortgaging of leases (or more correctly the tenants property rights contained within the lease), but not the mortgaging of the land itself (as this is precluded by s.102 of the Constitution as detailed above). Moreover, as specified in the *Alienation of Customary Land Act* (s.16) 'No distress for rent – Notwithstanding anything to the contrary in any Act, or in any rule of law, no lease or licence granted under this Part of this Act shall contain a power to distrain for rent, and it shall not be lawful for any person to distrain for rent thereunder'.

Formal identification, recording and registering of customary resource groups and their membership

The *Land Registration Act* (1992/1993) specifies these requirements at (s.15) 'Inclusion of land – When after the commencement of this Act any land becomes Public land, or freehold land, or any customary land lease is created, it shall be the duty of the Registrar to include such Public land or freehold land or upon application, such customary land lease in the Land Register.'

This means that only those 197 parcels of customary land with leases over them (referred to above) are formally registered. This registration 'as needed' results in understandable delays when there is a proposal for a potential lease for commercial, hotel, residential or other purposed proposed over a parcel of customary land. The *Land Titles Registration Bill* (2007), currently in its third hearing, extends (s.9(1)), repeals (s.94) and supersedes (s.96) the *Land Registration Act* to enable the Registrar to include in the Register customary land in respect of which judgement has been made by the Land and Titles Court under the provisions of the *Land and Titles Act* (1991).

The profound reaction by the Samoa Umbrella of Non Government Organisations (SUNGO) to the *Land Titles Registration Bill* (2007) highlights the level of confusion and misunderstanding over customary property rights in the country⁴⁹. The *Land Titles Registration Bill* (2007) provides for an electronic record of the Register, as well as far greater clarity in respect of leases, easements, licences, mortgages and other charges over (predominantly public and freehold) land. It merely builds on and supersedes the existing *Land Registration Act* (1992/1993) without, in any apparent way, limiting the sovereignty of customary land and Samoan custom. It also provides for electronic storage of information in a manner that was not foreseen at the time of the *Land and Titles Act* (1981), which deals with the Registration of Customary land in s.11, 12 & 13.

⁴⁹ see Samoa Observer headline Thursday 10 May 2007

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

The reaction by SUNGO highlights the passion over custom land within Samoan society and culture (as in other Pacific Island Countries), as well as demonstrating the need for a clear education policy at all levels of society, over the nature of property rights. It also conveys the power of the media to popularise myths and misunderstanding over land management issues, by actually increasing the likelihood of conflict. The Director of MNRE welcomed the response⁵⁰ as he saw the active engagement of SUNGO and other organizations in land issues, however misguided, to be a positive thing that could only lead to greater understanding of land issues by the wider population in the long term.

The recording of customary resource groups and their membership is addressed in the Land and Titles Act (1981), with Titles being considered under Part V. It is important to note the multiple uses of *Pulefaamanu*. It is taken to mean the ownership of any customary land or the control of any Samoan name or title by a person either in their individual capacity or on behalf of any Samoan title, family, village or district.

Recording of land boundaries and land titling

This is provided for in the *Alienation of Customary Land Act* (1965) at (s.7) 'Requiring survey - if the application does not, in the opinion of the Director [now Director of Natural Resources, Environment and Meteorology], sufficiently describe the land or interest desired to be leased or licensed the Director may require that the applicant provide or pay for a survey of such land or interest, and may refuse to proceed further until such survey has been provided or paid for by the applicant and made by the Director.'

Impact on economic development and conflict minimization

Whilst Setefano (2002) rightly argues that there is no established market for customary land - as customary land cannot be alienated or sold (and thus there is no willing buyer / seller arrangement) – there is potential to optimise leasehold arrangements over customary land and establish a willing buyer / seller market in leases.

Setefano further argues that customary land is an impediment to development initiated by the Government, using the example of road widening which requires the *taking* of customary land. Despite the coherent provisions of The Taking of Land Act (1964), disputes invariably arise – often pertaining to *matai* titles and authority that once economic value is placed on the land become protracted in the Land and Titles Court. This is currently an issue in the Apia-airport road (Vaitele Street) in preparation for the South Pacific Games (2007).

There is limited land for development and urban expansion in and around Apia. The Governments *Integrated Urban Planning and Management System for Samoa* (2001) proposed that families with 200-400 acres of land in proximity to the capital should

⁵⁰ personal communication

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

redistribute it or sell to the Samoa Land Corporation (SLC). Given the preclusion on freehold alienation over customary land, such an outcome could be achieved only through providing a lease to the Government or their SLC land development arm, to sub-lease on to prospective tenants striving for access to urban land. However, there is a lack of valuation capacity to reconcile an equitable and workable solution that will ensure both intergenerational and intra-familial equity.

Traditional decision-making processes

Below the role of the Head of State as ultimate high chief (*O le Ao o le Malo*) there is a hierarchy of several high chiefs (*Alii*), senior chiefs (*Sao*), chiefs and orators (*Matai*), women (*Sao'ao*) and untitled men (*aumaga*) within family groupings (*Aiga*). Women share rights to access customary land. Each title is associated with ancestral names, and is passed through families and ceremonially conferred allowing the chosen individuals to represent the family in public life. Titles provide the right to speak in family and village councils, to sit on councils (who collectively control 80% of customary land) and thus have access to land. At a village / familial level, the traditional decision making process is vested with the *Pulefaamanu*. The expectation is that the authority of the *matai* will be respected. Where there is dispute over land or title issues (chiefly title rather than the western notion of 'land' title) the matter is referred to the President of the Land and Titles Court for decision.

This raises the issue of **absenteeism** within the decision making process. The accepted authority of the *matai* is not limited by location, so for any decision over the commercial development of familial land the support of all *matai* in the family must be obtained. Given that Samoa has a resident population of 180,000 (approx.) and there are 120,000 (approx.) Samoans resident in New Zealand alone, plus a significant population of kin resident in (but not limited to) Australia and the US, proctoring full *matai* support can be a time-consuming if not impossible task. The *matai* chiefly title brings a range of rights and obligations, and whilst the issue of leaving the management of land 'back-home' in Samoa to the resident family residents, this solution to facilitate the development decision-making process was not warmly received. There remains a politically strong view that once a *matai* always a *matai*, irrespective of global location.

Rules, regulations and cultural norms regarding facilitation of land markets and land management

The *Alienation of Customary Land Act* (1965) provides prohibitions on non *matai* for agricultural leases over customary land at (3), 'Prohibiting some leases and licences – It shall not be lawful to lease or licence any customary land for any agricultural or pastoral purpose to any Samoan who is not for the time being holder of a *matai* title.'

The authority to grant leases over customary land is vested with the Minister of Lands, Surveys and the Environment (now Minister for Natural Resources, Environment and Meteorology) at (4), 'Power to grant lease or licence – Subject to

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

section 3 of this Act [see above], the Minister, if in his opinion the grant of a lease or licence of any customary land or any interest therein is in accordance with Samoan custom and usage, the desires and interests of the beneficial owners of the land or interest therein and the public interest, may grant a lease or licence of that customary land or interest therein as a trustee for such owners:

- (a) For an authorised purpose approved by the Minister;
- (b) If the authorised purpose so approved is a hotel or industrial purpose, for a term not exceeding 30 years, with or without a right or rights of renewal for a term or terms not exceeding an additional 30 years in the aggregate, as may be approved by the Minister;
- (c) If the authorised purpose so approved is not a hotel or industrial purpose, for a term not exceeding 20 years with or without a right or rights of renewal for a term or terms not exceeding an additional 20 years in the aggregate, as may be approved by the Minister;
- (d) For such rent or other consideration payable to the Director, reviewable or not, and if reviewable at such intervals or on such occasions and in such a way, as may be approved by the Minister and
- (e) Subject to such covenants, conditions and stipulations as may be approved by the Minister.’

Effects on commercial use of land by members and non-members land owning groups

In the 1960s and 1970s, some 700 acres of Government land was made available to villages and community groups near the Apia urban area. However, this opportunity to acquire freehold land within villages attracted limited potential purchasers due to its proximity to villages (from the perspective of non-familial purchases), expectations of village affairs and perception that over time the village would claim the land as *pulefaamanu*.

A similar example is currently being trialled over approx. 200 acres of Samoa Land Corporation (SLC) land between two villages to encourage economic development for two agricultural parcels. However, of the 24,000 acres administered by SLC, 40% near traditional villages is under conflict with traditional landowners who are demanding its return to the respective families.

Tourism ventures (or proposed ventures) highlight several key issues relating to the commercial use of customary land, both by members and non-members of land-owning families. The Minister of MNRE, as Trustee, has recently approved a 30+30 year tourism lease on a 6.76ha parcel customary land at Vauvau, Upolu, owned by four families, to the Warwick hotel group. Whilst not commenting on the remuneration involved, it is considered nominal for the quality of land and potential developers’ profit. It has taken some time to resolve the lease arrangements and

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

reconcile familial disputes over the potential economic return from this site. There was a legal impediment, but it was resolved and did not come through to the Land and Titles Court, possibly because of pressure from the village council who was the main beneficiary of the ex gratia payment (rather than the custom landowners). It has been suggested that the maximum amount should go to four family trusts for those families now and into the future. However, given that it is understood that there is no equity sharing provision in the lease, there is potential for future conflict.

The 18-year long saga over a 72 [or in some documentation and most discussions 750] acre parcel of potential tourism development land at Matuatu, Upolu, provides another example of the challenges of catalysing major tourism initiatives. In this case, the proposed development of Lefaga Beach Resort spreads over 16 some familial interests. Whilst money and endeavour have been expended over the years, the Lemalu Pita as entrepreneur who has led the initiative through the auspices of APT has little support from the resident familial interests ensuring a protracted ongoing conflict that will limit the development process.

Success stories of small-scale tourism initiatives over customary land are evident in Savaii, largely due to cohesive small ventures over single-familial interests. Examples include the diversity of vacation beach *fales* around Manase which range from ST\$65 modest – ST\$750+ luxury per night. Certain of these have received bank finance. In real terms, they generate employment and economic return for the family at far higher levels than achieved through tourism leases to international chains, whilst retaining control and only tying up a small amount of beachfront land.

Likewise, the Falealupo Rainforest Reserve canopy walk, which raises ST\$20 per tourist visitor is administered by the landholding family and generates some ST\$60,000 per annum into a village superannuation fund, provides a higher sustainable annual return than the former timber clearing over the land. There are multiple tourism related income opportunities forsaken, e.g., there is no guidebook for sale detailing the plant species, or opportunity to buy Cox, P. (1999) *Nafanua: Saving the Samoan Rain Forest*.

Effects on equitable sharing of benefits

Given the ongoing strength and respect afforded to the traditional *matai* system, in the limited examples of leases over customary land the remuneration is paid to the *matai(s)* as leader(s) of the family to distribute as they see fit. Obviously, as within any society, there are some benevolent *matai* and some less so.

Effects on conflict minimization

Whilst the country is politically stable, and the traditional *matai* system remains strong and central to Samoan society and culture, there are understandably familial disputes over both land and title. Significantly, these are exacerbated in the light of the potential for economic returns over customary land.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

Encouraging dialogue, discussion and common understanding of issues

Locally, land disputes are managed by the *matari* represented at family and village councils. Whilst these traditional systems operate well, they can be undermined by the complexity of economic expectation and aspiration. Where matters cannot be resolved traditionally, the matter is referred to the statutory authority of The Land and Titles Court.

Providing cost effective, transparent and accountable decision-making

Petitions filed in the Land and Titles Court will currently receive a preliminary hearing within six months. However, there is currently an 8-year backlog of appeals at the Land and Titles Court. There is priority given to appeals where other cases in a lower court are waiting for a related decision.

Part of the backlog occurred because the former President of the Land and Titles Court was also the Chief Justice. The former expatriate support had only just learnt the role by the time his three-year contract expired. Currently government are considering appointing a second post alongside the President of the Land Titles Court to share the load and reduce the backlog. There are issues of capacity within 14-person team in the Court of First Instance, which are being resolved through a supportive in-service training programme.

The Chinese Government is currently building a complex of four courtrooms with associated judge's chambers. It is hoped that the current improvements will enable appeals to be heard within 2 to 3 years.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

COUNTRY CASE STUDY: SOLOMON ISLANDS

Informal and formal understanding of property rights

Customary land law is not standardised nationally or even at provincial level, as it derives from localised culture groups. The rules are largely unwritten and undermined by self-interested resource exploitation (UNDP, 2004, p.7). The situation is complex because of differing Melanesian, Polynesian and Micronesian customs and traditions amongst families, tribes and clans, across the archipelago (an extreme example, in Vella Lavella, relates to the tradition of granting customary land to the descendants of a woman from outside the clan who hangs herself on the land). These customs are interwoven with the affects of colonial rule, with the Solomon Islands becoming a British protectorate in 1893, resulting today in plural customary and Torrens land tenure systems. Matrilineal, patrilineal and bi-lineal descent groups are in operation, varying from province to province and within areas of each of the nine provinces (in Table 7, where 'yes' is specified for each system demonstrating the diversity within different areas of a particular province). These systems determine the understanding of customary property rights.

TABLE 7: DESCENT GROUPS SUMMARISED (ADAPTED FROM KOFANA, 2006)

Provinces	Type of Descent group		
	<i>Patrilineal</i>	<i>Matrilineal</i>	<i>Bi-Lineal</i>
Central Islands	No	Yes	
Choiseul	Yes	No	
Guadalcanal	No	Yes	
Isabel	No	Yes	
Malaita	Yes	No	Yes
Makira	Yes	Yes	Yes
Renbel	Yes	No	
Temotu	Yes	Yes	
Western	Yes	Yes	

Formal identification, recording and registering of customary resource groups and their membership

Of the 27,556 sq km land mass in the Solomon Islands, some 3,668 sq km (approx. 13%) was alienated under colonial rule. The alienated land is formally administered under the *Land and Titles Act* 1969 [Cap. 133]. The alienated land, which has been recorded, is held as:

Perpetual Estate [PE]: (akin to fee simple absolute in possession, i.e. freehold) must be held by an indigenous citizen with documentation showing owner name, area and including a reference plan.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

Fixed Term Estate [FTE]: (akin to term of years absolute, i.e. leasehold) granted with consent of the Commissioner of Lands. Documentation details the Grantee name, duration of term, conditions of grant, relationship to perpetual estate, rent and premium. Fixed Term Estates are for a maximum duration of 75 years.

There are 1,500+ Registered Leases and Sub-Leases over Perpetual Estate, Fixed Term Estate, and Registered Customary Land. These documents detail lessee name, duration, lease conditions, area and relationship to superior interest (predominantly PE). Leases for periods in excess of 2 years have to be registered.

In addition, there are some 90 registered leases (comprising 13.3 sq km) over Registered Customary Land. These require that the tribal group / trust be named on the documentation, with plan and locality recorded.

TABLE 8: ESTIMATES OF REGISTERED LAND BY TYPE AND PROVINCE (ADAPTED FROM KOFANA, 2006 - NOTE A NUMBER OF DIFFERENT ESTIMATES ARE CURRENTLY AVAILABLE)

	Perpetual Estate		Customary Land		Fixed Term Estate	
Province	No.	Area Km ²	No.	Area Km ²	No.	Area Km ²
Central	470	81.6	3	2.0	120	52.4
Choiseul	922	77.4	0	0.0	13	1.5
Guadalcanal	1,700	372.9	22	1.2	911	103.4
Honiara	6,078	22.8	0	0.0	5,049	12.7
Isabel	145	875.6	2	4.3	22	17.0
Makira	293	62.7	5	1.0	47	17.5
Malaita	977	122.4	48	3.0	321	32.6
Renbel	13	78.1	0	0.0	0	0.0
Temotu	68	156.0	1	0.0	8	0.6
Western	2,292	996.9	9	1.9	665	506.2
Total	12,958	2,846.3	90	13.3	7,156	743.8

The registered / recorded interests in the nine provinces plus the metropolitan area of the capital are summarised in Table 8. The data requires formal clarification as there are several different estimates currently adopted. Moreover, there are suggestions that Perpetual Estate can be held over unregistered customary land... this raises issue of transferability and value as security, if the land has not been registered. It is notable that the vast majority of recorded land parcels (>11,000 of approx. 21,000) are situated in the capital, indicating an obvious correlation with economic activity.

Restitution issue: The *Land and Titles Act* 1969 [Cap. 133] specifies at 100.- '(1) With effect from the 31st December 1977, any perpetual estates registered in the name of,

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

or on behalf of, any person who is not a Solomon Islander shall automatically convert to a fixed-term estate of 75 years at an annual rent after the first seven years (which shall be a rent-free period) calculated as a percentage of the unimproved capital value of such estate at a rate not exceeding 8 *per-centum*.’

Recording of land boundaries and land titling

The UNDP (2004, p.10) contests that strategies such as registration, commoditisation, commercialisation, overexploitation, use and sale that focus narrowly on the land itself may miss the point, instead becoming of themselves a cause for conflict. The UNDP report highlights that the social and economic concerns of landowners must be met in order to facilitate development counter the risk of future conflict (p.3). They identify the need for consultation with resource owners to shape evolving systems, as currently there is a lack of local acceptance and confidence towards land recording and registration.

At odds with the intent, there is a commonly reported fear that 'registration' will lead to a loss of rights and a takeover of land by the government. A breakdown in customary and state governance compounds the situation. The lateral and positive solution is the voluntary participatory approach to land recording adopted in the Aluta Basin region of Malaita in anticipation of possible palm oil plantations. This process allows for negotiation of boundaries, clarification of boundaries and stewardship under familial or clan land trusts.

Land recording *per se* is still in its infancy in the Solomon Islands, as the tribal landowners are yet to realise its benefits and remain suspicious that it could result in them losing their land. Potential economic returns drove the Aluta initiative, in preparation for a proposed palm oil development as an expansion of GPPOL. Of significance, the Secretary of the newly formed Tribal Lands Unit, Alex Rukia, decided against acquiring land as stipulated in the roles of an Acquisition Officer under the provisions of the Lands and Titles Act (1969).

Rukia identified that under current legislation, the acquisition process is prone to drag on beyond the expected timeframe for the proposed oil palm development. Such a process was considered unsuitable for the acquisition of Aluta and was likely to result in numerous conflicts (Rukia, 2005). The challenge provided an opportunity to trial the Land Recording Act 1994 that has never been tested on any customary land. The Tribal Lands Unit (TLU) was given the responsibility to design the entire recording process. In doing so, the Secretary to the Tribal land Unit, Rukia, said the ‘process was designed with an ultimate aim of isolating and minimizing possible conflicts that may arise, in the course of acquisition’. The project was divided into four distinct but important phases: awareness, recording, acquisition and surveying. The inclusion of the awareness phase at the beginning played an important role in bringing together the tribes, identifying the stakeholders, and determining the level of interest in the proposed development.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

An important capacity building initiative is the Solomon Islands Institutional Strengthening Land Administration Project (SIISLAP) centred on the Department of Lands and Surveys. The project was operational in two phases: SIISLAP (2000-2004) built the foundation for a land administration system that supports and guarantees reliable, transparent and accountable management of the land asset in accordance with Solomon Island Government principles. SIISLAP II (2004-2007) consolidated achievements in the core service areas of land records administration and management by focusing on institutional strengthening and capacity building within these areas as the affected, primarily, alienated land.

The project demobilised in June 2007. Its last year was impacted by the Government's 2006 appointment of Leonard Maenu'u as Director of Land Reform and Commissioner of Lands (the latter post being one that he previously held in 1975). The emphasis of the Land Reform Unit is on customary (according to Sullivan, 2007, p.1) and alienated land. It is understood that Maenu'u temporarily stepped down from the positions at the start of 2007, but is anticipated to return upon closure of the SIISLAP operation.

Whilst SIISLAP adopted a grass roots approach to land recording, it is understood that the new Director of Customary Land Reform dismissed Rukia's pioneering work in the Aluta Basin. Maenu'u has previously been involved in similar initiatives in Malaita (see, for example, his report (1979) on the Fiu Kelakwai Scheme) and has taken a top-down legislative response. This includes the contentious *Tribes and Customary Land Titles Act* proposed in August 2006. Lawyer Andrew Nori provided a prompt commentary (Nori, 2006), highlighting that many of the initiatives proposed were already available in the existing, but underutilised, *Land Recording Act 1994*. Nori highlights that for over eighty years the British colonial administration had attempted to acquire customary land as a platform for economic activities, but was only commercially effective on about 5% of the landmass. He cites the accepted view that the colonial administration failed to recognise collective ownership rights in the Solomon Islands when approaching alienation in favour of an individualised approach, and thus met resistance. Similarly, there are risks in developing land policies to push personal or own tribal interests.

Of significant criticism of the proposed *Tribes and Customary Land Titles Act* is recognition of "[3.] Tribes and / or Lines, indigenous to Solomon Islands and existing before the pre-colonial administration of Great Britain arrived, are hereby recognized as legal corporate instruments for the purposes of dealings in Customary Land". Whilst restitution has been successfully adopted elsewhere in the Pacific, Nori points out that no tribal registers were ever compiled by the British Solomon Islands Protectorate administration on the tribes that existed prior to or as of 1893. Rather the intent of the earlier *Land Recording Act 1994* was to clarify customary interests to land as they apply today.

Impact on economic development and conflict minimization

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

“Land itself is not a ‘problem’. The problem arises when land comes to be identified as a root cause of [violent] conflict. This immediately limits our focus to land [in a very physical sense] and the disputes over land – and distracts our attention from the breakdown of the traditional means of resolving disputes and from [the ways] traditional rules have been displaced by alien rules.” (UNDP, 2004, p.10) “The relationship between people's identity, group allegiances and land is inseparable and disagreements over land occur throughout the Solomon Islands. At the root of the tensions, particularly in Guadalcanal and Honiara, was illegal squatting and use of customary lands, the commercialisation of land, rapid population growth and land pressure and the poor management of urban growth.” (p.1)

The problems relating to land administration today are a product of colonial dispossession and policies that prohibited Solomon Islanders from holding registered title or engaging in leasing land. Obviously, this situation has now been reversed, with Perpetual and Fixed Term Estates requiring Solomon Islander ownership, and pre-independence Perpetual Estates held by non Solomon Islander interests were converted to a 75-year FTE. However, the colonial heritage has left many unresolved land management challenges, not least of all that in 1900 the British Administration anticipated that the Melanesian race may die out as a result of warfare and introduced disease. This perception led to large areas of Guadalcanal and Western Province being declared *wasteland* (Ruthven, 1979, p.242) under the *Solomons (Wastelands) Regulation 1900*, enabling large tranches of land to be conveyed to the Pacific Island Company, Levers Pacific Proprietary Ltd. (LPPPL) and others in the first two decades of the protectorate. These development certificates were granted for a period of 99 or 999 years.

It is relevant to note that the Allan Land Commission (1950) endorsed the *wasteland* policy and established a short-lived Land Trust Board (LTB) on the Fiji model to administer under-utilised customary land. On cost grounds the Allan Commission discouraged whole-scale land recording and codifying, instead recommending selective alienation and leasing for development purposes. A subsequent attempt to subdivide rural land for development in the 1960s failed due to intent of individualise title rather than attributing the superior interest to a group, family or clan, encouraging a less formal collective approach to land recording at Independence.

The experience of the Wasteland Regulation and the development certificates giving title to LPPPL and others explains, in part, ongoing caution and suspicion over land regulation by Solomon Islanders. This is understandable given that Solomon Islanders did not understand why the British administered government would take over ‘vacant’ land, given that most apparently unoccupied land was claimed by some family or tribe, albeit for usufruct purposes. Moreover, at the time (as today) the Government did not have the staff or resources to make a thorough investigation of every area. Similarly, as Ruthven (1979, p.246) highlights, the word ‘registration’ has historical connotations that lead to both concern and confusion. Recent examples of

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

compulsory acquisition (see Solomons Box 2 by Waleanisia), suggest education is the key to restoring public confidence in government land dealings.

In Solomon Islands, like many countries, the government, local council or utility company has the legal right to buy or take rights over any private property for public or private construction projects. Examples include airport expansions, housing developments, electricity pylons and cables, flood defence works, sewer, water or gas pipe schemes, rail or road building projects. In all cases, fair and reasonable compensation is determined to reflect the losses and disturbance caused by a compulsory purchase. The intent of compensation is that the landowner or occupier is left no worse or better off, than if the scheme had not happened. Usually compensation is a dollar value, although in circumstances it can include an exchange of land.

The legal basis of compulsory purchase is enshrined in the *Solomon Islands Constitution* Section 8 (1a). Likewise, all legally established City Councils in the country also have the power to compulsory purchase land as stipulated under Provincial Government Act Section 44 (1). The other law dealing with the same subject is the *Lands and Title Act*, (Cap 133) section 71 (1), with customary land dealt with specifically under section 84 (1).

Whilst formal legal institutional arrangements are available to the government, compulsory purchase often provokes a level of conflict and negative reaction against the government. Reasons include slow development, policies for return of alienated land, preference for leases to government, and distrust. As a result, most compulsory takings are agreed on a 50-year lease basis, with rental reviews every ten years.

Recent examples of compulsory taking include the Tulagi water source and Munda airfield. The Tulagi Maeliali water source was compulsorily purchased by the Government in June 1974. In the mid 1990's the landowners submitted a claim of land rents to be paid by the government. It transpired that the customary land was compulsorily purchased, rather than leased. Landowners subsequently submitted a claim of unfair compensation by the government, with the case pending court determination.

The case of Munda airfield is similar to the Maeliali water source in that landowners are not happy with the compulsory purchase dating back to 1965, now seeking the option of lease by the government. Most of the dissatisfaction stems from the alleged inequitable compensation paid to the landowners by the government. Typical of cases of intergenerational inequity, it is the descendants of landowners that sold land outright to the government who are dissatisfied with the way negotiations were conducted with their forebears. It was suspected that circumstances surrounding the negotiation (buyer and seller) were not transparent and involved undue force on the part of the colonial administration. Further, it was claimed that some of the land was purchased with an axe, implements, and few shillings. Exaggerated expectation runs high in the minds of landowners.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

Traditional decision-making processes

“Traditional authority (chiefs) has been undermined over time, initially by the Church, then by the Colonial Administration and now by politicians, government and international donors.” (UNDP, 2004, p.1) As a result, there are now plural traditional and non-traditional land and justice systems operating in parallel. Violence is higher in areas where the traditional systems are weaker.

The inequitable distribution of rentals or compensation amongst landowners themselves is a problem. It is a profound claim that land is owned by a tribe thus the proceeds from the land also belongs to the tribe and should be equally shared between all members. However, drawing on the Tulagi and Munda examples, the new generation of landowners have never seen the monetary component yet benefit from the enjoyment of water and the use of airfield. These intangible benefits predicted by their forebears are ignored in expectation of monetary benefit. The equitable distribution of income continues to disintegrate tribes and communities in many cases. It happens even with associations that are legally established. Women and children are always the victims of the selfish actions of men who are trustees of a tribe or clan.

Effects on commercial use of land by members and non-members land owning groups

The Guadalcanal Plains comprises one of the more fertile and productive areas of the Solomon Islands, benefiting from its proximity to the capital Honiara. The area was a significant source of conflict in the tensions of 1998-2003. Whilst the area had been settled by a high proportion of Malaitans, the UNDP (2004, p.2) are at pains to highlight that, “Conflict in Solomon Islands cannot, and should not, be labelled and ‘ethnic conflict’ or an ‘ethnic crisis’.” As discussed above, much of the productive land had been deemed *wasteland* and was alienated under the colonial administration. However, post conflict, certain land has been restored to customary owners by Government. With GPPOL taking over Oil Palm operations in the Plains there has been a significant change of participatory engagement with landowners compared to the prior SIPL operation.

Oil palm has become a key cash crop in Guadalcanal Plains. This was initially established by the Commonwealth Development Corporation in the 1970s, through a subsidiary the Solomon Islands Plantation Limited (SIPL). Large scale planting of oil palm was undertaken at Ngalimbiu and Tetere, covering approximately 6,000 hectares. [The background leading to the time of tension in 1999 / 2000 is covered by Naitoro (2000), at which time 20,000 Malaitans were displaced].

In the post tension recovery, there was political encouragement to re-establish oil palm production. A team of customary landowners visited Papua New Guinea to discuss the success of landowner involvement in the New Britain Palm Oil Project. Sending landowners to PNG to discuss with their *wantok* proved much more

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

successful than sending politicians or members of the Provincial Council. This has resulted in a scheme that is significantly more successful than before the tensions, running a much leaner operation with three harvesting trucks, where previously there had been eight. A single larger tanker now serves the project to transport the oil to the wharf.

In 2005, the landowning tribes re-established production with the encouragement of the new government. This was done by establishing Guadalcanal Plains Development Association Company, who acts as a trust for the interests of five tribes: Ghaubata, Nekama, Lathi, Thimbo and Thogo. Whilst Guadalcanal is a matrilineal society, males are often both the head of the family and head of the tribe.

Currently these five tribes lease a total of 6,551.66 hectares of registered customary and private land to Guadalcanal Plains Palm Oil Limited (GPPOL), through the Guadalcanal Plains Development Association Company. With the support and assistance of the New Britain Palm Oil Company, PNG 22 million kina (approx. \$29 million) was borrowed in PNG to re-establish production and rebuild the mill and infrastructure. GPPOL are leasing the land on a 50 year Fixed Term Estate for \$100 per hectare per annum, plus a monthly royalty payment. The lease rent is anticipated to increase to approx. \$150 per annum in the seventh year of the term, once the establishment debt is cleared, with the royalty expected to rise to around \$150 per tonne.

Palm oil has a twenty-year life cycle, so it is expected that the crop will be replanted around year 20 and 40. The expectation is that the lease will be automatically renewed at year 50. Production is expected to be at 6 tonnes per hectare by 2008, rising to 29 by 2012. The crop takes three years to mature to production, with 20 months in nursery conditions, then a further 16 months until first harvest (a 3-year process).

Returns from production across the 6,551 hectares are managed co-operatively. Annual rent currently totals \$655,166. In addition, royalties are currently running at approx. \$240,000 per month net (after debt service), with production and related royalties anticipated to rise significantly as more land becomes productive and the crop matures. Of this royalty revenue, about half is distributed on an area pro rata basis to the landowning tribes (currently about \$17 per hectare per month), with an equal amount invested. As stated, this is net income after debt service, with an expectation that the PNG 22 million kina debt will be cleared within seven years. Meanwhile, the investment fund currently exceeds \$1 million and there are plans to acquire a commercial property investment in Australia or New Zealand to capture rental growth and capital appreciation for the trustees.

An interesting equity aspect is that productivity is averaged out for all of the land owned by the tribes, rather than dealing with specific productivity on any one parcel. This means that during the replanting cycle, when areas of land have to re-establish optimal production, the landowners will continue to receive a stabilised return.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

Overall, returns to the customary landowners are far better than under the previous arrangements. With the move towards a savings mentality, the community has established a bank and financed telecom facilities and a police station. Schools have also been expanded.

A factory and palm oil nursery have been established, and GPPOL employ an expatriate general manager and land manager, supported by a Malaysian mill manager and PNG workshop and nursery managers. All other employees are local. A long-term goal is for the development of a refinery to capture processing returns. Currently refining is undertaken in Malaysia, although a new refinery was opened in New Britain at the end of 2006. The estimated productive land area needs to increase from 6,000 hectares to 15,000 hectares to justify production throughput for a refinery. Currently there is scope for customary landowners to produce palm oil on their own (unregistered) land and sell the produce to GPPOL, which generates a higher return than leasing out land and receiving rental and royalty.

There are plans to expand cattle grazing into the plantations, learning from the PNG experience, as the MOU with the GPPOL allows for grazing rights under the Fixed Term Estate agreements. After the earlier troubles, security in the scheme is very tight, with two Ghurkha's employed to train the company staff. Internal disputes are resolved between the five chiefs. The re-establishment of palm oil in the Guadalcanal Plains is a successful indigenous led collective of landowners working co-operatively and equitably for economic development on registered customary land.

However, there remains a lack of clarity over valuation and payment issues relating to the return of PE land (previously used, for example, for rice production) by the State to customary owners in the area, with valuations referring to both hypothetical market value (in an environment where no 'market' exists) and hypothetical land transaction value. The first figure may be provided for loan security purposes (albeit that the banks are unlikely to rely on such a figure given the lack of a 'market') and the second for stamp duty purposes, albeit that it is unclear to what extent (if any) a monetary payment was made to Government.

Effects on equitable sharing of benefits

GPPOL have learned from its experience with New Britain Palm Oil, and the reaction to the approach taken by SIPL and Gold Ridge mine, regarding equity participation. Ideally GPPOL want to operate with 15,000 ha. They currently have 6,500 ha plus a further 100 ha coming into production from 'outgrowers' (where palm oil is produced by small scale family operations on customary land, with assistance provided for laying out the plantation and provision of plant stock; the return is via a farm gate price for the kernels. Outgrowers are also encouraged to diversify with a market gardening). GPPOL, which became operational in 2006, is small in comparison to New Britain, where the company operates with 35,000 ha plantation and a further 20,000 ha of outgrowers. The GPPOL operation is,

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

however, a useful example of equity participation. The return on FTE plantations provides for:

- > Land rental of *Kina* 100 ha per annum to named landowners(s).
- > Royalty paid to an Association, which is a cooperative of five tribal units with interests in 56 parcels of land. The royalty is based on 10% of the farm gate price, and currently this approximates to SBD\$400-550 ha pa. The Association comprises ten representatives (one senior female and one senior male from each of the five tribes) operates as a go-between for the company and landowners. Given past experience with SIPL there has been a lack of trust by some people in respect of the Association with a preference to deal direct with the company. Currently 50% of the royalties are distributed and 50% are held in a trust fund. The Banks (particularly ANZ) are advising the Association on possible passive investments for the intergenerational trust component given that SBD\$1 million has accumulated over the first year.
- > The Association holds a 20% equity shareholding component of GPPOL which will start to pay dividends once the *PGK* 220 million debt (SBD\$529 million) for establishment has been serviced (anticipated to be 7 years).

The intergenerational benefit of the arrangements will take 20 years to manifest given the long-term nature of palm oil plantations, meaning that it will be the children and grandchildren of the current landowners who will be the major beneficiaries of current negotiations. Whilst there is a clear equity participation in the Palm Oil venture between GPPOL, the Association and the customary landowners, there is no clear evidence of equity sharing of the benefits within families and tribes. In certain examples the land has been returned to a trust of custom owners, with the situation further confused by named parties on transfers being male in a matrilineal area. Such circumstances can delay the land coming into productive palm oil capacity as other family members become frustrated by such arrangements and place caveats over the land. GPPOL, who are already leasing the land and paying the quarterly rental, are aware that it is for the custom owners to come to a solution (usually financial) amongst themselves, otherwise the matter will end up in protracted court cases.

The potential of palm oil production has been a catalyst for the Aluta Basin land recording referred to above. From GPPOL's perspective this is likely to be 4-5 years away from formal lease negotiations. GPPOL are keen to operate with an outgrower arrangement, but no investor will support the scheme if there is a risk of being held to ransom by landowners. A productive area of 3-5,000 ha is required to make the initiative viable and establish a mill. Whilst GPPOL have been advised that land tenure has been resolved in Aluta, they realise that it has only been sorted to a certain extent and experience is that once money enters the equation different perspectives come in to play. A challenge has been that they are now dealing with the fourth (acting) Commissioner of Lands in four years. There are several potential areas that GPPOL are keen to develop, but they are not interested in Fixed Term Estates. In

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

order to avoid conflict they are happy for the government to return prior plantations that the state holds titles on to the landowners and GPPOL will rent from them.

Effects on conflict minimization

As highlighted by a participant the UNDP (2004, p.10) report on Peace and Conflict Development Analysis in the Solomon Islands: “Land itself is not a ‘problem’. The problem arises when land comes to be identified as a root cause of [violent] conflict. This immediately limits our focus to land [in a very physical sense] and the disputes over land – and distracts our attention from the breakdown of the traditional means of resolving disputes and from [the ways] traditional rules have been displaced by alien rules.” The example of GPPOL’s participatory model to ensure land becomes economically productive demonstrates a way of minimising the potential for future conflict at an operational level. It does not resolve intra-tribal and intra-familial conflict, as witnessed by the caveats taken out over certain land dealings.

As stated, as customary land enters the money economy different perceptions come into play. There is a need to formalise the multiple property rights that may operate over any given parcel of land. The Aluta project is an example of opening up custom land for development and a participatory approach is required. Such initiatives where individual and group rights have not hitherto been formalised requires a sensitive participatory community engagement approach to minimise the risk of future conflict. Such processes take a significant investment of both time and money by the state. Given the reservations expressed that custom owners see registration and recording as a risk rather than a benefit, a major education programme about property rights is essential in all areas of the community. This requires, in the first instance, a well-managed information campaign to explain all the issues involved. The education and information campaign can be conveyed at multiple levels, through radio and print media, school curricula, church groups, community organization and NGOs.

As with other PICs, there are ranges of potential conflicts that will emerge in the future over Fixed Term Estates. In the case of former freehold or Perpetual Estates that became Fixed Term Estates at Independence, it is unclear whom any improvements on the land will belong to when these leases expire. For FTEs for residential property, Banks will only operate on the remaining interest of a FTE – albeit unclear who ‘owns’ the property rights in the improvements. People currently assume that FTEs will be automatically renewed upon expiration. In the case of land where government holds the superior interest (PE), this affords a level of social security.

Effectiveness of mechanisms for formal and informal land dispute resolution

Naitoro (2000, p.3) argues that ‘Development in the Solomon Islands may continue to be infested with social conflict unless there is a clear understanding of the

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

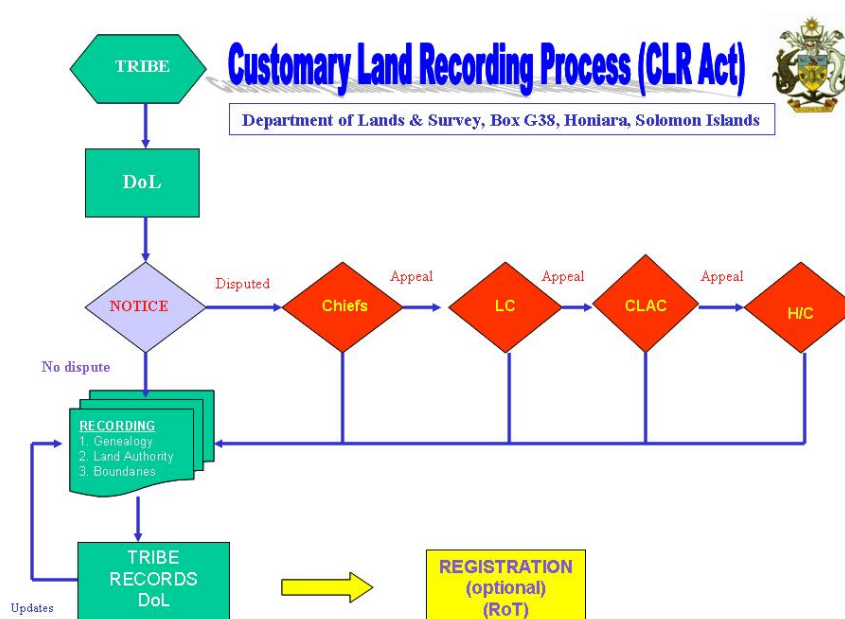
conditions of unfairness and their replacement with standards or mechanisms about values, power, resource use and exchange’.

There is a need to clarify understanding in respect of traditional authority structures and reconcile the impact of non-traditional and competing systems of authority, with UNDP proposing adoption of a Peace and Conflict Development Analysis toolkit (UNDP, 2004, p.39). The majority of the population are not part of the formal economy and for these people custom prevails. As raised above, the way to minimise future land dispute resolution is through education over property rights at multiple levels, e.g., through school curricula, church groups (albeit that UNDP questions the competing role of churches in local level governance), community organization and NGOs. The grass-roots reaction to land regulation and registration is that people perceive that something is being taken from them. This results in a lack of support for the government who, in turn, should be guaranteeing security of title for all parties.

Effectiveness of institutional arrangements as a platform for providing cost effective, transparent and accountable decision-making

The decision making process under the *Land Recording Act 1994* is detailed in Figure 4. This incorporates a customary appeals process via the House of Chiefs that operates in certain areas (including Aluta where the trial was undertaken), which if unresolved after their intervention will proceed to the formal court system. The House of Chiefs act as arbiters and endorse boundary agreements and genealogies, consistent with cultural norms (Sullivan, 2007, p.22).

FIGURE 6: SUMMARY OF PROCESS AND APPEALS OF THE LAND RECORDING PROCESS (RUKIA, 2005)



2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

To provide certainty and stability in arriving at acceptable decisions

Solomon Islanders commonly regard legislation as a tool that government uses to fulfil their own goals. Landowners fear is grounded on a perception of negative treatment of custom issues under the formal court system. In 1981 the government reiterated the importance that legislation establishes legal frameworks to enable the expression of Solomon Islands cultural identity in the land courts and support common law based on the respective customs of the people. The lack of public confidence in the governments commitment to uphold the law is often grounded on a lack of awareness of the legislation, the role of line agencies and a general lack of communication on land issues (Sullivan, 2007, p.18).

Similarly, there is a significant lack of trust in the valuation profession when it comes to land dealings and supporting the decision making process. The view of the lenders is that the quality of valuation reportage is very limited.

The arrival of the Australian-led Regional Assistance Mission to the Solomon Islands (RAMSI) has provided a significant level of demand, particularly for the housing market in Honiara. However, the banks treat the value component of unregistered customary land as zero, as they have no potential for leverage from the land.

As AusAID (2006b, p.7) highlights, 'Improving access to the economic potential of land and resolving lingering tensions over ownership and land title will also be an essential requirement of any long-term growth strategy. Disputed land use, ownership and access were fundamental to the 1998-2003 conflict. Solomon Islanders have to develop an indigenous solution to recognising customary values.' Whilst the indigenous solution of land *recording* in the style of the Aluta trial clarifies boundaries and is accepted by groups, chiefs and traditional arbiters, contrary to Sullivan's (2007, p.26) suggestion that this 'solution' will provide confidence to potential investors or users is not a view shared by the banking sector. Voluntary recording and the resolution of any disputes is a time consuming and important precursor to formal registration, which in turn creates opportunities for the grant of FTE or lease-leaseback 'solutions' into a form that is acceptable to lenders.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

COUNTRY CASE STUDY: VANUATU

Informal and formal understanding of property rights

There is a very widespread general understanding amongst ni-Vanuatu that the custom owners of land and their descendants are entitled to ownership of land in the country. There is also a very widespread general understanding amongst custom owners that by virtue of their ownership of land they are able to use the land as they wish. This includes granting formal leases and licences over the land to others, and granting informal permission to ni-Vanuatu to occupy the land in accordance with custom.

During the later days of the Anglo-French Condominium of the New Hebrides the desire of indigenous people to recover the lands which had been acquired by European settlers was the flame that ignited the earliest indigenous movement for independence in the 1960's, the *Nagriamel* movement, and also the *Vanua'aku Pati* which led the country to independence in 1980. The Constitution, which was drafted in 1979 and came into force at the time of independence in 1980, confirms in article 73 that "all land in the Republic of Vanuatu belongs to the indigenous custom owners and their descendants." The widespread awareness of ni-Vanuatu as to their right to own and use the land of their ancestors is tellingly described by the first Minister of Lands, Sethy Regenvanu, in his autobiography: "The nullification of land titles at independence which was a consequence of the provisions of the new constitution resulted in such confusion that it was difficult to arrange an orderly transfer of land to the rightful custom owners. Ni-Vanuatu rushed to repossess the land formerly alienated by law. Even those who had never made traditional claims to alienated land posed as custom owners, creating disputes that no one has been able to resolve even to this day" (Regenvanu, 2004, p.125). There is no doubt at all that all ni-Vanuatu are fully aware of their right to own and use the land of their ancestors.

However, two factors have very significantly reduced the effects of that general understanding. These are uncertainties as to rights of ownership and uncertainties as to rights of use of land.

Uncertainties about rights of ownership of particular lands

In some areas, there is uncertainty about exactly who the rightful owners are and the boundaries of their land. As the first Minister of Lands, has observed, "However it was[sic] proved difficult to identify the custom owners and since independence there have been numerous disputes about ownership of land. These have stopped productive development of the land and disrupted communities... Indeed a number of cases are still the subject of debate to this day, mainly due to the inability of ni-Vanuatu to agree on who are the rightful custom owners" (Regenvanu, 2004, pp.125 & 127).

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

Customary rights of ownership are dependent on inheritance, usually through males, but sometimes through females, and sometimes through both males and females, and sometimes through adoption. This assumes if appropriate customary procedures are followed, from the person(s) who were the original occupiers of the land (Simo, 2005, p.4).

There are no written records about who were the original occupiers of land in Vanuatu. Nor are there any written records of the people who were occupying land at the time of the arrival of Europeans, or at any time subsequently. Until very recently, there were no written records of the male or female descendants of the original occupiers, or of births deaths, marriages, and adoptions. A further complicating factor is that in many areas it is known that there have been movements of people: seeking food or water; fleeing a natural disaster, or a human enemy; and, sometimes, attracted to spiritual, medical, physical, and educational facilities and employment opportunities provided by European missionaries, traders, planters and settlers. These movements of people, individuals, families, sometimes several families together, occurred within most islands of the country, as well as between different islands.

Records are further complicated as men were, and indeed still are, permitted to marry more than one woman, and so have more than one family of children. Until very recently, children did not usually bear the name of their father, and the spelling of names was not uniform or consistent.

Much land was 'sold' in the 1880s and 1890s to Europeans. There are in existence written deeds of sale of land from that time bearing the signatures or marks of persons who claimed to be entitled to sell the land. In those areas where deeds of sale exist, they are often relied upon, especially by courts, as proving that the persons whose signatures or marks appear on the document were the descendants of the original custom owners.⁵¹ Whilst these documents clearly show that the persons whose signatures or marks appear on the documents claimed to be entitled to sell the land being sold, they do not establish whether they claimed to be owners of the land or merely agents or representatives of the true owners. Likewise it is unclear, if they did claim to be owners, that their claims to ownership were well founded and accepted by others. Similarly, if they were true custom owners, where there were any other persons who were owners but who did not sign the deed.

In Condominium times, the colonial administrators drew boundaries of some villages. While these offer some indication, they are not regarded by ni-Vanuatu as conclusive of the true boundaries of customary land.⁵²

⁵¹ See, e.g., *Malas Family v Songoriki Family* [1980 - 88] 1 Van LR 235, 254; *Regenvanu Family v Ross and Abel* [1980 - 88] 1 Van LR 284, 288 - 290; *Marie and Kaltabang v Kilman* [1980 - 88] 1 Van LR 343, 346 - 352.

⁵² "Pango chief reconfirms urban colonial boundaries", *Vanuatu Daily Post*, 01/10/07, p.5.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

In areas where there are no written deeds of sale, and no colonial boundaries, reliance is placed entirely upon family narratives and stories, most of which are hearsay. These can often be genuinely mistaken or deliberately falsified.

The hearing of disputes about ownership of customary land has not been speedy. Disputes about ownership of land sometimes lie with chiefs for years before they are decided.⁵³ If, prior to December 2001, a party was not satisfied with the decision rendered by the chief, he or she could take the dispute to the island court and then to the Supreme Court. Since December 2001, a dissatisfied claimant can file a claim with a village land tribunal with appeal to an area land tribunal, and ultimately an island land tribunal. The hearing of land disputes by the State processes has proven to be a very lengthy process, and, as described above by the first Minister of Lands, many disputes are still not resolved today (Regenvanu, 2004, pp.125-127).

Uncertainties about rights of use

In some areas, there is a quite genuine lack of understanding and misunderstanding about rights of use of land:

- > *use of land where ownership is disputed* - There seems to be a lack of understanding that if land is claimed by another person then it is unwise to allow other people to occupy that land until the dispute is resolved. It is not uncommon to find that persons laying claim to land that is disputed, actively encourage other people to occupy that land, probably in the belief that it strengthens their own claim to the land.⁵⁴
- > *effect of leases* - The Land Leases Act provides that leases may be granted to any person by the owner of any land in Vanuatu for periods of up to 75 years. To confer legal rights, leases over three years must be surveyed and registered in the land registry. The discussions surrounding the National Land Summit made it clear that there are still serious misunderstanding by ni-Vanuatu as to the binding effect of a lease. In particular are the circumstances where the terms of a lease grants the lessee exclusive possession for the full period of the lease, even to the exclusion of the owner, and that the terms of the lease cannot be altered in any way without the consent of the lessee. For example, the amounts of premiums and the amounts of rents, and the times when they are payable, cannot be changed to suit the interest and convenience of the landowners/ lessors, nor can the purposes for which land can be used be changed to suit the interests of the lessees (Tahi, 2007, pp.26-28, 32, 41).⁵⁵

⁵³ "South Santo teacher accused of underperforming", *Vanuatu Daily Post*, 24/10/07, p.6.

⁵⁴ "Settlers thank Chief Kalpoelep for land", *Vanuatu Daily Post*, 28/06/07, p.2; "Kastom fasin blong talem tankio from graon", *The Independent*, 01/07/07, p.23; "Eratap Village Council renounces Kalpoelep", *Vanuatu Daily Post*, 11/07/07, p.4.

⁵⁵ "Handwritten contract lands custom land owners in hot water", *Vanuatu Daily Post*, 13/10/07, p.1; "7000 lease titles to be reviewed for compliance", *Vanuatu Daily Post*, 19/04/07, p.2.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

Formal understanding of property rights

There is a very strong understanding by Government that the descendants of custom owners of land are entitled to own that land. Government has sponsored legislation to provide institutions to determine who the true descendants of custom owners are in circumstances of dispute over ownership, which cannot be resolved by customary means; i.e., Island Courts Act, 1983; Customary Land Tribunals Act 2001.

The Government is also aware that it has ownership rights over land owned by the previous governments in Condominium times, in addition to the right to declare land to be public land and to acquire land voluntarily and by compulsory acquisition. There are several occasions when land has been declared public land, and when land has been compulsorily acquired, especially for airports.⁵⁶

The Government has a complete understanding that it has the right to manage and to lease land when the ownership of that land is in dispute. Section 8 of the Land Reform Act 1980 provides that the Minister of Lands shall have general management and control, including the power to grant leases, over all land occupied by persons who had acquired freehold title to land or a life interest in land, or land which was not so occupied but where the ownership of the land was in dispute. The latter power has been exercised by Government on many occasions - in fact on so many occasions as to become the subject of adverse criticism at the National Land Summit, 2006, and of recommendations that it should no longer be exercised (Tahi, 2007, pp.29, 43). Since the National Land Summit, Government has agreed that this power shall not be exercised except when the public interest requires.

The Government is also aware that it is entitled to all minerals and other substances below the surface of the land. The Mines and Minerals Act 1996 vests in the Government all substances naturally occurring underneath the surface of land, whether in solid, liquid, or gaseous form. Thus the Government owns not only all precious metals such as gold and silver, but also metals of commercial value, such as coal and nickel, and non-mineral substances, such as oil, water and gas that lies below the surface of land.

Informal disregard of property rights

An emergent factor on the land scene in Vanuatu is not so much lack of understanding of other peoples property rights, but of an unwillingness to recognise the limitations upon one's own rights to land, and an unwillingness to respect the rights of other people to land. The first Minister of Lands highlighted this as a problem immediately after independence (Regenvanu, 2004, p.125), and it seems to have increased, rather than diminished in succeeding years.

The unwillingness of private people to accept the limitations to their own rights and to recognise the rights of others is displaying itself in several ways:

⁵⁶ "Valuation for land and property compensation for the three airports", *The Independent*, 29/10/07, p.20.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

- > some members of landowning family lease family land without agreement of other members;⁵⁷
- > members of landowning family lease land which includes the land of other families;⁵⁸
- > members of landowning families are leasing or licensing the same piece of land to different people;⁵⁹
- > members of landowning family are leasing land which they know is already occupied by relatives or other members of the community;⁶⁰
- > members of landowning families are allowing logging companies to log their land illegally;⁶¹
- > members of landowning families are leasing so much of their land that there will not be sufficient for their children, grandchildren and further descendants;⁶²
- > members of landowning families are leasing land without approval of their chief;⁶³
- > members of landowning families are leasing or licensing land which deprives the public of rights of access to the sea, landing areas and roads, or interferes with catchment areas for water supplies, and increases the number of unemployed people in peri-urban areas;⁶⁴
- > claimants to land whose claims to ownership are disputed are allowing and encouraging other people to occupy the land, before their ownership has been confirmed;⁶⁵ and
- > lessees are not using the land themselves but selling the leases on to other people at great profit to themselves, but not to the lessors /landowners.⁶⁶

⁵⁷ "Emau families concerned over 229-hectare Takara lease", *Vanuatu Daily Post*, 29/09/07, p.3; "Court restrains family from entering Taftumol boundary", *Vanuatu Daily Post*, 18/10/07, p. 6.

⁵⁸ "Investors told to keep off Eratap Point's 77-hectare lease", *Vanuatu Daily Post*, 24/09/07, p.1; "Opposition concerned over issuance of land leases", 29 / 09 / 07, p 2; "Letter to Editor : '5000 hectares of land at Epi' ", *Vanuatu Daily Post*, 13/10/07, p.7.

⁵⁹ "Prima land buyers call meeting", *Vanuatu Daily Post*, 02/08/07, p.2.

⁶⁰ *Ibid.*

⁶¹ "Illegal logging on Efate", *The Independent*, 03/06/07, p.1.

⁶² "My land or our land", *Vanuatu Daily Post*, 17/01/06, p.4; "Land Grabbers be Wary of North Efate Lands", *The Independent*, 07/10/07, p.14; "Sope concerned over massive land speculation on Efate", *Vanuatu Daily Post*, 13/10/07, p.3; "Sope on Efate Land", *The Independent*, 21/10/07, p..

⁶³ "Ngunu chiefs: 'customary dispute to be resolved in the village' ", *The Independent*, 19/03/07, p.2 ; "Emoi chiefs clear air over new Council", *Vanuatu Daily Post*, 20/07/07, p.3; "Govt urged to intervene in 5000 ha Epi land sale", *Vanuatu Daily Post*, 18/08/07, p.1; "Chief says Roimata didn't create 'naflak' system", *Vanuatu Daily Post*, 20/10/07, p.2; "Ferari sub-division under the spotlight", *Vanuatu Daily Post*, 20/10/07, p.3; Lelepa Vs TransPacific, *The Independent*, 21/10/07, p.1.

⁶⁴ "Lelepa Landing sold off", *The Independent*, 28/01/07, p.1; "Urban population to double in under 2 decades", *Vanuatu Daily Post*, 13/06/07, p.6; "Stop giving away free land to islanders: Nalau", *Vanuatu Daily Post*, 27/07/07, p. 2.

⁶⁵ "Settlers thank Chief Kalpoelep for land", *Vanuatu Daily Post*, 28/06/07, p.2; "Kastom fasin blong talem tankio from graon", *The Independent*, 01/07/07, p.23; "Eratap Village Council renounces Kalpoelep", *Vanuatu Daily Post*, 11/07/07, p.4.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

Formal disregard of property rights

It is not only private individuals, but also national, municipal and provincial government that is considered to be unwilling to recognise the limitations on its own rights to land and unwilling to respect the rights to land of others. This has manifested itself in several ways:

- > allegations that the Minister of Lands has been speculating in the leasing land in Efate and Santo for his own personal benefit;⁶⁷
- > allegations that the Minister of Lands has enabled public land to be transferred to political supporters;⁶⁸
- > allegations that the department of lands is registering new leases of land although a moratorium on land dealings was supposed to have been agreed after the Land Summit in 2006 until legislation is enacted to give effect to the principles adopted by the Land Summit;⁶⁹
- > allegations that the department of lands is using water belonging to landowners without the payment of compensation;⁷⁰
- > allegations that a municipal council has sold land belonging to the city at gross undervalue;⁷¹ and
- > allegations that land rents received by Government from the leasing of land the ownership of which is in dispute cannot be found.⁷²

Formal identification, recording and registration of customary resource groups and their membership

There is no general provision for the formal identification, recording and registration of customary resource groups or of landowning groups, which are usually families. Nor is there any general legislation that regulates the way landowning families must organise themselves and their activities in the management / use of the land that they own.

Some custom owners of land in the two largest villages, e.g., Ifira Trustees Ltd. and Mele Trustees Ltd., have formed companies to manage the land of residents of the

⁶⁶ "Land use is our culture not land owning: Chief", *Vanuatu Daily Post*, 03/10/07, p.2; "Owner says they 'leased' Pakatel Island", *Vanuatu Daily Post*, 03/10/06, p.3.

⁶⁷ "Allegations against Korman Mount", *Vanuatu Daily Post*, 21/04/07, p.1; "Allegations of abuse of office against Lands Minister", *Vanuatu Daily Post*, 11/05/07, p.6; "Allegations against Mr Maxime Carlot Korman", *Vanuatu Daily Post*, p.4; "More allegations surface against Korman in Santo", *Vanuatu Daily Post*, 23/06/07, p.1.

⁶⁸ "Minister Carlo gives Land Certificate to friend", *The Independent*, 24/06/07, p.3; "Mayor questions lands minister's public land deals", *Vanuatu Daily Post*, 5 / 07 / 07, p 6; "Clearing resumes on controversial land", *Vanuatu Daily Post*, 26/10/07, p. 6.

⁶⁹ "Consultant condemns Epi and Torres leases", *Vanuatu Daily Post*, 26/10/07, p.2.

⁷⁰ "Water Source Act passed without consultation", *Vanuatu Daily Post*, 10/02/07, p.6.

⁷¹ "Allegations fly over Municipal sale of waterfront land", *Vanuatu Daily Post*, 27/01/07, p.1; "Opposition calls on Mayor Avock to resign over allegations", *Vanuatu Daily Post*, 30/01/07, p. 2.

⁷² "Land issues: Where did all the COTA Money go?", *The Independent*, 22/07/07, p.26.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

two largest villages. These companies are registered with the registrar of companies. However, there are complaints of lack of transparency and accountability about the operation of these company trusts.⁷³

Other families of custom owners have made informal arrangements whereby they appoint some of the senior or more educated members of the family, or those with more business experience, as agents or trustees to manage the land on behalf of all members. It is clear that the complaints about lack of transparency and accountability which have been made against the formal organisations of land owners in companies and land trusts also are being made against the more informal arrangements.⁷⁴

Recording of land boundaries and titling

There is no provision for the recording of land boundaries and titling. The Ministry of Lands has tried to encourage boundaries of areas and villages to be marked, but this has not often happened. Government does not formally record the boundaries. Leases of customary land must be surveyed and registered, but not the customary land over which the leases is granted.

The right of chiefs to control activities in the area under their control

Another very important factor in the dynamics of customary property rights, which is not touched on in the preceding items, is the customary power of chiefs to control the activities of their followers. Chiefs of communities, with some few exceptions, do not claim to be the owner of all the land in the community under their control. However, chiefs do claim to be able to control what is done by those who acknowledge their leadership within the area under their control, i.e. within the village controlled by the chief and surrounding lands owned by families of the village. This can conflict with the wishes of families who wish to develop their land in a way different from the way in which it has been traditionally developed, especially if they wish to lease it for commercial or residential development.⁷⁵

There is a special problem in those places where there are two or more persons claiming to be the chief. Three of the largest villages on the island of Efate, the villages of Eratap,⁷⁶ Mele⁷⁷ and Mele-maat,⁷⁸ have two persons claiming to be chief.

⁷³ "Letter to the Editor: Ifira Trustees Financial Report, *The Independent*, 22/04/07, p.2; "Letter to the Editor: Ifira Trustees' Financial Report!!" *The Independent*, 09/09/07, p.4.

⁷⁴ "Over 50% of reserved land for Malas and Niwango sold out", *The Independent*, 29/07/07, p. 3.

⁷⁵ "Abolish land laws, Chiefs demand", *Vanuatu Daily Post*, 04/01/06, p.4; "Chiefs want Customary Land Tribunal axed", *Vanuatu Daily Post*, 06/01/06, p.4; "Santo Chief urges govt to iron out Lands Tribunal Act", *Vanuatu Daily Post*, 11/01/06, p.5; "Epi chiefs threatening to break law over Rovo Bay", *Vanuatu Daily Post*, 03/04/06, p.3.

⁷⁶ "Eratap Village Council renounces Kalpoelep", *Vanuatu Daily Post*, 11/07/07, p.4.

⁷⁷ "Two chiefs for one village", *Vanuatu Daily Post*, 02/03/06, p.4.

⁷⁸ "Chief says Mele Maat out of control", *Vanuatu Daily Post*, 02/01/07, p.4; "We need a new Chief: Mele Maat", *Vanuatu Daily Post*, 05/01/07, p.3; 300 villagers name their first Chief", *Vanuatu Daily Post*, 20/01/07, p.2; "Hae jif blong Mele Maat hem i jif Albea David folem blad laen blong jif", *The Independent*, 21/01/07 p.12; "Chief says one thing at a time", *Vanuatu Daily*

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

In another large village, Erakor,⁷⁹ there are three people asserting the right to be the chief. There is no State body which is clearly accepted as having legitimate jurisdiction to determine chiefly title, although island courts have sometimes done so. There are no written records of chiefs in individual islands. The Malvatumauri National Council of Chiefs has started to try to register individual chiefs and island and area councils of chiefs, but it is likely to be a long and difficult task with and no outcomes yet in sight. Meanwhile, the scope for multiple claims to chiefly titles continues.⁸⁰

Impact on economic development and conflict minimisation

The impediment to economic development of customary land, which would normally be anticipated to be caused by the widespread lack of accurate knowledge and understanding of who are the true owners of customary land, and where are the correct boundaries of customary land, has not been as great as might have been expected because of the following factors:

- (a) the power which is vested in the Minister of Lands to manage and lease land when the ownership is in dispute has enabled the Minister to grant leases for economic use. Consequently, even on the island of Efate where there are widespread disputes about ownership, the Minister of Lands has leased out much of the land;
- (b) the willingness by persons claiming to be the owners of customary land to allow ni-Vanuatu to occupy that land under arrangements corresponding to licences or tenancies at will; this occurs even before their claim to the land has been formally recognised. Similarly, the willingness of ni-Vanuatu to occupy land before ownership of such land is settled, together with the absence of any legislation to restrict such practices.

Conversely, there are several situations that have the potential to increase, rather than minimise, the risk of future conflict. These include, for example: the uncertainties as to who are the true descendants of the original custom owners; the actions taken by the Minister of Lands to lease customary land when the ownership is disputed; the actions being taken to lease land in disregard of the limitations on the rights of the lessors, and in disregard also of the rights of others.

Previously, conflicts mainly related to the ownership of land, caused by the uncertainties as to who was entitled to be regarded as the true owners of particular

Post, 02/02/07, p.4.; "Letter to the Editor: 300 villagers name their first chief", *Vanuatu Daily Post*, 07/02/07, p.6; "Disunity raises ugly head at Mele Maat", *Vanuatu Daily Post*, 07/04/07, p.3.

⁷⁹ "Chief Nmak shines over bloodline battle", *Vanuatu Daily Post*, 01/04/07, p.5; "Disunity raises ugly head at Mele Maat", *Vanuatu Daily Post*, 07/04/07, p.3; "Court records show Chief of Erakor is Nmak.", *Vanuatu Daily Post*, 12/06/07, p.2; "Erakor I stap long alert", *The Independent*, 18/08/07, p.30; "Kalomatak claims Erakor's Chiefly title amidst Court Orders", *Vanuatu Daily Post*, 23/19/07, p.1..

⁸⁰ "New chief has no right to title", *Vanuatu Daily Post*, 15/05/05, p.2; "Tri vilij jif blong Emae oli no wantem wok wetem jif John William Timakata", *The Independent*, 28/05/06, p.10; "Noone allowed to claim chiefly title for Tanoliu", *The Independent*, 01/04/07, p.27; "Kranke Kona", *Vanuatu Daily Post*, 26/04/07, p.5; "Chief wants retrial of chiefly title over Tagara", *Vanuatu Daily Post*, 10/10/07, p.4.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

pieces of land. Conflicts as to ownership are certainly still occurring.⁸¹ More recently, conflicts relating to land tend to arise more over disputes about the *use* of land. These conflicts over the use of land fall into several different categories:

- > conflicts arising between members of land owning family as to the use of land that is considered not to be equitable or fair for family members, present or future;⁸²
- > conflicts arising between a land owning family and other families whose land they are using without permission;⁸³
- > conflicts arising between a land owning family and persons whom they have allowed to occupy their land either under formal leases or informal customary arrangements;⁸⁴
- > conflicts arising between a land owning family and other members of their community who are adversely affected by the use which the family members are making of their land, particularly by way of leasing;⁸⁵ and
- > conflicts arising between a land owning family and chiefs of their community regarding the use which they are making of their land.⁸⁶

Effectiveness of the formal and informal land administration systems

Traditional decision-making process

Traditionally, the chief having control of the area in which the land is situated usually makes decisions about ownership of land. The chief normally consults the elder males from the different families in the area, before announcing his decision.

⁸¹ e.g., "Laef i kam bakegen long Shark Bay", *The Independent*, 08/01/06, p.7; "Luganville VMF investigate violence in South Pentecost", *Vanuatu Daily Post*, 31/01/06, p.6; "Epi chiefs threatening to break law over Rovo Bay", *Vanuatu Daily Post*, 03/04/06, p.3; "On whose land is Port Vila?", *The Independent*, 03/12/06, p.1; "Vete's claim is not an issue for the government": DG Nari", *The Independent*, 25/02/07, p.3; "Tonga Chiefs request dialogue with Chief Manto", *Vanuatu Daily Post*, 30/10/06, p.2; "Tonga chief withdraws from 'namwele ban'", *Vanuatu Daily Post*, 12/06/06, p.3; Respond to Selected Efate Vaturisu Resolution of February 2007", *The Independent*, 01/04/07, p. 7; "36 remanded over Pentecost land dispute", *Vanuatu Daily Post*, 14/06/07, p.6; "Ulei Chief maintains school on his land", *Vanuatu Daily Post*, 04/07/07, p.3; "Efate Vaturisu Council of Chiefs calls Vete activities in Efate unlawful", *The Independent*, 18/03/07, p.3; "Court orders Kilman to remove namele leaves", *Vanuatu Daily Post*, 24/07/07, p.3; "Court orders sought - on two fronts - to stop fishery", *The Independent*, 28/10/07, p.1.

⁸² "Emau families concerned over 229-hectare Takara lease", *Vanuatu Daily Post*, 29/09/07, p.3; "Court restrains family from entering Taftumol boundary", *Vanuatu Daily Post*, 18/10/07, p.6. "Over 50% of reserved land for Malas and Niwango sold out", *The Independent*, 29/07/07.

⁸³ "Investors told to keep off Eratap Point's 77-hectare lease", *Vanuatu Daily Post*, 24/09/07, p.; "Opposition concerned over issuance of land leases", 29/09/07, p.2; "Letter to Editor : '5000 hectares of land at Epi'", *Vanuatu Daily Post*, 13/10/07, p.7.

⁸⁴ "Prima land buyers call meeting" *Vanuatu Daily Post*, 02/08/07, p. 2.

⁸⁵ "Lelepa Landing sold off", *The Independent*, 28/01/07, p.1; "Urban population to double in under 2 decades", *Vanuatu Daily Post*, 13/06/07, p.6; "Stop giving away free land to islanders: Nalau", *Vanuatu Daily Post*, 27/07/07, p.2.

⁸⁶ "Nguna chiefs: 'customary dispute to be resolved in the village'", *The Independent*, 19/03/07, p.12; "Emoi chiefs clear air over new Council", *Vanuatu Daily Post*, 20/07/07, p.3; "Govt urged to intervene in 5000 ha Epi land sale", *Vanuatu Daily Post*, 18/08/07, p.1; "Chief says Roimata didn't create 'naflak' system", *Vanuatu Daily Post*, 20/10/07, p.2; "Ferari sub-division under the spotlight" *Vanuatu Daily Post*, 20/10/07, p.3; Lelepa Vs TransPacific, *The Independent*, 21/10/07, p.1.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

Decisions about the use and management of land, including decisions as to whether it should be leased or licensed to other people, are usually made by the head or senior members of the family which owns the land. If it is a large family, a committee of the more assertive or senior members may be set up to look after the management of the family land.

Formal organisational arrangements for decision-making

At independence, the Vanuatu government thought that there would be no need to establish any special mechanism for determining ownership of customary land because it was believed that all ni-Vanuatu knew very well what land they owned. However, it soon became apparent that this was an overly optimistic view and in 1983 island courts were established with jurisdiction to determine disputes about ownership of land, with appeal to the Supreme Court, whose decision was final.

After a decade, it became apparent that the number of land disputes coming before the courts was more than the courts could handle. Since December 2001, Parliament has provided that disputes about ownership shall be determined first by a village customary land tribunal appointed by the chief of the village. On appeal this is referred to an area customary land tribunal, appointed by the area council of chiefs, and then on subsequent appeal to an island customary land tribunal, appointed by the island council of chiefs. The decision of the island customary land tribunal is final, and there is no appeal from a decision of an island customary land tribunal. However, the Supreme Court does have power to set aside decisions of land tribunals on grounds of unauthorised membership of the tribunal, and unauthorised procedure by the tribunal, but not because the decision is based upon an error of custom.

The situation is still not very satisfactory. There are still cases pending before the island courts and the Supreme Court from before 2001 that have not been disposed of. The land tribunals are not operating very widely for several reasons:

- > they are viewed by some chiefs as supplanting their traditional powers to determine disputes about ownership of land;
- > there has been insufficient awareness-raising and training undertaken by the department of lands; and
- > some chiefs see the tribunals as threatening the interests of themselves or their families in land.

Decisions as to use and management of land

The formal control over management of land comes from two sources:

- > *Physical Planning Act*. This Act authorises the establishment of planning areas and the control of all development within those areas by the planning authority, which is a municipal council or a provincial council. It has not proved very effective

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

because of lack of a strong, or in some cases any, planning unit within the municipalities and provinces. One of the resolutions of the National Land Summit was that attempts should be made to strengthen physical planning (Tahi, 2007, p.43), and a meeting was recently held to discuss what needs to be done to strengthen the planning capacity of local government.⁸⁷

- > *Land Leases Act.* This Act provides that leases may be granted by owners over the land and that such leases may be forfeited for non-compliance with the terms of the lease. However, it is clear that enforcement of the terms of leases, especially leases granted by the Minister of Lands, is not very effective.⁸⁸ Changes of use of leases granted by the Minister of Lands have often been allowed. A resolution was passed at the National Land Summit that changes of use should not be permitted without the approval of the chiefs of the area (Tahi, 2007, p.41).

Rules, regulations and cultural norms regarding land markets and land management

There are no formal rules or regulations regarding land markets. There are cultural norms, in that family land is supposed to contain the spirit of the family, and to have a spiritual, as well as a material value, and sacred or tabu places in family land are not supposed to be transferred out of the family. Another important cultural norm is that people in community should act with mutual respect towards each other, and especially towards the chief.

These cultural norms tend to wilt in the face of offers of cash, especially offers of substantial cash. Thus cultural norms did not prevent the heads of the families which owned Eroika Island, which is revered as containing the burial place of the legendary paramount chief Roimata and some scores of his followers, from granting a lease of that island to an Australian investor. Similarly, cultural norms have not prevented some land owning families of Maungaliliu village in north Efate from agreeing to allow extensive commercial developments to be undertaken on their lands without any prior consultation with, much less approval of, the chief of their community.

There are no formal rules and regulations about the management of customary land, except that land transactions between custom owners and a non-indigenous citizen or a non-citizen are required by the Constitution to have the consent of the government through the Minister of Lands, and that leases cannot be granted for more than 75 years.

Again there are the cultural norms that require that sacred or tabu places should not be disturbed by the use of land, although in areas that have been leased to Europeans or licensed to ni-Vanuatu, the memory of the exact location of sacred or tabu places tends to fade, and the cultural norms to lose their significance. There are also cultural norms that require that any novel activities by villagers should be approved

⁸⁷ "Provinces need to develop Physical Planning Structures: Sampson", *Vanuatu Daily Post*, 23/10/07, p.3.

⁸⁸ "7000 lease titles to be reviewed for compliance", *Vanuatu Daily Post*, 19/04/07, p. 2.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

by the chief of the village. As has been mentioned already, these cultural norms have not proved strong enough to prevent landowning families from leasing off the sacred places to overseas investors, or from entering into extensive arrangements for the commercial development of their land without any discussion with, or approval of, their chiefs.

Effects on commercial use of land by members and non-members of land owning groups

In these circumstances, the commercial use of that land tends to be controlled by assertive chiefs and/or by the senior or assertive members of the land owning families, and tends to be subsistence or small-scale agricultural.

In areas where the boundaries of land owned by individual families have been lost, usually during the period of ownership by Europeans before independence, chiefs who are assertive can exercise control over much of the land. They determine whether to hold it for themselves, or allocate it to families who support them, or licence it to other people for consideration. Those lands that the chiefs hold for themselves are usually operated on a subsistence or small scale agricultural basis, as are those lands that chiefs allocate to others.

In areas where the boundaries of land owning families have not been lost, individual members of the family will choose whether to operate on a subsistence or on a small-scale commercial basis. If the area of land is large, members of the family may choose to allow the more assertive or educated members of the family to manage all or some of the land on a more large scale commercial basis. This is often achieved by formally leasing or licensing the land. Committees or trustees have been appointed in some places. Because there is a lack of any active formal supervision of such organisations, their activities are often not very transparent, and there is a serious risk that they are being operated for the self-interest of the members of the committee or trust.⁸⁹

The general effect of informal land administration on the commercial use of land is probably best summed up in the words of the first Minister of Lands (Regenvanu, 2004, pp.125,127): “Ni-Vanuatu rushed to repossess the land formerly alienated by law. Even those who had never made traditional claims to alienated land, suddenly posed as custom owners, creating disputes that no one has been able to resolve even to this day. As a result, many developed plantation properties have reverted back to bush because of the inability of landowners to maintain productive development of them. Plantation agriculture has, as a result, declined in its significance as one of the key factors in the country’s economy... Some of the properties were returned without much difficulty, where custom ownership was clear. It was obvious, however, that without external support, Ni-Vanuatu, whether traditional claimants or new lease holders, could not keep them at an economically productive level or as well

⁸⁹ “Letter to the Editor: Ifita Trustees Financial Report”, *The Independent*, 22/04/07, p.2; “Letter to the Editor: Ifira Trustees’ Financial Report!!!”, *The Independent*, 09/09/07, p.4; “Over 50% of reserved land for Malas and Niwango sold out”, *The Independent*, 29/07/07, p.3.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

maintained as they had been under foreign ownership. For me and the government, this was an embarrassing blow, because it tended to support what the former title-holders had been saying - that their properties would under nationals, revert to bush.”

The effects of the formal land administration system upon the commercial use of land is, as indicated above, not as significant as it could, or should, be. The Physical Planning Act is not effectively enforced. There are places inside zoning areas where planning principles are clearly not being implemented, either because the terms of the planning scheme are defective, or because no effective measures are taken to ensure compliance with those terms. There are places outside planning areas which should be brought within the purview of a planning scheme. The Land Leases Act is also not sufficiently effectively enforced, and approvals to changes of use are frequently granted.

The ineffectiveness of both forms of the formal land administration was the subject of adverse comment at the National Land Summit, and resolutions were passed to try to strengthen them (Tahi, 2007, pp.33 & 43).

Effects on equitable sharing of benefits

Sufficient has already been said about the way in which the informal land administration system operates to indicate that it does not provide any sound or secure means of ensuring an equitable sharing of the benefits from land transactions.

In areas where the boundaries of individual families have been lost, the families will be dependent upon the benevolence of the chief in respect of how much land will be allocated to them. If he is an assertive and selfish chief, there is a possibility that he will take the lion's share for himself, and leave the pickings for his people. If he is a conscientious and considerate chief, his people have more chance of equitable return.

In areas where the boundaries of individual land owning families are well established, the families are able to retain the benefits from the land for themselves. This does not mean that it will necessarily be equitably, as between the different members of the family. This is especially so when the family and/or the landholding is large, when it is very likely that the management of the land will be placed in the hands of a committee or a board of trustees. Without the rigours of external audit or accountability, such family arrangements seem often to be regarded as providing greater benefits for the stronger and more assertive members of the family.⁹⁰

There is nothing in the formal land administration, as expressed and provided for in the Land Leases Act that is designed to ensure that there is any equitable sharing of benefits derived from land transactions. There is no requirement that the revenue

⁹⁰ "Letter to the Editor: Ifira Trustees Financial Report, *The Independent*, 22/04/07, p.2; "Letter to the Editor: Ifira Trustees' Financial Report!!", *The Independent*, 09/09/07, p.4; "Over 50% of reserved land for Malas and Niwango sold out", *The Independent*, 29/07/07, p.3.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

from lease must be divided equally amongst, or paid directly to, each of the individual members of the land owning family.

Effectiveness of formal and informal land dispute resolution mechanisms with regard to encouraging dialogue, discussion and common understanding of issues

The formal land dispute resolution mechanisms operating in Vanuatu are, for cases filed before December 2001, the island courts and the Supreme Court. The Island Courts Act, and the rules of procedure made by the Chief Justice for the island courts, do not expressly require or authorise opportunities for dialogue or discussion between the parties, and in practice, the courts do not provide such opportunities. The rules of procedure of the Supreme Court do expressly provide for conferences between the parties and do expressly provide for mediation, but in practice, the Court does not allow such opportunities unless the parties expressly request it, which does not often happen.

For cases about land disputes filed after December 2001, the formal mechanisms are the customary land tribunals, at village level, area level, and island level. The Customary Land Tribunal Act 2001 expressly authorises the chair of a tribunal to adjourn a hearing for up to 10 days to enable discussion between the parties, but in practice this does not seem often to be done.

Meetings that are held by chiefs to determine a dispute about land ownership may be adjourned at any time for the purpose of enabling the parties to have discussion and dialogue, and this quite frequently does occur.

Effectiveness of formal and informal land dispute resolution mechanisms for providing cost-effective, transparent and accountable decision making

As stated above, land disputes filed before 2 December 2001 are subject to resolution by the island courts and the Supreme Court. Island courts tend to sit in only one place in an island, and there is not an island court in each island or indeed in each province, so, although the costs of hearings by such courts are borne by the State, difficulties of access and costs of transport can be high for parties. Lawyers may not appear in island courts, so there are no lawyers' fees to be paid by parties. The Supreme Court has a permanent presence in two islands and provinces, and usually sits in three other provinces at least once per year, but there is one province in which it does not usually sit. The costs of these sittings are borne by the State, but parties bear the costs of court fees for filing documents, and transport to attend the hearings, as well as any costs ordered by the Court. Lawyers may appear in the Supreme Court, and are usually instructed in land cases, and their fees tend to be high because the hearings in land cases tend to lengthy. Often it takes years for parties in land disputes to save up enough money to proceed with an appeal to the Supreme Court.

The hearings of the island courts and the Supreme Court are held in public, and the decisions of the island courts and the Supreme Court are given in open court. To the

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

extent that land cases are almost always recorded in writing, it can be said that they are transparent. The decisions of the island courts can be appealed to the Supreme Court, and so can be said to be accountable, but the decisions of the Supreme Court in land matters are final, and so are not accountable.

The customary land tribunals determine Land disputes filed after December 2001. The land tribunals are designed to be self-supporting, so that the total allowances of the adjudicators, which are prescribed by the legislation, are shared equally amongst the parties. There are no fees for filing documents, and since lawyers cannot attend before the land tribunals, there are no lawyers' fees either. A village land tribunal is established in the village where the land in dispute is located, so there are usually no transport expenses. If the matter is appealed to an area land tribunal or an island land tribunal, then some transport expenses would probably be incurred at that stage. Decisions of land tribunals are required to be announced in public, and the legislation requires that they be recorded in writing. The village and area land tribunal are subject to appeal to the island land tribunal, but the decision of that body is final. The Supreme Court is empowered to supervise the proceedings of land tribunal, and to set them aside if the membership or procedure is defective, but is not authorised to intervene with regard to the substance of the decision.

Many chiefs have regarded with some suspicion, and in some cases outright opposition, the customary land tribunal system.⁹¹ It is evident that much more needs to be done in the way of awareness and training before it will become fully effective.

The informal resolution of land disputes either by chiefly decision or by conciliation and agreement involves very little costs to the parties, except with regard to any fines that the chief may impose either as punishment for conduct arising from the dispute or as remuneration for the persons involved in making the decision. As the hearings are conducted in public, and the decisions are announced in public, the proceedings may be regarded as transparent. As there is no established structure for appeal, informal resolutions of land disputes may be regarded as not accountable, but in practice, if there is a high chief, or paramount chief, who asserts authority over the area where the dispute occurred, it may be possible for his intervention to be obtained. Informal methods of land dispute resolution can be regarded as cost-effective and transparent.

Providing certainty and stability by arriving at acceptable decisions

For land disputes filed before December 2001, decisions made by island courts with regard to land disputes have been almost invariably appealed to the Supreme Court. As stated above, decisions by the Supreme Court cannot be appealed. Decisions of the Supreme Court on appeal from island courts do not appear to have given rise to

⁹¹ "Abolish land laws, Chiefs demand", *Vanuatu Daily Post*, 04/01/06, p.4; "Chiefs want Customary Land Tribunal axed", *Vanuatu Daily Post*, 06/01/06, p.4; "Santo Chief urges govt to iron out Lands Tribunal Act", *Vanuatu Daily Post*, 11/01/06, p.5.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

publicly expressed dissatisfaction in recent times, although few such decisions reported in the newspapers in recent years.

For land disputes filed after December 2001, decisions by village land tribunals are often appealed to area land tribunals, but so far there does not seem to have been an appeal to an island land tribunal. It is probably therefore too early to be able to say whether the tribunal mechanism is providing decisions which are acceptable. However, as mentioned earlier, the customary land tribunal system has not been well received by chiefs, and unless more awareness, training and support is provided by the Department of Lands, it may not prove to be effective in the long-term.

It is difficult to determine the number of land disputes that have been satisfactorily resolved by informal means it is difficult to say. Evidently, informal land resolutions do not always produce acceptable resolutions of the disputes, because prior to December 2001, island courts received many applications to determine the ownership of land. Since December 2001, land tribunals seem to be receiving applications to resolve land disputes, when one of the parties has not been satisfied by the decision reached by informal means. Unfortunately, statistics and information are not available to be able to provide a precise assessment.

Concluding comments

In some areas of Vanuatu, there are uncertainties about rights to ownership of land which produce conflict or the potential for conflict. These include the determination of who are the true custom owners of customary land. This has proven to be a lengthy and difficult task in some areas, and the longer the period of disputed ownership, the greater the risk of conflict. The Minister of Lands has statutory powers to manage land when the ownership is in dispute. As a result, many leases have been granted over such land, so that when ownership is determined, the owners will find that they are committed to leases that they themselves did not approve.

In some areas of Vanuatu, there is reasonable certainty about who is entitled to own land, but there are aspects about the way in which the land is used which produce conflict, or the potential for conflict. This includes some land owning families who are leasing their land in such quantities that future generations will be deprived of sufficient land for their livelihood:

- > some landowning families are using land, especially by way of lease, which is not theirs to use;
- > some landowning families are leasing or licensing land which they had previously allowed to be occupied by others;
- > some members of landowning families are using or leasing family land without the consent of other members of the family;

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

- > some members of land owning families are acquiring benefits from the land in ways which are not transparent or accountable and are claimed by other family members to be inequitable and unfair;
- > some land owning families are leasing land in such ways that members of their community and the public are deprived of access to the foreshore, sea, landing places, rivers, and roads;
- > some land owning families are using their lands, especially with regard to leasing, in ways that are not approved by the chiefs of their communities; and
- > allegations are being made that the Minister of Lands is speculating in land for his own personal and political benefit.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

COUNTRY CASE STUDY: PAPUA NEW GUINEA

Nature and dynamics of local customary property rights

About 98% of land in PNG is held under a variety of customary tenure systems with clans being the most usual basic land owning entities for most. These land owning entities form the basis of land groups and play significant roles socially, economically, politically and culturally in the lives of people in their communities. A number of customary resource tenure and use systems continue to be active throughout Melanesia, these being defined and constrained by the kinship and inheritance patterns operating in each particular Melanesian society.

The most common are patrilineal systems through which permanent rights across a number of fields are inherited and passed down the male line. The proportion of matrilineal systems increase as one travels further south in Melanesia; here natural resource rights are passed down the female line (though males in each generation still manage the resources on a day-to-day basis). Other tenure systems combine elements of these two. Chiefly and strongly hierarchical systems are relatively few in the northern part of Melanesia and increase as one travels south in Melanesia.

Some common characteristics include (Kanowski *et al.*, 2005):

- > Melanesian tenure systems are essentially privatized resource ownership and use systems;
- > A wide range of rights (of inheritance, of use, of access, of control) is vested in customary groups that are kin-based according to the locally applying ideology. The particular grouping is that at which final decisions regarding land and other resources can be made. In Melanesia this is usually the clan level, but may also be the sub-clan or extended lineage;
- > Membership in such a customary group is inherited at birth and is confirmed by self and mutual recognition. Permanent rights holders can invite in temporary users (e.g., to make a garden together) though this does not give residual rights to temporary users;
- > Use of an area of a group's territory for a specific purpose (e.g., new subsistence garden) is by agreement with group elders;
- > Different rights to the one area of land may apply – ownership and inheritance rights, temporary gardening rights, right to build a house, rights over economic trees, fishing rights, etc.;
- > Rights to economic trees (e.g., coconuts, nut trees, pandanus, etc.), usually planted and maintained by an individual are held by that individual and may pass this property on to any other individual (but usually a family member); and

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

> These tenure systems are dynamic and to a large extent very resilient.

Modern developments across Melanesia have placed great strains on these customary tenure systems, especially through the logging of large areas of tropical forests where both internal and external corruption and manipulation has been ever-present. The active presence of emerging Melanesian elites in each country has resulted in the spinning of dreams that remain that for the vast majority of resource rights holders with only a very small proportion of individuals gaining significant material benefits from such exploitative activity.

Following on from a Commission of Inquiry into Land Matters, the PNG government endorsed a Land Groups Incorporation Act in 1974. This was intended as a means to empower customary land-holding groups to register as modern ‘incorporated land groups’ [ILGs] and so enable and empower these customary groups to manage their own development. From the late 1980s the mining and forestry industries have used the identification of customary land groups and the Act as a means to share out mining royalties and ensure resource owner agreement and nominal involvement in both industries’ activities. Particularly in the forestry sector the creation and use of ILGs has been much abused by logging companies and local entrepreneurs.’

While this is a generalized description of Melanesian tenure systems, the description fits PNG systems well: they have traditionally been land tenure systems that have been privatized to kin-group based customary groups that are self-selected by specific membership criteria. These customary systems are all based on a combination of rights and responsibilities to which members of each customary system subscribed and supported. According to customary practice in relation to land, each ‘land group’ within a tenure system makes final decisions about land use and land management within its domain. Multiplying this by many thousands of such customary land groups covers what is now the sovereign nation of Papua New Guinea.

Informal and formal understanding of property rights.

The remarks below are premised on an understanding that customary tenure systems and associated property rights are the formal systems under their control. From a state point of view these are considered ‘informal’, however according to the PNG National Constitution all these customary systems are given full constitutional recognition, at least in theory.

Broadly speaking, customary formal understanding of property rights is ingrained in young people as they grow up in their own society. Thus permanent property rights cannot be sold or transferred to outsiders. Temporary users of property (i.e., invited in by a permanent rights holder) do so under particular conditions, including that the access for use is limited in time and space and cannot evolve into permanent rights. Permanent holders of rights to property maintain their rights by regularly practicing

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

them and/or (if they are working in town) by supplying goods or cash to their fellow land group members while *in absentia*. Traditionally there have been ways and means for individuals to change their land group membership, namely by adoption into another land group or choosing, for various reasons, to change allegiance; however, such ways and means are increasingly being abandoned.

A formal understanding of property rights under custom is also quite clear. For example, permanent holders of rights in a land group know where their land group's domains are, and where the boundaries are (and a justification for such boundaries). While members of a particular lineage within a land group tend to use particular areas within that domain, in general all land group members can, with the permission of land group leaders, garden, hunt, plant economic trees, fish etc. across that domain.

Another issue that needs to be clarified here is the overuse and misuse of the term 'communal' in relation to PNG customary tenure systems. This term is often applied by outsiders (and often repeated by individuals in PIC countries who want to speak the same kind of 'in' language) to mean that all people within any one such customary tenure system have exactly the same rights, that is, on a 'communal' basis. Besides this over-generalized use being quite incorrect in the Pacific region generally and specifically in PNG, it shows a lack of any understanding of these tenure systems. The use of this term is not to be encouraged since its meaning and use varies considerably from speaker to speaker and from context to context.

Formal identification, recording and registering of customary resource groups and their memberships

The basic customary requirements for customary resource group are:

Acquisition (i.e., inheritance) of permanent land rights is by birth according to the locally applying ideology (patrilineal, matrilineal, cognate, etc.);

Membership is confirmed by self and mutual recognition, reinforced by recitation of an individual's genealogy. There are also customary ways, such as adoption, by which individuals can be properly brought an existing kinship group;

Past practice in many (if not most) PNG societies has been that where a particular genealogical link in a particular generation has not been in accordance with the prevailing group ideology (e.g., if the link is a matrilineal link in a group with strong patrilineal ideology). This link could be 'regularized' by later remembering and reciting a genealogy in a more ideologically acceptable way and thus conferring respectability and genealogical 'purity' and thus of those individuals. This was a retrospective way to redraw the map of relationships from the past to the present and so make it acceptable for those descendants to have the status of permanent rights holder and for them to remain within those land groups and legitimately pass on those rights to their own descendants. Such retrospectivity is now no longer acceptable particularly since genealogies are increasingly being recorded on paper and are thus no longer so malleable or adaptable.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

Recording of land boundaries and land titling

According to custom across PNG, land boundaries are most usually demarcated in two ways:

- > Customary domain boundaries follow natural boundaries such as creeks, rivers, mountain ridges,
- > In addition, these natural boundaries need to be supported by a land group's migration stories and mythological histories that justify the land group's current spatial location and current land occupancy.

The migration histories linked to current occupancy of a domain are particularly important to justify a land group's current location. These may be integrated with those of neighbouring land groups whose members also speak the same language, and with whom members of a particular land group are allied in a variety of ways.

Currently, increasing numbers of land groups in PNG are working to fix their boundaries onto maps and in this way attempting to get recognition of their domains. Part of the incorporation process for incorporated land groups can involve the inclusion of a map of the land group's domain, whether hand-drawn or on an acceptable standard map. Most of these kinds of maps as part of an ILG process are problematic in that such boundaries are hardly ever drawn in consultation with neighbouring land groups – to minimize or resolve possibilities for conflicts over boundaries. Such boundary drawing (or boundary claiming) inevitably often overstep the mark somewhere and a land conflict arises between two neighbouring land groups.

Issues around establishing actual boundaries on the ground are often fraught with potential conflicts. When notional land group boundaries are sufficiently vague such potential conflicts usually do not come to a head, but when boundary is to be fixed on the ground and on a map then potential conflicts could become possible or likely conflicts. There is an exponential increase in the potential for conflict to become real when mechanisms for resolving conflicts are not accessible to a festering situation.

Recording of land boundaries and land titling in the formal state systems quite clearly from the beginning of the Australian colonial period in PNG have followed Australian practice and the PNG Land Act in its various incarnations more or less follows Australian law and practice. Boundaries were surveyed in standard ways; if land was being purchased from customary landowners they were carefully interviewed by patrol officers, their relationships to the area of land in question were clarified, and those landowners were then eventually paid.

As a nation, PNG needed an institutional arrangement to bridge the informal system of customary land tenure linked with land and people with the formal national laws on land. This allows communities to relate to modern economic and organizational systems as well as to the outside world. As a mechanism to support communities'

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

development, the *Land Groups Incorporation Act* (1974) [LGIA] encourages this interface. The LGIA allows customary land groups to be recognized as legal corporate entities, and then to legally hold and manage their customary land in their land group's name.

Incorporated land groups were first proposed by the Commission of Inquiry into Land Matters (CILM) in 1973. The CILM recommended group titles as the foundation for eventual customary land registration. The motivation for the enactment of the LGIA however may have been from a slightly different government land policy at that time, as it was intended at that time also to pass other associated laws. The law was enacted but its implementation was not vigorously pursued.

A study on the status of ILGs confirms a perceived trend: prior to 1990s, ILGs were little known, with no more than 10 being registered annually. After the revision and enactment of both the Forestry Act (1991) and the Oil and Gas Act (1998), the number of ILGs registered annually rose significantly. These laws referred to the LGIA and used ILGs as the means to mobilize customary land owning groups and used in these two sectors largely to externalise the distribution of financial benefits to the land groups in the project areas. ILGs have also been used in the lease-lease back arrangements (through the Land Act, 1996) in large agricultural project areas such as the New Britain Palm Oil project. More recently, Telikom PNG Ltd. has been offering community service packages to ILGs within the vicinity of telecommunication facility sites with the intention of encouraging these communities to reciprocate by looking after these facilities.

The ongoing problems with ILGs in these two sectors have been widely documented. Most of these problems are attributable to the additional purposes that ILGs have been expected to fulfil beyond the LGIA's original purpose. The inflated problems of ILGs has largely been a result of the "rent-seeking" behaviour among customary landowners and fuelled by the substantial amounts of money in benefits distributed in the resource project areas. Some of the problems at the ILG level include: proliferation of ILGs of which some are splinter groups and others are bogus urban based ILGs (most with the intention to split and maximize of the financial benefits); leadership struggles; lack of transparency and accountability by leaders; misuse of ILG funds; inequitable distribution of benefits (favouring mostly those in the circle of families and allies of group leaders); and benefits not reaching all the members, especially down to women and children in villages.

Most ILGs do not yet have the capacity to manage their corporations and hence do not function as they should; they do not hold meetings as they should or record the outcomes of those meetings, and the dispute settlement authorities of the ILGs do not function at all. In terms of administrative processes, the ILG office located in the Department of Lands and Physical Planning is not able to effectively and efficiently process ILG applications and administer the ILG register. The ILG

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

processes have been defined by the LGIA, but are not followed due to lack of resources and capacity and sometimes by undue external pressures.

The increased involvement of other sectors in the process of ILG applications makes it increasingly susceptible to abuse as the applications go through different bureaucratic offices (so, for example, the files of a large number of registered ILG are deemed missing by the ILG Office. The problem of limited file storage space and facilities has impaired the ILG office's ability to check on multiple applications and monitor progress of applications. Consequently, the ILG office is not able to respond promptly or adequately to customer queries nor is able to undertake the preparation of other useful ILG information processing tasks. The ILG application process appears to lack proper regulatory mechanisms and costs very little. This has opened the process for numerous unnecessary applications. Finally, the LGIA does not cater well for the many new roles that ILGs are expected to perform, resulting in the process being greatly abused.

The land reforms proposed in the National Development Task Force, particularly by the Customary Land Development sub-Committee, give considerable emphasis to ILGs as the basis for processes leading towards registration of customary land. These recommendations have the benefit of hindsight, learning from the oversights and weaknesses over the past decades relating to ILGs and now seeking to redress many of the issues that have been raised. This Task Force is following similar views to those put forward by the Commission of Inquiry into Land Matters. It retains many of the elements of the customary land tenure systems (such as group titles) and at the same time works towards expediting the process of bringing customary land into mainstream development to benefit not only the landowners but also the nation.

The proposed reforms are intended to broaden the purposes of ILGs, address the present shortcomings, strengthen the weaknesses and tie up the loose ends in the Law. Recommendation 50, for example, proposes to amend the LGIA to make provision for its use in voluntary customary land registration and to address some of the issues identified above. Some concerns on the proposed reforms include the need for continued political support to pursue these reforms and that the issues in the administration of state land are adequately addressed to establish a strong basis on which the reforms on customary land together with ILGs can build.

Impact on economic development and conflict minimization

PNG's land system combines a state-run formal land registration and management system (some 2% of the land area) with many customary localized land use and tenure systems (some 98% of the land area) that provide localized systems of land use and management.

The 98% of land held under customary ownership is relatively productive – besides being the basis of a healthy and adaptive subsistence agriculture sector across the whole country with the major crops differing between altitudinal ranges and many

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

different niche environments, There is no one system that links and manages all the customary systems.

In addition to an active subsistence agriculture sector many rural-based Papua New Guinean farmers are also involved in a wide range of cash crops, many of them tree-based such as coconuts, cocoa and coffee; these are harvested and usually processed to some degree before sale. Other cash crops include vanilla, a range of root crops (sweet potato, yams, taro) and many other vegetable crops grown for sale. During the colonial and early post-colonial periods most coffee, cocoa and copra (from coconuts) exported from PNG were grown on alienated areas of land, through a vibrant plantation sector. Currently the plantation sector has receded somewhat so that now some 80% of exported coffee, for example, is drawn from many smallholder growers of coffee, growing on land under customary tenures, by individuals on land to which they have rights.

One effect of the expansion of cash crops in rural areas is that increasing areas are becoming locked up under perennial tree crops such as coffee and cocoa. A new crop in rural areas that is having the same effect is oil palm. Locking up large areas of land under perennial tree crops means that the area of agricultural land that were previously available for customary use (incorporating cycles of fallow periods that allow the fertility of the soils to regenerate). The impact of this is that where customary land use and tenure systems rely on significant land areas to give land groups sufficient area within which to use group resources and allow soil fertility to regenerate. As more and more areas have become tied up under long-term cash crops, there is less available for use by land group members.

While increased economic development in theory has increased disposable income in rural communities, in reality with increasing educational and other opportunities such activities have less and less been of benefit to the land group as a whole and more and more to individuals and entrepreneurs who use land group resources to benefit themselves. In addition, a loophole in the previous Land Act allowed some individuals and entrepreneurs to use a theoretically legal 'land tenure conversion' process to acquire a land title to parcels of what was previously land under customary tenure.

Traditional decision-making processes

Traditional decision-making systems in PNG have worked principally through a process of consensus within a kin group or a customary land group; in such customary systems all the effective individuals knew each other and knew pretty well everything about each other; they all depended on each other.

This generalized system began to break down soon after individuals began to leave their villages to work on plantations elsewhere and in this way effectively escaped from the power and control of the '*bigmen*' and elders. The nature of leadership, too, had changed quite significantly since colonial days, these changes accelerating since

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

PNGs independence. The rise and rise of individuals and entrepreneurs (though their beginnings are most usually based on customary principles) has introduced another critical (and in many ways new) element into decision-making processes and the shorter- and longer-term effects on them. One of these effects is that whatever benefits are forthcoming there is no equitable sharing of these benefits. The forest sector completely exemplifies this change from traditional decision-making processes and from equitable sharing of benefits.

Despite many of these kinds of changes, there are still traditional decision-making processes in place in most rural communities in PNG; here there is a greatly heightened understanding that customary land is one of the few items of any value that rural people still own and control, and they do not want to give up their customary land. This kind of conservative reaction in the great majority of the PNG population is understandable when people have seen the way in which more and more of their natural resources have been sold for a song and perhaps one or two of the notes have come back to these communities.

Customary land use and tenure systems do still operate fairly well in relation to most matters. People in communities still plant and grow their subsistence foods in season after discussions and agreements about where the best places might be to plant yams this year, they still carry on at least some of their ceremonies and cultural lives, still follow through births, marriages and deaths largely according to customary practices. People are generally great optimists and eternally hopeful that the living standards in their rural communities would improve over time. They are optimistically concerned for their children who now almost all go to school, at least for some years. This, incidentally, is one of the reasons for rural land group members' desire to secure their customary land boundaries – their children are now in school all day and not out in the domain with their grandfathers, fathers, uncles and brothers learning all there is to learn about that domain. Rural people are determined not to be cheated or manipulated out of their customary land rights.

Formal organizational arrangements for decision-making

In the formal state-managed organizational arrangements for decision-making everything depends on the rules and regulations of the organization. That is, the ways in which the bureaucratic system works. There is over-whelming evidence, as regularly published in PNG media, reporting on more and more attempts to subvert the provincial or national land boards through bribery or corruption. Thus the existing state systems setting out the rules and regulations – no matter what the cultural norms are – are thought by much of the population to be window dressing behind which the operators and manipulators continue to work their 'normal' business. No wonder people are increasingly cynical.

One critical system on terms of land-linked formal decision-making is that of courts, particularly land courts. This system, interestingly, has its beginnings in informal activities at the local village level. At that level a rumbling local land dispute is

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

brought to the existing village court system and the local village court officials attempt to resolve the issue under dispute and very often do bring about a resolution. Where one of the disputants wants to take the issue further, it can be taken up to the district land court and further up the hierarchy of land courts. The most critical level is at the local village; this level is closest to the disputants and everyone around them is intimately known to the disputants.

Where one of the disputants in a land-related dispute is a company and another is the state then such a dispute immediately goes to a higher court of law.

Rules, regulations and cultural norms regarding facilitation of land markets and land management

The rules, regulations regarding facilitation of land markets and land management, as noted above, are closely based on Australian formal land law systems and generally accepted as the ways these things are done with regard to state land.

Cultural norms regarding these matters may be another thing again. This is largely because there is a perception in the wider PNG community (based on stories handed down from their ancestors and different sets of values now than existed at the time) that lands alienated by and to the state (whether in German or Australian colonial times) were acquired very cheaply and sometimes by improper means.

Increasingly, in recent times, rural PNG communities do not want to sell their customary land to the state or to people outside their communities. If this is at all possible, the land group – particular domain nexus appears to have become even stronger than it was in the past, through not necessarily based on the same reasons. Now people in every land group know that their customary land and natural resources are almost the only things of any value that they still own and still have control over. Moreover, they do not want to lose any more of it. While this may sound defiant it is actually a very valuable springing-off point for more lateral, inclusive and pro-active strategies to be developed for customary landowners that work interactively with them and build capacity at that level.

Effects on commercial use of land by members and non-members land owning groups

The situation on peri-urban land is complex in other ways in that here land will always be the locus of disputes. This is the way it is partly because formal land systems are concentrated in and around urban areas near which there are always accretions of people living, usually in what are called squatter settlements and these are most usually found on customary-owned peri-urban land.

A particularly apt example, also in the way in which these communities have over quite a long period of time worked through different strategies and emerged with a workable modern approach, is the Ahi group of villages, the customary-based villages near Lae City. The Ahi residential project provides an example of a strategy for

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

moving out of the 'squatter' mode of settlement. The Ahi comprise some 10,000 people in 33 clans living in six villages adjacent Lae City, Marobe Province, PNG. In an attempt to preserve their cultural identity and their traditional land, they formed the Ahi Landowners Association in the 1980s as a registered incorporated body under the Associations Incorporation Act. They have an outstanding claim of AUD\$36 million over Lae City. The Ahi have promoted land development through a lease and leaseback arrangement. By providing formal leases over recognised parcels of land, occupants can enjoy a level of social, spatial, and financial security that is not possible in squatter settlements. Social control will be more likely because there will be a clear line of relationship with the customary owners who will take the role of landlords in a traditional sense: applying a level of customary authority over the settlement that is better aligned with traditions and likely to encourage more responsible behaviour amongst tenants.

For many years the Ahi people through their Ahi Association unsuccessfully demanded their land rights to be respected and compensation to be awarded for the loss of the land on which Lae City is built. Settlers stole from Ahi village gardens, for example. A pre-independence court case seeking financial compensation for the areas of land on which Lae City is built made a significant ruling that appears never to have been honoured and this has been the basis of much Ahi resentment. Much more recently, after unsuccessfully working through a number of different strategies, a rejuvenated Ahi Holdings Ltd. is working on the creation of new legal resettlement areas near the city. In the interests of minimizing conflict in and around the city, most of which is based on land issues, the Ahi grouping is embracing change and becoming one of the major stakeholders in the city's development. This approach, if pursued vigorously and consistently will also be of benefit to the shareholders of Ahi Holdings Ltd., all customary Ahi landowners.

Effects on conflict minimization

In general, communities have in the past embraced conflict over land as one way to measure a kin group's viability as a group and the worth of that group's alliances to achieve victory over another combatant group. One of the signs of victory was to acquire some of the other group's land. That group, in turn, would later attempt to reclaim such areas of group territory.

In PNG at least, there is no significant floating population that is looking for land areas in which to settle. If there is a floating population it tends to head for urban areas. In rural areas clan land boundaries are quite well known, in a modern PNG context at least, as well as the membership requirements to belong to customary land groups. This means that, generally speaking, there tend to be no huge land disputes under way or simmering. Where the colonial Land Demarcation Commission was active and boundaries were investigated and adjudicated, there is today no significant disagreement with the boundaries then decided. Unfortunately, the Land Demarcation Commission, despite having undertaken a huge task across major parts of the country, only ever had two adjudications ruled on and decided under law.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

Nevertheless, rural land groups do not know about this disappointing outcome to a large and important set of activities and generally affirm their support for the informal adjudications that were undertaken and cement boundary markers buried.

In a peri-urban context land is always a source of conflict as more and more people come into town from rural areas, seeking work and access to urban amenities.

Effectiveness of formal and informal land dispute resolution mechanism focussing on their effectiveness as platforms for encouraging dialogue, discussion and common understanding of issues. To encourage dialogue, discussion and the common understanding of issues in relation to ‘informal land’ (i.e., the customary land use and land tenure systems) the obvious place to begin and focus on is on the local platform, that is, at the initial and local level of land dispute resolution, the village level. The land disputes at this level tend to be small and often a spin-off of other kinds of disputes (e.g., often between two land groups rather than between two individuals). To find ways to encourage this level to work more effectively and more pro-actively would seem to be a good investment, but would need to be built upon a platform that recognizes and respects customary tenure and has an understanding of local tenure systems. A quick and practical resolution of land disputes at this level will encourage customary landowners to focus their attention and energies to developing more realistic ways in the modern PNG context to manage their natural and human resources more effectively.

The next levels of land dispute resolution mechanisms, the land courts at district and provincial levels suffer from having an insufficient number of trained land magistrates who are able to work in unbiased ways to resolve land disputes referred to them. At these levels they can hear commercial cases as well as those relating to customary land. A build-up of the numbers of trained land court magistrates is needed.

Another issue that needs to be re-built into the ways in which governments, agencies and individuals (often leaders) like to discuss land issues is to re-establish the critical linkage between rights and responsibilities (this linkage applies to tenure systems across all PICs). Programs emphasizing this nexus should be being prepared for and taught at all levels of schooling in PNG

Effectiveness of formal and informal land dispute resolution mechanism focussing on their effectiveness as platforms for providing cost effective, transparent and accountable decision-making. The vast majority of PNG land is land held under customary systems. PNG needs to find and develop effective, practical and achievable ways to build upon the strengths of these customary systems while also encouraging its people to manage these resources more efficiently both for their own benefit and for that of the nation.

Two major and linked elements are essentially missing from virtually all PICs, but particularly in the Melanesian states of Papua New Guinea, Solomon Islands and, to

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

some extent, Vanuatu. These are, firstly, information and access and, secondly, the lack of a coherent, cooperative, and productive strategy for land use.

The latter situation exists because no colonial administration or post independence government was willing to deal fairly and constructively with customary land and resource tenure, i.e., to accept these customary systems as a given and work with them. There was little general understanding that these customary tenure systems are in practice highly adaptive and adaptable systems, systems that have been reinventing themselves (and their kinship-based customary groups) over a very long period. Without this understanding nor the willingness to accept them for what they essentially are (namely privatised property systems built onto a kin-group membership base) successive administrations increasingly focused on ways to alienate land from customary owners and manage this small 'state' land base. The administration benignly let the remaining vast majority of the land drift on focusing on subsistence agriculture and with gradually increasing areas under cash crops.

A productive and pro-active land use strategy is premised on an interactive and accessible flow of information. Outsiders expect PNG farmers to make pragmatic and economic decisions about the use of their land virtually without any knowledge of what the range of development options is, the labour and finance requirements and likely financial and other benefits for each such option.

Effectiveness of formal and informal land dispute resolution mechanism focussing on their effectiveness as platforms to provide certainty and stability in arriving at acceptable decisions. When decisions are made in a court of law, Papua New Guineans expect that such decisions will always be fair and made based on not just the formal law but on an understanding of customary law. What they do not want to see or experience is that particular decisions are made clearly biased and in ways that indicate that the presiding officer could have been open to persuasion.

To make unbiased decisions magistrates do need to understand as much as possible the customary systems in which they work as well as the formal law in which they have been trained. Other ways of achieving a balanced court should be investigated, including having two local adjudicators sitting on the bench with a magistrate.

In relation to how local land group boundaries are recorded and accessed, there is a very strong argument to be made to have the primary record kept at a local government level, with subsidiary copies held at the provincial level as well as at the national level. At the local government level individuals within a land group or adjacent land groups can refer to such a document to which all relevant land groups (and associated individuals) are parties to the recorded document. There is nothing to be gained from restricting access to such records other than to breed uncertainty and mistrust. The particular land group will also have a copy of this document, which will form the basis for a cost-effective, transparent and accountable system built largely upon customary tenure systems, of which alienated – i.e., state – land is only a very small part.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

The recently issued Final Report of the National Land Task Force in PNG (2007) puts forward a large group of recommendations around Incorporated Land Groups and ways of strengthening them, building up the capacity of these building blocks and supporting their activities.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

COUNTRY CASE STUDY: NEW ZEALAND

Nature and dynamics of local customary property rights

Informal and formal arrangements for customary property rights are being transformed to accommodate Māori cultural requirements and aspirations of the Māori land owning community. The majority of Māori landowners will neither live or work on their ancestral lands nor derive a sustainable income from the products of the land. Increasing numbers of owners for a fixed area of land reduces the likelihood of individuals gaining access to the land for their private use.

The current institutional arrangements are the remnants of introduced legislation in the 1860s that codified and individualised Māori ownership in land – effectively to facilitate its alienation (Kawharu, 1977; Williams, 1999). This system of registering individual interests against Certificates of Title replaced the traditional systems of ownership and transfer of property rights. It has led to a cumbersome situation where ballooning numbers of landowners have an infinitesimal stake in the land. An interest in the land, no matter how small however, gives the owner a number of rights: one is the right to vote for representatives and to have their say in the administration and management of the land.

Under the current institutional arrangements governing Māori land (largely dictated by the Te Ture Māori Act 1993 - TTMA and administered by the Māori Land Court) owners of Māori land have a limited number of options to overcome the problems stemming from the proliferation of registered owners (Boast *et al.*, 2004). The most efficient structure to administer and manage the land for the benefit of the entire collective of owners is one of two entities. The first is modelled on the corporate joint stock holder company (Māori incorporation). The second on the trust structure (Ahuwhenua Trust – there are other trust options as well under the current legislation to meet landowner requirements). These organizations therefore have the difficult task of balancing the multiple viewpoints and values of a large and growing body of owners.

Although diversity in viewpoints is to be expected from any community there are a number of values that are commonly held among the Māori landowning community. These include *kaitiakitanga* or guardianship of the land; *mana whenua* (traditional authority and control over the land); *whanaungatanga* (maintenance of kinship ties); *wairuatanga* (spirituality). There are many others but these illustrate the spiritual connection among Māori and between Māori and their natural environment. For the average Māori land organization (trust or incorporation) there will be commercial and non-commercial objectives (based on cultural imperatives) that need to be juggled.

In recent years there has been an emergence (or re-emergence) of traditional (informal) institutions in response to the tension between sustainable commercial

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

production and sound environmental management. Examples include a greater number of landowners working with the governors and administrators of Māori land to retire marginal land and establish a land restoration programmes (Aohanga Inc., 2002; Tahamata Inc., 2006). As *kaitiaki* (guardians) of the land the purpose of these initiatives are understood by all parties and the costs carried by the organizations. Although the costs to the organizations can be significant the cultural benefit can have a number of intangible benefits that have long-term value.

Adjustments to the formal institutional arrangements to ensure, for example, that *mana whenua* or land retention is maintained while also overcoming the constraints of multiple ownership have also emerged in recent years. This has seen Māori trusts and incorporations in establishing of alternative legal structures such as the limited liability company registered under the Companies Act, 1993 in an effort to separate ownership of the land from the business activity (Kingi, 2005). These structures are not subject to the constraints of TTWMA and the jurisdiction of the Māori Land Court and are therefore seen as the preferred structure to separate commercial activities from the social and cultural responsibilities that can distract trustees and committee members. Establishing subsidiary structures has the potential to mitigate many of the problems associated with a lack of self-disciplining mechanisms and blurred lines of responsibilities that often result from organizations with multiple objectives. A company allows the separation of commercial objectives from social-cultural objectives and provides a mechanism whereby internal checks on performance can be carried out.

Informal and formal understanding of property rights

In common with other postcolonial PICs, New Zealand has a mixture of property rights, some that existed prior to British colonisation, and those that were created by virtue of British sovereignty being asserted over the islands of New Zealand.

New Zealand is in a quite different position to other Pacific nations and its large neighbour Australia, given that the Treaty of Waitangi of 1840 arguably ceded to the colonial power the sovereignty held by Māori. Claudia Orange in her seminal work on the Treaty states that the Crown was through the Treaty given “an exclusive right of pre-exemption of such lands that the Māori people wish to sell” (Orange, 1987, p.1).

Aside from the differing expectation of the parties about their relative positions subsequent to the signing of the Treaty, it is nevertheless clear that the settler society heralded the commencement of a period wherein dyschronous property rights would be created. These dyschronous rights in New Zealand property law also raise issues of the culture embedded in the various property rights.

Tanira Kingi points out that the issue with Māori property rights is one of maintenance of *mana whenua*, with all the spiritual and cultural incidents that Māori customary or Māori freehold tenure implies (Kingi and Maughan, 1998). In the case

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

of general freehold, such incidents are absent in settler society, and hence the difficulty of accommodating dysynchronous property rights within a single national property law regime.

Formal identification, recording and registering of customary resource groups and their membership

The identification, recording and registering of land holding of customary groups (and any other land holders) is subject to the provisions of the *Te Ture Whenua Act 1993* (TTWA), however it is clear that not all Māori land holdings are registered under the *Land Transfer Act 1952*. The TTWA establishes four distinct tenures by virtue of s.129 (1) pertaining to Māori people, namely:

- > Māori customary land
- > Māori freehold
- > General land held by Māori (but not Māori freehold)
- > Reserved Crown land for Māori

Recording of land boundaries and land titling

As mentioned above, not all Māori lands are registered, notwithstanding the general presumption in New Zealand that the common law pertaining to property is conceived to permit the recognition of multiple and individual interests in property.

This codification of property since 1840 has continued apace for the settler society, but it is apparent that the dysynchronous property rights held by Māori prior to colonisation have not been fully recognised through recording and titling.

Impact on economic development and conflict minimization

This unsatisfactory situation has been further confounded by the decision of the New Zealand Court of Appeal in *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (*Ngati Apa*) in respect of lands below high water mark. It was argued by the Crown that Māori customary title no longer existed below high water mark primarily due to a series of past extinguishing acts.

The significance of the *Ngati Apa* decision is that large areas of land throughout New Zealand below high water mark can arguably contain surviving Māori customary land, and could be Māori freehold land (Boast, 2005, pp.79-80). It is interesting that the driver for the overturning of previous views that codification of Māori property rights had occurred wholly within the TTWA, was the Court of Appeals recognition that contemporary native title law has moved on.

The decision of the Australian High Court in *Mabo & Ors v Queensland (No 2)* (1992) 175 CLR 1 (*Mabo*) was according to Boast one of the central urges upon the Court to

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

that extent the decision in *Ngati Apa* has brought New Zealand into line with other significant post colonial common law countries such as Australia and Canada.

Not only was Māori customary property rights now a prospect in land below high water mark, the decision in *Ngata Apa* also raised the prospect of Māori property rights in the sea bed.

It has been argued that the decision in *Ngati Apa* raised the future spectre of *Mabo* style decisions in New Zealand, highlighting the recognition by the New Zealand Court of Appeal that codification of Māori interests in land was not all encompassing (Sheehan, 2003, p.10).

The emergence of further Māori property rights as a result of the decision in *Ngati Apa*, which were not foreseen by contemporary New Zealand settler society, provides a fascinating insight into the slow unravelling of settled New Zealand property law.

Traditional decision-making processes

The Māori have successfully used Incorporations and Trusts over many years to facilitate investment on their own lands, and in partnership with non- Māori on their own land and on general freehold land. However, the emergence in recent years of traditional structures of decision-making raises the need for more subtle recognition of these ancient structures within a modern management framework that is conducive to the economic and social demands of New Zealand modernity.

The balance to be achieved between these traditional decision-making processes and present day needs of the Māori population lies at the heart of this project investigation. The following section investigates how Māori landowning structures are responding to the multitude of Māori customary viewpoints, using the example of Northern Waiaapu.

The Northern Waiaapu region is located at the north eastern extremity of the North Islands East Coast approximately 130 kilometres north of Gisborne. This area is characterised by the predominance (>68% of the total area) of land held as Māori Freehold as defined by Te Ture Whenua (Māori) Act 1993 (T'ITWA); the national percentage is variously reported as between 5 and 6%. Interestingly, Māori hold a considerable proportion of the remaining 'General' freehold land in the Northern Waiaapu and appear to utilise their 'General' land more intensively.

Multiple-title is a key feature of, and has long been identified as central to the difficulties in administering Māori land (Hunn, 1960). Multiple ownership imposes additional cost as well as internal political barriers to (effective and efficient) administration; and especially so where any change requires owner's approval. Formal institutional differentiation of Māori land commenced in 1862 with the introduction of the first Native Titles Act. This was rapidly followed by numerous

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

amendments and other associated legislation leading to the Rees Carroll Commission concluding as early as 1891 that:

“So complete has been the confusion both in law and practice that lawyers of high standing and extensive practice have testified on oath that if the legislature had desired to create a state of confusion and anarchy in Native-land titles it could not have hoped to be more successful than it has been. Were it not that the facts are vouched upon the testimony of men whose character is above suspicion and whose knowledge is undoubted, it would be well nigh impossible to believe that a state of such disorder could exist.”

(Waitangi Tribunal, 1984)

This is the foundation upon which the formal institutions and structures which govern Māori land are based; these formal institutions provide the framework with (and within) which the informal structures have interacted and evolved. The contemporary outcomes of these interactions are expressed, and therefore measurable, in how (and if) today's owners interact with their land. In practical terms these are expressed in the presence of, or lack of, formal governance/ownership structures. Table 9, below, shows these structures present Northern Waiaapu region in January 2006.

TABLE 9: GOVERNANCE STRUCTURE OF MĀORI LAND IN NORTHERN WAIAPU 2006 (SOURCES: TPK, MĀORI LAND INFORMATION BASE AND MLC, MĀORI LAND ON LINE).

Governance Structure	Number of Blocks	Owners	Total Area (Ha)
Ahu Whenua Trusts	183	30,219	22,740 (31.8%)
Other Trusts	56	n.a.	1,423 (2%)
Māori Incorporations ⁹²	50	50 ⁹³	18,922 (26.4%)
No Clear Structure	966	n.a	28,431 (39.7%)
Other	53 ⁹⁴	1,419	30.0
Total	1,308		71,546

What is not clear from these tables is the impact on productivity of governance structure. It is intuitively assumed that improved structure is beneficial; but the lack of clear structure should not automatically lead to the conclusion that the land is under utilised without closer investigation. What is certain is that if successful farm businesses are to operate on multiple-titled Māori land, formal administration by some form of structure is required, these structures impose additional political, and economic operational costs. These costs accrue due to impact of managing large and complex ownership lists, higher governance/management committee expenses, as well as the costs of statutory requirements (for Incorporations) for annual audit and share valuations. Less obvious are costs of maintaining or improving skill levels of office holders in governance and management roles. These costs may be direct where

⁹² Eighteen Incorporations hold 18,922 hectares in 50 separate titles

⁹³ Legal ownership of the land held in Incorporations vests with the Incorporation, which is responsible for administering its own ownership list. Thus it is the Incorporation rather the individual(s) that is recognised as the owner in law

⁹⁴ The data list for this classification was obtained from Schedule 3 of the Māori Reserved Land Amendment Act 1997

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

training is provided; or hidden where skill levels are low and/or not keeping pace with the changing demands of business. Informal cultural institutions often constrain this change process where there is a reluctance to promote younger, but more skilled/educated governors/managers (Cottrell, 2003).

Good performance will always depend upon appropriate structure, matched with good skills. High skill levels may mitigate the impact of poor structure, but good structure will not overcome limitations imposed by poor skill levels. The two (high skill levels and good structure) are not synonymous but must co-exist if governance is to succeed.

A de-facto and indirect measure of the difficulties in administering Māori land in the Northern Waipapu may be gauged by analysing the difference in the utilisation and productivity between Māori and non-Māori land. Table 10 presents these land utilisation differences.

TABLE 10: NORTHERN WAIAPU LAND UTILISATION (EGGINK, 2007)

	Māori	Non-Māori
Pasture	29.2%	19%
Exotic Forest	8.6%	35%
Indigenous Forest	37.1%	34.8%
Reverted	23.6%	7.8%
Other	3.5%	3.4%

The productivity difference data is extensive (Hayes, 2002; Wedderburn *et al.*, 2004) but can be simply summarised as showing that, in economic terms, non-Māori land in the Northern Waipapu can be expected to produce ten times more net profit than equivalent quality Māori land (Eggink, 2007). These differences can be analysed in fine detail, but of more interest is *why* does land under the Māori land titles-system generate a lower cash surplus than equivalent land under non-Māori ownership systems (Phillipson, 2004)? And what is the opportunity cost to Māori, of the legislative and policy constraints on Māori land (Clough *et al.*, 2002)? If this opportunity cost ‘gap’ is to be closed, policies must be developed to mitigate the impact of the constraints on the utilisation and productivity of Māori land.

The Māori land multiple-titles system imposes different mechanisms on owners of Māori land than those that define non-Māori land; these formal mechanisms (institutions) interact with the informal structures at each level of interaction. This results in different outcomes manifesting in the observable differences in the utilisation and productivity of Māori land. Mechanisms include succession (esp. intestate succession), fragmentation, partition, consolidation, and incorporation. The differential impact of these mechanisms on the productivity and utilisation of land under different titles-systems are dynamic, enduring and often compounding. They are dynamic because the impacts change over time as the economic social and

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

political conditions change; enduring because the differences are institutionalised; and compounding because complexity increases over time and especially so, because individual involvement (self interest) diminishes as ownership lists increase in size. These implications can be understood as the issues that arise as a result of the large and growing number of often unidentified (and unidentifiable), sometimes disinterested (unaware/uninformed) and widely geographically dispersed owners. The ever increasing cost and the logistical complexity of communicating with exponentially growing ownership lists, and organising meetings of these owners, is a significant factor (barrier) to effective decision making, and therefore the effective utilisation of resources.

Previous research has identified history, anthropology, commerce, law and public policy (Harris, 1996), as all having treated multiple-ownership as the reasons for governments reforming of Māori land title. In her 1996 Thesis she records two Māori farming families' dealings with family owned Māori land in Northland. This work provides practical insight into the reality facing Māori operating businesses within the constraints of Māori land law, while at the same time attempting to meet the wider expectations of family and community. The pressure of these obligations to provide family income and security, as well as meet the expectations of the wider family and community often conflict.

Secure ownership is a requirement of, but does not in itself confer sufficient utility for access to, and efficient allocation of, resources (capital and labour). Kawharu (1977) reports conflicts occurring at the interface between sound business and customary practice. The story of a wife's ancestral connection to her land over-riding her own and her husband's business interests, ultimately leading to the family no longer farming the land in favour of her blood relatives, demonstrate such conflict. The implications (economic, social, cultural, and emotional) of these conflicts on Māori families and their commitment to each other and their land are impossible to quantify directly.

In South Taranaki today, a contemporary manifestation of such conflict can be seen between Hapu (extended family group) and Incorporation. This on going dispute between Nga Ruahine and Paraninihi Ki Waitotara Incorporation over a 40ha block on the outskirts of Manaia has resulted in highly productive (and valuable) land not being used for any economic purpose for many years. Nga Ruahine, having purchased the statutory leasehold title to a block of ancestral land, ceased to meet the obligations of the lease on the basis that they owned the underlying freehold and therefore should not have to pay rent (to themselves?).

However the process of Incorporation involves exchanging the proprietary rights over the land title itself for shares in the Incorporation. The legal nuances allow the Incorporation to merge freehold and leasehold title, but this right does not extend to its shareholders. A rational and pragmatic approach could be to allow shareholders the right to surrender sufficient shares in the Incorporation in exchange for the value

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

of the freehold title. It appears the wider (political) implications prevent such resolution.

The ongoing conflicts between the formal and informal institutions governing Māori land administration have been clearly identified, yet this thorny issue continues to beset the economic development of much poorly utilised Māori land. This is especially so where established ownership structures do not already exist. If the productivity gap is to be addressed a broad based, coherent and cohesive package of initiatives designed to unshackle the land and its people must be developed.

Formal organizational arrangements for decision-making

The formal structures that Māori have in place such as Incorporations and Trusts are subject to normal corporate governance requirements. Indeed, it is argued that such Māori enterprises are effectively indistinguishable in decision-making operation to similar non- Māori corporations. However, the impact of the maintenance or even reintroduction of traditional decision-making structures may as indicated above result in a re-examination of how such structures interact with modern commercial practice.

Rules, regulations, and cultural norms regarding facilitation of land markets and land management

Because Māori have adopted arrangements such as Incorporations and Trusts, the rulemaking and regulatory framework for land dealings and land management are indistinguishable from similar regimes for non- Māori land.

It must be recognised that Māori are now significant participants in the New Zealand economy having gained in excess of \$NZ2 billion from the National Fisheries Settlement Deed (Sealord Deed)⁹⁵. Much investment by Māori is now on general freehold land in partnership with major non- Māori organizations and banks and financial institutions.

Effects on commercial use of land by members and non-members land owning groups

Given that much commercial use of land is undertaken on commercial terms by Māori Incorporations and Trusts in partnership with non- Māori organizations, the landowning groups appear to be very well informed of the effect of the proposed commercial use of their land. Again, it must be stressed that the current investment thrust by Māori is not just on Māori freehold land.

Effects on equitable sharing of benefits

The groups represented by Māori Incorporations and Trusts share the benefits of the various commercial endeavours that are undertaken; however, the question arises as

⁹⁵ Pers.com. Phillip Green, Barrister at Law Pipitea Chambers, Wellington.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

to whether all parties are represented in a manner that reflects the proportionality of their traditional rights and interests.

Effects on conflict minimisation

The maintenance and even re-emergence of traditional decision-making structures whilst desirable from the standpoint of cultural and spiritual embeddedness may be seen as a less efficient form of decision-making. However, the history of relentless diminution of Māori property rights since European contact has clearly been recognised as Jackson (1995, p.254) observes:

Colonization required that the institutions of Māori law were to be replaced by the mythology of Pakeha law which sought to deny the reality of its cultural bias and its imposed political servitude through a dishonest rhetoric of impartiality and equality. And they were to be supplanted by a Pakeha political authority which sought to justify its power through language sourced in the mythology of that law.

The redefinition and incorporation of basic Māori legal and philosophical concepts into the law is part of the continuing story of colonization. Its implementation by government, its acceptance by judicial institutions, and its presentation as an enlightened recognition of Māori rights are merely further blows in that dreadful attack to which colonization subjects the indigenous soul.

Given the above, the current penchant for Māori traditional decision-making is not unexpected, and as Jackson (p.261) further observes:

...For Māori, justice can be gained only by linking again the cultural and philosophical perceptions of justice and political power. It requires an acceptance that rangatiratanga is a political authority. It means ultimately that the justice for Māori is more than a discussion about legal pluralism or even about how a Māori legal system might operate parallel to that of the Pakeha.

It may seem prosaic in the extreme, but property law in post colonial common law countries such as Australia, New Zealand and Canada is clearly still crystallising. Hazlehurst points out that constitutional and legislative accommodation of “special indigenous rights” remains unfolding in the three countries (Hazlehurst, 1995, p.xiv). Therefore, it is not surprising that the relationship between the property rights of the settler society (Pakeha) and the Māori is an issue of unfolding and refolding the respective rights and interests.

One such result is the re-emergence of traditional decision making within the Māori constituency of the New Zealand nation.

Effectiveness of formal and informal land dispute resolution mechanisms focussing on their effectiveness as platforms for encouraging dialogue, discussion and common understanding of issues. The current move towards traditional decision-making structures has clearly raised the prospect of increased conflict in decision making regarding the utilisation of customary or traditional lands. Arguably current corporate law and due diligence requirements for decision making regarding entrepreneurial endeavours, stands in impossible conflict with traditional

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

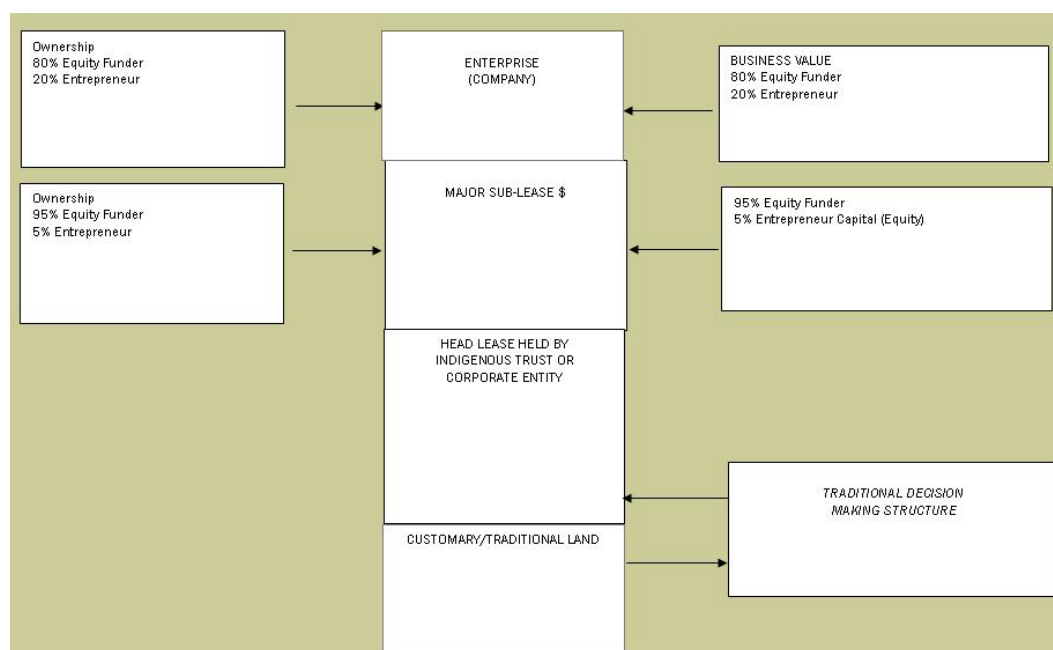
decision-making structures. Both traditional and corporate decision making structures need to be accommodated in any model constructed to encourage dialogue, discussion, and resolution of issues that pertain to land utilisation in particular.

Eggink (2007) highlights the differential production of Māori land holdings, vis-a-vis non- Māori land holdings in Northern Waiapu and concludes that:

...there are definite and ongoing conflicts between the formal and informal institutions governing Māori land administration. This thorny issue besets economic development of poorly utilised land where established ownership structures do not already exist.

Such conflicts act against good land management, and it is clear that the accommodation required between traditional and corporate decision-making structures necessitates the conceiving of a more inclusive decision-making model such as Figure 7.

FIGURE 7: TRADITIONAL DECISION MAKING WITHIN AN ENTERPRISE FRAMEWORK FOR EQUITY FUNDING (LEASEHOLD)



Effectiveness of formal and informal land dispute resolution mechanisms focussing on their effectiveness as platforms for providing cost effective, transparent and accountable decision-making. It is posited that the model outlined above will permit cost effective transparent and accountable decision making within an acceptable corporate law and property law framework that will facilitate equity funding of entrepreneurial endeavours. The framework also allows for traditional decision making to be incorporated in the leasehold arrangement between the customary landholders and the indigenous trust or incorporation, which will be the head lessee of the customary or traditional lands.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

The model proposed will permit certainty and stability to occur within a framework wherein traditional decision-making is utilised to reach outcomes that are acceptable to the customary/traditional landowning group.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

REFERENCES

- Acquaye, E. (1984) Principles and Issues. IN ACQUAYE, E. & CROCOMBE, R. (Eds.) *Land Tenure and Rural Productivity in the Pacific Islands*. (Rome, Suva & Noumea: FAO, IPS-USP, SPREP).
- ADB (2004) *Swimming Against the Tide - An Assessment of the Private Sector in the Pacific*. Asian Development Bank, Manila, Philippines.
- Alchian, A. A. (1965) Some Economics of Property Rights. *II Politico*, 30 (4): 816-29, Reprinted (1977) in Armen A. Alchian, *Economic Forces at Work*. (Indianapolis: Liberty Press).
- Alchian, A. A. (2006) Property Rights. *The Concise Encyclopedia of Economics - The Library of Economics and Liberty*, Accessed: 04/05/06, Website, Available at: www.econlib.org/library/Enc/PropertyRights.html.
- Aohanga Inc. (2002) Pers. Comm. with Aohanga Incorporation Committee of Management over restoration of areas of indigenous forestry. Communication occurred while Tanira Kingi was a committee member between 2000 and 2002. [personal communication with: KINGI, T.
- AusAID (2006a) *Pacific 2020: Challenges and Opportunities for Growth*. Australian Agency for International Development (AusAID), Canberra.
- AusAID (2006b) *Solomon Islands Transitional Country Strategy: 2006 - mid 2007*. Australian Agency for International Development, Canberra.
- Baldwin, R., Bogaerts, T., Csaki, C., Dale, P. & Zichy, A. (1999) *Land Markets in East and Central Europe*. Report on ACE study for European Union. European Union.
- Boast, R. (2005) *Foreshore and Seabed*, (Wellington: Lexis Nexis).
- Boast, R., Erueti, A., McPhail, D. & Smith, N. F. (2004) *Māori land law* (Wellington: LexisNexis).
- Boydell, S. (2000) Coups, Constitutions and Confusion in Fiji. *Land Tenure Center Newsletter*, 80, Fall 2000, 1-7, 10.
- Boydell, S. (2001) *Land Tenure and Land Conflict in the South Pacific* [background report for the 2002 FAO/USP/RICS Foundation South Pacific Land Tenure Conflict Symposium]. Food and Agriculture Organization (FAO) of the United Nations, Suva, Fiji, pp.43, <http://www.usp.ac.fj/fileadmin/files/faculties/islands/landmgmt/publications/faoreport.pdf>.
- Boydell, S. (2004) Sustainable Urban Development: Pacific Dream or Reality? A Fiji Case Study. *Fijian Studies - A Journal of Contemporary Fiji. Special Issue: Environment and Sustainable Development*, 2, 1, 33-50.
- Boydell, S. (2007a) Finding hybrid solutions to the Financial Management of Customary Land - from a Pacific perspective. *Indigenous Studies and Indigenous Knowledge Conference (ISIK 2007)*, NAKATA, M., Sydney, Jumbunna Indigenous House of Learning, 15 pages.
- Boydell, S. (2007b) Myth, Embeddedness and Tradition: Property Rights Perceptions from the Pacific. IN SMAJGL, A. & LARSON, S. (Eds.) *Sustainable Resource Use: Institutional Dynamics and Economics*. (London: Earthscan).
- Boydell, S. & Holzknicht, H. (2003) Land - caught in the conflict between custom and commercialism. *Land Use Policy*, 20, 3, 203-07.
- Boydell, S. & Reddy, W. (2000) Contemporary Land Tenure Issues in the Republic of Fiji. *6th Pacific Rim Real Estate Society (PRRES) Conference*, Sydney, 11.
- Boydell, S., Searle, G. & Small, G. (2007) The Contemporary Commons: understanding competing property rights. *State of Australian Cities Conference (SOAC 2007) - Growth, Sustainability and Vulnerability of Urban Australia*, HAMNETT, S., Adelaide, South Australia, SOAC/UniSA, 10.
- Boydell, S., Small, G., Holzknicht, H. & Naidu, V. (2002) Declaration and Resolutions of the FAO/USP/RICS Foundation South Pacific Land Tenure Conflict Symposium, Suva, Fiji, 10 - 12 April 2002. Land Management and Development, University of the South Pacific, Accessed: 15/06/02, Web based PDF, Available at: <http://www.usp.ac.fj/landmgmt/PDF/SPLTCDECLARATIONRESOLUTIONS.PDF>.
- Brochu, M. (2002) Preliminary Paper to Assist Participants at the National Consultation on Evictions, Squatter Settlements and Housing Rights Workshop. *National Consultation on Evictions, Squatter Settlements and Housing Rights*, Organised by Citizens Constitutional Forum (CCF) and held at the University of the South Pacific, Suva, Citizens Constitutional Forum (CCF), 20.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

- Bromley, D. (1991) *Environment and Economy: Property Rights and Public Policy*, (Cambridge, Ma.: Basil Blackwell, Inc.).
- Bromley, D. W. (2004) Reconsidering Environmental Policy: Prescriptive Consequentialism and Volitional Pragmatism. *Environmental and Resource Economics*, 28, pp.73-99.
- Bromley, D. W. & Yao, Y. (2006) Understanding China's Economic Transformation: Are there lessons here for the developing world? *World Economics*, 7, 2, pp.73-95.
- Brown, K. (2000) The Language of Land: Look before you leap. *Journal of South Pacific Law*, 4.
- CCF (2003) What are good land policies for Fiji in the 21st Century? Report of the National Land Workshop 20 July 2002. Citizens Constitutional Forum (CCF), Suva, Fiji, 96 pages.
- Cheung, S. N. S. (1969) *A Theory of Share Tenancy*, (Chicago: University of Chicago Press).
- Clough, P., Sutton, W. & Goodall, A. (2002) Natural Resource Policy and Maori Economic Development. NZIER, Wellington.
- Coase, R. H. (1960) The Problem of Social Cost. *Journal of Law and Economics*, 3, 1, 1-44.
- Cottrell, R. V. (2003) Māori farming business development (a FoMA perspective). *Paper presented at the New Zealand Grasslands Association*, Manawatu.
- Crocombe, R. G. (1968) Improving Land Tenure. South Pacific Commission, Noumea, New Caledonia, 72.
- Crocombe, R. G. (1975) An Approach to the Analysis of Land Tenure Systems. IN LUNDSGAARDE, H. P. (Ed.) *Land Tenure in Oceania*. (Honolulu: University of Hawaii Press).
- Crocombe, R. G. (1983) Land Tenure and Agricultural Development in the Pacific Islands. ASPAC Food & Fertilizer Technology Center, Taipei, Taiwan.
- Crocombe, R. G. (1984) Registration, Security and Productivity in the Pacific Islands: Experiences and Potentials. IN ACQUAYE, E. & CROCOMBE, R. (Eds.) *Land Tenure and Rural Productivity in the Pacific Island*. (Rome, Suva & Noumea: FAO, IPS-USP, SPREP).
- Crocombe, R. G. (2001) *The South Pacific*, (Suva: Institute of Pacific Studies, The University of the South Pacific).
- Curtin, T. & Lea, D. (2006) Land titling and socioeconomic development in the South Pacific. *Pacific Economic Bulletin*, 21, (1), pp.153-80.
- Dale, P. (2000) The Importance of Land Administration in the Development of Land Markets - a global perspective. Technical University of Delft, Accessed: 07/10/07, Seminar Paper, Internet sourced PDF, Available at: http://www.landentwicklung-muenchen.de/aktuelle_aufsaeetze_extern/seminar_04.pdf.
- Dale, P., Mahoney, R. & McLaren, R. (2002) Land Markets and the Modern Economy. RICS, London.
- de Soto, H. (2000) *The mystery of capital: why capitalism triumphs in the West and fails everywhere else*, (New York: Basic Books).
- Demsetz, H. (1967) Toward a theory of property rights. *American Economic Review*, 57, 347-59.
- Denman, D. R. (1978) *The Place of Property: A New Recognition of the Function and Form of Property Rights in Land*, (Cambridge: Geographical Publications Limited).
- Department of Mining (2007) Women in Mining National Action Plan. Department of Mining, Government of Papua New Guinea Port Moresby, 32 pages, http://rspas.anu.edu.au/blogs/rmap/files/2007/10/arg3_wim5yrplan07-12.pdf.
- Dubois, O. (1998) *Getting Participation and Power Right in Collaborative Forest Management: Can Certification and the '4Rs' Help? Lessons from Africa and Europe*, EAEME European Postgraduate Programme in Environmental Management, Parma, Italy, Parma.
- Eggink, A. H. (2007) *Utilisation and Productivity of Land in Northern Waiapu*, Unpublished Masters of Management Thesis, Massey University, Palmerston North.
- FAO/USP/RICS Foundation (2002) South Pacific Land Tenure Conflict (SPLTC) Symposium, 10 -12 April, 2002. *South Pacific Land Tenure Conflict (SPLTC) Symposium*, Accessed: at: <http://www.usp.ac.fj/landmgmt/SYMPOSIUM/>.
- Farran, S. (2002) Myth or Reality: Case study of land tenure in Efate, Vanuatu. *FAO/USP/RICS Foundation South Pacific Land Tenure Conflict Symposium*, BOYDELL, S., Suva, Fiji, FAO / USP / RICS Foundation, pp.12, <http://www.usp.ac.fj/landmgmt/SYMPOSIUM/>.
- Farran, S. & Paterson, D. E. (2004) *South Pacific Property Law*, (Sydney: Cavendish Publishing Limited).
- Fingleton, J. (2004) Is Papua New Guinea viable without customary groups? *Pacific Economic Bulletin*, v.19, 2, pp.96-103.
- Fingleton, J. (2005a) Pacific 2020 Background Paper: Land. *Pacific 2020 Background Papers*, Commonwealth of Australia.
- Fingleton, J. (Ed.) (2005b) *Privatising Land in the Pacific - A defence of customary tenures*, (Canberra: The Australia Institute).

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

- Fingleton, J. (2007) Rethinking the need for land reform in Papua New Guinea. *Pacific Economic Bulletin*, 22, (1), pp.115-21.
- Fonmanu, K. R. (1999) *Dispute Resolution for Customary Lands in Fiji*, Unpublished Masters of Geomatics Science by Research Thesis, Department of Geomatics, Faculty of Engineering, Univeristy of Melbourne, Melbourne.
- Forman, G. & Kedar, A. (2004) From Arab land to 'Israel Lands': the legal dispossession of the Palestines displaced by Israel in the wake of 1948. *Environmental and Planning D: Society and Space*, 22, pp.809-30.
- Gordon, H. S. (1954) The Economics of a Common Property Resource: The Fishery. *Journal of Political Economy*, 62, 2, 124-42.
- Gosarevski, S., Hughes, H. & Windybank, S. (2004a) Is Papua New Guinea viable with customary land ownership? *Pacific Economic Bulletin*, v.19, 3, pp.133-36.
- Gosarevski, S., Hughes, H. & Windybank, S. (2004b) Is Papua New Guinea viable? *Pacific Economic Bulletin*, v.19, 1, pp.134-48.
- Government of Fiji (1999) Cabinet Workshop on ALTA, Paper 1: The Verification of Expired Leases. Government of Fiji, Suva.
- Government of Fiji (2006) 1/8/06 - Indigenous Claim Tribunal Bill approved. Fiji Government Online Portal, Accessed: 24/07/07, Fiji Government Online Portal, Fiji Government Online Portal, Available at: http://www.fiji.gov.fj/publish/page_7181.shtml.
- Government of Vanuatu (2007) Final report of the National Land Summit.
- Gray, K. J. & Gray, S. F. (2005) *Land Law*, (Oxford: Oxford University Press).
- Greif, A. (2006) *Institutions and the Path to the Modern Economy: Lessons from Medieval Trade*, (Cambridge: Cambridge University Press).
- Hann, C. M. (1998) Introduction: the embeddedness of property. IN HANN, C. M. (Ed.) *Property Relations - Renewing the anthropological tradition*. (Cambridge, UK: Cambridge University Press).
- Harris, A. (1996) *Māori land development schemes, 1945-1974, with two case studies from the Hokianga*, Unpublished Master of Philosophy Thesis, Massey University, Palmerston North.
- Hayes, T. (2002) A Quantitative study of Māori and European Farms in the Tairāwhiti Māori Land Court District.
- Hazlehurst, K. (1995) Introduction: Unyielding domains in the post-colonial relationship. IN HAZLEHURST, K. (Ed.) *Legal Pluralism and the Colonial Legacy: Indigenous experiences of justice in Canada, Australia, and New Zealand* (Aldershot: Avebury).
- Holzknicht, H. A. (Ed.) (1995) *Manual on Land Group Incorporation*, (Hohola: Papua New Guinea Forest Authority).
- Home, R. & Lim, H. (Eds.) (2004) *Demystifying the Mystery of Capital: Land Tenure and Poverty in Africa and the Caribbean*, (London: GlassHouse Press).
- Hughes, H. (2004) Can Papua New Guinea Come Back From the Brink? *Centre for Independent Studies - Issue Analysis*, 49, (13 July 2004), 12 pages.
- Hunn, J. K. (1960) Report on Department of Māori Affairs: with statistical supplement. Government of New Zealand, Wellington.
- IFC (2007) Doing Business in 2008: Registering Property. *Doing Business*, International Finance Corporation (IFC) of The World Bank Group, Accessed: 13/10/07, World Bank website, Available at: <http://www.doingbusiness.org/ExploreTopics/RegisteringProperty/>.
- IIED (2005a) The four Rs. IIED, Accessed: 23/08/05, Website, Available at: <http://www.policy-powertools.org/Tools/Understanding/TFR.html>.
- IIED (2005b) Stakeholder Power Analysis. IIED, Accessed: 04/05/2005, Website, Available at: <http://www.iied.org/forestry/tools/stakeholder.html>.
- IIED/Dubois (2005) The 4Rs Framework. FAO, Accessed: 30/11/05, at: http://www.fao.org/Participation/ft_more.jsp?ID=1221.
- Jackson, M. (1995) Justice and political power: Reasserting Māori legal processes. IN HAZLEHURST, K. (Ed.) *Legal Pluralism and the Colonial Legacy: Indigenous experiences of justice in Canada, Australia, and New Zealand*. (Aldershot: Avebury).
- Kalauni, S. (1977) Introducing Niue Island. IN KALAUNI, S., CROCOMBE, R. G., TUHEGA, L., DOUGLAS, N. O., PIHIGIA, T., LEONARD, G. G. & LIPITOA, E. (Eds.) *Land Tenure in Niue*. (Suva: Institute of Pacific Studies, University of the South Pacific).
- Kanowski, P., Holzknicht, H. A. & Perley, C. (2005) Oceania - Islands of Contrast [Chapter 17]. IN MERY, G., ALFARO, R., KANNINEN, M. & LOBOVIKOV (Eds.) *Forests in the Global Balance – Changing Paradigms*. (Helsinki: International Union of Forest Research Organizations).

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

- Kawharu, I. H. (1977) *Maori land tenure: studies of a changing institution*, (London: Oxford University Press).
- Kedar, A. (2003) On the legal geography of ethnocentric settler states: notes towards a research agenda. IN HOLDER, J. & HARRISON, C. (Eds.) *Law and Geography*. (Oxford: Oxford University Press).
- Keesing, R. M. (1993) Kastom re-examined. *Anthropological Forum - Special Issue: "Custom Today"*, Vol.6, No.4, pp.587-96.
- Kingi, T. (2005) Where are all the Māori farmers? *Journal of the New Zealand Institute of Primary Industry Management Incorporated*, 8, 2, pp. 14-16.
- Kingi, T. & Maughan, C. W. (1998) Legal devices to manage customary Māori land: Overcoming the conflict between retention and development. *Journal of Malaysian and Comparative Law*, 25, (Special Issue), pp. 254-67.
- Kofana, G. E. (2006) *Rural Development and Land Reform Policies: Past, Present and Future*, unpublished working draft of Masters Research (supervised by Roberstson, R. & Boydell, S.).
- Lal, P. & Reddy, M. (2002) Old Wine in a New Bottle? Proposed Sugar Industry Restructure and Land Conflict. *FAO/USP/RICS Foundation South Pacific Land Tenure Conflict Symposium*, BOYDELL, S., Suva, Fiji, Land Management and Development, USP, 22 pages.
- Lalabalavu, N. (2006) Speaking Notes, Qoliqoli Bill, 2006 [Introduced by Minister for Fijian Affairs, Lands & Provincial Development - 09/8/06]. Accessed: 24/07/07, Fiji Government Online Portal - Speeches, Fiji Government Online Portal - Speeches, Available at: http://www.fiji.gov.fj/publish/page_7223.shtml.
- Lea, D. (1997) *Melanesian Land Tenure in a Contemporary and Philosophical Context*, (Lanham, Maryland: University Press of America).
- Levi, A. & Boydell, S. (2003) The roles and responsibilities of absentee land owners in the Pacific - A Niue case study. *International Association for the Study of Common Property - Second Pacific Regional Meeting*, Brisbane, Australia, Digital Library of the Commons, 18.
- Lunnay, C., Fingleton, J., Mangawai, M., Nalyal, E. & Simo, J. (2007) Vanuatu: Review of National Land Legislation, Policy and Land Administration. Government of Vanuatu, Port Vila.
- Lyons, K., Davies, K. & Cottrell, E. (2007) The Need to Consider the Administration of Property Rights and Restrictions Before Creating Them. IN SMAJGL, A. & LARSON, S. (Eds.) *Sustainable Resource Use: Institutional Dynamics and Economics*. (London: Earthscan).
- Maenu'u, L. (1979) Fiu Kelakwai Scheme. IN LARMOUR, P. (Ed.) *Land in the Solomon Islands*. (Suva, Fiji: Institute of Pacific Studies, University of the South Pacific and the Ministry of Agriculture and Lands, Solomon Islands).
- Marchak, M. P. (1998) Who Own's Natural Resources in the United States and Canada? Land Tenure Center - University of Wisconsin, Madison, 11.
- Naitoro, J. H. (2000) Solomon Islands conflict: demands for historical rectification and restorative justice. *Asia Pacific School of Economics and Management Pacific Update Papers*, National Centre for Development Studies, Australian National University, Asia Pacific Press at the Australian National University.
- Nori, A. G. H. (2006) Tribes and Customary Land Titles Act 2006 - Commentary by Andrew G.H. Nori (dated 14 August 2006).
- North, D. C. (1993) Economic Performance through Time. The Nobel Foundation, Accessed: 30/09/07, Lecture for the memory of Alfred Nobel, December 9, 1993, Nobel website, Available at: http://nobelprize.org/nobel_prizes/economics/laureates/1993/north-lecture.html.
- NRI (2007) The National Land Development Taskforce Report: Land Administration, Land Dispute Settlement, and Customary Land Development. National Research Institute (NRI), Boroko.
- Orange, C. (1987) *The Treaty of Waitangi*, (Wellington: Allen & Unwin).
- Payne, G. (1997) *Urban Land Tenure and Property Rights in Developing Countries: A Review*, (London: Intermediate Technology Publications/Overseas Development Administration (ODA)).
- Pearsall, J. (Ed.) (1998) *The New Oxford Dictionary of English*, (Oxford, UK: Oxford University Press).
- Pejovich, S. (1990) *The Economics of Property Rights: Toward a Theory of Comparative Systems*, (Dordrecht: Kluwer Academic Publishers).
- Peteru, M. V. (2003) Land Registration and Titling Process in Samoa (LRTP). *Samoa Infrastructure Asset Management Project Phase - 2*, Government of Samoa/IDA, Apia, Samoa, pp.47, <http://www.mnre.gov.ws/projects/siam-2/documents/Land%20Titling%20Review%20Report%202003.pdf>.
- Phillipson, G. (2004) Chief Historians Final Recommendations. Waitangi Tribunal, Wellington.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

- PIFS (2005) The Pacific Plan for strengthening regional cooperation and integration. Pacific Islands Forum Secretariat (PIFS), Suva, Fiji, <http://www.pacificplan.org/tiki-page.php?pageName=The+Pacific+Plan>.
- Power, A. P. (2003) Creation of Melanesian Property Rights - Building Bridges between Custom and Commerce. PNGbuai.com, Accessed: 09/11/05, Website, Available at: <http://www.pngbuai.com/300socialsciences/management/land-development/creation-property-rights/part1-creation-melanesian-property-rights030802.html>.
- Rakai, M. E. T., Ezigbalike, I. C. & Williamson, I. P. (1995) Traditional Land Tenure Issues for LIS in Fiji. *Survey Review*, 33, (258), pp.247-62.
- Ramírez, R. (2002) A conceptual map of land conflict management: Organising the parts of two puzzles. Sustainable Development Department (SD), Food and Agriculture Organization of the United Nations (FAO), Accessed: 23/03/2002, FAO website, Available at: http://www.fao.org/sd/2002/IN0301_en.htm.
- Regenvanu, S. J. (2004) *Laef blong mi: from village to nation / an autobiography by Sethy John Regenvanu*, (Port Vila, Vanuatu: USP Institute of Pacific Studies).
- Rigsby, B. (1998) A Survey of Property Theory and Tenure Types. IN PETERSON, N. & RIGSBY, B. (Eds.) *Marine Tenure in Australia: Oceania Monograph 48*. (Sydney: University of Sydney).
- RNZI (2006) Fiji Law Society says Qoliqoli bill is unconstitutional. Radio New Zealand International, Accessed: 24/07/07, Radio news website, Radio news website, Available at: <http://www.rnzi.com/pages/news.php?op=read&id=27974>.
- Rodman, M. (1995) Breathing Spaces: Customary Land Tenure in Vanuatu. IN WARD, R. G. & KINGDON, E. (Eds.) *Land, Custom and Practice in the South Pacific*. (Cambridge, UK: Cambridge University Press).
- RPR Consulting (2005) AusAID - Pacific 2020 - Land Roundtable discussion - unpublished Report on Proceedings, 4 July 2005. AusAID).
- Rukia, A. (2005) A Preliminary Report of the Auluta Basin Customary Land Mobilization Program. Tribal Lands Unit, Department of Lands and Survey, Government of Solomon Islands, Honiara, Solomon Islands, 16pp.
- Ruthven, D. (1979) Land Legislation from the Protectorate to Independence. IN LARMOUR, P. (Ed.) *Land in the Solomon Islands*. (Suva, Fiji: Institute of Pacific Studies, University of the South Pacific and the Ministry of Agriculture and Lands, Solomon Islands).
- Scholtz, C. (2006) *Negotiating Claims: the Emergence of Indigenous Land Claim Negotiation Policies in Australia, Canada, New Zealand, and the United States*, (New York: Routledge).
- Setefano, P. M. (2002) Regional Representatives Report: Samoa. *FAO/USP/RICS Foundation South Pacific Land Tenure Conflict Symposium*, Suva.
- Sheehan, J. (2003) Spectre of Mabo rises in NZ. *Australian Property Institute NSW News* Nov-Dec 2003.
- Sheehan, J. & Small, G. (2002) Towards a Definition of Property Rights. *Working Paper 01.02*. (Sydney: UTS Property Research Unit).
- Simo, J. (2005) Report of the National Review of the Customary Land Tribunal Program in Vanuatu. Vanuatu Cultural Centre, Port Vila.
- Siwatibau, S. (2002) Welcome Address for the FAO/USP/RICS Foundation South Pacific Land Tenure Conflict Symposium, Suva, Fiji, 10 - 12 April, 2002. Transcribed by Boydell, S., Accessed: Web based PDF, Available at: <http://www.usp.ac.fj/landmgmt/WEBPAPERS/WELCOMEADDRESS.PDF>.
- Smaajgl, A. & Larson, S. (2007) Institutional Dynamics and Natural Resource Management. IN SMAJGL, A. & LARSON, S. (Eds.) *Sustainable Resource Use: Institutional Dynamics and Economics*. (London: Earthscan).
- Sullivan, M. (2007) Recognition of Customary Land in the Solomon Islands: Status, Issues and Options. *Resource Management in Asia-Pacific, RMAP Working Paper 66, 2007*, Canberra.
- Swinen, J., Vranken, L. & Stanley, V. (2006) Emerging Challenges of Land Rental Markets: A Review of Available Evidence for the Europe and Central Asia Region. *Chief Economist's Regional Working Paper Series: Infrastructure Department (ECSIE), Vol.1, No.4*, The World Bank, Washington D.C., pp.99.
- Tahamata Inc. (2006) Pers. Comm. with members of the Tahamata Incorporation Committee of Management over restoration of a section of the Ohau River. Communication occurred July 2006. [personal communication with: KINGI, T.
- Tahi, S. (2007) National Land Summit Faenol Ripot. Government of Vanuatu, Port Vila.

2.3 REVIEW OF CUSTOMARY PROPERTY RIGHTS AND FORMAL AND INFORMAL INSTITUTIONS FOR ECONOMIC DEVELOPMENT AND CONFLICT MINIMISATION

- Tanner, A. (2003) Qele, Veikau and Navosa; Communal and Individual Land Rights in Central Vitilevu, Fiji. *ASAO Annual Meeting: Common Property and Customary Right in the Contemporary Pacific*.
- Tongatule, I. (1981) Niue: Fragmentation and Absenteeism. IN LARMOUR, P., CROCOMBE, R. & TAUNGNGA, A. (Eds.) *Land, People and Government: Public Lands Policy in the South Pacific*. (Suva: Institute of Pacific Studies, University of the South Pacific, in association with the Lincoln Institute of Land Policy).
- Umbeck, J. (1977) The California Gold Rush: A Study of Emerging Property Rights. *Explorations in Economic History*, 14, 2, 197-206.
- UNDP (2004) Solomon Islands Peace and Conflict Development Analysis: Emerging Priorities in Preventing Future Conflict. United Nations Development Programme.
- Vodoz, L. (1994) La prise de décision par consensus: pourquoi, comment, à quelles conditions. *Environnement & Société*, 13, 57-66.
- Waitangi Tribunal (1984) Turanga tangata, turanga whenua. The report on the Turanganui A Kiwa Claims. *Wai 814, v I*, Legislation Direct, Wellington.
- Waldrop, M. M. (1992) *Complexity: the emerging science at the edge of order and chaos*, (New York: Simon & Schuster).
- Walker, G. B. & Daniels, S. E. (1996) Foundations of Natural Resource Conflict: Conflict Theory and Public Policy. *Conflict Management and Public Participation in Land Management*, SOLBERG, B. & MIINA, S., Joensuu, Finland, European Forest Institute, 14, 1997.
- Ward, R. G. (1965) *Land Use and Population in Fiji*, (London: H.M.S.O.).
- Ward, R. G. (1995) Land, Law and Custom: Diverging Realities in Fiji. IN WARD, R. G. & KINGDON, E. (Eds.) *Land, Custom and Practice in the South Pacific*. (Cambridge, UK: Cambridge University Press).
- Ward, R. G. & Kingdon, E. (1995) Land Use and Tenure: Some Comparisons. IN WARD, R. G. & KINGDON, E. (Eds.) *Land, Custom and Practice in the South Pacific*. (Cambridge: Cambridge University Press).
- Webster, C. & Lai, L. W.-C. (2003) *Property Rights, Planning and Markets: Managing Spontaneous Cities*, (Cheltenham, UK: Edward Elgar).
- Webster, T., Bannerman, S., Kalinoe, L., Kiris, J., Tolopa, O., Kubak, J., Barker, P., Manning, M., Kassman, S. & Yala, C. (2007) The National Land Development Taskforce Report. *Monograph 39*, National Research Institute, Pt Morseby, PNG.
- Webster, T., Kassman, S., Kanawi, J. & Kalinoe, L. (2006) The National Land Development Taskforce Workshop on Understanding Transactions on Customary Land, PNG.
- Wedderburn, M. E., Webby, R., Parminter, T. & Pikia, R. (2004) Land Stewardship and farming for economic, social and cultural goals, a Māori perspective. AgResearch.
- Weiner, J. & Glaskin, K. (2007) Customary Land Tenure and Registration in Australia and Papua New Guinea. IN WEINER, J. & GLASKIN, K. (Eds.) *Asia-Pacific Monograph 3*. (Canberra: ANU e-Press).
- Williams, D. V. (1999) *Te kooti tango whenua: The Native Land Court 1864-1909*, (Wellington: Huia Publishers).
- World Bank (2003) Land Policies for Growth and Poverty Reduction. *World Bank Policy Research Report*, Copublication of the World Bank and Oxford University Press, Washington.
- Yuyuge, E. (2003) Women Forgotten in the Race for Benefits in the Papua New Guinea Petroleum Sector. *Women in Mining Conference - Voices for a Change*, REID, M., Madang Resort Hotel, Papua New Guinea Department of Mining / World Bank / Papua New Guinea Chamber of Mines and Petroleum, 18 pages, <http://siteresources.worldbank.org/INTOGMC/Resources/336099-1163605893612/yuyugewomenforgotten.pdf>.