

Volume two

Case studies on customary land and development in the Pacific © Commonwealth of Australia 2008

This work is copyright. Apart from any use as permitted under the *Copyright Act 1968*, no part may be reproduced by any process without prior written permission from the Commonwealth. Requests and inquiries concerning reproduction and rights should be addressed to the Commonwealth Copyright Administration, Attorney-General's Department, Robert Garran Offices, National Circuit, Barton ACT 2600 or posted at http://www.ag.gov.au/cca

 Volume two
 ISBN
 978 1 921285 23 3

 Volume set
 ISBN
 978 1 921285 28 8

Disclaimer The views expressed in this publication do not necessarily represent the views of any individual or organisation involved in the Pacific Land Program.

Published by the Australian Agency for International Development (AusAID), Canberra, June 2008.

This document is online at www.ausaid.gov.au/publications

For more information about the Australian overseas aid program, contact:

Public Affairs Group AusAID GPO Box 887 Canberra ACT 2601

 Phone
 +61 2 6206 4000

 Facsimile
 +61 2 6206 4695

 Internet
 www.ausaid.gov.au

Designed by Swell Design Group Printed by Pirion Pty Ltd

Volume two Contents

Preface	v
Introduction	vii

Reconciling customary ownership and development

1	Incorporated land groups in Papua New Guinea Tony Power	3
2	Village land trusts in Vanuatu: 'one common basket' Jim Fingleton, Anna Naupa, Chris Ballard	21
3	Recording land rights and boundaries in Auluta Basin, Solomon Islands John Cook, Genesis Eddie Kofana	47
4	Land registration among the Tolai people: waiting 50 years for titles Jim Fingleton, Oswald ToLopa	65
5	Informal land systems within urban settlements in Honiara and Port Moresby Satish Chand, Charles Yala	85
6	The role of the Central Land Council in Aboriginal land dealings Mick Dodson, David Allen, Tim Goodwin	107
7	Maori landownership and land management in New Zealand Tanira Kingi	129
8	Absentee landowners in the Cook Islands: consequences of change to tradition <i>Ron Crocombe, Makiuti Tongia, Tepoave Araitia</i>	153
Di	spute resolution	
9	Mediating land conflict in East Timor Daniel Fitzpatrick	175
10	Resolving land disputes in Samoa Jennifer Corrin	199

11	Settling customary land disputes in Papua New Guinea	
	Norm Oliver, Jim Fingleton	

Land for public purposes

12	Acquiring land for public purposes in Papua New Guinea and Vanuatu Michael Manning, Philip Hughes	241
13	Accessing land for public purposes in Samoa	265
	Chris Grant	

Policy reform and administration

14	The paths to land policy reform in Papua New Guinea and Vanuatu Michael Manning	285
15	Strengthening land administration in Solomon Islands Douglas Larden, Marjorie Sullivan	307
16	Training and educating land professionals: the value of institutional partnerships <i>Chris Lunnay</i>	327

Annex: Contributors to the case studies

347

Preface

Making land work, produced as part of AusAID's Pacific Land Program, has two volumes. Volume one, *Reconciling customary land and development in the Pacific*, is an overview of the main issues that Pacific island countries, Papua New Guinea and East Timor referred to broadly as the Pacific region—are likely to face if they choose to reform their land policies and institutions to promote social and economic development. This volume, Volume two, *Case studies on customary land and development in the Pacific*, is a collection of 16 studies that look at problems and innovative practices in land tenure and administration across the Pacific region.

AusAID recognises that land policy reform is something that must be driven by Pacific governments and communities, not by donors. For this reason, *Making land work* does not seek to advocate any particular policy options or models. Nor does it necessarily reflect AusAID or Australian government policy. Rather, it has been published as an information resource for countries undertaking land policy reform. It draws lessons from international experience, canvasses broad principles and approaches, and seeks to stimulate ideas on policy options.

Making land work reflects the input of some 80 experts and practitioners in land and development from the Pacific region, including Australia and New Zealand. A steering group of senior representatives from government, regional organisations and civil society in the region provided broad guidance and advice for both volumes.

The annex to this volume details the process and participants in preparing the case studies. These studies were drafted by land experts and practitioners following a topic selection and appraisal process. All but two are based on in-country research and consultations by authors. Early drafts were reviewed by panels of officials, experts and practitioners from the Pacific region and Australia, then revised by authors and finalised for publication by AusAID's editorial team. This volume contains the edited versions of these second drafts produced for AusAID by the authors.¹

Land policy reform in the Pacific is a complex and sensitive issue. There is a wide variety of views and perspectives held by experts and practitioners—sometimes conflicting, yet sometimes equally valid. It is neither possible nor desirable to attempt to reconcile all of the differing perspectives or conflicting views. While there may be disagreement by some over the content of *Making land work*, AusAID hopes this will encourage ongoing dialogue and debate on this important issue across the region.

If *Making land work* contains inaccuracies or errors of fact or omission—despite the best efforts of those involved—AusAID accepts full responsibility.

¹ One case study, 'The Native Land Trust Board of Fiji and development within communal tenure', is not included in this volume as a result of delays in agreeing to its final text. It will be published on AusAID's website and in any reprint.

Introduction

MAKING LAND WORK

Pacific governments and communities are increasingly realising there is a need to strengthen and improve their systems for managing and using land. Since 2004 Papua New Guinea and Vanuatu have been developing major programs to reform land policy. Papua New Guinea has already begun implementing its own program—a long-term and sweeping initiative that aims to underpin the nation's economic development agenda.

Other political and community leaders in the region are also talking of the need to make their most basic asset, land, work better for national development. They recognise that secure land tenure and effective land administration are fundamental prerequisites for improved living standards, better public services, increased investment, protection of vulnerable groups (such as customary owners and women) and reduced social tensions.

The issue for Pacific islanders is how to make greater use of land without giving up the customary laws and practices that form the fabric of their culture and societies—practices that for countless generations have regulated the use and management of land and ensured food security. In the past, especially during the colonial period, land policy reform in most Pacific countries meant permanently taking land away from customary ownership and imposing western forms of tenure.

The two volumes that comprise *Making land work* are about increasing the contribution land can make to communities and the economy without removing it from customary ownership. The aim of the 16 case studies in this volume is to improve understanding across the Pacific of how other countries in the region, including Australia and New Zealand, have dealt with land administration and customary tenure issues while promoting economic and social development.

The case studies are not designed as policy prescriptions to be transplanted from one country to another. They seek to provide ideas and inspiration to Pacific governments, officials, landholders and the private sector on how options might be developed for their own countries.

THEMES OF THE CASE STUDIES

The case studies in this volume were researched and written in 2007. The studies draw on the experience of countries in the Pacific region including New Zealand and Australia and are grouped by theme.

The first theme, 'Reconciling customary ownership and development', covers a broad range of issues, which are canvassed in eight case studies. They reveal the constraints and opportunities presented when development plans require access to land in customary ownership. They demonstrate the importance of retaining customary systems while linking them to the legal, economic and business development systems that are emerging as Pacific societies and economies are increasingly integrated with the wider international community.

The second theme, 'Dispute resolution', features in three studies that review experiences in East Timor, Samoa and Papua New Guinea. Disputes involving land are common in the region and are very often at the heart of serious conflict. These case studies describe some of the innovative ways in which disputes can be managed and conflict averted. They also demonstrate the limitations of the dispute resolution processes described.

There are two studies that address the third theme, 'Land for public purposes'. They analyse issues around securing land for public use in Papua New Guinea and Vanuatu, and in Samoa. As societies and economies develop, there is increasing need for land for public infrastructure and services such as roads, ports, schools, hospitals, sanitation, water supply and power generation. These studies outline the successes and problems that three countries have experienced.

The fourth theme, 'Policy reform and administration' is covered by three very different studies of aspects of land policy reform and administration. Land administration that is well planned and resourced is essential if the goals of land policy reform are to be achieved. These studies reveal the importance of ongoing political commitment to reforming land administration, to providing sufficient resources for administering land systems, and to building and maintaining the right skills base.

RECONCILING CUSTOMARY LAND AND DEVELOPMENT

Case Study 1, 'Incorporated land groups in Papua New Guinea', outlines Papua New Guinea's experience with customary landowning groups forming bodies that have formal legal status. The study analyses the strengths and weaknesses of using this method to enable groups to make their land available for development and share the benefits.

Case Study 2, 'Village land trusts in Vanuatu: "one common basket" ', recounts Vanuatu's experience with using land trusts as legally recognised bodies to make decisions on behalf of customary landowners. The study briefly outlines the histories of two trusts and analyses their successes and problems.

Case Study 3, 'Recording land rights and boundaries in Auluta Basin, Solomon Islands', describes a consultative process to identify the owners of an area of land in Solomon Islands suitable for growing oil palm. The study analyses the way in which the landowning groups, who are keen to reap the potential benefits of the oil palm development, increasingly accepted the need for recording the details of land ownership and boundaries, and the successes and challenges of the process.

Case Study 4, 'Land registration among the Tolai people: waiting 50 years for titles', provides an account of efforts to register land in East New Britain Province in Papua New Guinea based on Tolai territorial and social units and on input from traditional leaders. It analyses the reasons why the processes used were accepted and their potential for releasing land for productive development.

Case Study 5, 'Informal land systems within urban settlements in Honiara and Port Moresby', describes the challenges of urban growth. It analyses how informal arrangements that have developed between settlers and landowners might be regularised for the benefit of both.

Case Study 6, 'The role of the Central Land Council in Aboriginal land dealings', outlines how the Central Land Council in the Northern Territory of Australia is used by traditional landowners to conduct land dealings. It analyses the reasons for the success of this intermediary body and discusses its relevance for a Pacific context.

Case Study 7, 'Maori landownership and land management in New Zealand', analyses the impact of Maori land registration in individualised parcels and recent efforts to revert to collective ownership through incorporations and trusts.

Case Study 8, 'Absentee landowners in the Cook Islands: consequences of change to tradition', outlines how inadvertent change to customary practice has resulted in the significant problems of fragmented landownership and absentee landowners. It analyses how such problems might be avoided in other contexts.

DISPUTE RESOLUTION

Case Study 9, 'Mediating land conflict in East Timor', describes a mediation model for land conflict. Examples of how it has worked are provided and its possible applicability in other contexts is analysed.

Case Study 10, 'Resolving land disputes in Samoa', outlines how Samoa has built on the customary system for resolving land disputes by formally recognising the role of village councils and establishing the Land and Titles Court. It analyses the benefits and problems of the current system.

Case Study 11, 'Settling customary land disputes in Papua New Guinea', describes and analyses the efforts in 1973 to create a legislative basis for land dispute resolution that was significantly influenced by Melanesian custom and its subsequent failure to operate effectively due largely to inadequate resources.

LAND FOR PUBLIC PURPOSES

Case Study 12, 'Acquiring land for public purposes in Papua New Guinea and Vanuatu', describes experiences of accessing land for public use. The analysis focuses on the problems that have arisen and the most potentially useful ways of dealing with them.

Case Study 13, 'Accessing land for public purposes in Samoa', outlines the procedures used in Samoa to acquire land for public use. It emphasises the importance of adequately consulting landowners and of disseminating information.

LAND POLICY REFORM AND ADMINISTRATION

Case Study 14, 'The paths to land policy reform in Papua New Guinea and Vanuatu', describes recent processes to launch land policy reform in these two countries. It emphasises the importance of a well-planned and structured process of policy development based on extensive community consultation and participation.

Case Study 15, 'Strengthening land administration in Solomon Islands', describes an Australian-funded project and analyses its strengths and weaknesses. It emphasises the importance of such a project having local 'ownership' and a flexible design and flexible activities.

Case Study 16, 'Training and educating land professionals: the value of institutional partnerships', draws on experience with an Australian-funded project in Laos that built capacity to train land administration professionals. The experience is analysed and conclusions are drawn for meeting training needs in the Pacific region.

RECONCILING CUSTOMARY OWNERSHIP AND DEVELOPMENT

CASE STUDIES

1	Incorporated land groups in Papua New Guinea	3
2	Village land trusts in Vanuatu: 'one common basket'	21
3	Recording land rights and boundaries in Auluta Basin, Solomon Islands	47
4	Land registration among the Tolai people: waiting 50 years for titles	65
5	Informal land systems within urban settlements in Honiara and Port Moresby	85
6	The role of the Central Land Council in Aboriginal land dealings	107
7	Maori landownership and land management in New Zealand	129
8	Absentee landowners in the Cook Islands: consequences of change to tradition	153

RECONCILING CUSTOMARY OWNERSHIP AND DEVELOPMENT

Incorporated land groups in Papua New Guinea

Tony Power » Land Administration Consultant, Papua New Guinea

A snapshot

Incorporated land groups in Papua New Guinea

In Papua New Guinea, legislation is in place that allows customary land groups to use their land in the formal economy. The main vehicle for this is a form of 'incorporation'. Incorporation is a legal term—in this case, for when a customary landowning group forms a body that has legal status under the formal legal system. This body, or corporation, can sue and be sued, hold assets in its name, hire agents, sign contracts and make rules governing its internal affairs. Oil palm growers in West New Britain in Papua New Guinea have had great success in using this type of legal vehicle for their own economic benefit. But there have also been problems, particularly when incorporated land groups are used as vehicles for receiving royalty and compensation payments from mining and forestry companies.

The important lessons from Papua New Guinea's experience are that incorporated land groups:

- » can be an effective way for customary groups to engage in the formal economy and legal system
- » can help to unlock the productive potential of land but need to be supported by mechanisms to help land groups identify and protect land in order to avoid conflict and disputes
- are a convenient mechanism for receiving royalty and compensation payments but they need to have access to reliable and impartial advice to ensure that benefits are directed towards the economic and social development of the group
- » provide the flexibility and authority for community members to choose how to distribute income
- » require the support and regulation of government to ensure that they are effectively formed and managed
- » require mechanisms to educate and inform people on their functions and capabilities.

Contents

»	INTRODUCTION	6
»	INCORPORATION IN PAPUA NEW GUINEA	7
»	INCORPORATED LAND GROUPS AND THE FORESTRY SECTOR	8
»	INCORPORATED LAND GROUPS AND THE PETROLEUM INDUSTRY General issues The case of the Kutubu gas and oil fields	9 9 10
»	POSITIVE OUTCOMES IN THE OIL PALM INDUSTRY	12
»	LAND ADMINISTRATION AND POLICY REFORM	13
**	LESSONS Establish processes and support for group representation of customary landowners Promote the contribution incorporations can make to land development Encourage social and economic activities among members of incorporated groups Acknowledge the flexibility within incorporated groups for distributing income Promote good corporate governance through information, education and legal support Ensure there is effective government regulation and support	14 14 15 15 15 16
»	APPENDIX: CONTACTS Meetings Teleconference and email	17 17 18
»	BIBLIOGRAPHY	19

Introduction

People have occupied the land of Papua New Guinea for tens of thousands of years. Over that time they have organised themselves into groups who manage land and govern themselves by what is known as 'custom' or 'traditional practices'. The principles arising from custom are not written down but maintained through memory and by retelling happenings. Because there are no written records, the rules of how land is allocated, shared and used are passed from generation to generation by retelling. Similarly, histories are maintained by repetitive public orations of the origins of the group and marriages, births, deaths and the occupation of land. Most peoples in the Pacific region and the lands they hold continue to be governed by custom.

The modern world, however, is encroaching on the isolated peoples of the region, and customary groups are increasingly finding the need to interact with modern formal economies and legal systems. This meeting of traditional and modern worlds often comes about because of the need for land for some type of economic or social development—a school, health clinic, hotel or mine, or agriculture or forestry. In most cases customary landowners like to benefit from such developments, but they also like to benefit as a group, family, clan or tribe. At the same time they like to protect and preserve their customary interests and rights.

These wishes raise many issues and questions. How does a group that lives by custom negotiate and forge agreements with other parties such as government agencies or companies that operate in a formal economy and formal legal system? How are the rights of the customary group protected when it enters into such agreements? And, how can the rights of the other party to the agreement be protected?

Different countries have sought different ways to answer these questions. One of the most common ways is 'incorporation' of the customary landowner group so that it is formally recognised as a legal body by the legal system. The incorporated land group becomes the representative of the tribe in the formal legal system and is able to enter into agreements and make decisions on behalf of the customary group.

As a legal vehicle, an incorporated land group can serve the customary group in a number of ways:

- » protect the group's rights and interests
- » explore opportunities for developing land or other assets that belong to the group
- » negotiate on behalf of the customary group in business, development or legal matters
- » assist the group in managing the use of land
- » receive payments such as rents and royalties on behalf of the group
- » distribute and/or invest rents, royalties or other income on behalf of the group
- » raise finance so that the customary group can invest in its own land.

Incorporation raises many questions for customary groups, who have their own decisionmaking systems and traditions. Can these be preserved within a legal creation like an incorporated land group? Who represents or speaks on behalf of the group? Who makes the decisions in the incorporated land group and what is the process by which they are made? How are the benefits of a tourism development or a mine, for example, distributed fairly to all members of the group?

Papua New Guinea has laws under which customary groups can be incorporated so that they can use their land in the formal economy while protecting their customary interests. But its experience shows that, even if good laws can deal with the complexities of customary landownership and land tenure, problems can still arise.

Incorporation in Papua New Guinea

The move to create corporations from customary landowning groups was begun to give Papua New Guineans business opportunities and involve them in the economic life of their country. The Land Groups Incorporation Act grew from the 1973 Commission of Inquiry into Land Matters (CILM) and the Plantations Redistribution Scheme. The Plantation Redistribution Scheme returned the land to customary owners that had been taken from them—alienated from them—during colonial times for use as plantations.

The Commission of Inquiry believed a system that enabled the legal recognition of customary land tenure must be built on traditional custom. It recommended a law be passed that would allow customary groups to register as a legal body if they wished. Both the Business Groups Incorporation Act and the Land Groups Incorporation Act were passed in 1974. However, another piece of legislation that should have accompanied these Acts was not presented to Parliament. This legislation would have allowed customary groups to register their land.

The process for incorporating customary groups, as described by Fingleton (2007, pp. 27–8), begins with preparing the group's constitution, which must set out:

- » the name of the group
- » the qualifications for (and any disqualifications from) membership of the group
- » the title, composition and manner of appointment of the committee or other controlling body of the group
- » the way in which the group acts and the way its actions are recorded
- » the name of the custom under which the group acts
- » the details of the group's dispute settlement authority
- » any limitations or conditions on the powers given to the group under the Act
- » any rules applicable to how the group's affairs are conducted.

7

A group submits its constitution to the Registrar of Incorporated Land, who is supposed to publicise the application and check the group's suitability for incorporation. After any comments or objections received have been considered, the registrar can issue a certificate of recognition. This means the group is legally incorporated, gaining legal status as a corporation with perpetual succession. Perpetual succession means that the corporate body continues to exist after the death of any of its members and the sale of its assets. Once legally incorporated the group can sue and be sued, enter into contracts and do other things a corporation can do.

The main immediate application of the Land Groups Incorporation Act was to allow customary groups to hold title to and manage land that had been alienated during colonial times and then returned to them under the Plantation Redistribution Scheme. However, this title cannot be used as security for commercial borrowing. If the incorporated land group wishes to create an asset that can be used as collateral to raise money from commercial financial institutions to invest in the land, it must follow the procedures known as 'lease and lease back', whereby the group gives the land to the state (alienation) and then leases it back from the state. The lease becomes a tradeable asset that can be used by the group or sold to any other entity, and is thus valuable collateral. Having title to the land, the incorporated land group can also issue leases to other groups or individuals to use the land. If commercial financial institutions deem these leases to be secure, they can be used as collateral.

Incorporated land groups and the forestry sector

The report of the Commission of Inquiry into Land Matters stressed that incorporation should be carried out only when there was a real need for it and when it was genuinely desired by the customary group concerned. For some time, virtually all of the land groups incorporated were those that had alienated plantation land returned to them. But when a Forestry Act was prepared to allow for the logging of forests on customary land, the existing Land Groups Incorporation Act was seen by the government as an ideal vehicle through which timber companies could deal with landowners in areas set aside for logging. Under the Forestry Act, the trees on the land are purchased from the owners of the land; the land does not change hands. Because land is only indirectly involved, not having title to land—or the legislation to enable them to gain title—is not a problem.

The Forestry Act 1991 requires landowning groups to be incorporated under the Land Groups Incorporation Act in areas where logging companies have gained the rights to log the forests. A Forest Management Agreement gives ownership of the trees, but not the land, to the National Forest Service, which is responsible for negotiating with the logging companies. Kalinoe (2003) describes this as 'the backdoor' method of gaining access to the land on which forests grow. The National Forest Service is responsible for paying royalties and compensation to the incorporated land groups. The land group leaders are then responsible for distributing payments to group members. Experience shows that once the representatives of the incorporated land group have signed the Forest Management Agreement, the National Forest Service has very little more to do with the incorporated land groups. No assistance is provided to the groups to learn how to involve themselves in business opportunities offered by the timber industry and the Forestry Act prevents landowners from negotiating directly with logging companies. The National Forest Service says it lacks the funds to help land groups with their financial management and business opportunities. Most logging companies have not become involved in the social and economic welfare of the people on whose land they are cutting down trees.

In 2001 a World Bank review of 32 proposed logging projects found that over 90 per cent of landowners were not aware of the implications of belonging to an incorporated land group. Even fewer were aware of the possible economic opportunities provided by their incorporation into a land group or the responsibilities of the group's leaders.

Incorporated land groups and the petroleum industry

GENERAL ISSUES

When petroleum exploration companies enter customary land they must compensate customary landowners for any damage to the land. If an exploitable resource such as oil or gold is discovered, landowners should benefit from possibly large amounts of money paid as royalties or rents, negotiated by the government. Distributing compensation and royalty payments to landowners creates a problem for the resource companies and the government because they need to know whose land is involved and who the landowners are. Knowing who the real owners are is important because many people claim they qualify as a landowner when resource rents, royalties and compensation are to be paid.

Under mineral exploration and development legislation, it is the government's primary responsibility to identify landowners, carry out the process of incorporating land groups under the Land Groups Incorporation Act and mediate between the resource developer and the land groups. But government departments have become increasingly incapable of operating effectively in rural and remote areas because of a lack of funding and staff training. As a result these tasks have been passed on to the resource companies, who have taken on the role reluctantly so that they can expedite their projects. This has led to landowners thinking it is the responsibility of the resource companies, not the government, to provide them with health, education and other services normally provided by government (Power 2000a, pp. 86–7).

An account of how the incorporation process worked on the Kutubu petroleum development licence areas illustrates some features of land group incorporation in Papua New Guinea.

THE CASE OF THE KUTUBU GAS AND OIL FIELDS

The US oil and gas exploration company Chevron developed the Kutubu gas and oil fields in the late 1980s and early 1990s in the Southern Highlands and Gulf provinces. When developing the project it needed to identify landowners to arrange for compensation and royalty payments. Chevron assumed the responsibility and land groups were incorporated under the Land Groups Incorporation Act to 'give powers to landowners to manage their affairs in a businesslike way' (Power 2000b, p. 29). Chevron recognised that 'the constitutions of incorporated land groups guarantee that decisions regarding clan resources are made by the correct authorities in the clan' (Power 2000b, p. 29). So it developed a guide to land group incorporation and a training manual for fieldworkers and villagers, which were used by the field officers employed in the Kutubu project.

Land groups were identified by constructing detailed genealogies. From these a census of living members was extracted for each clan, whether they were resident in the village or elsewhere. Chevron engaged former government officers (*kiaps*), both expatriate and national, to undertake this work. For Petroleum Development Licence 2, census data for each of the 84 villages were entered, clan by clan, in the Village Book used by the former colonial government for village censuses. Village Books enable individuals to be recorded as members of nuclear families, extended families and landholding groups.

Two cultural and language groups, Fasu and Foi, are affected by the Kutubu oilfield. The Fasu occupies 92 per cent of the land under development and that land contains all of the oil. The Foi owns the balance, which has no oil. Fasu leaders chose to share royalty and equity benefits equally across the various Fasu incorporated land groups in the Kutubu oilfield, regardless of their population size and land area. This remarkable decision was taken after exhaustive discussions in the longhouses led by the senior Fasu landowner leader assisted by an expatriate lawyer, who was the manager of the landowner company. Unfortunately, the negotiations on sharing pipeline benefits among Foi groups were not as successful.

From Chevron's point of view the system worked well. In the Kutubu oilfield, 2788 payments were made between 1989 and 1995 to incorporated land groups to compensate for the impact on their land of petroleum activities, including road and pipeline construction. Only 90 transactions were held up temporarily because of land disputes between group members. These disputes were resolved using the Land Disputes Settlement Act (Power & Hagen 1996).

The model constitution for incorporated land groups was expanded to include clauses to address management. This was done to give greater protection to members of customary groups by providing a common law remedy for theft, which was not automatically available under the Land Groups Incorporation Act. In practice, because of their lack of access to police services and courts, land group members were not able to use these clauses, though many later had the need.

At Kutubu the customary landowners did not have a genuine desire to be incorporated. They were incorporated because the Kutubu gas and oil project required customary groups and land to be identified so that compensation and royalties could be paid. The landowners had little opportunity to develop the skills needed to manage an incorporated land group. There was almost no government support in the area, which prior to the gas and oil discovery had been isolated, poor, undeveloped and serviced mainly by Christian missions. And there are no intermediary organisations in Papua New Guinea like the Central Land Council in Australia to provide the support indigenous people need to form and manage themselves as a corporate body (see Case Study 6, 'The role of the Central Land Council in Aboriginal land dealings').

For the Fasu and Foi, the incorporation of their land groups was only about collecting revenues from the oil and gas project—not about, for example, working to improve other development or income-generating opportunities for the group. Weiner (2007, pp. 120–1) argues:

Having worked with the Foi, both before and since the advent of the oil project, there seems no doubt in either my mind or theirs: the incorporated land group is perceived solely as a petroleum benefit-receiving body, and all of the uses to which it has been put by the Foi (and other people within the petroleum project area) have been exclusively related to this function.

Inevitably, because the incorporated land groups are used as vehicles for only receiving income rather than generating income and social development, issues relating to 'rent seeking' and conflict have emerged. Rent seeking is a term used by economists to describe the behaviour of a group, individual or organisation who seeks to make money by manipulating the economic and/or legal environment, often at the expense of other people who also have entitlements, rather than make a profit through trade and production of wealth.

In the mid-to-late 1990s the Foi began exploring ways to gain a greater share of the compensation revenues and they applied to incorporate more land groups in an attempt to make their numbers equal to the number of Fasu land groups. Even the Fasu incorporated land groups began to break up. In 1998 alone, 13 new groups were formed, all of them subgroups of already incorporated groups (Weiner 2000). Many of the new incorporated Land but instead were 'rubber-stamped'. The number of Fasu incorporated groups has increased from 59 to about 83.

Another important reason for forming subgroups was to bypass instances of poor management of the original incorporated land group, and the limited opportunity for incorporated land group members to go to the police or the courts in the event of dishonest land group management. Government services were very weak and the foreign joint venture companies at Kutubu were extremely reluctant to get involved in local and regional politics, even arguing that legislation in the United States of America prevented them from doing so.

In the absence of extensive training, uneducated and commonly illiterate members of the incorporated land groups could not control their group managers, let alone their landowner company managers. Dishonest and criminal actions of some landowner company leaders went unhindered, millions of kina were lost and opportunities to begin legitimate businesses were squandered. Frustrated members of incorporated land groups tried to bring control of their groups closer to home by forming their own incorporated land groups.

Positive outcomes in the oil palm industry

Despite the problems experienced in the petroleum industry, customary landowners have used the Land Groups Incorporation Act successfully for their benefit in the oil palm industry. In West New Britain a number of adjacent landowning groups were incorporated to put to economic use large parcels of land that would otherwise have been unused or the subject of ownership disputes. Within this process, people began to benefit from returns generated by New Britain Oil Palm Limited, which were used to fund community development. They also continued to work their own oil palm blocks and to earn income from other agricultural activities. Importantly, they earn their income by working their land rather than, as noted in the case at Kutubu, simply collecting rent from companies occupying their land.

This case demonstrates that, when exposed to genuine business opportunities and assisted by capable business and legal advice (supplied in this case by New Britain Oil Palm Limited), some landowners respond constructively and resolve their differences for a common economic benefit. Several factors stand out as contributing to success. The leaders of landowning groups:

- » took strong leadership roles
- » applied customary principles of land management
- » looked after other groups with lesser economic rights and interests
- » exercised their own customary powers (with no assistance from the government) to exclude groups that had no rights in the land concerned.

In one case, after New Britain Oil Palm Limited evaluated the land as suitable for oil palm development, it reactivated a disused landowner company that had been established when two coconut plantations were returned to the former landowners. Customary land that had been logged and was located between the plantations was included to form a single block of land suited to oil palm development.

Five years of protracted dealing with the Lands Department, and extensive negotiation and bargaining among the 31 local customary groups involved, resulted in the incorporation of six land groups. Each customary landowning group identified a representative member to make up the management committee of the reactivated company. The incorporated land groups became shareholders in the company.

West New Britain has other examples of how the Land Groups Incorporation Act was used to allow customary groups to bring land into economic production. In one example, an incorporated land group was formed from nine clans that held an agricultural lease over a former plantation, which was then subleased to New Britain Oil Palm Limited. Another block, which had been alienated under the land tenure conversion legislation in the 1970s to pursue various development options that had failed, was also leased to the company. The income from this land is being used for community development by seven participating customary groups. In another example, four customary groups incorporated and leased back their land to themselves under the Land Act. All income from this project goes to community development, which includes an annual budget of K60 000 to pay school and university fees for all member children.

In these examples, the landowners have had one main aim: to convince New Britain Oil Palm Limited that they would be reliable business partners. Landowners employed custom to deal with group membership and land rights and learned the fundamentals of business management and the need to bargain and compromise among themselves to meet this goal. The outcome is that New Britain Oil Palm Limited is investing tens of million of kina to develop the land, including roads, buildings, houses and vehicles. Tax credits are received for the public parts of this infrastructure expenditure.

Land administration and policy reform

The national government has never made available the resources needed to properly implement the Land Groups Incorporation Act. The Lands Department assigned the task to the Registrar of Titles, who even now has only one assistant and does not have a computer. It was assumed that provincial departments would cooperate but no funding was made available to them to perform their statutory responsibilities to ensure incorporated groups are authentic and had a meaningful purpose.

In 2006 the government began extensively reforming land policy, which has included a review of the Land Groups Incorporation Act. This is the first time land laws have been reviewed since the Department of Petroleum and Energy review in 1998–99. The current initiative is very significant as it is well resourced and well supported at the community, bureaucratic and political levels.

While the Land Groups Incorporation Act may be improved by amendments, as the petroleum and energy review found, problems extend beyond the law. They also relate to the inability of customary groups to obtain group title in customary land and the lack of support available to incorporated land groups and members of these groups from government or elsewhere. Importantly, the current process of reform has given priority to improving land administration.

Lessons

ESTABLISH PROCESSES AND SUPPORT FOR GROUP REPRESENTATION OF CUSTOMARY LANDOWNERS

lesson 1	The incorporation of landowning groups is an important tool available to customary groups to enable them to use their land in the formal economy while retaining their group ownership and identity.
LESSON 2	Legislation and procedures that allow a customary group to identify its land and hold group title in the land are an important way to support land group incorporation and to minimise fragmentation of landowning groups.

The incorporation of land groups enables customary landowning communities to participate in the formal economy at the group level. This is important in many Pacific island countries, as customary land is mostly owned by groups rather than individuals.

Processes to incorporate a landowning group need to be combined with processes for the group to clearly identify and protect its assets (land). This will prevent the fragmentation of landowning groups and the incorporation of new smaller groups designed only to capture valuable land for the benefit of their fewer members.

PROMOTE THE CONTRIBUTION INCORPORATIONS CAN MAKE TO LAND DEVELOPMENT

LESSON

Incorporated land groups can be an effective vehicle for unlocking the productive potential of customary land.

The incorporation of land groups can enable the development of substantial agricultural operations, such as the oil palm plantations in West New Britain. Landowners can use incorporation to extract substantial benefits in terms of income, employment, and social and infrastructure services from land.

ENCOURAGE SOCIAL AND ECONOMIC ACTIVITIES AMONG MEMBERS OF INCORPORATED GROUPS

lesson 4	Incorporated land groups can be an effective way for customary groups to work with industry and resource companies whose activities require royalties and compensation to be paid to the landowners.
LESSON 5	When incorporated land groups are set up only to receive compensation and royalty payments the potential for group disintegration and conflict is acute. Incorporated land groups in this situation may be able to avoid these problems if they have access to advice on corporate governance and on ways members and royalty payments can be used in social and economic activities that benefit the group. This advice could be provided by a well-resourced government agency or an intermediary institution (like the Central Land Council in Australia).

In the forestry and mining sectors, landowners affected by the activities of those sectors are entitled to compensation and royalty payments. These payments can be facilitated through incorporation of the landowning groups. However, if groups are incorporated only for the purpose of receiving payments they face a strong incentive to engage in non-productive rent-seeking behaviour, as demonstrated at Kutubu. Such behaviour may be avoided if the members of the incorporated group can engage in productive wealth-creating activity or social development, as in West New Britain.

ACKNOWLEDGE THE FLEXIBILITY WITHIN INCORPORATED GROUPS FOR DISTRIBUTING INCOME

lesson 6

An incorporated land group provides flexibility for the customary landowners to choose how to use or distribute the group's income.

A benefit of incorporated land groups is that the responsibility of how to use or distribute their income is in the hands of the customary landowners through the incorporated groups. How they deal with the proceeds is subject to the constitutions of the incorporated groups, but the mechanisms and decision-making processes are able to reflect traditional practices.

PROMOTE GOOD CORPORATE GOVERNANCE THROUGH INFORMATION, EDUCATION AND LEGAL SUPPORT

lesson 7	For incorporated land groups to be effective they require the support of an accessible legal system.
lesson 8	The effectiveness of incorporated land groups can be improved if members are able to access information and education about their roles and responsibilities as members of a corporate body.

There are instances of poor governance in the management of incorporated land groups. This may be due to dishonest practices of management or to poor education and information. Where there are illegitimate practices, people are often unable to get legal help, especially in remote areas. Illiteracy and low education levels also mean that group members often are poorly informed of the functions and activities of the incorporated land groups. Moreover, they are commonly isolated or ignorant about their rights and obligations under the law.

ENSURE THERE IS EFFECTIVE GOVERNMENT REGULATION AND SUPPORT

lesson 9	The state has a key role in ensuring that sufficient and long-term resources are available for regulating and supporting the formation and management of incorporated land groups.
lesson 10	The state may be able to provide the support incorporated land groups need through an intermediary institution like the Central Land Council in Australia. Such an institution may be able to secure its own funding, especially in relation to land that is able to generate a reliable and long-term source of revenue.

The sustainability of incorporated land groups often depends on effective administrative support from the government. Without government regulation and support incorporated land groups are vulnerable to disputes or misuse. While private sector organisations interested in the land or its resources may decide to take over the role of the state in supporting incorporated land groups, this is often only for as long as it takes for them to get access to the resources they want. Civil society may also decide to support incorporated land groups, but they are often not able to provide reliable and long-term support.

Appendix: Contacts

MEETINGS

- » Graham Pople, Madison Enterprises (PNG) Ltd, operators of Mt Kare Gold Prospect, Port Moresby
- » Laurie Bragge, Oilsearch, Port Moresby
- » Ian RS Marru, DPE Support Officer, Landowner Coordinator and Liaison, Port Moresby
- » Brian Aldrich, Managing Director, AKT and Associates, Port Moresby
- Joe Badi, Manager, Acquisitions Branch, Forest Planning Division, National Forest Service, Port Moresby
- » Josepha Kiris, Chief Land Titles Commissioner, Port Moresby
- » Oswald Tolopa, Director Planning Division, Department of Lands and Physical Planning, Port Moresby
- » John Kawak, Lands Officer, Oilsearch, Moro
- » John Ipidari, Business Development Officer, Oilsearch, Moro
- » Ronalad Sihinue, Community Affairs Coordinator, Oilsearch, Moro
- » Philip Kanora, Coordinator, Murik Lakes Resettlement Project
- » Melchior Mangino, Field Assistant, Mamber Village, Angoram District, East Sepik Province
- » New Britain Palm Oil Limited
 - Jamie Graham, General Manager
 - Ashley Barnes, Coordinator Mini-Estates
 - Himson Waninara, Company Secretary
 - Lillian Holland, Lands Officer
 - Frank Lewis, Manager, Smallholder Project, Oil Palm Industry Corporation
- » West New Britain Oil Palm Development Committee (West New Britain Provincial Government)
 - Sam Gakan, Acting Administrator, Kimbe
 - Gawago Enabo, Administrator, Talasea District
 - Ben Morden, Lands
 - Kasen Dumot, Lands
 - Leo Brown, Agriculture
 - John Kaniovisi, Agriculture

- » Ben Mare, Director, Lolokoru Estates Ltd
- » Lawrence Valuka, Chairman, Lolokoru Estates Ltd
- » Urban Kave, Secretary, Kulungi Village, Kedopoho ILG Management Committee
- » John Simo, Chairman, Vulupi Plantation, Natoko ILG Management Committee
- » Gerald Kura, Secretary, Morokea Village, Morokea ILG Management Committee
- » Thomas Webster, Director, National Research Institute, and Chairman, National Land Development Taskforce

TELECONFERENCE AND EMAIL

» Wycliffe Antonio, Land Administration and Survey Section, UniTech, Lae

Bibliography

- Barber, K & Rumley, H 2003, Gunanurang: (Kununurra) Big River—Aboriginal cultural values of the Ord River and wetlands, a study and report prepared for the Water and Rivers Commission (WA), viewed August 2007, http://portal.water.wa.gov.au/portal/page/ portal/WaterManagement/Groundwater/Ord/>.
- Bolton, GC 1981, 'Black and white after 1897', in CT Stannage (ed.), *A new history of Western Australia*, University of Western Australia Press, Perth.
- Buchanan, G 1933, *Packhorse and waterhole—with the first overlanders to the Kimberleys*, Angus & Robertson, Sydney.
- Case, N 1999, 'Tide of history or tsunami? The Members of the Yorta Yorta Aboriginal Community v The State of Victoria & Ors (1998)', *Indigenous Law Bulletin*, viewed August 2007 http://www.austlii.edu.au/au/journals/ILB/1999/9.html.
- Durack, PM 1933, 'Pioneering the East Kimberley', *Early Days* (Journal of the Historical Society of WA) vol. 2, pp. 2–28.
- Filer, C 2007, 'Local custom and the art of land group boundary maintenance in Papua New Guinea', in JF Weiner & K Glasin (eds), *Customary land tenure and registration in Australia and Papua New Guinea: anthropological perspectives*, Asia-Pacific Environment Monograph 3, Resource Management in Asia-Pacific Project, Australian National University, Canberra, pp. 135–74.
- Fingleton, J 2007, 'A legal regime for issuing group titles to customary land: lessons from the East Sepik', in JF Weiner & K Glasin (eds), *Customary land tenure and registration in Australia and Papua New Guinea: anthropological perspectives*, Asia-Pacific Environment Monograph 3, Resource Management in Asia-Pacific Project, Australian National University, Canberra, pp. 15–38.
- Government of Papua New Guinea 1973, *Report of the Commission of Inquiry into Land Matters*, Port Moresby.
- ——1983, Report of the Task Force on Customary Land Issues, Port Moresby.
- Hughes, H & Warin, J 2005, A new deal for Australians and Torres Strait Islanders in remote communities, Issue Analysis no. 54, Centre for Independent Studies, Sydney.
- Kalinoe, LK 2003, 'Incorporated land groups in Papua New Guinea', *Melanesian Law Journal*, viewed August 2007, http://www.paclii.org/journals/MLJ/2003/4.
- Lynch, CJ 1969, 'Legal aspects of economic organization in the customary context in Papua New Guinea and related matters', Legislative Draftsman's Office, Port Moresby.
- National Research Institute 2007, *The National Land Development Taskforce report*, NRI Monograph 39, National Research Institute, Port Moresby.
- Peterson, N 1981, *Aboriginal land rights: a handbook*, Australian Institute of Aboriginal Studies, Canberra.

Power, AP (ed.) 2000a, *Land group incorporation: village guide and legal guide*, Anutech/AusAID, Canberra (an edited version of two earlier manuals).

—2000b, *Land group incorporation: a management system*, Train-the-trainer manual produced for the AusAID-funded Human Resource Development of the National Forest Authority, Anutech/AusAID, Canberra.

—2003, 'Creation of Melanesian property rights: building bridges between custom and commerce', colloquium on peri-urban customary land issues in Papua New Guinea, Melanesian Land Studies Centre, University of Technology, Lae, 27–29 August 2003 (Internet publication by UniTech).

——& Hagen, PC 1996, 'The escalation of landowner benefits in the Kutubu Petroleum Development Project', in PG Buchanan (ed.), Petroleum exploration, development and production in Papua New Guinea: proceedings of the third PNG Petroleum Convention, Port Moresby, 9–11 September.

- Stanner, WEH 1965, 'Aboriginal Territorial Organisation: estate, range, domain and regime', *Oceania*, vol. 36, no. 1.
- Strelein, L 2002, 'Western Australia v Ward on behalf of Miriuwung Gajerrong High Court of Australia, 8th August 2002 summary of judgement', *Land, rights, laws: issues of native title,* vol. 2, no. 17.
- Sullivan, P 1996, All free man now: culture, community and politics in the Kimberley region, Aboriginal Studies Press, Canberra.
- Weiner, JD 2000, 'Audit of Foi incorporated land groups: results and analysis', Chevron report to Minister of Petroleum and Energy.
- Weiner, JF 2007, 'The Foi incorporated land group: group definition and collective action in the Kutubu Oil Project Area, Papua New Guinea', in JF Weiner & K Glasin (eds), Customary land tenure and registration in Australia and Papua New Guinea: anthropological perspectives, Asia-Pacific Environment Monograph 3, Resource Management in Asia-Pacific Project, Australian National University, Canberra, pp. 117–34.
- Willis, P 1980, 'Patrons and riders: conflicting roles and hidden objectives in an Aboriginal development programme', MA thesis, Australian National University, Canberra.

RECONCILING CUSTOMARY OWNERSHIP AND DEVELOPMENT

Village land trusts in Vanuatu: 'one common basket'

Jim Fingleton » Development Law Consultant, Australia

Anna Naupa » Senior Program Officer, Australian Agency for International Development, Port Vila, Vanuatu

Chris Ballard » Division of Pacific and Asian History, College of Asia and the Pacific, Australian National University, Canberra

A snapshot

Village land trusts in Vanuatu: 'one common basket'

The village land trust is a concept used in Vanuatu after independence (1980) to meet the pressing need for a legally recognised body to make decisions on behalf of customary owners whose alienated lands were being returned. In the decades since, although the use of village land trusts has not spread around Vanuatu, the two main ones established—Ifira Trustees Limited and Mele Trustees Limited—have enjoyed relative success, albeit with mixed experiences. They have enabled leases to be negotiated over former alienated lands, revenues to be collected, investments to be made in businesses, and a wide range of services to be provided to the villages involved. The trusts have also been a symbol of village solidarity—a 'common basket' from which everyone can eat.

The experiences of the village land trusts provide some important lessons.

- » Land trusts can be an effective vehicle for representing group ownership in the formal economy.
- » The incorporation of land trusts requires a regulatory regime to ensure accountability and transparency.
- » Governments can play a supportive role when land trusts are being set up.
- » Land trusts can have the flexibility to incorporate traditional decision-making structures.
- » Business and investment activities are best kept separate from the land management activities of land trusts.
- » Land trusts would benefit from an intermediary advisory body.

Contents

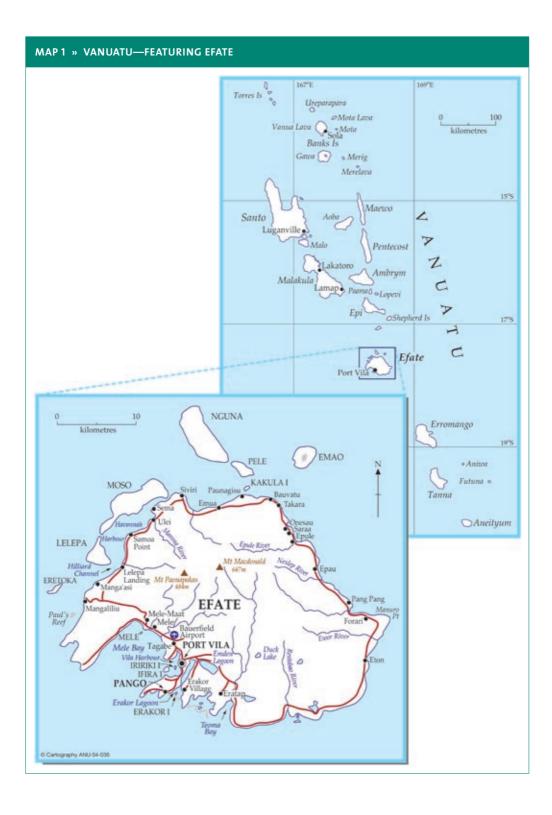
»	REFERENCES	45
»	APPENDIX: INTERVIEWS	44
	Establish supporting mechanisms for trusts	43
	Define the scope of trusts	43
	Emphasise community benefits in land trusts Promote the compatibility of trusts with tradition	42 42
	Acknowledge the skills and support required to set up trusts	41
	Consider land trusts a vehicle for managing customary land Ensure land trusts have a robust regulatory regime	41 41
»	LESSONS	41
»	PERFORMANCE OF THE IFIRA AND MELE LAND TRUSTS	39
	Mele land trust	39
"	lfira land trust	30 38
»	REPORTING BY THE IFIRA AND MELE LAND TRUSTS	38
	lfira land trust Mele land trust	36 36
»	DECISION MAKING BY THE IFIRA AND MELE LAND TRUSTS	36
	Mele land trust	35
»	ACTIVITIES OF THE IFIRA AND MELE LAND TRUSTS Ifira land trust	33 33
	Mele land trust	32
>>	VANUATU'S EXPERIENCE OF LAND TRUSTS Ifira land trust	31 31
»	THE LAND TRUST CONCEPT	30
»	CULTURAL CONTEXT	28
»	HISTORICAL AND POLITICAL CONTEXT OF LAND MANAGEMENT IN VANUATU	27
»	THE SETTING	24

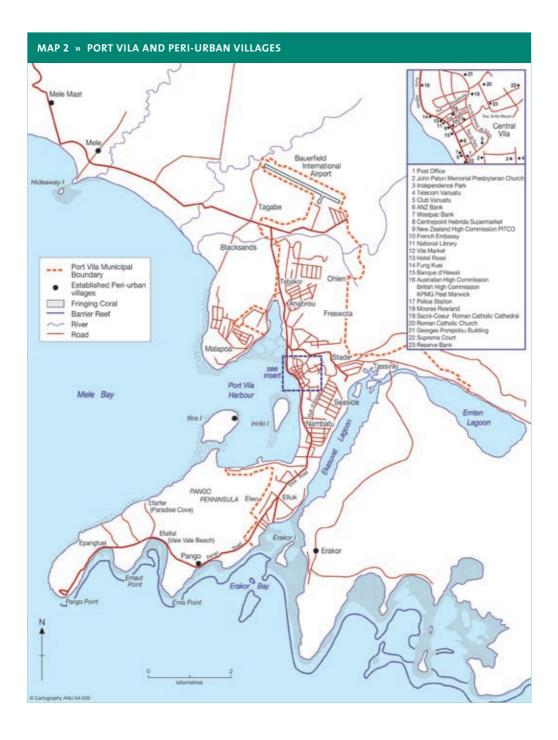
The setting

The area of Vanuatu covered by this case study lies on the outskirts of the capital Port Vila, and focuses on the peri-urban villages of Ifira and Mele (Maps 1 and 2). In recent years Vanuatu has built on its reputation as a Pacific holiday destination, becoming the focus of a land boom fuelled by investors from Australia and New Zealand. The great majority of this activity has been on the main island of Efate, where Port Vila is located. It is estimated that, since independence in 1980, 55 per cent of all land on the island—and more than 80 per cent of coastal land—has been converted by customary owners to long-term leases. This amounts to an extraordinary loss of control over the nation's land. Vanuatu's status as a tax haven is crucial in attracting investment (Rawlings 2007).

Ifira is an island of half a square kilometre, located at the entrance to the harbour of Port Vila, with a population of 983 at the time of the most recent national population census (1999). Large areas of the traditional lands of Ifira villagers were alienated during the colonial era. Although much of their land is now lost to the town of Port Vila, villagers still have important landholdings behind the wharf area, across the harbour's entrance at Malapoa and beyond to the airport. Perhaps the jewel of their landholdings is Iririki Island, just offshore and adjacent to the town's commercial centre. Reflecting their central location, Ifira villagers have long provided senior politicians, civil servants and businessmen.

Mele village moved to the mainland adjacent to its previous offshore island location in 1950 (Naupa 2005). With a population in 1999 of 1851, it is Vanuatu's largest village, lying 10 kilometres around Mele Bay from Port Vila. Its traditional lands stretch from a boundary with Ifira lands near the airport westwards around Mele Bay to Devils Point and Tukutuku, where they abut the mainland landholdings of the Lelepa Island villagers. The people of Mele village have been no less prominent in the nation's affairs than Ifira villagers, and they provided the first president after independence.





Historical and political context of land management in Vanuatu

For present purposes, the history of land management in Vanuatu can be divided into two periods—before and after independence. Before independence in 1980, around 20 per cent of the country's land area (and a far greater percentage of the land suitable for agriculture) was owned by foreign interests. Beyond the boundaries of the two urban centres of Port Vila and Luganville, land management was almost entirely a matter of choice, with little in the way of planning and development requirements or land revenues. Titles in alienated lands were confirmed and registered by the Joint Court almost without exception, regardless of native claims to the contrary (Van Trease 1987). By the 1970s, however, as ni-Vanuatu became increasingly concerned that much of their most valuable land was in foreign hands, the level of protest increased greatly.

Measures were taken to return some land, but an Anglo–French Condominium with conflicting goals and agendas could not address the grievances. So these serious land problems were left to the incoming independent government to resolve. After a long struggle in which the central issue was returning alienated lands to their customary owners, the Constitution adopted at independence declared: 'All land in the Republic of Vanuatu belongs to the indigenous custom owners and their descendants' (Article 73).'

The only exception to this declaration was that the government could own land acquired in the public interest (Article 80). Under this power, much of the land within the town boundary of Port Vila became public land.

Whereas the land management system before independence could be called 'laissezfaire', for quite different reasons the system introduced at independence ended up being much the same. It was designed to deal with the pressing need to change the land tenure system from one dominated by outsiders to one giving priority to the needs of the nation's citizens. All alienated lands were returned immediately to customary owners. The Land Reform Act passed in 1980 enabled customary owners to negotiate leases for up to 75 years with the previous owners of their land. But this could be done directly without first determining customary ownership. Once registered under the Land Leases Act, no challenge to ownership can overturn a lease.

Matters such as identifying customary owners, while not ignored by the incoming government, could not be given priority. Even the vital question 'what are custom owners—individuals or groups?' was left to be answered later by a national land law called for by the Constitution (Article 76). This law was also intended to address Vanuatu's need for a comprehensive land administration system. Almost 30 years after independence a national land law is still not in place.

1 In fact, Article 71 in the original version of the Constitution. A renumbering was carried out after independence

In the absence of such a law, the nation's land affairs are being conducted with major gaps and weaknesses in land policies and laws and in the administrative system to implement them. Possibly the biggest gap is in how the customary group can be involved effectively in making decisions on customary lands. Into this gap, the ni-Vanuatu leaders introduced the concept of village land trusts. Such trusts have played a significant role in the land affairs of Mele and Ifira villages over the past three decades. The trusts combine traditional and modern institutions and are designed to meet modern needs without displacing the traditional values and practices underpinning village communities. As such the experiences of these village land trusts can make a valuable contribution to developing ways to manage lands in the Pacific islands.

Cultural context

The widespread alienation of customary lands through foreign ownership before independence and the widespread allocation of long-term leases in the decades since took place at Mele and Ifira against a background of cultural change. Anna Naupa (2005) concluded:

As cultural change blurs the boundaries between the traditional and the modern, indigenous reference to *kastom* [social structures, values and practices perceived as traditional] in contemporary Vanuatu is rather vague. Ni-Vanuatu remain aware of *kastom* ideals but can manipulate interpretations to suit changing needs ... The ambiguous nature of *kastom* therefore allows communities to address the changing social (and natural) environments, while always rooted in basic cultural values.

In the study area of South Efate, the *naflak* kinship system² plays a central role—now as in the past—in distributing chiefly titles and rights to land. *Naflak* are clan identities organised according to matrilineal descent. Before the interior and coastal settlements were amalgamated during the colonial era into the major villages surviving today, evidence suggests that individual settlements were identified primarily with a single landowning *naflak*. *Naflak* names reflect natural species, such as octopus or coconut. As a general rule the names of marine species identify communities with origins along the coast, while the names of terrestrial species identify communities with links to the interior of mainland Efate.

Naflak identities are inherited maternally—a brother and sister share the same *naflak* as their mother but not that of their father. A group of people sharing a *naflak* identity and traditionally residing together are referred to as a *nakainanga* (a matriclan descended from a common female ancestor). In contemporary Efate society, *naflak* is often referred to as 'family' and contrasts with 'bloodline' or those related by patrilineal forms of descent.

The temptation to see the society as unambiguously matrilineal must be resisted, because other factors have introduced patrilineal features. Both Ifira and Mele are dominated culturally by relatively recent Polynesian immigrants, employing patrilineal descent for rights to land. These people have subsequently intermarried with members of indigenous Melanesian Efate communities, thus also inheriting matrilineal *naflak* principles—a source of some internal tension and confusion. At a later stage Presbyterian missionaries also promoted patrilineal descent of chiefly titles and other rights. So, while rights to land and chiefly titles are generally acquired in accordance with principles of matrilineal descent, a mission-inspired revolution in kinship has promoted a system of patrilineal descent to chiefly titles and rights to land. This system is now widely regarded as 'traditional'.

One consequence of the contemporary interpretation of *kastom* is that women have become more marginalised from land decisions—only male heads of households participate in land matters.

It is not surprising therefore that under these many different influences there is confusion about what is customary, and how far *kastom* can form the basis for modern land tenure and land use. However, the official position is clear. Article 74 of the Constitution declares: 'The rules of custom shall form the basis of ownership and use of land in the Republic of Vanuatu'.

In addition Chapter 5 of the Constitution provides for the National Council of Chiefs (*Malvatumauri*) with a 'general competence to discuss all matters relating to custom and tradition'. Chiefs are officially recognised as having authority in a hierarchy—from village chiefs to area, island, provincial and national councils of chiefs. In 2006 the National Council of Chiefs Act was passed, providing an administrative structure for the National Council of Chiefs and identifying its role in registering island and urban councils of chiefs. Under the Customary Land Tribunals Act 2001 chiefs are the main authorities for settling land disputes, but their future role in developing the nation is unclear. Both the national executive and judiciary seem to have reservations about what their role should be (Lunnay et al. 2007).

These uncertainties about custom, and the role of customary groups and chiefs in the land matters of contemporary Vanuatu, present major problems for rational, fair and sustainable land management. Vanuatu has a comprehensive set of laws that deal with negotiating land leases, registering leases and other interests, settling land disputes, planning and protecting the environment³, but it does not have a law for identifying customary owners of land. Yet it is these people who own all land except public land and are entitled to negotiate leases that can tie up a community's lands for generations.

The level of dissatisfaction with current arrangements can be gauged by the popular support for the National Land Summit held in September 2006 and the wide range of reforms called for in its 20 resolutions. For decisions involving customary lands, the interests of groups (village, kinship group, family) need to be balanced with the interests of individuals. And to meet the nation's future land needs, the traditional and the modern need to be balanced.

The land trust concept

A trust is a highly specialised concept of the western legal system. Basically a person (the trustee) holds property for the benefit of other people (the beneficiaries). The trustee has particular duties and the legal authority to act on behalf of the beneficiaries, so that actions taken by the trustee are legally binding. These characteristics of trusts have made them an attractive mechanism for the ownership and management of customary lands.

Throughout history whenever colonisers encountered indigenous peoples, they applied concepts from their legal culture to them—literally, to 'assimilate' them. Thus customary groups were sometimes treated as corporations, cooperatives, associations or councils. At other times a representative approach, using agents or trustees, was adopted (Fingleton 1998). While converting indigenous institutions into something similar and familiar is convenient for colonisers, indigenous institutions can suffer as a result of the administrative mechanisms imposed on them.

Using the trust concept to reflect the relationship between chiefs of customary groups and the members of those groups assumes that the role of trustees under western law corresponds to the role of chiefs under customary land tenures. There are, however, fundamental differences between the two roles, an obvious one being that a chief is also a member of his customary group. This gives rise to unavoidable conflicts between a chief's personal interests and his duties as a trustee.

Yet the appeal of trusts remains and, provided that safeguards are in place to reduce the risk of conflict, they can fulfil a useful purpose in managing customary lands. One safeguard is to have a statutory body act as trustee for customary landowners, as the Native Land Trust Board does in Fiji. An alternative safeguard is to have a group of people, even a corporation, act as trustee for the landowners. Another safeguard is to allow the trustee to act on behalf of customary landowners only after a process leading to informed consent and in accordance with directions given by the landowners.

In Australia in the Northern Territory, for example, three main bodies are involved in holding and managing Aboriginal land titles—the traditional Aboriginal owners, Aboriginal land trusts and Aboriginal land councils. The land trusts hold title to the lands, but can exercise their powers over the lands only in accordance with directions given to them by the land councils, which must first get the informed consent of the traditional owners.

Vanuatu's experience of land trusts

Vanuatu has its own particular experience of land trusts. The Presbyterian Church used land trusts from early times to manage its many landholdings in Vanuatu (Van Trease 1987) and the Land Trust Board was established by the British colonial authorities in 1973 to facilitate the return of certain lands to customary ownership. The British attempted to set up a joint land trust board to implement more general land reforms, but this was unsuccessful (Van Trease 1987). By the late 1970s the Vanua'aku Party's leadership, with its Anglophone and Presbyterian connections, drew on these precedents when preparing to recover alienated lands at independence.

Another device used to press land claims was the land committee (called 'land council' in some places). The Fila Island Land Committee was established in 1973 to raise Fila (Ifira) land claims with the Anglo–French Condominium, and the Mele Land Committee was formed to do the same some years later. In the late 1970s the Vanua'aku Party encouraged villages to set up land committees to press their claims for returning alienated lands and identifying the original customary owners.

IFIRA LAND TRUST

The Ifira land trust was set up in 1976 by Kalpokor Kalsakau, who was Vanuatu's first finance minister after independence, using his knowledge of Fiji's Native Land Trust Board gained while a student in Fiji. He, Barak Sope, a highly influential Ifiran islander who was later prime minister, and the chief of Ifira, Graham Kalsakau, were the three signatories to a memorandum of association for setting up a trust company. In 1978 the trust was incorporated as a private company with the name Ifira Trustees Limited.⁴ Its objectives include to:

accept and execute the office of trustee, and to take, receive, hold and deal with all property ... that may be granted, conveyed, transferred or given to the Company upon any trust or trusts for the benefit of the people of Fila Island.

These people were further specified as 'the members from time to time of the Blakniu, Blakuita, Blakmalu and Blaknui clans'.⁵

⁴ It seems that the company was also licensed as a 'trust company' under the Trust Companies Regulation (Cap. to) (George Vasaris, pers. comm., 2007). As defined in that law, a 'trust company' means any company carrying on trust business, and 'trust business' includes the business of acting as trustee (s. 2).

⁵ These are said to be the totems of the four *naflaks* (*blak* in Ifira), which originally settled Ifira Island, although the *naflak* identities were presumably inherited originally from in-marrying Efate mothers.

After Ifira Trustees Limited was incorporated, a declaration was signed by the chief of Ifira village and nine other villagers, whereby 'the Ifira Island Community acting through the Chief and his Council and the Land Committee of Ifira Island' vested certain lands in Ifira Trustees Limited to be held 'beneficially for all the members of our community'. The lands handed over to Ifira Trustees Limited were listed by location and title number and included Iririki Island, Tagabe, Malapoa Estate, De Gailland Residential Estate, and Malapoa Peninsula. It is notable that the trust was set up at the village level, which is a settlement unit made up of traditional landowning groups.

The declaration is a remarkable document, carefully drafted to address the difficult question of how land that would come under the ownership of the unidentified customary owners at independence could then be vested in the trust. It states:

<u>IN MAKING THIS DECLARATION</u> we state our awareness of Articles 71, 72 & 73 of the Constitution of the Republic of Vanuatu and say that there is no inconsistency between our <u>DECLARATION</u> and the said articles because –

- 1. the said Lands belong beneficially to the respective indigenous custom owners and their descendants;
- 2. we have applied our own rules of custom in deciding the basis of ownership and use of the said Lands;
- we have adopted and therefore recognise the concept of a trust as being 'a recognised system of land tenure' for the purposes of our custom in regard to Article 73 of the Constitution.⁶

Whether this 'vesting' of customary land in the trust would survive a legal challenge by the customary owners is debatable.

MELE LAND TRUST

Ati George Sokomanu, Vanuatu's first president after independence, also drew on the Native Land Trust Board precedent when establishing the Mele land trust. He had been a student in Fiji, and in 1979 the chief of the village, Peter Poilapa, was joined by four other villagers and their solicitor as the signatories of the memorandum of association for incorporating a private company, Mele Trustees Limited, which was incorporated in 1980. Its objectives include to act as trustee and receive property granted to it upon any trust 'for the benefit of the people of Mele village'. These people are further specified as 'the members from time to time according to custom of the various clans of kinship groups which together comprise the class of people known as Mele villagers'.

Like Ifira, Mele village is not a single traditional landowning group but a number of landowning groups. As with the Ifira trust, those involved in setting up Mele Trustees Limited emphasised its importance in managing alienated lands on behalf of the community, rather than splitting them up among their respective customary owners.⁷ According to one person interviewed as part of the case study: 'Nobody knew exactly where their lands were, so Mele land trust took care of the lands'.

Much of Mele village lands had been alienated during the colonial era.⁸ So there was a very large area for which management arrangements had to be set up quickly. Naupa (2005, p. 7) estimated that about 30 per cent of all Mele lands was involved. However, inquiries have not brought to light a document similar to the declaration at Ifira, aimed at vesting the lands in the trust to administer on behalf of all Mele villagers.

Activities of the Ifira and Mele land trusts

IFIRA LAND TRUST

The main purpose of the Ifira land trust was to hold and manage land given to it on trust for the benefit of the specified villagers.

Iririki Island became the original cash cow for the trust. Its title was held from early times by the Presbyterian Church and during the 1970s the Fila Island Land Committee negotiated the return of the island to the customary owners. In 1976 the church assembly finally agreed the whole island would be returned, but on the proviso that it be held by a trust. According to information provided by Kalpokor Kalsakau, the land committee decided it would be held by the Ifira land trust, partly to meet the church's demands and partly to avoid arguments over the identity of the customary owners.

In 1983 a protracted land dispute was settled with a payment of US\$1 million by Iririki Resort, the lessee of part of Iririki Island, in return for a lease over the balance of the island. With this as capital, and with a steady flow of rents from its other properties, the trust built up its assets. By 1991 it had ten subsidiary companies with interests in stevedoring, shipping, waterfront development and many other businesses.⁹ The total value of its assets in that year was Vt281.5 million (US\$2.5 million). Its trading account showed that Vt219.6 million (US\$2.0 million) was made in 1990 from premiums on transferring leases, while the profit on rental property was Vt20.3 million (US\$0.2 million).

⁷ The trust's first administrator, Meto Nganga, its first secretary, Simeon Poilapa, and its adviser, Ati George Sokamanu, were all interviewed as part of this case study.

⁸ Chris Ballard extracted details from the Joint Court decision on Title 122, dated 1933, which shows 14 sales by one Mele chief between 1886 and 1902, amounting to well over 2000 hectares.

⁹ This information is taken from the public files of the Financial Services Commission, being the report and financial statements for Ifira Island Trust for the year ended 31 May 1991.

Ifira islanders interviewed for this case study emphasised the importance of the trust in maintaining community solidarity. As one interviewee put it: 'Everybody eats from the one common basket'. Indeed, a striking feature of the trust's operations is the services it provides to the Ifira community, young and old. These include a pension scheme for all islanders aged over 50 years, tertiary scholarships, village administration, the supply of water and electricity across the island, support for schools and community organisations (for sport, women, churches and people with disabilities), interest-free loans for school fees, the cost of medical evacuations and an annual Christmas voucher of Vt10 000 (US\$900) for all islanders aged over 18 years. Island leaders say that, if the emphasis had been on identifying only the customary owners of the leased lands, it would have 'divided the community'. 'The trust holds us together'.¹⁰

The basis of the trust's wealth is its revenue from leases. By December 2001 Ifira Trustees Limited had granted the leases detailed in Table 1. While the total area (24.4 hectares) is not great, the land involved is on the edge of Port Vila and highly valuable.

TABLE 1 » LAND LEASED BY THE IFIRA AND MELE LAND TRUSTS AS AT DECEMBER 2001			
	Number of leases	Total area	Lease terms
Ifira land trust	85	24.4 hectares	For 48 leases: 75 years For 37 leases: 50 years
Mele land trust	211	3788.75 hectares	Average: 60 years
Source: Farran (2002, p. 2).			

Until a lease for 60 hectares of land at Malapoa Point was granted the trust had encountered no major conflicts, although there had been minor internal conflicts. In 2005 litigation over that lease began, which pitted Ifira Trustees Limited against the Kalsakau family. The central issue in the case revolved around the statutory power of the Minister of Lands to grant a lease over disputed land. The Acting Minister had granted the lease to Ifira Trustees Limited, but the Supreme Court set aside the grant in a decision approved by the Court of Appeal. A key consideration in the Court of Appeal's judgement (October 2006) was that both the Acting Minister of Lands and the Director of Lands at the time were prominent Ifira islanders, with personal interests in the matters they were supposed to be dealing with independently. Of greater importance for the discussion in this case study is that the Kalsakau family was asserting its right to lease the land as their own customary land.

10 The quotations in this paragraph are from interviews with Michel Kalworai and four members of the trust's board of directors.

MELE LAND TRUST

As with the Ifira land trust, the Mele land trust's main purpose was to hold and manage land given to it on trust for the benefit of the people of Mele village.

At an early stage the Mele land trust began accumulating assets. Without the initial capital base Ifira received from its court settlement, the Mele trust had to borrow to invest. In 1982 it raised capital to buy a 49 per cent share in the Hideaway Island Resort by placing a charge of Vt7 million (US\$70 000) on its shares, as security for repayment of the debt. Its lease income in 1983 was almost Vt2.5 million (US\$25 000), but in 1984 it received close to Vt16 million (US\$160 000) from logging operations on Mele land. In 1985 the trust purchased a 33 per cent share of Vate Timber Co. Ltd. for Vt7.7 million (US\$75 000). By 1989 its financial returns showed total assets of Vt18.4 million (US\$165 000) from its business of collecting lease incomes. By 1992, however, after a change of directors and accountants, the assets had been reduced to Vt4.8 million (US\$43 000)." This major change in the trust's fortunes reflected the changes in its decision making (discussed next).

In its early years the trust provided some services to the village community, including electricity, water and road improvements, and it supported various community organisations. Money was also distributed. However, these benefits dried up when the trust ran into financial difficulties. As the trust's difficulties increased, it relied more and more on granting new leases to generate income. By December 2001 the Mele land trust had granted the leases detailed in Table 1.

Whereas only 51 leases (mostly agricultural) were granted between 1980 and 1990, another 147 (mostly residential and commercial) were granted between 1993 and 1996.¹² Many of these leases have been converted into coastal subdivisions, denying Mele villagers access to their beaches and marine resources, with minimal return for the village. Indeed, Mele villagers are planning to move the village once again, to an inland location.

The loss of many of the trust's assets between 1992 and 1996 severely eroded its revenue base. The current board unsuccessfully invested in a couple of ventures to diversify the revenue base—a rubbish collection service, which had to be sold to meet the costs of an adverse Supreme Court judgement in a land dispute, and a community fishing venture, which failed in the face of strong competition. The trust is now exploring the feasibility of developing a housing subdivision of between 40 and 50 plots in the hills above the village.

¹¹ Information in this paragraph is taken from the public files of the Financial Services Commission, being the annual financial statements and directors reports.

¹² Data from the Vanuatu Archives, deposited by Sue Farran in 2003.

Decision making by the Ifira and Mele land trusts

IFIRA LAND TRUST

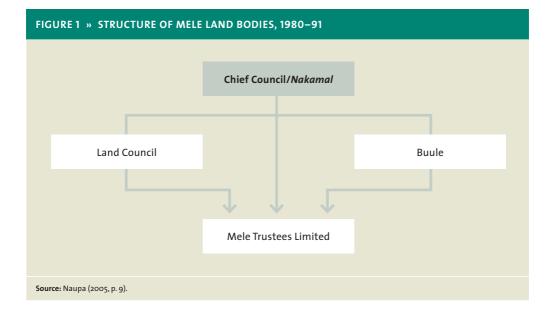
As a registered company Ifira Trustees Limited is subject to a wide range of requirements set out in legislation and in its articles of association, providing for the appointment of directors, their duties and the holding of meetings. Further requirements were added over time. Initially there were seven directors, including the village chief and a company, Financial Services Limited, but this was felt to be not fully representative of the Ifira community and the trust was restructured in 1999. The number of directors was increased to 31—the village chief and 30 'family' representatives elected by an annual general meeting on the village council's recommendation.

In 1999 a further adjustment involved appointing an advisory board—the Ifira Tenuku Land Management Board of Directors. According to Steven Kalsakau, the Member for Efate Rural and a director of Ifira Trustees Limited, its members are the 18 'main landowners' the village chief, *naflak* leaders and family heads. In 2000 the advisory board issued a land policy 'to facilitate the use of land for and on behalf of Ifira Trustees Limited'. The board's decisions are declared to be binding on Ifira Trustees Limited, which must refer all landrelated matters to the board before any implementation. The land policy further provides that, where customary owners of any land are identified, Ifira Trustees Limited can act on the owners' behalf only with their agreement. The policy also provides for a leasing procedure, forms to be used, fees to be paid, the fixing of rents and premiums, land use zoning, surveying, valuation and the removal of unapproved settlers.

MELE LAND TRUST

Mele Trustees Limited is also subject to all the normal decision-making requirements set out in the company legislation and its articles of association. But it has faced some novel requirements from the beginning. Initially there were six directors, including the village chief and the solicitor acting for the trust. However, as Naupa (2005) has described, behind this formal decision-making body lay an elaborate structure in which the village chief and his council, a land council and a committee of elders (*Buule*) had major decision-making roles. The pre-independence land committee, comprising representatives from each of the 29 'families' of the village, became the land council when Mele Trustees Limited was formed in 1980. Naupa (2005, p. 8) continued:

The Land Council served as the cultural watchdog for Mele Trustees, which operated in a modern leasehold land tenure system. At its inception it was a policy of the Trust that its Board members received advice from three bodies in the village: the Chief and his Council in the *Nakamal*, the Land Council, and Buule, a committee of elders dedicated to tracing genealogies to ensure rightful claims to land (Fig. 1). The Council ensured that the Trust respected the traditions of people it represented in that individual clans were involved in decision-making through family representatives. The Council and the Trust together served to regulate development on Mele land to benefit villagers (eg through employment), and did their best to ensure that no land disputes would arise later.



This careful blending of the traditional and the modern bodies for making decisions about land management worked well for a decade. Naupa (2005, p. 9) described what happened next:

However, in 1991, recently graduated Mele university students banded together in opposition to the Mele Trustees' structure. They succeeded in abolishing the Land Council and Buule, and introduced in their place a committee of shareholders, comprised of family representatives.

The traditional transparent *nakamal* discussions were replaced with boardroom meetings with select representatives, removing knowledge of trust activities from the village. While women had been able to listen in on *nakamal* discussions, they were not represented on the newly formed committee of shareholders.

The trust's administrator at the time, Meto Nganga, mentioned another factor contributing to the trust's difficulties. As the customary owners of particular lands came to be identified, they began agitating to remove their lands from the management of the trust. The concept of 'one common basket', where everyone benefited from the village lands, began to collapse.

The original board of directors, with its chiefly representation, was replaced by a board elected by a new membership of 31 shareholders, each representing one of the original Mele 'families'.¹³ And, as already mentioned, the trust changed its accountants¹⁴, began to lose money, sold assets to cover debt and granted many leases to maintain a flow of income. During the 1990s there was further turmoil and directors were frequently replaced. It is estimated that, probably in response, somewhere between 75 and 80 per cent of the land formerly under the trust's management has been withdrawn and is now held and managed separately by four of Mele's 31 customary landowning families.

Reporting by the Ifira and Mele land trusts

IFIRA LAND TRUST

The company's legislation requires annual reporting and the filing of financial statements, which are available to the public. However, in Ifira's case a search at the Financial Services Commission revealed only one full report for the year ended 31 May 1991. For most other years all that is recorded is that assets of \$3 (the company's initial share capital) were held. Possibly the explanation can be found in the fact that the 1991 report is headed 'Ifira Island Trust', not Ifira Trustees Limited. It is known that there was a trust instrument, as it is referred to in the declaration vesting certain lands in Ifira Trustees Limited. Possibly two legal entities—Ifira Island Trust and Ifira Trustees Limited—are used as a legal device to keep certain information from the public eye.

The last report on the Financial Services Commission files is for 2001. Letters to the local newspapers complain about the absence of recent financial reports, and query how the trust's funds are being managed. On the other hand, there seems to be general satisfaction with the many benefits that the trust brings to Ifira village. Its attractive appearance and general wellbeing can be attributed in part at least to the trust's activities. During the case study there was no apparent opposition to the trust's continued existence.

¹³ This figure differs from the 29 'families' mentioned previously. One family seems to have divided and, on some accounts, the village chief was included as a member.

¹⁴ A member of the new accountancy firm became chairman of the trust's board of directors.

MELE LAND TRUST

It is a different story with the Mele trust. Its financial reporting is full and tells a story of fluctuating fortunes. From total assets of Vt2 million (US\$20 000) in 1981 the trust grew to hold Vt12.6 million (US\$126 000) in 1984, then sank during the mid-1980s only to rise again to a peak of almost Vt20 million (US\$200 000) in 1991. After restructuring and replacing directors, assets declined again to a low of Vt4.4 million (US\$44 000) in 1997. A major increase in leases granted increased the trust's assets to Vt10.6 million by 2003, the last year financial statements were lodged.

With the Mele land trust too there is the suggestion that two separate entities exist or at least that there are two separate accounts, one public and one private. The apparent lack of transparency was given as one reason for the distrust that motivated the takeover by the young university graduates in 1991. Yet annual general meetings were held and reports tabled as required by law, and the directors 'tried to make it understandable' to the villagers.¹⁵ Recently there has been concern that financial statements have not been lodged as required by law for the past three years.

Performance of the Ifira and Mele land trusts

Success is a relative concept in developing countries, where failure is common. The Ifira and Mele village land trusts have survived for some 30 years, which is a remarkable achievement in itself. As with other companies their fortunes have risen or fallen depending on the quality of their management. Not all investments have been profitable. For example, the Ifira trust's involvement in retail marketing was a failure.

The basic income of both trusts is the rents and premiums made from leasing the lands they manage on behalf of the customary owners. Both trusts have invested some of this income in businesses on those lands. Mele's funding of its share in Hideaway Island Resort showed how a legal entity can facilitate access to credit. The Ifira land trust has an impressive array of subsidiary companies contributing to the village, its stevedoring business being a valuable provider of employment. Directors of both trusts have been paid fees and other entitlements, adding to their individual wealth. The Mele directors received fees of Vt249 000 (US\$2400) in 1985. The remuneration for Ifira's directors in 1990 was Vt9 414 000 (US\$84 000).

What has been critical to the success of the trusts has been their ability to satisfy their village constituencies. Ifira land trust continues to provide a wide range of benefits and village services, and continues to enjoy popular support. Mele land trust, on the other hand, has provided declining levels of service and its popularity has correspondingly

15 Information in this paragraph was provided by the original administrator of the trust, Meto Nganga.

declined. In both cases their transparency in decision making and their accountability have been less than 'best practice', and regulatory oversight has been minimal. Problems may follow.

Each trust enabled village resources—land and people—to be melded for the greater benefit of all. The traditional village leadership (chiefs, *naflak* and family heads) and the new generation of educated younger members formed the decision-making nucleus, but their 'family' and 'bloodline'¹⁶ connections to the villagers allowed village views to penetrate the land management issues dealt with by the trust.

However, the contrasting experience of the two trusts highlights the critical importance of balancing the different elements of the village community and meeting the needs and expectations of these elements. In both villages the land trusts incorporated traditional and modern features in their decision making. Ironically, it was in Mele, where this was done most systematically, that traditional inputs proved most vulnerable. When the educated younger members of the village felt their interests were not being met, they altered the trust's structure along more democratic lines. However, the result was disastrous. By contrast, in Ifira the wide range of benefits provided from the trust's incomes is seen as being responsible for its continuing support within the village.

The ongoing performance and sustainability of the trusts largely depends on them satisfactorily answering one crucial question: how do they hold their authority and manage the customary owners' land? The loss of authority is an ongoing threat to the land trusts. Ifira attempted to answer this question by declaring that the trust was, in the words of the Constitution, a 'recognised system of land tenure' under Ifira custom and that the lands were vested in the trust. It seems that the Mele land trust made no such declaration. Therefore in recent years, when some dissatisfied villagers decided to remove their customary lands from the Mele trust, it could do nothing to prevent it. A similar threat now overhangs the Ifira trust.

In spite of these problems land trusts are a good option for facilitating land development while maintaining a landowner role in decision making. A testament to the value of the land trusts is revealed by the position of villages that did not adopt land trusts. The other main urban villages adjoining Port Vila, Pango and Erakor, have been targeted by developers and steadily their remaining customary lands have been leased to the developers. Such leasing is spreading throughout Efate and was a major grievance expressed at the National Land Summit in 2006 (see Case Study 14, 'The paths to land policy reform in Papua New Guinea and Vanuatu'). The landholdings of the Lelepa Island villagers are also rapidly being converted to leasehold. Ironically it had a land trust like Ifira's and Mele's, but it was disbanded soon after independence. Its land committee continued until 2005, when it too was dissolved by the local paramount chief. Land disputes have increased dramatically since then.¹⁷

17 Information provided by Peter Taurakoto, Vanuatu's Ombudsman and a Lelepa villager.

¹⁶ As mentioned previously, in modern Efate usage 'family' often refers to matrilineal kin and 'bloodline' to patrilineal kin.

Lessons

CONSIDER LAND TRUSTS A VEHICLE FOR MANAGING CUSTOMARY LAND

lesson 1

LESSON

2

LESSON

3

Land trusts can be an effective way for managing the link between community land and the formal economy.

Customary owners have difficulties managing their land when participating in the formal economy. The Ifira and Mele communities attempted to resolve this situation by setting up land trusts. Their pioneers recognised the need for a legal entity for formal land dealings.

ENSURE LAND TRUSTS HAVE A ROBUST REGULATORY REGIME

For land trusts to be effective they must be supported by a robust regulatory regime to ensure transparency and accountability.

When set up as a company, land trusts are subject to all the normal requirements for transparency and accountability (such as annual general meetings and reporting). However, there is evidence in Vanuatu that the statutory requirements for meetings and financial reports are not followed or enforced. A lack of transparency and accountability may have contributed to the difficulties of the Mele trust.

ACKNOWLEDGE THE SKILLS AND SUPPORT REQUIRED TO SET UP TRUSTS

Setting up trusts requires skills that are not always available in a community, leaving a role for government in facilitating and regulating the formation of land trusts.

The Ifira and Mele land trusts were set up by senior members of the community who had good education. Through their education they learned about the nature of trusts, their capability and their applicability to customary land. They were able to draw lessons from the experience of the Native Land Trust Board in Fiji.

EMPHASISE COMMUNITY BENEFITS IN LAND TRUSTS

lesson 4	Land trusts can be set up so that the emphasis is to benefit the community rather than individuals.
LESSON 5	Setting up land trusts with an emphasis on community benefits could improve their acceptance and their sustainability.

Probably the greatest contribution of the Ifira and Mele land trusts has been to village incomes and services. The trusts were set up to manage community lands for the benefit of their respective communities. The social 'contract' made when the trusts were set up was that they were a 'common basket' from which the whole community could 'eat'. Such applications and the distributions of income are likely to have reinforced the acceptance of Ifira Trust Limited in particular.

PROMOTE THE COMPATIBILITY OF TRUSTS WITH TRADITION

lesson 6	It is possible for trusts to be set up to incorporate traditional decision-making structures and authority.
lesson 7	It is important to combine the traditional with the modern, and groups with individuals.

A notable feature of the Ifira and Mele land trusts is how they have reinforced, rather than undermined, traditional authorities and the village structure. Only when these were replaced did the Mele trust start to stumble. Corporate structures for owning and managing customary land work best when they combine the traditional and the modern institutions, and embrace the group and individual levels of the local community. However, traditionalism may run counter to full-blown democracy, and there has been a notable lack of women as executives of both trusts. The Mele land trust had one female director on its initial board.

DEFINE THE SCOPE OF TRUSTS

LESSON	Land management and business operations are best kept separate when setting up a trust so as to 'quarantine' land tenure from the risks of business failure.
lesson 9	By exposing land management to risks associated with other investments, the community may lease more land than is desirable in order to cover business losses.

The Mele and Ifira land trusts expanded into a range of business activities. Land management and business development are two different operations, which require different kinds of structures and regulation. Importantly business developments bring associated risk to a trust's land management activities. Mele village's lands were put at risk when business ventures failed.

ESTABLISH SUPPORTING MECHANISMS FOR TRUSTS

lesson 10

An effective system for linking customary land to the formal economy might see land trusts being complemented by other mechanisms, such as advisory bodies.

The trust has proved to be a useful legal mechanism for 'signing off' on land dealings for the people of Ifira and Mele. But there also needs to be mechanisms for effective public awareness, consultation, advice and informed decision making within the affected local community. Generally this is outside the domain of trusts. In Ifira and Mele, separate chiefs' councils were set up to take on some of these responsibilities.

Appendix: Interviews

ABOUT IFIRA

- » Kalpokor Kalsakau
- » Steven Kalsakau, Executive Director, Ifira Trustees Limited, and Member of Parliament for Efate Rural
- » Tapangkai Basia ('Olfala Sope'), village leader
- » Tari Kalterekie, Manager, Ifira Land Management
- » Kalbovi Mangawai, Executive Director, Ifira Trustees Limited, and two other directors
- » Michel Kalworai, Secretary General, Shefa Provincial Government

ABOUT MELE

- » Ati George Sokomanu, former President of the Republic of Vanuatu and first Adviser to Mele Trustees Limited
- » Meto Nganga, first Administrator of Mele Trustees Limited
- » Simeon Poilapa, first Secretary of Mele Trustees Limited
- » Frank Latu, Director, Mele Trustees Limited
- » Sale Chilia, Director, Mele Trustees Limited

GENERALLY

- » Peter Taurakoto, Ombudsman
- » Emil Mael, Physical Planner, Shefa Provincial Government

References

- Farran, Sue 2002, 'Myth or reality: case study of land tenure in Efate, Vanuatu', paper for FAO/ USP/RICS Foundation Symposium on South Pacific Land Tenure Conflict, Suva, Fiji, April.
- Fingleton, JS 1998, *Legal recognition of indigenous groups*, Paper #1 in FAO Legal Papers Online series, viewed 30 April 2007, http://www.fao.org/Legal/default.htm.
- Lunnay, Chris, Fingleton, Jim, Mangawai, Michael, Nalyal, Edward and Simo, Joel 2007, 'Vanuatu—review of national land legislation, policy and land administration', report prepared for AusAID, March.
- Naupa, Anna 2005, 'Rooted in the land: evolving culture, land tenure and identity in Vanuatu', paper presented at Pacific Islands Workshop, Australian National University, Canberra, 31 January 4 February.
- Rawlings, Gregory 2007, 'Tax havens, expats and sea-changing property developers: current patterns of land use in Vanuatu', paper presented to State, Society and Governance in Melanesia Seminar, Australian National University, Canberra, 28 February.
- Van Trease, Howard 1987, *The politics of land in Vanuatu: from colony to independence,* Institute of Pacific Studies, University of the South Pacific, Suva.

RECONCILING CUSTOMARY OWNERSHIP AND DEVELOPMENT

3

Recording land rights and boundaries in Auluta Basin, Solomon Islands

John Cook » Consultant Anthropologist, Australia Genesis Eddie Kofana » Consultant, Solomon Islands

A snapshot

Recording land rights and boundaries in Auluta Basin, Solomon Islands

In 2003 work began on trialling processes for recognising and subsequently recording customary land custodians, their system of land tenure and the boundaries of their land in Auluta Basin in East Malaita, Solomon Islands. The Ministry of Agriculture wanted to make customary land available for an oil palm plantation, and this pilot project represented the first step towards registering and acquiring the land for development. As a result of the open and participatory approach adopted, fears about land registration were dispelled and it was possible to demonstrate the role of registration in making customary land available for commercial use.

Many lessons about recording and/or registering customary land emerged, including:

- » the importance of customary landowners having economic incentives for recording and registering their land
- » the importance of consultation, mediation, reconciliation, and cultural appropriateness
- » the importance of having a functioning system and legislative framework for recording and registering customary land
- » the value of pilot projects for developing land recording and registration systems and legislation
- » the need for strong administrative and financial support
- » the need for an enabling environment
- » the need for resources and institutional capacity
- » the benefit of engaging donors.

Contents

»	REFERENCES	63
	Adopt culturally appropriate processes	62
	Promote mediation and reconciliation	61
	Seek donor support	61
	Ensure administrative and financial support	61
	Develop a functional framework	60
	Consult widely with stakeholders	60
	Promote the economic opportunities arising from registering customary land	60
»	LESSONS	60
»	RECENT PROGRESS	59
»	DIFFICULTIES WITH THE PILOT PROJECT	57
»	OBJECTIVES OF RECORDING, REGISTERING AND ACQUIRING LAND	56
	Phase 3—Surveying	56
	Phase 2—Recording	54
	Phase 1—Awareness	54
»	APPROACH OF THE PILOT RECORDING SYSTEM	52
»	LEGAL FRAMEWORK FOR RECORDING CUSTOMARY LAND	51
»	THE ORIGIN AND HISTORY OF RECORDING LAND RIGHTS	50

The origin and history of recording land rights

During the October 2000 Townsville Peace Agreement that formally ended the period of ethnic tensions in Solomon Islands the Malaitan delegation demanded employment for Malaitans evicted from Guadalcanal during the tensions (Rukia 2005).

Since Malaitans had made up about 80 per cent of the workforce of the Guadalcanalbased oil palm company the Ministry of Agriculture proposed that customary land in Auluta Basin be made available for an oil palm development. Such a development would provide employment opportunities and Auluta Basin, which is at the eastern end of the provincial island of Malaita (north-east of Guadalcanal where the Solomon Islands capital of Honiara is located), had been identified by agricultural specialists in the early 1970s as an area potentially suitable for oil palm production.

The Ministry of Agriculture appointed a taskforce to explore ways to access the land needed to develop an oil palm plantation and in 2002 submitted a proposal to the (then) Department of Lands and Survey to register most of the customary land in the Auluta Basin for the development. Because feuding and litigation over land matters were endemic throughout Malaita and a potential threat to any land registration system, a decision was reached to trial processes for recognising, acknowledging and subsequently recording the customary custodians, their systems of land tenure and the boundaries of their lands.

The Secretary of the Tribal Lands Unit within the Department of Lands and Survey (Alec Rukia)—the only staff member—became coordinator of the trial and started work on it towards the end of 2003 (Rukia 2005).

This pilot project ultimately became a component of an ongoing technical assistance project funded by AusAID, the Solomon Islands Institutional Strengthening Land Assistance Project, known as SIISLAP (see Case Study 15, 'Strengthening land administration in Solomon Islands'). The two authors worked separately through SIISLAP on different aspects of this study.

Legal framework for recording customary land

There are two pieces of legislation that relate to land recording, acquisition and transfer in Solomon Islands.

All land registration to date has occurred under the Land and Titles Act 1969 (last amended 1988), which has proved cumbersome for registering customary land (Sullivan 2007). Although the Land and Titles Act recognised the need to define customary land boundaries and group ownership, the colonial administration's recording of those boundaries was sporadic and undertaken only for land required for national development.

Since colonial times, suggestions had been floated for improving the legislation for recording customary land boundaries to protect the rights of custodial tribes. But little had been done before George Scott became the Secretary to the newly created Tribal Lands Unit in 1990. He worked with a local lawyer, Andrew Nori, to develop a bill that became the Customary Land Records Act of 1992. That Act has remained without enabling regulations, and has not been implemented.

The Customary Land Records Act follows the traditional Solomon Islands custom of basing custodianship on lineage or genealogy. For any proposed recording under the Act there are three preconditions.

» A tribal genealogy or family tree justifying custodianship

A tribal genealogy is a record of all members of the tribe, beginning from the ancestor who first discovered or received the land, through to present-day populations. The genealogy must be accurate and complete to justify a claim of custodianship.

Customary land in Solomon Islands has been acquired mainly as 'discovered' land, occasionally as land received into the tribe as a gift and then handed down to descendents and, in rare instances, as land that is acknowledged to have been bought informally, but for which no transaction record exists. The members of the tribe that settled on the land are commonly understood to be the direct descendants of the discoverer—the one who found the land. The members of the tribe prove their link to the discoverer by keeping their genealogy—by reciting it or by writing it down, a very recent development.

When land was plentiful, it was commonly acquired through a gift for one of two reasons. A piece of agreed tribal land was sometimes given to a warrior who had recently fought off an enemy. Land was also gifted by a landowner to repay help given to him by a daughter, in which case the father would subdivide a piece of land and give it to the daughter's children.

» Agreed tribal boundaries

Tribes who share common boundaries must agree on the identified boundary.

» A tribal land authority

A Tribal Land Trust Board is expected to deal with the group's customary landholdings. The board should be elected by the tribe and comprise a chairperson, vice chairperson, secretary, treasurer and four-to-six other members, with at least two members being women. Board members are expected to be wise, knowledgeable (educated) and understanding, so the board can conduct its functions and duties under a constitution that serves the interest of the whole tribe.

Approach of the pilot recording system

In Solomon Islands people vigorously defend the pre-eminence of the customary land tenure system. This makes access to land difficult for government and private enterprise. It makes land governance unstable and international investors generally unwilling to engage in business in Solomon Islands. As a result, the processes, limitations, constraints and outcomes of recording and registering customary land are of widespread interest.

To address the issues arising from the customary land tenure system, an entirely new approach to recording customary land was conceived by the Secretary of the Tribal Lands Unit. The processes were intended to evolve, and it was not clear which piece of legislation would be used as the vehicle to record customary tenure. Based on the assumption that either the regulations of the Land and Titles Act, or the statutory requirements of the Customary Land Records Act, or both, would need to be met for registration to be completed, a system was outlined by Rukia, as shown in Figure 1, and trialled with the customary custodians in Auluta Basin.

The coordinator considered four principle elements identified at the outset of the project would ensure that the legislative requirements for recording and registering customary land in Solomon Islands could be met:

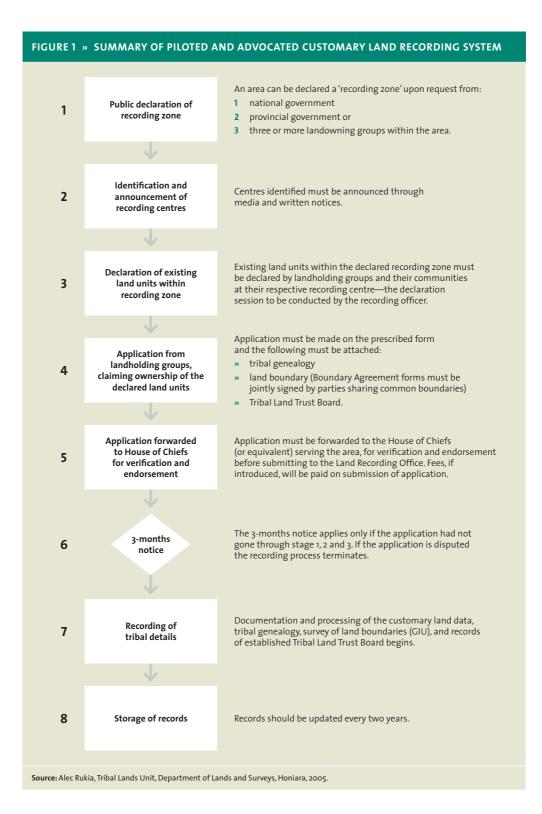
- 1 recording genealogies
- 2 surveying boundaries specific to each group within the broader land area of interest to the Ministry of Agriculture
- 3 ratifying recordings and surveys through a series of group meetings
- 4 developing administrative processes appropriate for managing the data.

Rukia (2005) noted that the new land recording system should allow people time to identify the rightful owners of tribal lands and to be educated on the dangers and benefits of development and on the phases involved in recording customary land. He noted that time and education were often lacking in existing practices.

Rukia envisaged that the pilot recording system would involve three phases over one year:

- » Awareness—6 months
- » Land recording—2 weeks
- » Land surveying—4 months.

52



PHASE 1—AWARENESS

The awareness phase started with a weekly program on the local short-wave radio stations from mid-2003. Towards the end of 2003 and the beginning of 2004, awareness workshops were held in various centres in Auluta Basin. The first two workshops were held in Nafinua village and Alisisiu village with the assistance of AusAID through the Community Peace and Reconciliation Fund.

SIISLAP provided support to the Secretary of the Tribal Lands Unit to continue his radio programs and to run further awareness workshops. Two workshop centres were established, along with eight recording centres. These centres were also established to serve as meeting places for local people, the recording team, taskforce members, and surrounding tribes. The awareness workshops were open to members of tribal groups close to the centres.

Part of the objective of the workshops was to inform participants of the requirements for developing land, the processes for registering customary land under the current land laws, and the new land recording system about to be introduced. Participants received training in how to record the required data for the new system. Specifically they were trained to draw up a family tree and to fill in the boundary agreement forms, and the functions and role of a Tribal Land Trust Board were explained. The landowners were expected to produce a very detailed and properly completed form to be presented during the recording phase (Kofana 2005).

Although not an official or technically required part of recording customary land, reconciliation programs were very important in facilitating that process. The Tribal Lands Unit played only a supporting role in organising these programs. The ministries of Agriculture and Reconciliation were the main agencies that provided support for the reconciliation programs, with additional support from AusAID's Community Peace and Reconciliation Fund. The programs enabled members of landowning groups to come together to develop an understanding of each other's family trees, and so collectively put together tribal family trees. As it turned out, the success of the whole recording system depended on the success of the reconciliation programs.

PHASE 2—RECORDING

The tribal groups presented the boundary agreement forms, family and tribal tree records and names of the tribal land authority body at the recording centre closest to them (Kofana 2005). The recording team travelled to each of the eight centres to collect the data and record it in the official government book. At each centre representatives of the tribal groups presented their data in the presence of neighbouring tribes and government officials. The participation of tribal members who had settled in urban centres was welcomed by those who remained on the land. After each presentation, neighbours were accorded the opportunity to disagree with the data presented. When no one objected, the information was collected and declared a true record. A small signing ceremony between heads of the tribal groups and the Secretary of the Tribal Lands Unit was held.

When there were disagreements between neighbours on the information presented, the Secretary to the Tribal Lands Unit acted as a mediator on the 'point of concern'. The phrase 'point of concern' was used rather than the word 'dispute' to ensure parties resolved their disagreements at the meetings rather than through the court system, which was associated with disputes. The disagreeing parties presented their points of concern in front of all present, and the recording teams took note of the concerns and attempted to resolve the disagreements.

A win–win approach to the recording process was encouraged. A way of addressing possible concerns had been established for each type of information presented. For example, three steps were provided to the recording teams for resolving boundary disagreements:

- 1 Ask both parties to walk the boundary together and to resolve their disagreements as they walked.
- 2 If the parties could not agree and their claims overlapped, ask both parties to agree to a compromise—cutting the disputed boundary territory in half and marking the mid-line.
- **3** If the parties continued to disagree, take the point of concern to the House of Chiefs for settlement. This step would remove the disputed land from the proposed oil palm development.

During the recording phase, nearly 90 per cent of all disagreements were resolved at the first step (Table 1). No disputes required referral to the House of Chiefs. This contributed to the local acceptance of the recording system.

TABLE 1 » RATE OF ACCEPTANCE OF PILOT PROCESS			
Type of data	Description	Based on	Acceptance rating ^a
Tribal genealogy	Family tree that justified a tribe's claim to landownership	Oral tradition	95%
Tribal land boundary	Signed boundary agreement forms	Oral tradition and on-site agreement of two landowning groups	88%
Tribal land authority	A legal body, elected to represent the tribe	Legal requirement	95%

a Observations made by the researcher (Kofana) during presentation ceremonies in the Auluta Basin pilot project in 2005.

PHASE 3—SURVEYING

Surveying commenced in 2005 but was slower than initially anticipated. Once the boundaries were identified and agreed, they were marked with paint (at least 3 metres above the ground). The formal recording of agreed tribal boundaries (spear line) remains to be completed using a global positioning system (GPS). The survey will use a GPS to plot the corners of the land boundaries, while aerial photographs will be used to plot the rivers, valleys and sites of cultural significance (tambu sites). Once that is completed, the government is expected to have at its disposal all of the information needed to register the land and acquire it.

Objectives of recording, registering and acquiring land

Recording and/or registering customary land has been a common issue in the Pacific, and has presented a dilemma for governments. SIISLAP supported investigations into this dilemma (see, for example, Sullivan 2007).

Recording implies a process of documenting the social, political and geographic ties behind land tenure, or at least the outcome of those relations. Once registration takes place, the validity of that land tenure does not rely on the ties continuing. For many custodians of customary land, registration signifies a 'freezing' of social relations, whereas recording tends to imply that the ties that have been recorded will continue with some degree of sustainability. Registration therefore carries a suggestion of the alienation of customary title. As can be expected, this does not sit well with customary groups.

The Auluta Basin pilot project was an attempt to identify social relations and customary tenure, gain group and provincial recognition of those ties, and record the information without knowing whether the recordings would lead to formal registration. Although the Ministry of Agriculture wanted formal land registration, the Tribal Lands Unit was more focused on defining a workable recording system.

Recording custodianship is not by itself sufficient to guarantee sustainable land tenure. That relies on developing legal and administrative processes that can make the recorded social, political and geographic ties subject to legal jurisdiction. In the Auluta Basin pilot project these processes were not developed or considered at the outset, but were allowed to evolve. This made longer term planning for sustainable recognition of tenure rights difficult.

Since there was no legal protection covering the recording process, the coordinator envisaged that, as soon as the records were completed, the government could invoke the acquisition section of the Land and Titles Act and appoint an acquisition officer to acquire the recorded land in Auluta Basin. The records would then become formalised and protected under the Land and Titles Act, and a formal registered title could be issued for each separately 'owned' parcel of land. The objective was to convert the customary land into registered perpetual estates. In Solomon Islands law, a perpetual estate has many of the characteristics of freehold land, including being able to be leased. By converting the land to perpetual estates, the oil palm venture could proceed to negotiating secure rights of access to land.

But to facilitate the conversion of customary land to perpetual estates, the land had first to become the property of the government and then be transferred back to the traditional owners. The Auluta Basin tribal landowners were made aware of this legal constraint and discussed their concern about 'losing' their land with government representatives. Most owners pointed out that the transfer of customary land to perpetual estates had been the sticking point in past acquisition attempts (Kofana 2005). They believed they could lose their land. For land to proceed to registration the owners needed to trust the government to return their titles to them immediately.

Difficulties with the pilot project

Administrative difficulties arose as a result of the project being instigated by the Ministry of Agriculture rather than the Ministry of Lands. The Department of Lands and Survey was to prepare budgets for different stages of the project and the Ministry of Agriculture was to approve them and make funds available. In reality this proved to be a problem for the project because of reduced government funding and slow administrative turnaround. The administrative delays disrupted the project's timeframe and created disjuncture in the recording process.

The single-handed effort of the project's coordinator was remarkable. But when he left the Department of Lands and Survey the Auluta Basin project dwindled, with less than all expectations met. The project was able to proceed, only because of the financial and logistical support provided when SIISLAP adopted it as a pilot for identifying a customary land recording system.

With hindsight it would have been more effective for the ministries of Agriculture and Lands to have signed off on a complete management plan for the recording project that contained appropriate milestones and checks and balances. But that was not possible because it was a pilot that depended on processes evolving before they could be defined clearly.

There had been no comprehensive approach developed to finalise the recording process, mainly because of community unwillingness to commit to formal (government-controlled) recording at the project's outset. So although useful initial engagements had been made, by late 2005 there was little sign that the planning and administrative procedures needed for a recording process were in place. Rather the coordinator expected them to develop as the community gained confidence.

Also there was no firm process for taking advantage of land tenure recordings once completed. The Auluta community remained unwilling to use the legislatively defined national system of land title registration. There was effectively nowhere for the recordings to go once created.

The customary land recording project was always going to be contentious, so its sustainability was doubtful at the outset. In effect, the pilot project worked with a constant question mark hanging over it, which undoubtedly made progress difficult. However, it is clear from hindsight that SIISLAP and the Ministry of Agriculture did not manage their stakeholder relations as well as they could have, notwithstanding the difficult circumstances. There was little consistent effort put into developing stakeholder forums and groups that might have fostered a better understanding of the aims and implications of recording.

Given the difficulty of developing an administrative process through a pilot project the Ministry of Agriculture was probably not realistic in expecting the land acquisition process would be completed within a year. Although the ministry faced a time constraint, local communities did not want to be hurried through the process, and the coordinator was content to allow their demands to control the rate of progress. It is therefore not possible to regard the pilot project as an actual recording process but as the beginnings of a recording process.

The recording process was in its initial phases and groups had only begun to articulate their land tenure in preparation for recording when a genealogy software package was tested in this traditional context in late 2005. The software proved inadequate, and its use was not continued. In effect, what had been recorded by that time was a set of flawed genealogies. At a series of meetings groups and individuals had an opportunity to review these genealogies and to stake their claims in a transparent and open manner.

Another difficulty for the Auluta Basin pilot project was the continuing political tensions and incidents of serious unrest and instability. These had a serious impact and influence on the project and its managing institutions.

Recent progress

A lack of administrative commitment to complete the recording almost halted the pilot project. The lack of coordination from Honiara to engage a surveyor when the recording was in progress, coupled with a new government and associated administrative changes, delayed the project throughout 2006, during which time local landowners lost confidence in the process. The delay lasted until the current Acting Commissioner of Lands took office (A Pinita, Commissioner of Lands, Department of Lands and Housing, Honiara, 2007, pers. comm.). Instructions were then given to appoint an officer to acquire the Auluta Basin land records.

Four acquisition officers were appointed and sent to collect the data. Reports reaching the Commissioner of Lands revealed that from the 24 tribal landowning groups that participated in the recording project 19 holdings were ready for registration and acquisition (G Kofana 2007, pers. comm., September). The Auluta communities had confidence in the records, and their quality reduced the work expected of an acquisition officer by half.

The three months notice of acquisition served over the 19 tribal landholdings had lapsed for most of those areas by September 2007 without any objections from neighbours. That lack of dispute is unprecedented in the history of Solomon Islands. The other five tribal landholdings were not ready for acquisition because of disagreements between the neighbours. However, the Ministry of Lands, Housing and Survey has since been advised that the disagreeing parties have resolved their problems and were now seeking to be part of the development.

In a memorandum of understanding signed with the Auluta Basin landowners in February 2007, the Solomon Islands Government assured them that, once the acquisition process was complete, the perpetual estate titles would be transferred back immediately to the tribal landowners. It also included how benefits from the development would be shared. With these assurances, the majority of Auluta Basin tribal landowners agreed to proceed with the registration process. A few landowners do not want their land converted to plantations, but most of them continue to show commitment to the oil palm development and look forward to the day when the acquisition and transfer of title is made.

This latest development has put into perspective the purpose of recording. It has also identified the place and role of recording in the acquisition of customary land in the context of Solomon Islands and has dispelled initial fears about registration. Recording has slowly gained people's respect and is understood to be the prerequisite of registration. Auluta Basin landowners realise that no recording means no registration and so no oil palm plantation.

The recording project has brought a new hope, with the oil palm development becoming more likely as progress is made. Moreover, the project is contributing to greater stability for the rural population of Auluta Basin. It has brought together members of tribes who have been absent from past decision making.

Lessons

PROMOTE THE ECONOMIC OPPORTUNITIES ARISING FROM REGISTERING CUSTOMARY LAND

lesson 1

LESSON

2

Customary landowners will be motivated to record or register their lands if there are well-defined economic opportunities and if the legislative framework requires recording or registration in order to make the land available to investors.

At the core of the progress so far in recording and registering customary land are the incentives for landowners to make their land available for the oil palm development. This development is seen as providing significant employment and income-earning opportunities. The people of Auluta Basin have gained their appreciation of the economic opportunities that the development could provide through their experiences working on an oil palm plantation in Guadalcanal.

CONSULT WIDELY WITH STAKEHOLDERS

Customary landowners will be motivated to record or register their lands if there is an effective process of consultation.

The pilot project was very successful at building trust and transparency among villagers. The project held a range of village meetings that were characterised by good will and a lack of conflict over land and group boundaries. The consultation process offered villagers a means of forging a relationship with western styles of land tenure. In part, the success was a result of the excellent people skills of the Secretary of the Tribal Lands Unit.

DEVELOP A FUNCTIONAL FRAMEWORK

LESSON 4	Pilot projects can be useful for developing systems for recording and registering land and for developing legislation.
LESSON 5	Before adopting programs to record or register customary land, there should be a functional system and legislative framework for recording and registering land.

The legal framework in Solomon Islands for recording and registering customary land is unclear. For this reason, it was unclear on what legislative basis the Auluta Basin project would proceed. That situation led to uncertainties at the outset. The pilot project explored these legislative constraints and found ways to work within the existing framework. In addition, the pilot project has helped to identify areas where legislative improvements can be made.

ENSURE ADMINISTRATIVE AND FINANCIAL SUPPORT

LESSON 5	A system for recording customary land needs strong administrative support, with good planning and adequate funding.
LESSON	Effective land recording or registration projects require enabling environments.

Administrative constraints were a problem for the pilot project, particularly for planning and financing. This in part was a result of the coordination issues associated with the administration crossing both the agriculture and land ministries. An additional problem was social and political tensions, which had an impact on the project and its managing institutions.

SEEK DONOR SUPPORT

LESSON

7

LESSON

8

A successful project needs adequate resources and institutional capacity, and donors can be effectively used to address any shortfalls.

The ministries associated with the Auluta Basin project had insufficient capacity and resources to successfully complete the project. As a result the project lacked well-developed strategic planning and management capacity. SIISLAP stepped in to help address these shortfalls.

PROMOTE MEDIATION AND RECONCILIATION

Most disputes over land can be effectively resolved through a process of mediation and reconciliation rather than through the courts.

The recording project allowed tribal landowners to resolve their own problems, which proved to be a success. The reconciliation processes ensured the views of all who had an interest in a parcel of tribal land were heard and noted. This provided an opportunity for family or tribal feuds to be resolved. Most disagreements were resolved with reconciliation ceremonies. The Tribal Lands Unit ensured that disagreements were settled before the records were accepted.

ADOPT CULTURALLY APPROPRIATE PROCESSES

lesson 9	The recording methodology is improved in accuracy and acceptability if it is built around the existing culture.
lesson 10	Where the existing culture is based on group ownership, the appropriate basis for recording and registering customary land is at the group level.

The Secretary of the Tribal Lands Unit understood the local cultural practices and language, which helped to ensure that the recording processes were culturally appropriate. Consistent with tradition, groups were identified by their tribal landholdings.

References

- Kofana, G 2005, 'Customary land recording report 2005', Solomon Islands Institutional Strengthening Project, URS for AusAID, Honiara.
- Rukia, A 2005, 'Customary land awareness: Alisisiu Land Workshop report', Ministry of Agriculture and Lands, Honiara.
- Sullivan, M 2007, *Recognition of customary land in the Solomon Islands: status, issues and options*, Resource Management in Asia-Pacific working paper 66, Research School of Pacific and Asian Studies, Australian National University, Canberra, http://rspas.anu.edu.au/papers/rmap/Wpapers/rmap_wp66.pdf.

RECONCILING CUSTOMARY OWNERSHIP AND DEVELOPMENT

4

Land registration among the Tolai people: waiting 50 years for titles

> Jim Fingleton » Development Law Consultant, Australia Oswald ToLopa » Director of Policy, Department of Lands and Physical Planning, Papua New Guinea

A snapshot

Land registration among the Tolai people: waiting 50 years for titles

Papua New Guinea has a long experience of registering land titles but attempts to extend the benefits of registration—secure titles, which can underpin development—to the great majority of Papua New Guinea's land area under customary tenures have failed. Ten years ago the East New Britain Provincial Government began its own Customary Land Registration Program. The evidence shows that a registration system based on Tolai territorial and social units and on input from traditional leaders in the determination of land rights would be highly acceptable—politically, socially and culturally.

The Tolai experience suggests that:

- » adequate time and other resources are required for a recording and registration system
- » there are community benefits from a process based on recording customary ownership using traditional methods as a first step to registering titles.

Contents

»	THE SETTING	68
»	THE CULTURAL AND POLITICAL CONTEXT OF TOLAI CUSTOMARY LAND	69
»	PAPUA NEW GUINEA'S EXPERIENCE OF CUSTOMARY LAND REGISTRATION	70
	Legislation before independence	71
	Reform attempts before and after independence	71
	Failed donor-led efforts to reform land tenure since the 1980s	73
	Latest events	74
»	EFFORTS TO REGISTER TOLAI CUSTOMARY LAND IN THE 1950S AND 1960S	75
	Results under the Native Land Commission	75
	Results under the Land Titles Commission	75
»	REVIVAL OF LAND DEMARCATION EFFORTS	77
	The Customary Land Registration Program	77
	Progress so far	78
	Problems and challenges	79
»	SOME UNDERLYING PRINCIPLES, CONCEPTS AND POLICIES	80
»	LESSONS	81
	Adequately resource the land registration process	81
	Provide sufficient time and an enabling environment	81
	Promote the benefits of recording customary land	82
»	APPENDIX: 2007 INTERVIEWS	83
»	REFERENCES	84

The setting

The Tolai people, with a population of more than 200 000, are one of the largest ethnic groups in Melanesia. Their traditional territory is an area in excess of 1100 square kilometres in East New Britain Province. It covers the rich volcanic hills and plains of the north-east Gazelle Peninsula and the adjacent Duke of York and Watom islands.

The population in rural East New Britain Province is growing at the very high rate of 4.2 per cent a year. For many years there has been migration to the area, 'with people from many parts of Papua New Guinea seeking better access to services, more productive environments and wage employment opportunities provided by the towns and plantations' (Hanson et al. 2001, p. 259). It is one of the wealthiest areas of Papua New Guinea.

European settlement in the Tolai area began in 1875, but the early missionaries and traders were soon outnumbered by plantation owners. It is estimated that by the early 1900s some 40 per cent of Tolai land had been alienated. A century of colonial rule followed European settlement—by Germany until the First World War and then by Australia. The area was a vast Japanese military garrison during the Second World War, but Australian administration resumed after the war, and continued until Papua New Guinea's independence in 1975.

Tolai were quickly recognised for their readiness to innovate, and many new measures (for example, cooperatives, local government, land settlement schemes, savings and loans societies, cocoa production, and women's clubs) were first trialled among Tolai. When moves began in the 1950s to extend the benefits of registering titles to customary land—land still subject to custom—once again the Tolai people were selected for its introduction. But more than 50 years later, there is yet to be any registration of Tolai land.

The cultural and political context of Tolai customary land

The occupation of land under custom is inseparable from other aspects of ethnicity and culture. Tolai have a strong ethnic and cultural identity. While most Tolai live in villages and tend cash crops and food gardens, many are employed in other parts of Papua New Guinea. Among the younger Tolai born to parents living away from the Gazelle Peninsula, the desire to 'return' to customary lands may not be strong. In contrast, many of the Tolai born on the Gazelle Peninsular but living and working away from the area are making arrangements for returning when they retire. For most, 'home' is the village in which they were born.

For Tolai, their identity is not just a matter of their distinctiveness as an ethnic group; it also covers kinship and land (see, for example, Fingleton 1985). As a matrilineal society, Tolai are members of their mother's lineage. The Tolai population is divided into two moieties—Marmar and Pikalaba. This is basically a division of people for marriage purposes. A Marmar person must marry a Pikalaba, and a Pikalaba must marry a Marmar. The two moieties are dispersed across the Tolai territory, and no Tolai villager is in any doubt as to who in the local community belongs to his or her moiety, and who belongs to the other. This moiety division is critical to Tolai social organisation and is an underlying factor in all matters affecting access to land.

The central corporate unit in Tolai society is the *vunatarai*—the group of people who trace their matrilineal descent from a single female ancestor. An individual acquires membership of a *vunatarai* from his or her mother, and from this comes their place in Tolai society and their main avenue for accessing land. Tolai may gain access to land by other well-established customary ways, but their most secure tenure is to the land of their own *vunatarai*. Members of a *vunatarai* acknowledge a common leader and identify themselves by reference to the place of their original settlement, where ancestors are buried and where the members of the *vunatarai* meet for ceremonial activities. If the *vunatarai* is regarded as a clan, Tolai also recognise the subdivision of larger clans into subclans and even separate lineages.

Tolai territorial units centre round the concept of the 'inhabited place'. The largest residential unit is the district around that place, usually the territory of a number of villages that have been traditionally associated. These are divided into subdistricts around individual villages. The smallest territorial unit is a piece of land—which may vary in size from a few square metres in heavily settled areas to more than a hundred hectares in kunai grasslands or areas under primary bush. Each such land unit is named (usually by reference to some natural feature or event that occurred there), and its boundary features are known by the adult members of the community.

The most crucial factor affecting the security of a Tolai's tenure of a piece of land is the intensity with which that person is identified with it. Identification derives from a history of connection with the land—both in a personal capacity and as a member of a kinship group. An individual's local identity pervades the Tolai culture. In summary, there are three basic categories of village resident:

- 1 those most closely identified with a village are the members of the *vunatarai* for which the village subdistrict is their original place of settlement
- 2 members of the *vunatarai* for which a neighbouring subdistrict is their original place of settlement and is within the broad district of their current village—their identities being at a lower order than the identities of people in the first category
- 3 village residents whose original place of settlement is in another district considered not to be true members of the village.

Back when most people married local residents and they did not move far, there would have been a high degree of correspondence between village residence and village membership. But today many village residents are not members, and many village members reside outside the locality with which they are identified. This is largely a consequence of greatly increased mobility and the modern emphasis on the nuclear family. Children are growing up on their father's land, remote from their own (that is, their mother's) land. These changes, together with the needs of an ever-growing population, are putting pressure on the Tolai system of customary land tenure. The alienation of relatively large areas of village land during the colonial period contributes to this situation.

Papua New Guinea's experience of customary land registration

Land titles registration in Papua New Guinea dates from the earliest colonial times. The current Land Registration Act is a direct descendant (by way of Queensland) of the original Torrens legislation, introduced in South Australia in 1858.

The Torrens system of title was designed to facilitate conveyancing, the transfer of the legal title in land from one person to another. Thus:

Registration of title is a process whereby the State maintains a register of parcels of land showing all the relevant particulars affecting their ownership, and guarantees these particulars to be complete and correct. The Register is the final authority. Transactions are effected by making an entry in the Register—and only by this means. A simple procedure with simple forms exists for this purpose and so dealing in land becomes easy, quick, cheap and certain. (Simpson 1969, p. 4) Land titles registration was introduced in Papua New Guinea to provide a service to the European settlers by facilitating dealings in land, but it also secured alienated land against claims by the former customary owners.

LEGISLATION BEFORE INDEPENDENCE

In 1952, drawing on a Fijian precedent, Native Lands Ordinance 1905, the colonial administration decreed the Native Land Registration Ordinance to allow for the registration of titles to customary land either in the names of individuals or a community. The Native Land Commission was established to investigate claims and register customary land. If a registration was not challenged within five years it became conclusive evidence of the ownership as registered. When the law was repealed in 1963, no titles had been registered. However, in the Kokopo District of East New Britain almost all group boundaries had been demarcated and the genealogies of the customary landowners had been recorded.

The Native Land Registration Ordinance was replaced by the Lands Registration (Communally Owned Land) Ordinance, as part of major land law reform that took place in 1963–64. The Land Titles Commission was established with exclusive jurisdiction to systematically adjudicate and register titles in customary land. Under this process the ownership of all land in a declared adjudication area would be investigated by demarcation committees, systematically determined, and then registered either as communally owned land or individually owned land.

At this time the Australian administration favoured the individualisation of customary tenures as the basis for indigenous economic development, an approach supported by a World Bank mission to Papua New Guinea in 1964. To this end, provision was made for the sporadic registration of individualised titles under the Land (Tenure Conversion) Ordinance. Under this ordinance all customary interests in land were extinguished and replaced by an individual title, which was then registered under the Torrens system.

REFORM ATTEMPTS BEFORE AND AFTER INDEPENDENCE

By the late 1960s Papua New Guinea had been divided into 536 adjudication areas, and 475 demarcation committees had been appointed (Fingleton 1980). But in 1969 when S Rowton Simpson, the British Land Tenure Adviser, produced a highly critical report of the registration system, its operation was suspended. Despite an enormous amount of work done by demarcation committees in hundreds of adjudication areas throughout Papua New Guinea, when the Lands Registration (Communally Owned Land) Ordinance was suspended no title had been entered in the Register of Communally Owned Land. The Simpson report led to a comprehensive review of the land registration laws and a new scheme was designed.

Inspired by the Simpson report the colonial administration set up a working party on land registration, a technical team visited Kenya to study the land registration system there, experienced anthropologists and legal academics were consulted, and a package of laws was drafted. The proposed laws were designed to provide:

- » a new system for determining ownership of customary land so as to register it in the names of groups or individuals
- » a system for controlling transactions in all registered land
- » a single Register of Titles and a modified Land Titles Commission.

On the eve of independence, however, the introduction of such sweeping reform was controversial, and in the face of strong Papua New Guinean opposition the draft laws were withdrawn.

Instead, in 1973 the new self-governing administration set up the Commission of Inquiry into Land Matters (CILM). CILM consisted of 10 Papua New Guinean commissioners, assisted by a small support staff of expatriate advisers. Its report made comprehensive recommendations for reforming land policies, laws and administration. With respect to customary land registration, CILM's view was that land policy should be an evolution from a customary base, not a sweeping agrarian revolution. It made the following recommendations.

- » New legislation for customary land registration should be introduced, but it should be used sparingly and only where there was a clear demand from the landowners concerned and a real need to replace customary tenures.
- The previous emphasis on individual titles to customary land was not appropriate and 'the basic pattern' should be to register group titles and provide for the group to grant registrable occupation rights to group members or leases to non-members.
- » There should be restrictions on dealings in registered customary land.

While some aspects of the CILM report were adopted and implemented, the recommendations relating to customary land registration were not followed through. But the CILM report did have an impact on the existing systems for registering customary land that had encouraged the individualisation of customary tenures. CILM had recommended against individualisation, so the processing of tenure conversions was discontinued from 1975 (although measures to convert land from customary tenure to individual registered title were revived in 1987).

FAILED DONOR-LED EFFORTS TO REFORM LAND TENURE SINCE THE 1980S

In 1983 the Task Force on Customary Land Issues was set up and it recommended reforms to land tenure. About this time the World Bank argued that land reform was necessary for the growth of income and employment, and the Land Evaluation and Demarcation (LEAD) Project was established. Because this project was to review land laws and land administration no other changes were made to the laws pending the results of that review.

Provincial governments were becoming frustrated at having to wait for progress at the national level on customary land registration. In 1986 the East Sepik Provincial Government proceeded with its own legislation. With the approval of the national authorities, in 1987 it enacted two laws based very much on the recommendations of CILM—the East Sepik Land Act and the East Sepik Customary Land Registration Act. A lack of funds and institutional capacity slowed progress in implementing the legislation and the East Sepik land laws were allowed to lapse without a title ever being registered.

In 1989 the large, five-year Land Mobilisation Project funded by the Word Bank was commenced, along with an AusAID-funded supporting project to strengthen land administration and develop a land information system. The World Bank project included a component to help formulate the policy framework for registering customary land at the provincial level, to assist provinces to draft customary land registration laws and to develop the necessary administrative procedures and structures to implement the legislation. The project concluded, however, without achieving its objectives.

In 1995 the World Bank attempted to attach a condition to its loan to Papua New Guinea under the Economic Recovery Program that required the legislation for customary land registration be completed and implemented in East Sepik and East New Britain provinces. When this became known, a wave of misinformation swept across the country and resulted in student protests, public meetings and riots. The World Bank loan to the government was seemingly confused with loans by commercial banks to individuals which are commonly secured by a mortgage—and rumours spread that, upon default in repayments, the World Bank would take over the people's customary land.¹ Although the Department of Lands engaged a private legal firm to draft the legislation, the attempt to legislate for customary land registration again failed.

After the trouble in 1995 outside agencies lost interest in promoting customary land registration in Papua New Guinea, but the Department of Lands pressed on. In June 2001, it was announced that the national government was proposing to introduce draft legislation. There were considerable tensions around this time, caused by government attempts to privatise particular agencies and downsize others. The World Bank had also revived its demands for 'land mobilisation'. Students and unions protested against the government's reform program, rioting ensued, and four people were killed.

LATEST EVENTS

Despite the extraordinary sensitivity about land reform, the subject is too important for it to be ignored by governments. In early 2005 the then new Minister for Lands, Dr Puka Temu, revived the subject of land policy reform. After a nationwide process of consultation, the Land Development Programme was established to implement reforms under three broad themes (National Research Institute 2007; see also Case Study 14, 'The paths to land policy reform in Papua New Guinea and Vanuatu'). The mobilisation of customary land for development purposes was one of these themes.

Rather than customary land registration per se, the registration of incorporated land groups features as the main vehicle for mobilising customary land (see Case Study 1, 'Incorporated land groups in Papua New Guinea').

SUMMARY OF THE MAIN LAND TITLE INITIATIVES, 1952–2007					
Date	Initiative	Results			
1952–63	National Land Registration Ordinance	No titles registered.			
1963–70	Lands Registration (Communally Owned Land) Ordinance	No titles registered.			
1963–75	Land (Tenure Conversion) Ordinance	737 titles registered.			
1971	Administration's draft land bills	Bills withdrawn.			
1973	Commission of Inquiry into Land Matters (CILM) recommendations on customary land registration	Policy approval given but legislation never drafted.			
1983	Task Force on Customary Land Issues	Proposals opposed by World Bank.			
1987	East Sepik provincial land legislation	No titles registered.			
1987–95	World Bank and AusAID land mobilisation projects	No policy approval. Land administration and land information systems improved, but not sustained.			
2001	World Bank revival of the Land Mobilisation Project proposals	Riots and four deaths—no further action.			
2007–	Land Development Programme	Customary land registration not a priority area of land policy reform.			

Efforts to register Tolai customary land in the 1950s and 1960s

RESULTS UNDER THE NATIVE LAND COMMISSION

Papua New Guinea's experience of customary land registration included attempts to register Tolai customary land. The Native Land Registration Ordinance of 1952 was introduced first in the Tolai area, and it is there that it had its greatest impact. Although not a single title had been registered when the law was repealed a decade later, a great deal of preparatory work had been done.

A former District Officer, Sydney Smith, was appointed Native Land Commissioner at Kokopo in 1956. Aware of the legislation's Fijian precedents, he corresponded with the Fijian Native Lands Commission and adopted its practice of using the indigenous territorial and social units for purposes of recording landownership (Fingleton 1985). On the advice of Tolai leaders, he first identified the boundaries of the districts and subdistricts that they recognised. Starting east of Kokopo, he then systematically recorded the names of the 'communities or matrilineages' that owned parcels of unalienated land right across to the coast of St Georges Channel.

By 1960 the ownership of some 6750 hectares had been recorded in this manner. There were decisions on 47 land parcels, ranging in area from 2 to 578 hectares. The landholdings of groups within each parcel (as many as 26 groups) were not differentiated. Despite the lack of registrations, this work was highly valued by Tolai, and the records that remain from this period are being used as the basis for the provincial government's current Customary Land Registration Program.

RESULTS UNDER THE LAND TITLES COMMISSION

The Land Titles Commission established as a result of the land law reforms of 1963–64 had two main methods for registering title to customary lands:

- registration after systematic demarcation and adjudication in the Register of Communally Owned Land
- » registration after *sporadic* tenure conversion in the Register of Titles (called the 'Register Book' in the legislation).

Either individual or group ownership could be entered in the Register of Communally Owned Land, and the land remained subject to custom. Only individual ownership could be entered in the Register of Titles, and the application of custom to the land ceased in all respects once registered in this way. By the middle of 1966, all customary land in the Tolai area had been divided into 95 adjudication areas, the first step towards registration in the Register of Communally Owned Land. Demarcation committees of local Tolai leaders had been appointed for each adjudication area. The next step was for claims to be made, which the demarcation committees would then investigate. After the period allowed for claims had passed (three months from declaration of the adjudication area), the committee was required to start preparing a demarcation plan, showing the boundaries of all customary land that was the subject of claims.

Information on each land parcel was kept on index cards, and the minutes of the meetings held by the demarcation committees were recorded, detailing the business conducted. As agreement was progressively reached on the location of the boundary, wooden stakes placed on the boundary of parcels were replaced by the cement markers of the Land Titles Commission. Any disputes were noted on the parcel card, and the matter was left to be resolved by the Land Titles Commission.

As the stakes were replaced by cements markers, commission staff carried out low-level surveys. The demarcation plan was progressively updated, until it was ready for an inquiry by the Land Titles Commission. Any disputes were then heard and determined, and the findings over the whole adjudication area were finally set out in an adjudication record. After any appeals were resolved, the Land Titles Commission certified the adjudication record and demarcation plan and forwarded them for registration.

The commission's demarcation and adjudication process took over and expanded the main elements of the Native Land Commission's previous practice in the Tolai area. Both systems based demarcation and adjudication on Tolai territorial and social units and traditional leadership. Tolai valued these processes highly, not only for recording existing landownership but also for documenting the basis of the tenure of each land parcel. The local identity of owners, associations between groups, and kinship and marriage relationships between individuals are crucial to Tolai land tenure, because land interests not only derive from these factors but also depend on them and are influenced by changes in them over time.

The considerable amount of work involved saw only one adjudication record completed, before the operation of the law was suspended in 1970. The record was for the Rakunat Adjudication Area, outside Rabaul in East New Britain. Demarcation had been completed in a number of other adjudication areas in readiness for adjudication, and was close to completion in some others.

Research conducted at Rakunat in the early 1980s (Fingleton 1985) found that:

- » the boundaries of land parcels were generally known and accepted
- » very few parcels (less than 10 per cent) were disputed
- » most of the parcels (almost 70 per cent) were recorded under group ownership in the name of the *vunatarai* (matrilineal group)

where parcels were recorded in the names of individuals, these people were usually relatives who formed a small matrilineal segment—for example, male and female siblings, and the children of the female siblings.

The research also revealed that transactions in land between groups and individuals were not new, but had occurred at Rakunat since its first settlement. Every transaction depended on a pre-existing relationship between the parties or a longstanding association between *vunatarai*. The consistent pattern emerging from transactions was the redistribution of land from comparatively 'land rich' *vunatarai* to members of 'land poor' groups.

No evidence existed of a trend towards the individualisation of customary tenures and this continued in modern times, with Tolai placing little importance on tenure conversion—the other main method introduced in 1964 for registering titles in customary lands. Twenty years later, only about 40 tenure conversions had been carried out in the whole of East New Britain Province.

Revival of land demarcation efforts

THE CUSTOMARY LAND REGISTRATION PROGRAM

When the East New Britain Provincial Government heard that East Sepik had passed its provincial land legislation in 1987, it became one of a number of provinces that also moved to bring in their own laws for customary land registration. The national authorities became fearful of losing control of the land reform agenda and of having 20 different land laws within the country. They set in train the preparation of 'framework' legislation, 'to avoid the emergence of a variety of inconsistent and uncoordinated provincial land administration systems' (Terms of Reference for Preparation of Drafting Instructions for the Framework Legislation 1988).

Drafting instructions were prepared and a working party was set up to draft the national 'framework' law for customary land registration and a model provincial law. But after reforms were introduced in 1995 that reduced the powers of provincial governments, this approach was abandoned. Soon after, the East New Britain Provincial Government began its own Customary Land Registration Program.

The Administrator of East New Britain Province had been delegated many of the national minister's powers under the 1996 Land Act, and a Lands Division was set up in the province to assist in exercising those powers. Much of its work concerns the administration of state-owned lands, but it has a small Customary Land Section responsible for collecting data, settling disputes and monitoring land dealings. The section is currently staffed by

the Provincial Customary Lands Officer, the Provincial Land Court Officer, land mediators and a collector of land data. It operates on an annual allocation from provincial funds, which in 2007 was K100 000.

There is general support for the Customary Land Registration Program—from the Provincial Executive Council and the Administrator to community governments and district administrators, as well as local members of the national parliament. In 2003 provincial funds were used to send six people to Fiji on a study tour in recognition of the Fijian precedents for the Native Land Commission. Their report concluded that basing land registration on the local social structure in East New Britain was the right approach, but also recommended that a large-scale public awareness campaign take priority over implementing new legislation.

The Customary Land Registration Program is a conscious attempt to 'revive' the system of data collection used by the Native Land Commission and the Land Titles Commission during the 1950s and 1960s. Land disputes were hindering development, and the provincial government believed that the records of demarcation committees would establish the 'history of landownership' and preserve the knowledge of clan elders collected and recorded in the 1950s and 1960s, which was being lost as they aged and died. The Provincial Executive Council adopted a policy of accepting demarcation committee decisions as 'binding' in the event of later disputes.

The Customary Land Section's main activities are to collect and update *vunatarai* genealogies and, using the demarcation committee records, establish village boundaries and then clan boundaries on the ground. The work at village level is preceded by a public awareness campaign, and it is intended that the clan landholdings will be surveyed and eventually registered.

PROGRESS SO FAR

The Customary Land Section is small, with a small budget and responsibility for mediating land disputes and dealing with other customary land issues as well as for its land registration tasks. So it is not surprising that it has not made much progress on land registration. Also, the officer responsible for supervising the section has many other duties as head of the Lands Division in the East New Britain provincial administration.

Over the past few years work under the Customary Land Registration Program has consisted mainly of collecting the records from the 1950s and 1960s that can be located, reviewing them and entering them in a computer database. Unfortunately many of the early records were lost in the volcanic eruption in 1994, which damaged the Rabaul Court House. And, recently, the office of the Customary Land Section was burgled and the computer storing the entered records was stolen. The main focus so far has been on Raluana and Bitapaka community governments, two of the four local-level governments in the Kokopo District. In Raluana the public awareness program has been conducted in most villages, and staff from the Customary Land Section is carrying out fieldwork to locate parcel boundaries based on the demarcation committee records. In Bitapaka there are major gaps in the demarcation committee records held by the section, but the community government is very keen to proceed and has started its own public awareness campaign.

PROBLEMS AND CHALLENGES

The task at hand for the Customary Land Registration Program is considerable and it is unlikely that the key objectives of achieving customary land registration can be met for two key reasons.

- » The provincial government funding of the program is not sufficient to meet the requirements of a long-term, sustainable, customary land registration system.
- There is no suitable customary land registration law at the national or provincial level.
 This means there is uncertainty about the legality of registering customary land.

There are additional problems for the program to overcome. The early records being used to establish the database are seriously deficient. They consist mainly of minutes of meetings, scraps of Native Land Commission decisions and deteriorating genealogies, which the section's staff try to make sense of. There are no Native Land Commission decision books, demarcation plans or even parcel cards. The minutes of meetings held are only work-in-progress documents. Many genealogies are missing.

Many of the missing records are likely to be held in the archives of the Land Titles Commission in Port Moresby.² But even if these can be located and copied, there is little point in sending them to East New Britain until appropriate facilities and systems are in place to store documents in a safe and accessible way.

The provincial government is well aware of the necessity for good communication, and it is emphasising the importance of ensuring the public is fully aware of the effects of registering customary land. Informed consent is critical to the success of any land registration measure. Public awareness campaigns need to be properly designed and conducted, but current efforts are haphazard.

Training in procedures and work practices is also lacking. The provincial government understands this, but so far training has been 'on the job'. Goals, guidelines and procedural steps need to be established and the necessary forms and possibly a manual of laws and procedures prepared. These can then be used as the basis for recruiting and training staff.

² Checks made during this case study were inconclusive. The Land Titles Commission had recently moved, and much of its material was still in boxes.

Some underlying principles, concepts and policies

Land registration is a process designed in western countries to facilitate the passing of land from one owner to another. But in developing countries registration has often been used as a vehicle for reforming land tenure. Land registration schemes, not just in Papua New Guinea but in the Pacific islands generally and elsewhere in the developing world, have mostly fallen well short of their intended goals and have led to unintended and harmful consequences. Customary land registration is something to be approached with great care—and without being too ambitious.

A basic policy question must be answered in any measure to register customary land: is it intended only to record the existing status quo or is it intended to change the nature of landownership and distribution? If the latter, what sort of change is intended? In some cases land 'rationalisation' has been the goal, with consolidated landholdings taking the place of many scattered parcels. In more ambitious reforms, land 'individualisation' has been the goal, with the landholdings of groups being divided among their current members. The history of land registration in developing countries shows that the more ambitious the reform, the less its chance of success and the more its chance of undesirable consequences.

There are two main aspects of a land registration system—what is called 'first registration', and then registration of 'subsequent dealings'. The first registration of land titles establishes the legal status of the land at the time of registration. But if the ongoing benefits of 'indefeasibility'—the guarantee that the particulars in the register are always complete and correct—are to be available, all subsequent dealings in the land must also be registered. This is where so many registers in the developing world have fallen down. If subsequent dealings (transfers, transmissions on death, etc.) are not recorded the register falls out of date and cannot be relied on.

In the Tolai area of East New Britain the measure that has enjoyed the greatest support is the systematic recording of the *existing* ownership of groups under custom of *existing* land parcels. This measure was based on a Fijian precedent dating from the early 1900s, but the Fijian system contains a mechanism for *dealings* in land after ownership is determined, which has not been adopted in East New Britain.

Without a mechanism for recording subsequent dealings, the system in East New Britain does not provide the flexibility necessary for adapting customary land tenures to modern circumstances and modern demands on land, including the ability to use land to raise finance. What is lacking therefore is not just the long-awaited law for registering group titles, but the equally important law for dealings in such titled customary lands.

Lessons

ADEQUATELY RESOURCE THE LAND REGISTRATION PROCESS

sson 1	Substantial and sustained funding is required to set up and maintain a register for customary land.
sson 2	There is limited value in pursuing a registration process if funding for setting it up and maintaining it are inadequate.

Land registration is a demanding process, involving the demarcation of boundaries and adjudication of existing land rights, the opportunity for appeal, surveys, the entry of titles in the register of titles, and the keeping of the register up to date. Skilled personnel and technical resources are essential for the process to work fairly and efficiently. Inadequate funding and administrative capacity have limited the success of the land registration aspirations of the Tolai people. Without guarantees that sufficient resources will be available to undertake the necessary tasks in the registration process and to maintain the register, it may be better not to start the process.

PROVIDE SUFFICIENT TIME AND AN ENABLING ENVIRONMENT

LESSON 3	Any program that aims to systematically register customary land must accept and incorporate an extended timeframe for completing the program.
LESSON 4	In view of the time needed, the success of a program for systematically registering customary land depends on a stable legislative and regulatory environment with respect to customary land registration.

The initiatives in the 1950s and 1960s to undertake a systematic process of customary land registration of Tolai lands demonstrated two things.

- » The task for accumulating the information needed for registration is considerable.
- The time needed for preparing for registration can be measured in years or even decades. Ultimately the pace of these initiatives could not keep up with the pace of change in national land policy.

PROMOTE THE BENEFITS OF RECORDING CUSTOMARY LAND

LESSON

Communities may find the recording of genealogies, social structures and land boundaries to be desirable and beneficial.

Despite attempting to systematically register land titles for more than 50 years, no title among the Tolai people has been registered. But a great deal of work was done in preparation for registering group titles in customary lands and this work was highly valued by the Tolai people. It became the basis for the provincial government's present Customary Land Registration Program. The main reason for its popularity relates to the recording of Tolai territorial and social units, which are fundamental to Tolai identity and their relationships with land.

Appendix: 2007 interviews

EAST NEW BRITAIN PROVINCIAL ADMINISTRATION

- » Aquila TuBal, Administrator
- » Horim Ladi, Deputy Provincial Administrator, Policy, Planning and Evaluation
- » Mary Dadatliu, Acting Lands Adviser, Division of Lands
- » ToPuipui, Provincial Customary Lands Officer, Customary Land Section, and five other officers from the section
- » Rachael Moore, Development Specialist, Australian Government Sub-National Strategy

KOKOPO DISTRICT OFFICE

» Edward Lamur, District Administrator

RALUANA COMMUNITY GOVERNMENT

- » Tio Wawaga, President
- » Peter Lapim, District Manager
- » Apolinaris Duamuga, Agricultural Officer

FIELD VISIT

A site inspection of land demarcation activities and a meeting were held at the Kunakunai and Ravat wards of the Raluana Community Government, attended by Horim Ladi, ToPuipui, the Provincial Land Court Officer, land mediators and other officers from the Customary Land Section, the President of the Raluana Community Government, the Raluana Coordinator, two councillors (Kunakunai and Ravat) and about 30 villagers (including one woman and six young men).

References

- Fingleton, JS 1980, 'Land, law and development: a case study of tenure conversion in Papua New Guinea', Master of Laws thesis, University of Papua New Guinea.
- ——1985, 'Changing land tenure in Melanesia: the Tolai experience', PhD thesis, Australian National University, Canberra.
- Hanson, LW, Allen, BJ, Bourke, RM & McCarthy, TJ 2001, *Papua New Guinea rural development handbook*, Australian National University, Canberra.
- National Research Institute 2007, *The National Land Development Taskforce report*, NRI Monograph 39, National Research Institute, Port Moresby.
- Simpson, S Rowton 1969, Land law and registration, Cambridge University Press, Cambridge.

RECONCILING CUSTOMARY OWNERSHIP AND DEVELOPMENT

5

Informal land systems within urban settlements in Honiara and Port Moresby

Satish Chand » Australian National University, Canberra Charles Yala » National Research Institute, Port Moresby

A snapshot

Informal land systems within urban settlements in Honiara and Port Moresby

Informal urban settlements are a growing and permanent feature of Pacific towns and cities, including Honiara and Port Moresby. Most of this growth is taking place on land with limited value, disputed title and/or customary title. Informal arrangements continue to evolve to provide some security of tenure for settler housing. But the security is still insufficient to alleviate overcrowding, inadequate basic services, crime, conflict and poverty.

If these issues are to be addressed, settlers must have greater security of tenure. But customary landowners fear that providing it will erode their claims to the land. Addressing the concerns of settlers and landowners simultaneously entails improving how land markets function and integrating informal arrangements into formal systems. This transition requires recognition that settlements are a permanent feature of the urban landscape.

Strategies to regularise informal settlements should engage all stakeholders, including customary landowners and municipal authorities. And more must be done to reduce the costs of regularising informal arrangements.

Experiences in Port Moresby and Honiara provide some important lessons.

- » Informal urban growth and tenure arrangements will occur whatever the regulatory framework.
- » To reduce urban poverty and conflict, the security of tenure for housing must increase, which requires wide and careful engagement of all stakeholders.
- » To the extent possible, informal land arrangements should be incorporated into the formal frameworks while reducing transaction costs and introducing user-pays mechanisms.

Contents

»	THE SETTING	88
»	CAUSES OF GROWTH IN INFORMAL SETTLEMENTS	89
»	THE NATURE OF INFORMAL SETTLEMENTS	90
»	INSECURE LAND TENURE AND POVERTY	91
»	INFORMAL SETTLEMENTS IN PORT MORESBY	91
	Area and population	91
	Land types and administration	92
	General characteristics	93
	Transactions on land	95
	Security of land tenure	95
	Maintaining rights to improvements	96
»	INFORMAL SETTLEMENTS IN HONIARA	97
	Informal settlements on customary land	98
	Post-conflict expansion of informal settlements	99
	Attempt to legalise the occupation of public land	100
	Features of informal settlement development	100
»	LESSONS	102
	Accept informal urban settlement as a permanent feature	102
	Acknowledge that settlers are not deterred by a lack of secure tenure	102
	Account for the consequences of inadequate urban land with secure tenure	102
	Acknowledge what sustains informal arrangements	103
	Recognise the limitations of informal arrangements and the challenges of change	103
	Acknowledge the potential role of the private sector and civil society	104
»	REFERENCES	105

The setting

Informal urban settlements are a feature of the urban centres of Papua New Guinea, and in Honiara, Port Vila, Suva and Tarawa. They are also appearing rapidly in other urban centres in the Pacific region. Some 80 per cent of the populations of Papua New Guinea, Solomon Islands and Vanuatu, and nearly half of the Fiji population live in rural districts where access to public services and employment opportunities remains poor. Consequently the drift from rural to urban areas has been increasing and is likely to continue to grow.

Of the 50 000 people in Honiara in 2006, for example, 17 000 were believed to have settled informally on government land and the informal population as a whole was estimated to be growing at an annual rate of 26 per cent (URS Australia 2006). In Port Moresby the 2000 census revealed that 53 000 people lived in informal settlements. This number is likely to have grown significantly since then. Suva, with a population in 2006 of around 200 000, is estimated to have an informal settlement population of 90 000. In Fiji 12 per cent of the total population of some 960 000 are believed to be living on land to which they have no legal title or customary rights (Chand 2007).

For the purposes of this case study, informal settlements are groups of households in localities and in conditions that contravene the laws and regulations of the state. More specifically, the breaches include those relating to the physical planning and building requirements of urban authorities and other state agencies. These settlements are characterised by haphazard housing, poor access to most basic amenities such as reticulated water, sewerage services and electricity, and at least some substandard (temporary) housing.

Informal settlements in Melanesian cities and towns are largely a post-independence phenomenon. The colonial administrations had placed tight restrictions—many that remained in force until the 1960s—on the migration of the indigenous populations from rural to urban areas. Towns in Melanesia were created principally for Europeans on the assumption that the strong attachment to the land of the indigenous populations would be sufficient to ensure they remained predominantly rural (Philibert 1988). These historical considerations explain the highly restrictive policies on informal settlements, which continue today, and are the foundation of the belief that informal settlements are a temporary phenomenon.

Causes of growth in informal settlements

The rapid growth in urban populations can be explained by a combination of the pull of urban centres and the push from rural areas. Employment opportunities, cash incomes and basic services are major pull factors. The expiry of land leases (in Fiji), tribal/clan conflicts (in Papua New Guinea), and the pressures of rapidly growing rural populations are major push factors. These factors are unlikely to diminish in the near future and, given the large rural populations involved, urban settlements in Pacific island countries are likely to continue to grow in the foreseeable future. Environmental degradation and climate change are also likely to exacerbate the pressures for urbanisation in atoll states, an issue of lesser concern within Melanesia.¹

People who migrate to urban areas face considerable incentives to locate in informal settlements. For example, such settlements often have unregulated access to water and electricity, and land prices are considerably lower than in formal settlements.²

Informal urban settlements with the poorest households are often located on marginal land, including riverbanks, steep gullies and mangrove swamps, and/or on land with disputed ownership.³ The implicit value of such land relative to its immediate surroundings is low and so the perceived risk of eviction by the landowner(s) is low. Settlements in such locations, however, are at a greater risk of being affected by natural disasters (for example, flooding).

There are several complex statutory requirements for establishing a formal settlement in major urban areas such as Port Vila, Honiara, Port Moresby and Suva (Chung & Hill 2002).⁴ Not surprisingly, the private sector has not taken up the challenge of making land available for housing for low-income households. The costs of registering land and building in compliance with statutory requirements for residential housing is well beyond the capacities of the average citizen. Most regulations pertaining to residential housing predate independence, making them a legacy of colonisation. The high standards for hygiene, sanitation and easements that apply to building public infrastructure are cases in point. This does not add up to a case for formalising informal arrangements but it is a case for lowering the costs of regulations. Formal arrangements are generally considered superior to informal arrangements since they give the holder the power to enforce their rights (Deininger et al. 2003). But weak states and poor governance, a characteristic of the Pacific, mute this advantage. Therefore there is a case for them legalising arrangements that already exist and are socially acceptable.

¹ Note that Melanesia has atolls as well and the inhabitants of these atolls face the same risks.

² The services are not free, but are either paid for by the political patrons of the settlements as is the case in Port Moresby or accessed illegally as is the case for water and electricity in Honiara.

³ There is evidence of informal settlements in Port Moresby and Suva, for instance, on prime land and occupied by a relatively high income group. Some have gone as far as investing in residential units for rental, especially in Suva.

⁴ In Vanuatu, as an example, no leases for housing can be issued until the plots have been 'adequately' serviced. This means that all of the following statutory instruments that apply to residential settlements must be complied with: Municipalities Act 1980, Land Leases Act 1983, Physical Planning Act 1986, Decentralization Act 1994, Public Health Act 1994, Customary Land Tribunal Act 2001 and several others still in the pipeline.

The nature of informal settlements

For people moving from rural to urban areas, a key concern is accessing land. Within Melanesia it is not the shortage of land per se that is the issue, but rather the lack of entitled/registered land. Settlers are not waiting for formal systems to deliver them tenure security. Instead informal arrangements are evolving to meet the demands of the settlers and the diverse challenges of existing land tenure arrangements. These informal arrangements vary from fairly sophisticated negotiations with landowners to land invasion and occupation. Settlers enforce their claims to their investments using means ranging from political patronage through to the threat of violence.

There is little evidence of a convergence among informal arrangements or towards the formal system. This 'market-driven' process is unlikely to provide tenure security for settlers or produce the community-wide benefits that can flow from more comprehensive land use planning. It also risks creating a system of property rights that parallels the formal one, but without protective mechanisms. Furthermore, the arrangements that have evolved are unlikely to address the wider social ramifications of the growth in settlements. This growth around regional cleavages, for example, has created pseudo tribes whose proximity risks conflict.

Accessing land for housing in urban fringes has been particularly problematic. Most alienated land in these areas has been developed or is already settled. As a result new settlements have spilled onto land held under customary title. The new settlers have often worked with the customary owners to access their land for housing. This approach has been somewhat successful, as evidenced by the level of investment in permanent and semi-permanent fixed assets such as housing, home businesses and fruit trees. Importantly, there have already been sales of real estate on land without secure title.

However, there are cases of customary landowners objecting to basic services being provided to settlers on their land for fear this will erode their rights to the land. As a result, Honiara, Port Moresby and Suva have suburbs with quality housing and services on land to which the homeowners hold title coexisting with overcrowded, ramshackle informal settlements.

How informal arrangements have evolved to date is context-specific but the motivation for each arrangement is the same—to meet the demands of the settlers for greater security to their fixed investments while protecting the rights of the landowners. Tenure security in the informal settlements on customary land in Port Moresby has been cemented over time through investments in physical and social infrastructure. This approach is being experimented with on alienated land in Honiara by converting temporary occupation licences (TOLs) into fixed-term estates (FTEs) with leases of 50 years. However, the governments of Papua New Guinea and Solomon Islands are making every effort to take back control of urban growth and reclaim land and income lost as a result of informal settlements.

Insecure land tenure and poverty

Insecure land tenure, as is generally the case for informal settlements, and poverty are closely associated. Evidence that such tenure is a cause of poverty in the Pacific can be gleaned from four separate perspectives (Chand & Yala 2006; Chung & Hill 2002; URS Australia 2006).

- 1 Insecure tenure has induced large family groups to settle close to each other to provide security for people and property. But large households involve sharing income, an arrangement that taxes the most productive member.
- 2 Opaque ownership rights to land has exposed settlers to multiple and sometimes cascading taxation by their patrons and, in some cases, by a multitude of landowner groups.
- 3 Incidences of regularising tenure have nearly always been followed by rapid improvements in housing quality.
- 4 Informal settlement has made access to basic services difficult. Settlers often share toilets and water sources and lack facilities for disposing of waste.

Informal settlements in Port Moresby⁵

AREA AND POPULATION

Port Moresby has a total land area of 240 square kilometres. By 2000 the population had grown to almost 255 000 from 112 000 in 1980—a population growth rate of 4 per cent a year. The population density in 2000 stood at 1059 people per square kilometre. According to the 2000 census, the net migration to Port Moresby from elsewhere in the country was 77 124. The census data show that the majority of migrants were young adult males, possibly arriving in the city in search of income-earning opportunities.

Informal urban settlements are a relatively recent phenomenon. In 1945, Port Moresby had six villages but no informal settlements. The 1980 national census revealed 34 informal settlements with a total population of 11 270. In contrast, the 2000 census recorded 55 informal settlements with a total population of 53 390. The data reveal that on average a new informal settlement was established each year over the 20 years to 2000 and the settlement population grew at an annual rate of 7.8 per cent—twice the population growth rate of Port Moresby overall—in this period.

⁵ Much of the evidence in support of the claims made in this section is drawn from a recent detailed household survey undertaken by the authors in their investigation on how urban land is used for housing in Port Moresby (Chand & Yala 2006). The authors surveyed a random selection of both settlements and households with the objective of drawing inferences for the whole population. The authors are aware of attempts by non-government organisations to improve housing in informal settlements and villages outside of the urban boundary, and planned initiatives of the National Capital District Commission to formalise settlements.

Census data show that new arrivals in Port Moresby are moving into informal settlements. There is also anecdotal evidence to suggest that some of the earlier settlers are moving from formal housing into the settlements to access 'free' utilities and cheaper land. At the above-mentioned rate, the informal settlement population in Port Moresby will double every nine years while the population of Port Moresby as a whole will take twice as long to double.

LAND TYPES AND ADMINISTRATION

Captain John Moresby annexed the state land on which Port Moresby is located for Britain in 1883. The customary landowners displaced are the Koiarai, Motu and Koitabu tribes. These tribes continue to threaten legal action to reclaim ownership of the annexed land within the National Capital District of Papua New Guinea.

The land in the National Capital District is held under two forms of control—state and customary. All state land is formally administrated by the Land Act 1996 and related laws. The National Capital District Commission is responsible for physical planning while the National Land Board and the Department of Lands and Physical Planning are responsible for allocating and administering, respectively, all state land. Customary land is administered through customary law. Even though customary law is unwritten and culture-specific, its application is sanctioned by the Underlying Law Act 2000 and the Constitution.

The customary law that applies to land held under customary control within the National Capital District is that practiced by the Motu, Koita and Koiarai people. This land is passed down through a patrilineal (male) inheritance system. It should be noted, however, that customary land formally converted to freehold through the Land Tenure Conversion Act 1963 lost its customary status, and the statutory laws pertaining to alienated land apply to its use.

GENERAL CHARACTERISTICS

Settlements in the National Capital District have emerged on land with three distinct ownership types—state, customary and disputed. A randomly selected sample survey of 441 households in 12 informal settlements of Port Moresby conducted in 2006 (Chand & Yala 2006) revealed interesting insights on life in settlements and how settlers acquired tenure security for the land settled on (Tables 1 and 2). Among the key findings are that:

» state land was settled on before land held under customary title

TABLE 1 » SUMMARY DATA FROM A SAMPLE SURVEY OF PORT MORESBY

- » the first settlements were formed following World War II by 'carriers' recruited by the allied troops from the surrounding region to help in the war effort
- » the descendents of these people claim legitimacy to their place of abode based on the sacrifices their parents made for the sovereign nation of Papua New Guinea.

The settlers pointed out, moreover, that the colonial administration had settled them and thus had responsibility for their rights to the land settled on. Many adults living in the older settlements—Koki, for example—claim this to be their home even though their parents came from the surrounding Central, Gulf and Western provinces. The Motu–Koitabuans, however, refute such claims.

INFORMAL SETTLEMENTS, 2006						
Settlement name	Landowner	Year first settled	Population (2000 census)	Number of households	Number of households interviewed	
Koki	State	1952	4 939	450	45	
Saraga	State	1960	2 243	446	45	
9-mile	State	1970	5 927	922	91	
Erima	State	1970	4 063	673	67	
Gorden Ridge	State	1975	2 702	441	44	
8-mile	State	1982	2 683	458	46	
Gorobe	Customary-state	1967	1 070	128	13	
Hohola	Customary-state	1981	1 015	188	19	
Savaka Bundi	Customary	1971	970	154	15	
Popondetta	Customary	1972	799	140	14	
Vadavada	Customary	1977	2 048	363	36	
Taurama	Customary	1990	447	62	6	
Total		28 906		441		
Note: Settlements arranged by type of landowner and first year settled.						

Note: Settlements arranged by type of landowner and first year settled. **Source:** Chand & Yala (2006).

IABLE 2 » HOUSEHOLD CHARACTERISTICS OF A SAMPLE OF PORT MORESBY INFORMAL SETTLEMENTS							
	Male headed households	Age of household head	Household heads with no education	Persons per household	Dependants per household	Household monthly income	Household heads self- employed
Settlement name	%	years (average)	%	no. (average)	no. (average)	kina (average)	%
Koki	89	40	9	17	6	1739	33
Saraga	91	39	11	9	3	537	31
9-mile	93	42	11	9	3	658	64
Erima	81	43	31	10	3	830	61
Gorden Ridge	73	42	24	8	3	735	35
8-mile	93	39	13	8	3	545	54
Gorobe	100	51	23	8	3	390	62
Hohola	95	41	11	11	5	1 183	68
Savaka Bundi	73	38	7	9	3	392	33
Popondetta	86	38	14	10	4	548	53
Vadavada	92	41	31	7	3	489	31
Taurama	100	49	33	5	2	210	83
Source: Chand & Yala (2006).							

HOUSEHOLD CHARACTERISTICS OF A SAMPLE OF PORT MORESPY

An interesting finding from the survey is that households from particular provinces tended to settle in groups to provide security for each other and their property. This form of group insurance can, however, ignite conflicts over issues brought from their tribal home or region and from competition for land and other resources within the Port Moresby setting.

The settlements were found to be full of entrepreneurial activity. Services available ranged from tucker shops, billiard tables, hairdressing services, repair shops and trade stores to illegal activities such as bootlegging. Permanent structures, some with septic toilets, television antennae and electricity generators, were discovered as was a commercial complex valued by the proprietor at K300 000 built on land with no formal title in the name of the investor. For the most part, settlements were accessible only to residents—strangers were not welcome within them.

TRANSACTIONS ON LAND

Between 11 and 71 per cent of households had acquired their land from the owner the Department of Lands in the case of state land, and customary owners (or claimants of being such) for land under customary title. There were anomalies, however. In two settlements on state land, the settlers claimed to being settled by former politicians and thus drew their claim to the land through political patronage. These settlers were active in the National Capital District Commission and national politics so as to maintain political support as an instrument for tenure security.

There was evidence that houses were sold and purchased despite the lack of clear legal titles to the dwellings and without the consent and/or knowledge of the landowners. These exchanges took place on all forms of property—from the most developed to vacant land over which claims remained to be formally established. A number of settlers reported buying their plots, often with improvements, from others. The price paid for land varied considerably between settlements and there was no clear, discernible difference in the price paid for land between the three land tenure types. Similarly, there was no distinct difference in the level of investments made by informal settlers, whether the land was state-owned, customary-owned or had disputed ownership.

SECURITY OF LAND TENURE

A number of people interviewed for this case study whose housing is on state land reported that the state could evict them and so their security of tenure rested on maintaining strong political patronage. The politicians they depend on for support, however, have an incentive *not* to provide secure property rights because it may erode their electoral base.

There were considerable differences in how settlers availed themselves of land held under customary title for housing. They ranged from land invasion—where a pioneer identified an empty piece of land, built on it and then surrounded the development with members of their clan and tribe—to explicit arrangements with customary landowners to access their land.

Under explicit arrangements, settlers sometimes made a large upfront payment on acquisition followed by regular payments of much smaller amounts or sometimes made a smaller upfront payment followed by larger, ongoing contributions. The regularity of payments differed. Some were monthly and some irregular and were driven by landowner requirements (for funerals or bride-price money).

The settlers substantiate their claim to the land they occupy in several ways. The most sophisticated included producing statutory declarations with the Commissioner of Oaths; others kept receipts for all payments made. One particular community—the Oro Development Community—has finessed arrangements whereby a formal intermediary collects rents, stores records and deals with disputes between settlers and customary landowners. This may be a model for regularising settlements that is worthy of further consideration.

Landowners have expressed fear of losing their land to settlers, particularly when outnumbered by people from the tribe or district of origin of the settlers. In one case, landowners simply refused to accept payments from settlers, fearing such payments would legitimise the claims of the settlers to the land settled on.

Settlers reported that most customary landowners refused to provide formal titles to the land settled on. Based on interview responses it is estimated that the proportion of households without formal title to the blocks of land on which their homes were built ranged from 55 per cent in Erima to 100 per cent in Gorobe and Saraga.⁶

MAINTAINING RIGHTS TO IMPROVEMENTS

In all but three settlements, rooms were available for rent but only one household among the 441 households interviewed had an entire house for rent. Occupation was deemed essential to maintaining rights to the property. Thus original owners who could not live in their property had relatives live in it instead. This also explains why renting rooms was common but renting houses was not.

The tendency for settlers to coalesce according to family, clan, tribe, province, profession and so forth could be as much a cause as a consequence of a weak state unable to enforce property rights within settlements. Because police attend to only the most serious of crimes, settlers provide their own security. The net result is that settlers provide security for only themselves and outsiders have problems reaching settlers or their settlements.

There is evidence that customary claimants have encroached on the rights of the state over alienated land. While the state claims ownership rights over Gorden Ridge, Koki and Saraga, settlers have reported making payments to customary landowners for land settled on. This is a clear case where state ownership of land has regressed to those who claim customary rights. The encroachment may benefit the settlers and the customary claimants, but it comes at a cost to the state. Settlers revealed a perception of greater tenure security through arrangements with customary landowners than through existing arrangements with the state. They reasoned that:

- » they had greater trust in the traditional arrangements for accessing land for housing
- » they had the capacity to counteract landowner claims should the need arise
- » the state had the means to evict them by force should it wish to do so.

Informal settlements in Honiara⁷

The city of Honiara is built on alienated land, which is surrounded mostly by land held under customary ownership. Most of the informal settlements are on state land. Some 25 per cent of Honiara's population resides on state land. The majority still has no legal right to do so and has no tenure security to the land on which they live and have food gardens.

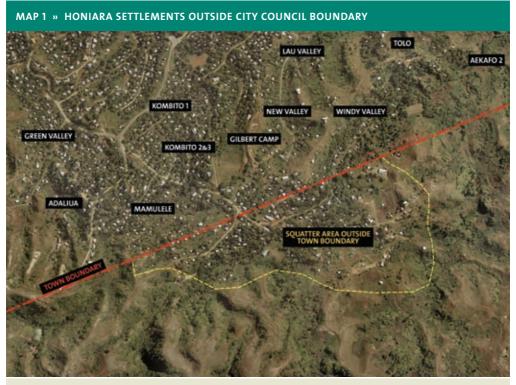
Since the 1970s Honiara has had a formal system to enable settlers to acquire public land for housing. The temporary occupation licences, issued by the Commissioner of Lands with annual rental payments to the (then) Department of Lands, have provided the formal channels through which public land has been accessed for housing. This system has had three significant drawbacks.

- » It has been anything but temporary, and the settlements have increased in both housing and population density, and expanded outward since the first licences were issued.
- » Dwellings have been constructed without systematic provision of access corridors and services. The Honiara City Council has not collaborated on planning with the national lands agency, so the TOL areas have been poorly planned.
- » Compliance with TOLs, particularly in keeping the licences valid, was poor from the outset, but fell sharply after the civil unrest began in the late 1990s.

⁷ The discussion on Honiara settlements is based on URS Australia (2006) report and information collected from a field visit to Honiara by Satish Chand from 20 to 24 June 2007. Gilmore Pio provided invaluable research assistance for the fieldwork.

INFORMAL SETTLEMENTS ON CUSTOMARY LAND

While the boundaries of Honiara City are not clearly defined, there is evidence of informal settlements spilling over onto land held under customary title (Map 1). In Guadalcanal where Honiara is located, rights to land under customary title are passed through a matrilineal (female) system of inheritance. To the best of the authors' knowledge, no research has been undertaken to determine how settlers have acquired this land for housing. While houses built on public land with registered title were more permanent in terms of construction, such differences were not obvious on TOL land compared with customary land. A visit to the Mbokona Valley, for example, showed permanent structures built on customary land as much as on adjoining TOL land.



Source: Gilmore Pio, Surveyor, Honiara, Solomon Islands.

POST-CONFLICT EXPANSION OF INFORMAL SETTLEMENTS

After the conflict in Guadalcanal between 1999 and 2003 was quelled and the Regional Assistance Mission to Solomon Islands (RAMSI) began in July 2003, settlers who had moved to Malaita at the height of the conflict returned and households returned from rural Guadalcanal to Honiara. The bulk of resettlements were on state land within the vicinity of the city.

Post-conflict settlements have continued to be haphazard and have spilled out from allocated TOL land onto customary land, a trend expected to continue for the foreseeable future. While the planning and administration of all land in Solomon Islands is the responsibility of the Ministry of Lands, Housing and Survey, enforcing responsibilities for areas beyond the city boundary falls on the provincial government. The Minister of Land for the Guadalcanal Province and his Permanent Secretary confirmed they had limited powers over land dealings within the province.

Honiara's population has been growing at an annual average of 6 per cent, nearly twice the national rate of 3.5 per cent. The growth rate of the settlement population in the three years after the arrival of RAMSI, however, was recorded at 26 per cent. A recent survey of 3103 households revealed growth rates in individual zones, each comprising approximately 50 households, of anywhere between 8 and 103 per cent (URS Australia 2006).

It remains to be seen whether the high rate of settlement growth will continue. Reasons for a possible tapering of growth rates include a slowdown in the return migration from Malaita and the hinterlands of Guadalcanal. However, the lack of employment opportunities in the rest of the country and the fact that some 85 per cent of the population still lives in rural areas and the outer islands suggest that the potential for migration to urban areas remains significant. The pattern of growth in informal urban settlements in Melanesia provides reason to believe that the settlement population of Honiara will continue to expand by around 6 per cent a year.

Compounding the problems of growth in informal settlements is the displacement of urban residents living in quality housing around the periphery of the city caused by an influx of expatriates as part of RAMSI. These arrivals have pushed up the cost of quality housing and pushed settlers further away from the centre. The higher rents have also induced growth in construction around the city.

ATTEMPT TO LEGALISE THE OCCUPATION OF PUBLIC LAND

The use of TOLs for settlement since the beginning of the conflict has declined significantly, both as the capacity of authorities to enforce compliance has declined and as settlement populations have risen rapidly. Survey results of settlements show that fewer than half of the settlers ever held a TOL and only 2 per cent held a valid (up-to-date) TOL.⁸

The categories of settlers without a TOL include:

- » relatives of the TOL holder who have built close to the original premises
- » squatters who have built houses on vacant public land within the settlement area
- » residents who have rented land from a TOL holder
- » those who have purchased premises informally from an existing TOL holder
- » residents with long-expired TOLs.

As part of broader public sector reform, the Ministry of Lands, Housing and Survey is considering ways to raise compliance with TOLs in an attempt to recover rental arrears. However, both the ministry and the settlers recognise that evicting settlers in large numbers is not practical. Amicable and acceptable solutions are the only options to consider.

A pilot project was undertaken within the broader land administration project funded by AusAID from 2000 to 2007 (see Case Study 15, 'Strengthening land administration in Solomon Islands'). It advocated a participatory approach to inform, educate and involve informal settlers in the reform process, and supported a government program to convert TOLs into fixed-term estates, which have an initial lease of 50 years. About 350 FTEs have been offered to informal settlers with or without TOLs, who had settled in the pilot areas, and this process is being continued by the ministry. The pilot project assisted settlers with establishing roads and footpaths throughout their settlement areas, but addressed only a small proportion of the total area of informal settlement in Honiara. This is a bold initiative and one likely to result in lessons that can possibly be adapted to other Pacific island countries.

FEATURES OF INFORMAL SETTLEMENT DEVELOPMENT

A survey of existing settlements clearly shows older settlements have better quality housing while newer ones have in the main temporary or semi-permanent structures built without municipal approval. The poorer standard of building, combined with the fact that some of the newer settlements are on steep slopes, creates major risks in the event of a natural disaster such as an earthquake or landslide following prolonged rain. Houses could collapse on each other and/or cascade down steep slopes, causing major loss of life and property.

Settlement areas with reasonable access to basic infrastructure such as roads, electricity and water have grown the most rapidly. However, while these services have raised the implicit value of property they have also created congestion. These areas are also fertile ground for informal arrangements to provide long-term access to land and sometimes illegal access to electricity and water. These are also the areas where many of the arrangements seen to have developed in Port Moresby are at a nascent stage of development.

Housing densities have increased through infill while new settlements have appeared on what in 2003 was vacant land. The absence of government control has meant that some households have claimed land adjoining their premises. In several cases, claimants have lied about having FTEs over the sites to stop others from laying claim to vacant land.

There is also some evidence of land invasion. In a few cases, extended families are building premises close to each other on vacant land and blocking off access to others. This resonates with the problems of agglomeration witnessed in a more mature form in Port Moresby. The risks of such expansion are overcrowding, the spread of disease due to a lack of waste disposal facilities, increasing crime between families (tribes) and increased susceptibility to natural disasters.

FTE land that is close to the city is being developed for quality housing to take advantage of the rapidly rising rental market following the arrival of expatriates. Some of this land is held by the Honiara City Council. It is also being settled informally as the council is unable to prevent the chaotic nature of development on its property.

The rapid growth of the settlement population presents a formidable challenge to the Ministry of Lands, Housing and Survey on how to accommodate developments within the formal system. Some problems the ministry faces could be of its own making, however. It has been slow to enforce compliance with existing TOLs and has provided verbal permission to people wishing to settle in some areas of the city. A widely held perception that there is corruption in allocating land and issuing TOLs and FTEs has not helped to rein in a settlement process that has been largely out of control since 1999.

Current strategies being canvassed to resolve these issues require an elaborate, efficient and honest administration. A pilot has been proposed whereby a newly established Land Development Planning Group would take responsibility for coordinating the development of subdivisions across government agencies while supporting the regularisation of existing settlements.

Lessons

ACCEPT INFORMAL URBAN SETTLEMENT AS A PERMANENT FEATURE

lesson 1

A failure to acknowledge the reality of urban growth is one factor that has prevented landowners and governments in the Pacific region from controlling informal urban development.

Urban settlers are a permanent feature of the Pacific landscape, a fact that needs to be accepted by the wider population. While settlers are sometimes seen as a problem, they provide much of the hard labour needed in the cities in which they live and supply most of the garden produce consumed by urban residents. There are both powerful push and pull factors responsible for the swelling urban settlements, including tribal conflicts and income-earning opportunities, which are unlikely to disappear in the foreseeable future.

ACKNOWLEDGE THAT SETTLERS ARE NOT DETERRED BY A LACK OF SECURE TENURE

lesson 2

Urban areas will grow despite a lack of secure land tenure. Informal arrangements have evolved to provide the minimal level of tenure security required for settler housing to occur.

Most urban growth is occurring on land with limited value, with disputed title, and/or where the land is held under customary title. The high costs of regulating formal housing, the lax enforcement of the regulations, and the access to unregulated and often subsidised services such as water and electricity are plausible factors responsible for the growth of informal settlements.

ACCOUNT FOR THE CONSEQUENCES OF INADEQUATE URBAN LAND WITH SECURE TENURE

LESSON 3

The lack of access to urban land with secure tenure has resulted in negative spillovers that have an impact on wider society, such as poverty, overcrowding, increased conflict and loss of public revenue.

The consequences of a lack of land with security of tenure for urban housing include:

- » the high cost of housing in the formal settlements
- » the poor access to basic services in informal settlements
- » the higher levels of poverty and overcrowding in informal settlements
- » the higher levels of dispute and conflict over land and resources
- » the loss of public revenue from unregulated access to utilities such as water and electricity in the informal settlements.

ACKNOWLEDGE WHAT SUSTAINS INFORMAL ARRANGEMENTS

LESSON 4

In the absence of access to secure tenure, informal arrangements evolve to enable the construction of homes and the sale of land and housing. However, this evolution is often sustained by entrenched ethnic/tribal rivalries and political patronage that risks creating a system of property rights that parallels the formal system.

In the absence of secure urban land tenure, settlers and landowners (state and customary) have developed arrangements to meet their needs for greater security and certainty. These have provided a sufficient level of tenure to permit people to construct homes on land to which they have no legal title. However, the arrangements that have evolved differ markedly for land held by the state and land held under customary title, as well as across settlements. Actions taken by settlers have varied from:

- » invading land and physically defending their occupation
- » seeking and maintaining political patronage in return for settlement on state land
- » making payments to landowners and retaining all evidence of the payments for the land settled on.

RECOGNISE THE LIMITATIONS OF INFORMAL ARRANGEMENTS AND THE CHALLENGES OF CHANGE

LESSON 5	There needs to be a transition from the informal arrangements into the formal planning, land administration and dispute resolution systems.
LESSON	If utilities are to be provided to the settlements, a user-pays system needs to be devised.

The arrangements that settlers and landowners (state and customary) have developed to provide greater tenure certainty are sometimes at each other's expense and often with little consideration of the effect these arrangements have on the wider community. Informal land arrangements in Port Moresby and Honiara are not sophisticated and are unlikely to evolve naturally to the point whereby they can mitigate the negative consequences of informal urban settlement, such as the lack of access to utilities, overcrowding, poverty and crime.

Addressing the need for utilities would be easier in Honiara than in Port Moresby since the bulk of land settled on in Honiara is owned by the state while the newer settlements in Port Moresby are on land held under customary title.

ACKNOWLEDGE THE POTENTIAL ROLE OF THE PRIVATE SECTOR AND CIVIL SOCIETY

LESSON	The limited capacity of the public sector calls for greater participation by the private sector and civil society in making land available for formal housing.
LESSON	Any sustainable strategy to increase the tenure security of settlers would have to be wholly or partly self-funding and be complied with voluntarily by the majority of settlers.

None of the Pacific island nations have the luxury of time to address the growing problems of informal settlements or have the administrative capacity to enforce compliance with existing legislation pertaining to urban settlements.

Lowering the costs of compliance and providing some targeted subsidies or funding to encourage the private sector/civil society to become involved in providing landowners and settlers with some land administration and dispute resolution services, as is already happening to a limited degree, is one way to increase access to urban land with secure tenure.

The private sector and landowners could be invited to fill the market void for tenure security within the urban fringes for urban housing. A strategy that fulfils the demands of settlers and landowners simultaneously can be both good for business and good for development.

References

- Chand, Satish 2007, '50/50 by 2020: poverty and redistributive politics in post-independence Fiji', *Pacific Economic Bulletin*, vol. 22, no. 2, pp. 22–35.
- ——& Yala, Charles 2006, 'Improving access to land within the settlements of Port Moresby', IDEC Working Papers 07/04, Crawford School of Economics and Government, Australian National University, Canberra, viewed September 2007, <www.crawford.anu.edu.au/ degrees/idec/working papers/IDEC07-04.pdf>.
- Chung, M & Hill, D 2002, *Urban informal settlements in Vanuatu: challenge for equitable development*, report prepared for the Pacific Islands Forum Secretariat and UN Economic and Social Commission for Asia and the Pacific, Pacific Operations Centre.
- Deininger, K, Feder, G, Gordillo de Anda, G & Munro-Faure, P 2003, 'Land policy to facilitate growth and poverty reduction', *Land Reform*, 2003/3, special edn, pp. 5–18, viewed September 2007, <www.fao.org/docrep/006/y5026e/y5026e03.htm>.
- Philibert, J 1988, 'Women's work: a case study of proletarianization of periurban villages in Vanuatu', *Oceania*, vol. 58, no. 3, pp. 161–71.
- URS Australia 2006, 'Solomon Islands Institutional Strengthening of Land Administration Project (SIISLAP II): tenure conversion of temporary occupation licenses—milestone # 8', report prepared for AusAID, URS Australia Pty Ltd, Canberra, 4 August.

RECONCILING CUSTOMARY OWNERSHIP AND DEVELOPMENT

6

The role of the Central Land Council in Aboriginal land dealings

Mick Dodson » Director, National Centre for Indigenous Studies and Professor of Law, College of Law, Australian National University, Canberra David Allen » Specialist Legal Consultant, Indigenous and Human Rights Tim Goodwin » Research Assistant, National Centre for Indigenous Studies, College of Law, Australian National University, Canberra

A snapshot

The role of the Central Land Council in Aboriginal land dealings

In a part of the Northern Territory of Australia, Aboriginal traditional landowners conduct their land dealings through the Central Land Council. A legislative framework has established the structures and procedures that govern dealings in Aboriginal land. More specifically it covers how land use agreements are negotiated and enables the funds generated to be spent to advance long-term economic and social development. Although the particular circumstances of the Central land Council are not seen in Pacific island countries, there are nevertheless important attributes of this intermediary that may appeal to countries in the Pacific region. Most notable is that its functions of advising and facilitating traditional landowners wishing to engage with the formal economy are separate from decision making about land use. The traditional landowners retain their decision-making powers.

Key lessons from this case study are that the institutional framework of the Central Land Council:

- is an effective and workable model for enabling an intermediary body to assist customary landowners to engage in land dealings within the formal economy
- can provide valuable benefits to the social, cultural and economic wellbeing of communities
- » enables landowners to retain control over how to allocate revenue received
- » is well placed to facilitate initiatives for community development
- would need to be scaled down in its size and scope of services for most Pacific island contexts.

Contents

»	BRIEF HISTORY OF ABORIGINAL LAND RIGHTS	110
»	ABORIGINAL LAND TRUSTS, LAND COUNCILS AND LAND DEALINGS	111
»	ROYALTY ALLOCATIONS	112
»	CENTRAL LAND COUNCIL	114
	Representation, geography and demographics	114
	Governance of the Central Land Council	114
»	EXPLORATION AND NEGOTIATING FOR CONSENT	116
»	TANAMI DESERT GOLD MINES AND WARLPIRI EDUCATION AND TRAINING TRUST	118
»	ANALYSIS OF ISSUES	120
	The rights of traditional owners and transaction costs to third parties	120
	Sustainability, succession and renegotiation of agreements	121
	Social and economic development through innovations in agreement-making processes	121
	Gender Terrene and a second a bility	122
	Transparency and accountability	123
	Disputes	125
»	RELEVANCE OF THE CLC MODEL FOR THE PACIFIC	125
»	LESSONS	126
	Establish an institutional framework that leaves land control	
	and ownership with the traditional landowners	126
	Ensure the legislation and resources adequately support a land council arrangement	126
	Consider the value of services an intermediary body can provide	127
	Leave responsibility for managing and distributing returns with the landowners	127
	Mandate that revenues are used for community development	127
»	REFERENCES	128

Brief history of Aboriginal land rights

In 1963 seven clans of Yolgnu in the Gove Peninsular of the Northern Territory of Australia objected to the mining licence the Australian Government granted allowing bauxite to be extracted from their traditional land. They brought a Federal Court case, *Milirrpum & Others v. Nabalco Pty Ltd*, to establish ownership of the land in accordance with traditional Aboriginal law. In 1971 it was found that the Yolgnu traditional relationship to land could not be recognised as a proprietary right under Australian common law. Consequently they did not hold a right to control access and could not prevent—or permit—mining on their traditional land.

The Australian Government commissioned Justice Woodward to conduct an inquiry into appropriate ways to recognise Aboriginal land rights in the Northern Territory. In 1974 Woodward presented his final report. He found that a land base was essential to enable Aboriginal economic development and proposed procedures for claiming, holding and dealing with traditional Aboriginal land. The report strongly recommended that mining and other development on Aboriginal land should proceed only with the consent of the Aboriginal landowners. In his view '... to deny Aborigines the right to prevent mining on their own land is to deny the reality of their land rights'. The right to withhold consent should be over-ridden only if the Australian Government determined that the national interest required it.

Acting on Woodward's recommendations, the first land rights legislation in Australia, the *Aboriginal Land Rights (Northern Territory) Act 1976*, was passed by the Australian Government. In broad terms the legislation provides structures and procedures for Aboriginal people to claim, hold and manage their traditional lands. Just as the control of access to land for mining or any other form of development was central to the origins of the legislation, the right to control access is central to the Act.

Aboriginal land trusts, land councils and land dealings

Under the Aboriginal Land Rights (Northern Territory) Act, Aboriginal land is owned by the group of Aboriginal people with primary spiritual responsibility for the land according to traditional Aboriginal law. The traditional owners hold a communal title that is inalienable; it can be surrendered to the Crown, but it cannot be sold or mortgaged. The title is held by a land trust, which acts purely as a land titleholding body and grants interests to third parties only under instructions from the traditional owners.

The traditional owners hold an almost absolute right to prevent unwanted development on their land. The Australian Government's right to override the wishes of the traditional owners regarding mining projects where the national interest requires it has never been exercised.

The primary decision to lease Aboriginal land for development is made by the traditional owners of the particular land under consideration. They must decide 'as a group', but the final decision may be made in accord with Aboriginal tradition or some other method determined by the owners. All decisions must be made on the basis of informed consent.

To assist traditional owners exercise their rights to claim and manage Aboriginal land, and to broadly advance the interests of Aboriginal people, Aboriginal land councils were established under the Act. The primary responsibilities of land councils include:

- » ascertaining and expressing the wishes of Aboriginal people living in the area of the land council as to the management of Aboriginal land in that area
- » protecting the interests of traditional owners of, and other Aboriginal people interested in, Aboriginal land in the area
- » consulting with the traditional owners of, and other Aboriginal people interested in, Aboriginal land in the area regarding any proposed use of that land
- assisting Aboriginal people within the area of the land council to carry out commercial activities (including developing resources, providing tourist facilities and engaging in agricultural activities)
- » assisting in protecting sacred sites
- » assisting Aboriginal people to make traditional land claims.

Land councils do not make primary decisions about the use of Aboriginal land; they provide information and professional advice to the traditional landowners. If the traditional owners are willing to lease land for development, the land council will act on their instructions in negotiating an agreement with the third party proposing the development. The agreement will specify the terms and conditions for granting a lease over the traditional owner's land to enable the development to proceed.

Land councils hold important secondary decision-making powers in relation to granting a lease for development on Aboriginal land. Before directing the relevant land trust to grant the lease, the land council must be satisfied that, as a group, the traditional owners have given their informed consent—that is, the council must ensure that the group understands the nature and purpose of the grant, that the terms and conditions of the grant are reasonable, and that the group agrees to the terms and conditions. In arriving at its decision to direct the land trust, the land council must also have consulted with any Aboriginal communities or groups affected by the grant, to allow them to express their views.

The Act allows a land trust to:

- » lease Aboriginal land to any person for any purpose
- » grant a 99-year headlease over a township² or
- » grant a mining exploration licence on Aboriginal land.

A lease entitles a person to enter Aboriginal land and use the leased land. It is an offence to enter Aboriginal land without a legal entitlement to do so. Land councils have developed under the Act a permit system for people without a right of entry.

Royalty allocations

When a mining lease is granted over Aboriginal land, the mining company pays royalties on the value of the minerals extracted from the land to the Northern Territory Government and/or the Australian Government. The Australian Government then pays an amount of money equivalent to these royalties from consolidated revenue into the Aboriginal Benefits Account. This money is called 'mining royalty equivalents'.

The Aboriginal Benefits Account distributes these funds in three ways:

- as payments to traditional owners and other Aboriginal people living in areas affected by mining
- » as community grants for the benefit of Aboriginal people living in the Northern Territory
- » as funding for land councils.

² Aboriginal Land Rights (Northern Territory) Act 1976 (Cwth), s. 19A. Recently the Act was amended to allow a 99-year lease to be granted to an entity approved by the federal Minister for Families, Housing, Community Services and Indigenous Affairs or the Northern Territory Chief Minister. While the traditional owners must consent to this grant, the approved entity has a right to sublease the land without the need for further consent (ss. 3AA, 3AAA, 19A(13)–(14)).

Originally the distribution formula under the Act was 30 per cent to traditional owners and other Aboriginal people living in areas affected by mining, 30 per cent to community grants and 40 per cent to land councils. These percentages represent a policy decision to create some equity between traditional owners and other Aboriginal people in the Northern Territory. It dampens 'windfall' gains by traditional owners and potentially disruptive economic imbalances. To some degree, it also dampens the financial incentive for traditional owners to give consent to mining developments.

As the result of an amendment in 2006, 30 per cent continues to be distributed to traditional owners and other Aboriginal people living in areas affected by mining, but land council funding is now determined by the federal Minister for Families, Housing, Community Services and Indigenous Affairs on a performance basis and budget estimates prepared by the land councils, and the remaining funds are spent at the direction of the minister for the benefit of Aboriginal people in the Northern Territory.

This change has taken away any structural incentive for land councils to advocate mining (or other potentially high-profit development) by removing the direct link between land council funding and royalty payments. But this incentive was always small because, if traditional owners found that the land council constantly gave pro-mining advice, the trust built between the two groups would break down. This trust is central to efficient land negotiations and appreciated by mining companies, which understand its breakdown would create a barrier to future mining developments.

The funds from the Aboriginal Benefits Account that are paid for the benefit of traditional owners and other Aboriginal people living in areas affected by mining are directed to land councils, where they are passed on to royalty-receiving associations. These associations also receive any negotiated royalties paid to the traditional owners by mining companies under the terms and conditions of a mining exploration licence. These payments are for the exclusive benefit of traditional owners and are additional to the royalties paid to the Northern Territory Government and/or the Australian Government.

The royalty-receiving associations typically invest a proportion of the funds and distribute the remainder to various subcommittees, which allocate the funds to community projects or individuals. Traditional owners' receipts from non-mining leases are dealt with in a similar way.

Central Land Council

REPRESENTATION, GEOGRAPHY AND DEMOGRAPHICS

There are four Aboriginal land councils in the Northern Territory established under the Aboriginal Land Rights (Northern Territory) Act: the Northern Land Council, the Central Land Council, the Tiwi Land Council and the Anindilayawa Land Council.

The Central Land Council (CLC) represents Aboriginal people in the arid southern half of the Northern Territory. Its area of responsibility covers almost 775 000 square kilometres of remote, rugged and often inaccessible country. The major economic activities are cattle breeding on large pastoral properties, tourism and mining. There are 18 000 Aboriginal people from 15 different Aboriginal language groups in the Central Australia region. These language groups are often sorted into three major language families—Arandic, Ngarrkic and Western Desert.

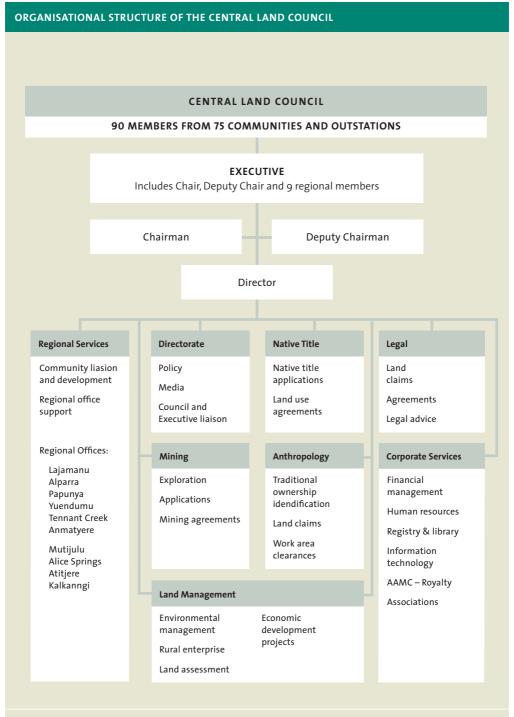
GOVERNANCE OF THE CENTRAL LAND COUNCIL

The CLC is a federal statutory authority under the Aboriginal Land Rights (Northern Territory) Act. It is governed by an elected council of 90 Aboriginal people, both men and women. The CLC area is divided into nine regions and the regional boundaries are based on the 15 language groups within the area. Elections for the council are held every three years and each region is represented by 10 delegates.

The 90 regional delegates elect the chair of the council, deputy chair and members of the Aboriginal Benefits Account Advisory Committee. The Australian Electoral Commission assists in conducting the election. The role of the Aboriginal Benefits Account Advisory Committee is to advise the federal Minister for Families, Housing, Community Services and Indigenous Affairs regarding payments to the Aboriginal Benefits Account. The 10 members of each regional delegation also elect one of their members to the Executive Committee of the council.

At the regional level, Aboriginal communities nominate their 10 delegates on a consensus basis. Apart from providing assistance to transport community members to nomination meetings, the CLC is not involved in what is essentially a community process, managed within family groups. The transparency and validity of the election and nomination processes have not been a contentious issue over the life of the CLC.

The full council meets three times a year and is the supreme policymaking forum of the CLC. The Executive Committee meets approximately monthly and holds extensive powers delegated by the council, making it the most active high-level forum. The day-to-day running of the CLC is managed by the Director, in consultation with the Executive Committee. The Director oversees about 120 staff engaged to carry out the CLC's responsibilities.



Source: Central Land Council.

The CLC has a number of important sections that help to provide policy and legal advice to traditional owners about land dealings. These include:

- » Legal Section, which provides advice to traditional owners on granting leases and mining interests (exploration licences, mineral claims, mineral leases, etc.) and on their terms and conditions
- » **Mining Section**, which deals with exploration and mining applications, liaises with mining companies and assists traditional owners in drafting mining agreements
- » Anthropology Section, which assists in identifying traditional owners and assists traditional owners in protecting sacred sites
- » Land Management Section, which assists traditional owners in identifying, creating and managing opportunities for sustainable economic development on their land
- » Community Development Unit, which specifically assists traditional owners to create and manage community development projects for the benefit of Aboriginal people and communities
- » Aboriginal Associations Management Centre, which provides administrative support to royalty-receiving associations, which hold mining royalties for the benefit of affected areas.

Exploration and negotiating for consent

Exploration and mining on Aboriginal land are subject to both the Northern Territory Mining Act and the federal Aboriginal Land Rights (Northern Territory) Act. The federal Act prescribes the negotiations and processes leading to Aboriginal land use agreements for both the exploration and extraction of minerals.

A mining company wishing to explore for minerals on Aboriginal land within the CLC area must first apply to the Northern Territory Minister for Mines for an exploration licence under the Mining Act. The minister cannot grant a licence until the CLC has given its consent, acting on the instructions of the traditional owners of the affected land.

The process of negotiating for consent is initiated when a mining company submits a written application for a licence to the CLC. The application must provide detailed information, including an outline of the proposed exploration program, period of activity, techniques to be used, and the general effect on the land, including any potential environmental and social impacts. The application must also include estimates of the cost of exploration, the geological potential of the area and proposed payments for exploration activities. When the CLC accepts the application an initial 12-month negotiation period commences. With mutual consent this may be extended by 12 or 24 months. Within this period the CLC must either grant or refuse to grant the exploration licence following consultations with the traditional owners.

The CLC is required to convene meetings with the traditional owners and to consult with other Aboriginal groups affected by the potential grant. The purpose of these meetings is to consider the exploration proposals and the terms and conditions of any agreement. The applicant is entitled to present its exploration proposals at the first of these meetings and to attend the first meeting where the terms and conditions of an agreement are discussed. Many meetings may be required, and the applicant's attendance at subsequent meetings depends on the consent of the traditional owners. The CLC notifies the applicant of the scheduled meetings and associated costs, which are born by the applicant.

In practice these meetings are generally held 'on country' and their number depends on the nature of the proposed activity. The Anthropology Section of the CLC plays a vital role in identifying traditional owners to ensure that all appropriate people are consulted. Meetings and discussions are conducted in accord with Aboriginal culture and may involve separate consultations with men, women and people with primary responsibility for various significant sites within the affected area.

The CLC bears the responsibility of ensuring that the traditional owners understand the nature of the agreement before they either accept or refuse consent to the licence. A meeting of the CLC delegates (or its Executive Committee) must be satisfied that the traditional owners understand the nature and purpose of the terms and conditions of the licence, that the terms and conditions are reasonable and that the traditional owners have agreed with the applicant to the terms and conditions.

The traditional owners may instruct the land council to not grant an exploration licence on some or all of an Aboriginal land trust area that is the subject of an application, which would effectively veto proposed mining on their land. In this event a five-year moratorium on negotiation commences, unless after two years the traditional owners decide to recommence negotiations in certain circumstances.

If consent is granted and ratified by the land council, it notifies the Northern Territory Minister for Mines. Before an exploration licence is granted under the Mining Act, the minister must also consent in writing to the grant and a formal deed of agreement must be signed by the applicant and the CLC.

Tanami Desert Gold Mines and Warlpiri Education and Training Trust

Within the CLC area of responsibility is the Tanami Desert, about 600 kilometres north-west of Alice Springs. It is the site of several gold mines. Over time, exploration and mining agreements have been negotiated between the traditional Aboriginal landowners, the Warlpiri people, and Newmont Tanami Pty Ltd (and its predecessors in title) relating to these mines.

In the exploration agreements, terms and conditions typically require compensation for land disturbance, best industry practice to minimise disturbance to the land and to the owners, development of the social, cultural and economic structures of the owners, access for the owners to use the land in accord with Warlpiri tradition, specification of proposed exploration work, work clearances to protect sacred and significant sites, payments for associated work clearance costs, notification of proposed access to land, and the establishment of liaison procedures between the CLC and the mining company to manage and monitor exploration activities in accord with the agreement.

The various mining agreements in the Tanami Desert were renegotiated and consolidated in 2003. The new consolidated agreement with Newmont Tanami Pty Ltd is for the life of the mines, with provision for further periodic renegotiations.

Mining operations are on a 'fly in – fly out' basis to minimise social disruption. The training given to mine employees contributes to their knowledge and understanding of the need to prevent damage to sites of cultural heritage and significance and helps to ensure cross-cultural awareness. To meet the environmental protection provisions, which reflect the wishes of the traditional owners, operations adhere to best practice initiatives in the mining industry. Among other things, they include minimal disturbance of the ground, no interference with natural water systems, the retention of natural vegetation as well as the rehabilitation of land, prevention of harm to wildlife, and monitoring and reporting on the natural environment and any impacts.

As part of the agreement Newmont endeavours to provide employment and training opportunities for Aboriginal people, especially those who live in the local region. Prevocational training and mentoring programs encourage young Aboriginal people into the industry and Newmont regularly consults the CLC about employment and contracting opportunities. A committee made up of representatives from the CLC, Newmont and the Warlpiri traditional landowners monitors the implementation of the agreement and meets about three times a year, with the cost of meetings funded by Newmont. As part of the process of negotiating the consolidated agreement for the mines, the Warlpiri Education and Training Trust (WETT) was established and Newmont agreed to a significant increase in direct royalty payments, which are paid via the CLC directly to an Aboriginal corporation whose membership is restricted to the traditional owners. Newmont was satisfied that an increase in the royalty payments to the level requested was justified provided that the increase was directed to WETT and subject to the specific requirements identified in its trust deed. This created a synergy with the wishes of the traditional owners expressed at a Warlpiri Triangle Workshop, where a number of community members, particularly women, wanted to use royalty monies for educational purposes. The structure of WETT arose directly from these ideas, which were endorsed by traditional owners.

Kurra³ is the Warlpiri royalty-receiving association for two of the mines. It does not receive royalty-equivalent payments from the federal government, only the negotiated royalty payments from Newmont. It invests 50 per cent of all income and, after administrative costs, applies the balance on the instructions of its members. Kurra is also trustee for WETT, which receives 20 per cent of the negotiated income and the full increase in direct royalties under the consolidated mining agreement. Annual payments to WETT exceed \$1.2 million, although they vary and depend entirely on production and price. These payments are expected to continue for 5–20 years, depending on the life of the mines.

Newmont's connection with WETT is not limited to royalty payments. Representatives of Newmont are included on the WETT Advisory Committee, which also includes the Director of the CLC, education officials and other experts. Newmont is also considering funding an extra staff position in the CLC's Community Development Unit. This unit works with the trustee of WETT to develop programs that the Advisory Committee has recommended. It also coordinates consultations with Aboriginal communities in the area to map their educational and training needs.

The CLC is working with the Warlpiri community to develop longer term projects. Community consultations resulted in priority support for the development of an antenatal and early childhood centre, a youth and media project, a Warlpiri learning community, and a support program for secondary school students. Training support for the delivery of kidney dialysis is also being considered. These projects are now being developed with Warlpiri communities, the Advisory Committee and government agencies. The CLC intends to coordinate WETT projects and blend funds with existing government programs and services.

Analysis of issues

THE RIGHTS OF TRADITIONAL OWNERS AND TRANSACTION COSTS TO THIRD PARTIES

The Aboriginal Land Rights (Northern Territory) Act provides the traditional owners of Aboriginal land considerable power to control development on their land and to negotiate the terms of land use agreements through land councils, such as the CLC. The right of traditional owners to withhold consent and the heavy transaction costs for miners have been criticised as acting as a disincentive and constraint on general economic development, particularly exploration and mining activity on Aboriginal land (Industry Commission 1991; Reeves 1988). Mining companies have indicated that it is more costly to negotiate exploration and mining agreements on Aboriginal land than on non-Aboriginal land (McKenna 1995, p. 303). To some degree, this is a necessary consequence of recognising Indigenous rights under the Act (Industry Commission 1991; Northern Territory Department of Mines and Energy 1984; Oxfam Community Aid 1999; Reeves 1988). ⁴ If Indigenous peoples are to derive benefits from others using their traditional lands, there will be transaction costs associated with negotiating, agreeing terms and providing compensation for land use.

A fog of ideology shrouds much of the past analysis and debate over the Act's provisions and the extent of its transaction costs (Altman 1993; Industry Commission 1991; McKenna 1995, pp. 304, 307; Reeves 1988; Tasman Institute 1993). An ideological or political reluctance to accept that Aboriginal people should be given greater rights to control access to their land has characterised some positions. Advocates on both sides have been suspected of protecting vested interests. In large part the debate is becoming increasingly anachronistic.

During the last fifteen years [before 2005] the legal, policy and institutional environment within which decisions on mineral development take place in Australia has changed significantly. Particularly important ... have been the High Court's recognition of native title in Mabo and the consequent enactment of the Commonwealth Native Title Act 1993, and the development of 'corporate social responsibility' policies. The latter have led major mining companies to negotiate with Aboriginal traditional owners even in the absence of legal requirements to do so. There is now a broad policy consensus in Australia that mineral development should proceed with the agreement of, rather than over the opposition of, Aboriginal traditional owners. (O'Fairchealleaigh 2006, p. 1)

This positive shift in attitude is fully supported by discussions with Newmont personnel during this case study. A senior lawyer, experienced in negotiating with the CLC under the Act, described the legislation as:

... clearly facilitating economic development and providing a well-structured framework for third parties. You know the rules; it works really well. Section 42 provides a whole process. CLC have a dedicated staff who have been there over a long period of time. That makes things easy. It is well funded to support its constituents.

This situation was contrasted with dealings with traditional owners outside the Act where things are less clear: 'it's difficult to know who you are dealing with; there are overlapping and competing claims' by traditional owners who are 'less well resourced'.

The overriding quality of the Act is its *clarity* of procedure. Another Newmont employee, who has many years of experience in negotiating exploration and mining agreements on Aboriginal land, identified the Act as providing 'certainty'. Negotiating the parameters of the mining agreement at the exploration stage 'to broadly map out the concepts' enabled the move from exploration to mining to occur 'reasonably seamlessly; its basic terms are predetermined'. It is 'easier than on land anywhere else. It is their [CLC's] responsibility to identify the traditional owners—to go out and see who the players are. I wouldn't like to contemplate a situation without the Land Council'.

Some frustration was expressed about the bureaucratic process of obtaining individual permits for the flow of Newmont mining staff into and out of the mine sites. But a satisfactory system has been worked out with the CLC. It was thought that 'in other places where Indigenous people' are involved 'an approach similar to the Act should be considered'.

SUSTAINABILITY, SUCCESSION AND RENEGOTIATION OF AGREEMENTS

Mining agreements signed by the CLC remain valid, even if the traditional owners have not been adequately consulted. The right to access and use the interest granted over Aboriginal land is specifically guaranteed. As already noted, it is the CLC's responsibility to identify the traditional owners of communally held land whose land title is held by a land trust. The sustainability, succession and renegotiation of agreements have not proved problematic.

SOCIAL AND ECONOMIC DEVELOPMENT THROUGH INNOVATIONS IN AGREEMENT-MAKING PROCESSES

The mechanisms and procedures of the Aboriginal Land Rights (Northern Territory) Act severely limit any innovative changes to the negotiation process itself. There is greater scope for creativity in terms of the substantive benefits derived from agreements and how they can be used to achieve sustainable social and economic outcomes. The CLC has been quite creative in using land use agreements as a catalyst to draw in external funding, expertise and experience to develop a deeper economic base on Aboriginal land. The renegotiation described earlier illustrates how good social outcomes can come from the negotiation process. The potential to use negotiated royalty payments by Newmont in a constructive, sustainable way through WETT was an important factor in the CLC's negotiations to increase the level of these payments.

The CLC has created a strong link between land use revenues and innovative community development projects managed by Warlpiri traditional owners. WETT has become a vehicle to deliver tangible benefits in areas as diverse as community health, education, training and communications. Agreements are increasingly being used as more precise instruments for supporting the broad aim of building sustainable economic and social benefits. The CLC acts as an intermediary between its constituents and other stakeholders, to consult, coordinate negotiations, provide professional advice and draw in external funds to support community projects.

The Indigenous Pastoral Program also demonstrates the CLC's intermediary role. The CLC was instrumental in establishing the program with the aim of linking grazing licences to economic development on Aboriginal land. In negotiating agreements for grazing licences, the CLC often ensures that, as well as rent and monitoring rights, provision is made for local Aboriginal people to receive employment and training. The structures built on the land are often owned by the traditional landowners at the end of the lease, which provides the basis for a viable pastoral enterprise controlled and operated by traditional owners.

Applications for grazing licences are prioritised by the Indigenous Pastoral Program Steering Committee. A consultant, employed as part of the program, appraises the land, determines the viability of the applications and recommends options for traditional owners and pastoralists. The CLC arranges consultations between traditional owners, the applicant pastoralists and the consultant. The consultant has also trained Aboriginal people in corporate governance.

GENDER

The CLC consists predominately of men. The representation of women is gradually increasing, but remains in the order of 5 per cent. Women are better represented on the Executive Committee, with two women and eight men, currently elected.

Such formal representation does not adequately identify the active role Aboriginal women play in governance. In relation to land use agreements the Executive Committee's role is confined to ensuring that the traditional owners have given informed consent. In determining that consent, women play a key role. The CLC convenes separate meetings with the custodians of women's sites on the land under consideration. While it is frequently said that 'Men speak for country', women's voices are heard and respected in matters that pertain to them specifically and that concern general terms and conditions of agreements.

Women have been particularly active and effective in promoting more sustainable social and economic development financed by land use agreements. It was women in Warlpiri Triangle Meetings who spoke strongly about using royalties for education, acting as a catalyst to WETT. The WETT Aboriginal Sub-Committee comprises seven women and one man. The head of the Community Development Unit notes the consistent and effective role of Aboriginal women in the CLC area in broadening the perspective of the potential benefits that can be derived from Aboriginal land.

TRANSPARENCY AND ACCOUNTABILITY

The CLC reports annually to the federal Minister for Families, Housing, Community Services and Indigenous Affairs with fully audited financial reports. Given the substantial funds administered by the CLC and the exceptional scrutiny of the role of land councils, it is perhaps surprising that financial irregularities have not been a contentious issue for the CLC.

In negotiating land use agreements the CLC enters a potentially litigious area, particularly in the mining field. But this has very rarely been the case because of the transparent processes used. Newmont representatives noted that CLC appeared to have a very trusting relationship with traditional owners and acted as a 'fair broker', consistent with the protection of Aboriginal interests.

For the constituents of the CLC, accountability issues are more centred on transparency in controlling specific projects, using funds and identifying outcomes. This is illustrated by the Uluru Rent Money Project, funded by a significant increase in revenues for the lease of the Uluru-Kata Tjuta National Park negotiated by the CLC. Previous revenues had not left a substantial legacy for Anangu traditional owners. In 2005, the first year of the project, the council nominated three Anangu communities to benefit. The CLC ran a series of day-long community meetings and smaller discussion groups to identify community needs and priorities.

In 2006 broader consultations were held with the traditional owners. This marked the transition of effective ownership of the project from the council to Anangu. Central to the project is community involvement. At every stage—from identification of community needs to project development and implementation—Anangu are in control and direct how their funds are used. The traditional owners make specific decisions about project targets and have developed principles for the governance of the project (Box 1). The principles centre on identifying real needs, equity, transparency in how funds are used, good planning, consistency of purpose and lasting outcomes for their children.

The results of a survey to get Anangu views on the project indicate strong support for it (Box 2). To date rent money has been used to build a radio tower for a remote community, fund community members to receive dialysis in Alice Springs, and build a maintenance

workshop to develop skills and increase employment opportunities. The CLC has used the project to attract additional government funds to build a new community store and to obtain a grant (matching the input of rent money) to repair a church.

BOX 1 » ULURU RENT MONEY PROJECT: PRINCIPLES OF GOVERNANCE

- » Support projects where there is real need.
- » Share the money around—three communities supported each year.
- » Show clearly what the money is being spent on.
- » The project can't do everything.
- » The project is for bringing wide benefit to Anangu traditional owners.
- » Support projects that will last and keep going, not fall down—strong projects.
- » Anangu should stay in the places where projects are funded. Don't leave them and go somewhere else.
- » Provide support for homelands where people are living and for people who want to move back to their homelands.
- » Help Anangu for the future; help the young people.
- Do good planning—have a good, clear concrete plan so you can build on it into the future.
 Plan for the long term so that young people will benefit.
- » Work under the Land Rights Act.

BOX 2 » ANANGU VIEWS ON THE ULURU RENT MONEY PROJECT

In 2007 the Community Development Unit of the CLC surveyed Anangu traditional owners about their views on the progress of the Uluru Rent Money Project. Some of their responses follow.

- » It's a good project; we can help each other. This is a better way with the money. Government can see we are doing good things with the money. This will keep the money safe and government will help more with projects.
- » I really like the project. CLC care, checking up on how things are going, making sure things are happening and people are using the money for what they said they would.
- » Anangu need to be in charge of projects, say what we want and then see the projects through. Get direct involvement from Anangu, not from outside; that way you get outcomes from the money that's around.
- » It's a good project and some people are getting things they want but, for people who are not getting something from this project, some people are sad.
- » In this project we get the money, decide how to use it ourselves and government can see we are using it.
- » This project is really good. It's giving Aboriginal people help. But this project can't do everything. Government's got to put in too.

DISPUTES

As previously noted, the Aboriginal Land Rights (Northern Territory) Act is federal legislation, and the Federal Court of Australia is the ultimate arbiter in any dispute arising out of a decision made under the legislation. Rarely have proceedings been instituted in the Federal Court between traditional owners, the Central Land Council and/or other parties.

In general, disputes are rare. Most disputes between traditional owners are dealt with through cultural processes and dialogue. Often CLC staff are not present when these disputes are resolved. Under the Act the CLC is bound to follow the instructions of traditional owners regarding land dealings. This limits the possibility of disputes between the CLC and traditional owners.

Relevance of the CLC model for the Pacific

The Aboriginal Land Rights (Northern Territory) Act and the basic functions of the CLC are able to be adapted for Pacific contexts. The central element underpinning the success of the CLC is that it is an intermediary *advisory* body between investors and landowners, with traditional landowners retaining the power to make decisions about their land. Traditional owners retain the right to consent to the development of resources on their land and are able to negotiate the terms and conditions of their economic development.

However, in the Pacific context the challenge is to scale down the CLC's structure while retaining its effectiveness. Beyond providing a stable corpus of legal expertise, the CLC's core functions of identifying the relevant traditional owners and confirming they have given informed consent to grant licences or leases over their land should be preserved in any adaptation. These functions not only protect the interests of the owners but also provide security for third parties. The CLC effectively serves as a corporate shield. It enables landowners to meet with third parties directly and to conduct their inside-business privately. It enables third parties to rely on the agreement and interest granted without any need to inquire into background processes.

Importantly for the Pacific, countries will need legislation that prescribes clear representative structures and procedures, together with pathways for negotiating land or marine use agreements and for distributing revenues. Such legislation maximises transparency and provides independent judicial review as an ultimate means of accountability.

Lessons

ESTABLISH AN INSTITUTIONAL FRAMEWORK THAT LEAVES LAND CONTROL AND OWNERSHIP WITH THE TRADITIONAL LANDOWNERS

lesson 1 It is feasible to have an institutional framework where decision-making powers and control over land are retained by the traditional owners and an intermediary body is used to facilitate their engagement with the formal economy.

A key characteristic of the CLC is that it is an advisory body and does not mix its advisory role with decision-making powers. The CLC does not have authority to act on behalf of landowners in negotiating agreements. Instead, all decisions are made by landowners. The CLC's primary role is to facilitate negotiations, provide advice for the benefit of landowners, and ensure that all landowners are fully informed on the nature of the negotiations. Traditional owners are able to retain their cultural decision-making processes, including making decisions as a group.

ENSURE THE LEGISLATION AND RESOURCES ADEQUATELY SUPPORT A LAND COUNCIL ARRANGEMENT

LESSON 2	To duplicate a land council arrangement in the Pacific, the potential revenues from developing the land would need to be taken into account when developing its design and scope of services.		
lesson 3	Any legislation to establish a land council arrangement should be carefully designed to facilitate the particular types of land use agreements anticipated.		

For funding, the CLC depends directly on mining royalties of about \$15 million a year. This arrangement is supported by the mineral prospectivity of the CLC area. In the absence of such prospectivity in the Pacific, an organisation the size of the CLC would not be feasible. Similarly, the highly detailed and prescriptive Aboriginal Land Rights (Northern Territory) Act is designed to facilitate land use agreements for mineral exploration and extraction. While the level of CLC funding may seem large, the majority of stakeholders accept that a well-resourced organisation is necessary for the success of land negotiations with the minerals sector.

CONSIDER THE VALUE OF SERVICES AN INTERMEDIARY BODY CAN PROVIDE

LESSON 4

An intermediary body can provide valuable services for landowners wishing to engage with the formal economy, with benefits for their social, cultural and economic wellbeing.

The CLC provides landowners with a range of valuable services. These include facilitating the negotiation of agreements, recording and identifying traditional owners, and providing professional advice and assistance in managing land for the social, cultural and economic benefit of the Indigenous communities. The services provided by the CLC have delivered good outcomes, with developments contributing to the economic and social welfare of communities, while protecting traditional and cultural interests.

LEAVE RESPONSIBILITY FOR MANAGING AND DISTRIBUTING RETURNS WITH THE LANDOWNERS

LESSON 5

6

By insulating the intermediary body from the proceeds of land use, landowners retain control over distributions, resulting in responsible reinvestments and community programs.

Importantly the CLC has not been granted the authority or power to decide how to distribute funds that accrue to landowners. Instead, proceeds are passed on to royalty-receiving associations, and these are under the control of the landowners. Typically some of the proceeds are reinvested, with the balance distributed to community projects or individuals.

MANDATE THAT REVENUES ARE USED FOR COMMUNITY DEVELOPMENT

LESSON The intermediary body is well placed to provide additional services for community development.

The CLC was never provided with a statutory function to pursue community development as a specific objective, but a specialist unit was created within the CLC to coordinate consultations with Aboriginal communities on community development needs. This has been beneficial. However, there are concerns that the community development objectives fall outside the CLC's mandate. In the Pacific context, it might be preferable to have a statutory provision to promote the use of revenues for sustainable community development. Ultimate control over community development projects and the use of funds for such purposes should remain with the traditional owners.

References

- Altman, Jon 1993, 'Economic dimensions of the High Court's Mabo judgement', Australian Economic Review, vol. 103 (3rd quarter).
- Industry Commission 1991, *Mining and mineral processing in Australia*, vol. 3, *Issues in detail*, AGPS, Canberra.
- McKenna, Siobhan 1995, 'Negotiating mining agreements under the *Native Title Act 1993'*, *Agenda*, vol. 2, no. 3, pp. 301–12.
- Minister for Families, Community Services and Indigenous Affairs 2006, 'Permit system for Indigenous communities', Press release, 12 September.
- Northern Territory Department of Mines and Energy 1984, 'Delays to mineral exploration resulting from the Aboriginal Land Rights Act', Darwin.
- O'Fairchealleaigh, Ciaran 2006, 'Aborigines, mining companies and the state in contemporary Australia: a new political economy or "business as usual?" ', *Australian Journal of Political Science*, vol. 41, no. 1, pp. 1–22.
- Oxfam Community Aid 1999, Inquiry into the Reeves report on the Aboriginal Land Rights (Northern Territory) Act 1976: submission to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, viewed June 2007 http://www.oxfam.org.au/campaigns/submissions/reevesreportlandrights.pdf>.
- Reeves, John 1988, *Building on land rights for the next generation: report of the review of the* Aboriginal Land Rights (Northern Territory) Act 1976, Aboriginal and Torres Strait Islander Commission, Canberra.
- Tasman Institute 1993, The importance of property rights in the economy: issues raised by Aboriginal land rights and the Mabo decision, Melbourne, August.

RECONCILING CUSTOMARY OWNERSHIP AND DEVELOPMENT

Maori landownership and land management in New Zealand

Tanira Kingi » Institute of Natural Resources, Massey University, Palmerston North, New Zealand

A snapshot

Maori landownership and land management in New Zealand

In the late 1800s and early 1900s Maori people lost control of substantial tracts of land. At the same time customary land was systematically 'individualised' and registered using mechanisms designed to break down group ownership. This process led to considerable problems and its legacy remains. In more recent times efforts have focused on finding effective ways to overcome problems such as absentee ownership and title fragmentation by reverting to collective ownership using incorporations or trusts as vehicles. Institutions that support Maori land have given much attention to improving how these incorporations and trusts function.

The experiences in managing Maori land in New Zealand provide important lessons on:

- » the effects of registering customary land
- » the role of good management, administration and governance when formalising structures to support group ownership
- » the importance of collecting quality information
- » the need for access to development finance.

Contents

»	MAORI PEOPLE TODAY	132
»	MAORI LAND TODAY	132
»	CUSTOMARY SYSTEMS OF LANDOWNERSHIP	134
	Rights of access and use	134
	Tribal boundaries and relationships	135
	Enforcing property rights	135
»	INDIVIDUALISATION AND CODIFICATION OF MAORI LAND	136
	Maori incorporations	139
	Trusts	140
»	THE ROLE OF THE MAORI LAND COURT	141
»	BALANCING THE RIGHTS OF DIFFERENT LANDOWNERS	141
»	BALANCING THE OBJECTIVES OF LANDOWNERS	142
»	MANAGING THE BUSINESS OF INCORPORATIONS AND TRUSTS	143
	The lack of business experience	143
	Legal capacity to conduct affairs	144
	Access to credit for land development	144
»	FACILITATING LAND DEVELOPMENT	147
	Ministry of Maori Development	147
	The Office of the Maori Trustee	147
»	LESSONS	148
	Acknowledge the effects of land registration	148
	Support landownership structures	148
	Improve land information	149
	Increase access to credit	149
»	REFERENCES	150

Maori people today

Maori people make up about 15 per cent (or almost 565 500) of New Zealand's population of close to 4.2 million (Statistics New Zealand 2007a, 2007b). In 2006, 87 per cent of the Maori population lived on the North Island, with a quarter living in the Auckland region. In the 1950s, nearly 70 per cent of Maori lived in rural areas but by 2006 almost 85 per cent lived in urban areas.

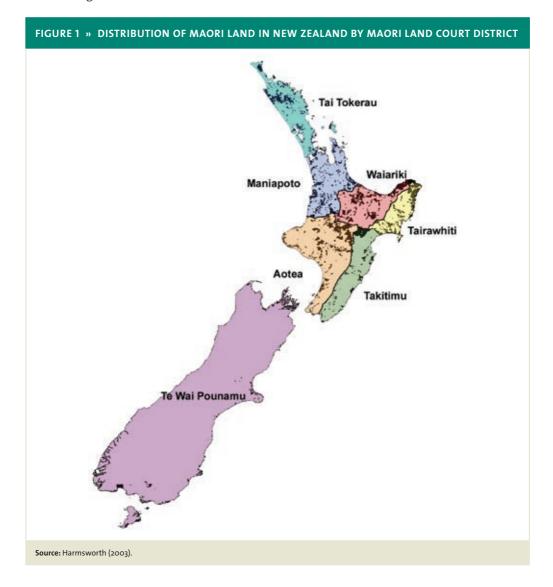
The Maori population is young compared with the total population of New Zealand. Its median age is 22.7 years while the total population's is 33 years. Children less than 15 years old make up 22 per cent of the total population but 35 per cent of the Maori population. In comparison with New Zealand's non-Maori population, Maori in general are more likely to leave school with lower qualifications and be unemployed or employed in low-skilled work. They also are less likely to own their own home and have a greater chance of suffering from physical and mental health disorders (Durie 2005; Te Puni Kokiri 1998).

Maori land today

Maori land has been estimated at about 5.6 per cent of New Zealand's total land area of 26.9 million hectares (Table 1). Its distribution according to Maori Land Court Districts indicates that the largest concentration is in the central and eastern regions of the North Island (Figure 1).

TABLE 1 » DISTRIBUTION OF MAORI LAND BY MAORI LAND COURT DISTRICT				
	Total land	Maori land	Proportion of total land	Share of Maori land
District	hectares	hectares	%	%
Taitokerau	1 732 192	139 873	8.1	9.2
Waikato-Maniapoto	2 156 583	143 388	6.6	9.5
Waiariki	1936 270	426 595	22.0	28.2
Tairawhiti	1169 091	310 631	26.6	20.5
Takitimu	1936492	88 608	4.6	5.9
Aotea	1 284 284	334 207	26.0	22.1
Te Waipounamu	16 715 185	71 769	0.4	4.7
Total	26 930 097	1 515 071	5.6	100.0
Source: Te Puni Kokiri (1996).				

As New Zealand citizens Maori have the right to purchase and own 'general land' (land available on the open land market) while holding interests in their ancestral lands (Maori land). This creates two parallel land tenure systems. Maori land is almost exclusively owned by the descendents of the original owners, handed down through successive generations to the current owners.



Today, Maori land is usually of poorer quality than general land in New Zealand, largely because the most fertile and best suited land for agricultural production was sold or confiscated from its Maori owners in the 1800s or early 1900s. Large areas of Maori land are better suited to forestry or conservation. Maori land is also more likely to be 'landlocked'—an estimated 30 per cent. Owners of such land are unable to access the land and have no option but to lease it to neighbours who have access. There is also a significant area of Maori land in fragile natural environments such as wetlands and coastal areas or bordering lakes and rivers. This land is likely to have less productive potential and has greater restrictions imposed on its use by regional or district government authorities (Harmsworth 2003).

Customary systems of landownership

RIGHTS OF ACCESS AND USE

Customary (pre-European) land 'ownership' systems were anchored in Maori cosmological beliefs that humans were produced from a union between earth mother (*papatuanuku*) and sky father (*ranginui*). The Maori term for land, *whenua*, also means placenta and the term for people, *tangata whenua*, means born of the earth's womb. With these beliefs and the understanding that land is permanent and human life is transient, Maori considered their association with land more in terms of 'belonging to' rather than 'owning'. Given this, in the remainder of this section any expression of ownership is used to refer to the capacity of Maori to specify, enforce and allocate rights of access and use to land.

Prior to the introduction of a system of deed title and registration in 1862, Maori land was owned collectively by the tribe (*iwi*), clan (*hapu*) and extended family (*whanau*). These tribal structures still exist. The largest communal unit in Maori society is the tribe, a political grouping that comprises several clans, each recognising descent from an eponymous ancestor(s). A clan shares social, political and geographic ties and operates as a cohesive unit within the tribe. A clan is made up of several extended families.

Early Maori settlers—estimated to have arrived in Aotearoa (New Zealand) between 500 and 900 AD—established landownership through the custom of bespeaking or naming the land during discovery or exploration (*taunaha whenua*). Ownership was confirmed by settlement and occupation or maintaining the lighted fires (*take ahi kaa*) and subsequently transformed into an ancestral right (*take tipuna*). Other rights to land included right of conquest (*take raupatu*) and right of gift (*take tuku*). In most cases the occupancy, use and protection of any resource were sufficient evidence of ownership and the foundation for individual and group property rights (Kawharu 1977).

Land was held by the kinship group and the rights of the individual to a share of the community's resources were recognised by the allocation of access or occupation rights to those resources. Individual rights to land were established by descent. Within each clan, individuals were selected and trained as priests (*tohunga—tohu* means 'a sign' or 'to see'), who acted as the intermediaries between the world of light (*te ao marama*) and 'beyond in the world of darkness' (*te tua-uri*). Priests also acted as the community's knowledge repository and one of their skills was to recite the genealogical descent of any individual under their charge back in time to earth mother. Even today there are priests with this ability.

Although descent gave individuals the right of access or entry to land, the right of use depended on residence, participation in the community and observance of its rules and standards. This condition was necessary because most individuals had genealogical links with more than one clan or tribe. The right to use the land required sustained effort over generations of occupation. Those that did not contribute to the community and live by its rules were liable to be plundered and their possessions claimed by the tribe.

TRIBAL BOUNDARIES AND RELATIONSHIPS

Land boundaries between tribes and clans are not distinctive or precise. Under the customary system overlapping boundaries and interests in land between clans were common. Although a clan was autonomous and generally associated with a particular land area, in many cases they were mobile. Over time some clans changed location but would maintain ancestral associations with their former locations.

This is why clans are not defined by land boundaries but by genealogical allegiances. It is also why land boundaries were fluid under the traditional system rather than fixed and exclusive. Rights to use land and resources were governed by relationships rather than physical demarcation lines. These relationships defined access points to a particular resource or resources, which could be shared with groups both near and far. Therefore maintaining the rights to use land and resources relied on maintaining good relationships with others rather than on creating defensible or exclusive boundaries.

ENFORCING PROPERTY RIGHTS

Memorising minute details of the land was the Maori method of enforcing rights to land. Tribal elders and priests knew every prominent natural feature and the relationship of these features within the land area. This intimate knowledge was important, particularly where the relationships with neighbouring clans and tribal groups were complex. Every piece of land was named and carefully delineated by natural boundaries and topographical features. Warning signs (*rahui*) were used to demarcate physical boundaries.

Every natural feature of land bore names that spanned centuries of occupation. The ability to recite the place names, traditional food-gathering places, battle sites, burial sites, the genealogical descent from the original founders, and accounts of internal disputes of ownership were all important in determining the rights of the owners. This knowledge was passed down through the generations as proof of ownership. A consequence of the precise knowledge of land boundaries coupled with an equally exact recall of the occupiers' genealogies was the relative ease with which Maori land was codified and registered during the 19th century.

Individualisation and codification of Maori land

Following the signing of the Treaty of Waitangi on 6 February 1840 between various tribal leaders and the English Crown, royal instructions were issued (in 1846) to the then governor to set up a Land Court to bring Maori land under English common law. This was eventually achieved in 1862 and the Native (now Maori) Land Court Act became fully operational in 1865, its main objective being to 'encourage the extinction of (native) proprietary customs'.

Because of the reluctance of Maori to make land available for sale, the Crown brought in the New Zealand Settlements Act 1863, under which land was confiscated by declaring a district and all land within it Crown land (Box 1).

BOX 1 » LAND CONFISCATION AND ALIENATION

The New Zealand Settlements Act passed in 1863 facilitated the confiscation of 526 000 hectares of Maori land in Taranaki (West Coast of New Zealand's North Island). However, three years before this legislation, military intervention facilitated the sale to the Crown of 600 000 hectares of land in nearby Waitara even though the sale was vetoed by the tribe's chief, Wiremu Kingi. This land sale triggered what was to be known as the 'Maori land wars', which resulted in widespread land confiscations, particularly from owners deemed to be 'rebellious' to the Crown. In 1884 the Crown returned 103 000 hectares as Native Reserves (which in 1892 passed to the West Coast Settlement Reserves). These reserves remained in government control until 1976, by which time their total area had diminished to its current area of around 22 000 hectares.

Source: Kingi (2006).

Other mechanisms used by the Land Court to convert native title to the English system included section 23 of the Native Lands Act and the '10 owner rule' that allowed a certificate of title to be issued to no more than 10 owners. This enabled government land purchase officers and other agents of the Land Court to speed up the land codification process. The consequences of assigning title to a small subset of owners resulted in ownership disputes that continue today.

Although it was possible for a certificate of title to be issued to an entire tribe, there was a proviso that the block must exceed 2000 hectares. To prevent group ownership, large areas of tribal land were often divided into several allotments and each lot awarded to no more than 10 people (often from different clans or tribes). Although this procedure admitted more people to the title, it effectively fragmented title to tribal land, a process accelerated by a clause in the Act that deemed all living children of the owners were entitled to succeed equally to Maori land (not just the first born, as under Maori customary rights). After only a few generations, large areas of Maori land had been divided into small unusable portions.

There are currently 26 480 certificates of titles, with an average size of 59 hectares (but ranging from 88 square metres to 522 hectares) and an average number of ownerinterests of 73 per title (but ranging from 1 to 425). Owners can have multiple interests in more than one block of land. This has resulted in owner-interests numbering more than two million and increasing by 185 000 a year with successions (Maori Land Court 2006).

The term 'individualised Maori land' stems from the owners having an individual interest in the land (e.g. a shareholding) that is registered against the land's titles. Maori land is often referred to as 'multiple-owned' because of the multiple owners that have registered individual interests in the land.

The systematic process of confiscation and individualisation led to the current situation where the remaining land held under group or collective ownership constitutes a very small proportion of New Zealand's total land area. The large numbers of owners registered against the land titles have produced a difficult situation that requires expensive and cumbersome management structures to administer the owners' interests.

Individualisation of title has created the need for organisational structures that minimise the problems of fragmented title and absentee ownership. The individual interest that Maori hold in land conflicts with the indigenous relationship with land. Maori social structures were traditionally viewed as the foundations for development. Wealth acquisition, therefore, was acceptable only if the community benefited through cooperative enterprise.

As a result many Maori land structures uphold collective values as a guiding philosophy for culturally centred sustainable economic development. Maintaining cultural identity and traditional values is important in building owner support for development initiatives.

Maori land is governed by the Te Ture Whenua Maori Act 1993. This legislation has three land tenure categories:

- 1 Maori freehold land—with few exceptions, land that has not been out of Maori ownership (accounts for about 98 per cent of all Maori land)
- 2 Maori customary land—land that is held under traditional or customary ownership systems and that has not been registered with a certificate of title and no individual names are registered against the title
- **3** Maori general land—land that had passed out of Maori ownership when a minimum of five owners choose to reclassify it under the administration of the legislation and the Maori Land Court.

The correct term for the majority of Maori land is 'Maori freehold' land. This distinguishes it from customary land and Maori general land, which account for less than 2 per cent of the total area.

Under the Te Ture Whenua Maori Act, Maori incorporations and trusts control around 64 per cent of Maori land. There are 129 Maori incorporations and over 20 000 trusts (see Table 2). The rights to this Maori land are dictated by shares in incorporations and beneficial interests in trusts. They vary, depending on the sizes of their ancestors' landholdings in the original area of land.

Maori land administered by incorporations and trusts is estimated to be worth NZ\$1.5 billion and contributes around NZ\$700 million a year to the New Zealand economy (New Zealand Institute of Economic Research 2003).

TABLE 2 » NUMBERS OF INCORPORATIONS AND TRUSTS BY MAORI LAND COURT DISTRICT				
District	Incorporations	Ahuwhenua trusts	Whanau trusts	
Taitokerau	7	436	1 741	
Waikato-Maniapoto	15	972	1 781	
Waiariki	28	1486	6 716	
Tairawhiti	64	858	2 918	
Takitimu	3	343	544	
Aotea	2	688	1307	
Te Waipounamu	10	418	666	
Total	129	5 201	15 673	
Source: Maori Land Court (2006).				

The transfer (sale or gift) of Maori land is restricted to other Maori with affiliations to the titleholder unless 75 per cent of registered owners and the Maori Land Court approve the transfer. Because of these restrictions, most rights of access and use are granted using leases. Few common characteristics apply to leases of Maori land and, as McPhail (Boast et al. 2004) has pointed out, terms and conditions formulated by negotiation between lessee and owners vary, depending on circumstances and whether a lease is rural, urban, commercial or residential.

MAORI INCORPORATIONS

Most Maori incorporations were established prior to the 1960s, the first in 1910. The owners amalgamated (incorporated) individual titles of Maori land into groups under a single administration and management structure (Box 2) and then elected a group of representatives—a committee of management—to be responsible for developing and managing the incorporated lands.

These days landowners rarely choose to incorporate their lands, but they are still able to do so by making an order to the Maori Land Court. If the court is satisfied that the owners agreed to the order by passing a resolution at a meeting, or if the court is satisfied that the owners of not less than 15 per cent of the aggregate shares in each block of land consent to the order, incorporation can take place. Upon incorporation, the landowners become shareholders and their shareholding is based on their share in the value of land or assets of the incorporation.

The committee of management can have no fewer than three and no more than seven members. Depending on the constitution of the incorporation, elections may be by shares (or poll vote weighted by the size of ownership shares), or one vote per person. If the constitution allows, the committee of management may also appoint members although this practice is not common. The elections are often controversial as family representation is sometimes more important than the governance skills of an individual.

BOX 2 » RECOVERY FROM LAND CONFISCATION—PARININIHI KI WAITOTARA INCORPORATION

Parininihi ki Waitotara Incorporation (PKW) was formed in 1976 to administer the 22 000 hectares of land remaining in the West Coast Settlement Reserves after the government relinquished control. The area consisted of around 300 West Coast leases, the majority to non-indigenous farmers. As the leases expire PKW has first right of refusal and to date the incorporation has acquired 32 leases, most functioning dairy farms. In recent years these farms have been amalgamated into more scale-efficient production units with significant capital to refurbish dairy sheds and staff houses. The incorporation has around 20 dairy farms operating under 50:50 sharemilking contracts that are managed by PKW Farms Ltd., responsible for the incorporation's NZ\$50 million farming interest in Taranaki.

Source: Kingi (2006).

Incorporations must establish and maintain share registers—an official record of shareholders, their shares and contact details. Maintaining a share register is time consuming and expensive, especially for large incorporations with many thousands of shareholders. It is not uncommon for a register to have as much as 50 per cent of its information obsolete and consequently large amounts of unclaimed dividends. This is symptomatic of the considerable fragmentation of shareholdings.

TRUSTS

The trust is the most common ownership structure used by Maori landowners to administer their land interests. The Te Ture Whenua Maori Act has five categories of trust and these are subject to the general law of trusts. Each trust requires:

- » land vested in the trust to be trust property
- » a trustee to have control of the property
- » beneficiaries.

The most common category of trust is the Whanau trust; more than 15 000 have been set up (Table 2). Its main use is to maintain family interests in land by halting further succession and fragmentation of title. Each trust is established with family and extended family members, who are the beneficiaries of the trust. Under the Act a Whanau trust's purpose is to promote the social, cultural and economic welfare of the descendents of original owners named in the trust order.

The category of trust that administers the largest area of Maori land is the Ahuwhenua trust (which translated means 'fruits of the land'). Under an Ahuwhenua trust the land, along with any encumbrances the title carries, is vested in trustees. Many commercial provisions available to incorporations are now available to Ahuwhenua trusts; so there is little to differentiate the commercial activities of the two structures. For example, both structures can establish a subsidiary limited liability company to gain greater commercial freedom and credibility.

The three remaining trust categories—Kaitiaki, Whenua Topu and Putea—control land that forms less than 2.5 per cent of Maori land. Their functions under the Maori Land Act are:

- » Kaitiaki trusts—to administer land interests belonging to individuals unable to manage their affairs
- » Whenua Topu trusts—to administer land for which individual interests have been replaced by group ownership
- » Putea trusts—to administer non-economic interests.

The role of the Maori Land Court

The Maori Land Court is a central institution for Maori land and is the most important repository of Maori land information. It is responsible for maintaining extensive title and transaction records, including records that date back to its establishment as the Native Land Court in 1862. While it performs an important function it has been severely criticised for its role during the late 1800s and early 1900s in registering and alienating Maori land. Difficulties have arisen from the court's failure in its early years to identify rightful owners or record the basis for selection or settlement. At the time of determining ownership it was common for individuals to submit more than one name under various aliases (McHugh 1993). This is frustrating for trust administrators and costly to incorporations in charge of maintaining ownership records.

In recent years the court has been striving to find practical solutions that will advance landowner interests. This is crucial when landowners feel isolated from the decisionmaking process and are unable to voice their opinion or influence activities.

The court has also been more proactive in facilitating the better use of Maori land by improving the quality of information available to landowners. This work includes the Maori Freehold Land Registration Project, which aims to register all outstanding Maori freehold land titles. Currently, less than 60 per cent of Maori land titles are registered. Registration will enable Maori landowners to obtain a provisional or fully registered title. A provisional title enables landowners to use their land as collateral, which increases development options.

The court has also established Maori Land Online (Ministry of Justice 2005). This gives users access to up-to-date information about blocks of land or incorporations and trusts, including ownership structure, titles, names of trustees or committees of management, and lists of shareholders.

Balancing the rights of different landowners

The vast majority of owners in large incorporations and trusts do not live on their land or derive income from the land apart from dividends or grants. Absentee owners fall into two broad categories: those living close to the block of land and those living out of the district. Those living close are known as *ahi kaa*—those who keep 'home fires burning'. This refers to traditional Maori landownership systems where land was deemed to be 'owned' when it was proven to be occupied, successfully defended over time and recognised by neighbouring clans and tribes. Those living close therefore hold an important position in Maori society. In addition to acting as customary guardians (*kaitiaki*) of land they are usually relied on by landowners to maintain the community houses (*marae*) of the incorporation or trust.

Under Maori land legislation, all beneficiaries of incorporations and trusts must be treated equally. This means that Maori with shares in incorporations and beneficial interests in trusts, regardless of residence, have the same voting rights at annual or special owner meetings. This creates tensions, as resident landowners see themselves as entitled to have more say.

A related issue is the rights of minor shareholders relative to major shareholders. Under the one-vote-per-person decision-making procedure commonly used by Maori trusts and incorporations, high numbers of minority shareholders tend to out-vote small numbers of majority shareholders (Maori Land Tenure Review Group 2006). An inherent bias in governance is therefore created towards the small (or minority) interests. The effect is a conservative, risk-averse attitude toward development proposals.

Under the poll vote system the interests of minority shareholders (incorporations) or beneficial owners (trusts) bear little weight compared with the interests of a small number of major shareholders or beneficial owners. Many larger incorporations and trusts have applied to the Maori Land Court to alter their constitutions and trust orders so that major decisions requiring owner approval are supported by the wishes of major shareholders.

Balancing the objectives of landowners

The interaction of landowners with incorporations and trusts varies markedly, depending on the number of owners and the spread of owners within New Zealand and overseas. Annual meetings are the main vehicle for communicating with owners, although many larger structures produce regular newsletters to inform shareholders of key activities and events.

The challenge for trustees and committee members is to balance sociocultural, economic and environmental objectives. The cultural values of the landowning community usually influence decisions significantly because land is a source of identity and the centre of cultural pride. But land also plays an important role in economic advancement, particularly as a source of capital. Economic objectives are therefore juggled alongside cultural values.

Empirical research of Maori land structures (incorporations and trusts) in Northland in 1997 found landowners had high expectations that such structures would actively support tribal development by providing community grants and generating employment opportunities through investing in local businesses. A structure's ability to meet its social and cultural objectives was seen as having as much importance as maintaining commercial viability (White 1997).

Managing the business of incorporations and trusts

Maori incorporation and trust structures that aspire to succeed commercially face a number of constraints.

THE LACK OF BUSINESS EXPERIENCE

One constraint is the lack of business experience among elected members and trustees. Appointments to committees or trusts are made primarily from within landowning groups, where commercial acumen is generally limited. They also commonly reflect the political interests of families keen to maintain control of the structure.

Appointments of general managers or chief executive officers are becoming more common among structures large enough to justify the cost. Atihau-Whanganui Incorporation (Box 3) recently restructured and appointed a chief executive officer.

This incorporation is one of the largest in New Zealand and makes a major contribution to the local community (Aotea Maori Land Court District). One reason for the restructure was recognition that 97 companies listed on the New Zealand stock exchange were smaller than Atihau-Whanganui Incorporation. Put another way, the incorporation is larger than 60 per cent of listed companies (Atihau-Whanganui Incorporation 2007, pers. comm., 30 March; Ministry of Maori Development & Federation of Maori Authorities 2004, pp. 56–9).

BOX 3 » CORPORATE RESTRUCTURING OF MAORI ORGANISATIONS

Atihau-Whanganui Incorporation was formed in 1970 and is located in the Aotea Maori Land Court District. It has a total land area of 40 800 hectares. As of 2007 it controls around 20 000 hectares (the remainder being in leases) and has around 40 employees.

The incorporation's aim is to resume all leased land when the leases expire. The incorporation has approximately 6500 shareholders and its core business activity is sheep and beef farming. It also has around 2000 hectares in commercial forestry.

In 1995 the incorporation produced its first strategic plan and in 2003 it restructured and created three subcommittees—farming, forestry and finance (including general administration). In 2006 the incorporation received a \$3 million regional development grant to buy out the lease of a dairy farm and pay for improvements. In the same year it employed a chief executive officer, who started in May 2007. This officer is a shareholder and has extensive commercial experience in New Zealand and internationally. A key function of the chief executive officer is to develop investment strategies to consolidate the current farming business and investigate alternative investments to diversify the incorporation's activities.

LEGAL CAPACITY TO CONDUCT AFFAIRS

Another constraint facing Maori land structures is the uncertainty about their legal capacity to conduct their affairs. Trusts and incorporations are subject to the scrutiny of the Maori Land Court. While not commonly exercised, the court has full powers to remove trustees and committees of management. More important, however, is the effect the Land Court's jurisdiction can have on the perceptions of financial institutions and business partners.

Alternative legal structures such as limited liability companies are being used more by Maori trusts and incorporations to separate landownership from business activity (Box 4). In recent years the Maori Land Court has actively promoted this type of company structure.

BOX 4 » JOINT ARRANGEMENTS BETWEEN MAORI ORGANISATIONS

Waerenga East and West Incorporation was the first incorporation in the Te Arawa region (Tairawhiti Maori Land Court District). It has a land area of 554 hectares and approximately 800 owners. In 1996 the decision was made to form a dairy production joint venture with a neighbouring incorporation—Pukahukiwi Kaokaoroa Incorporation—with a land area of 214 hectares. As a result, in 1996 Waerenga-Pukahukiwi (Wae-Kiwi) Ltd was formed as a dairy company milking around 1500 cows a year.

While land titles remained with the incorporations, the company's assets included grazing leases, part ownership of the dairy herd and ownership of the milking shed. A board of directors was formed with representatives from both incorporations and an independent director was appointed. A sharemilker was employed to produce milk for Wae-Kiwi. The joint venture was an innovative way to raise capital on securable assets (overcoming the constraints of using Maori land as collateral) and increase the assets and cash flow of both incorporations. Just as importantly the joint venture expressed an important Maori value—tribal connections (*whanaungatanga*)—because it led to the building of relationships with the landowners of the neighbouring block.

Whangara B5 Incorporation is in the Tairawhiti Maori Land Court District and controls 2960 hectares in sheep and beef production. Its neighbour, Pakarae Incorporation, has just over 2000 hectares. In 2006 a partnership was formed between the two incorporations to form a limited liability company—Pakarae-Whangara B5 Partnership. As in the Waerenga–Pukahukiwi case a board was formed with provision to appoint independent directors. This was a key factor in gaining support for the partnership from shareholders of both organisations. Te Puni Kokiri covered part of the costs of forming the partnership and has promoted the structure of the new company and the process of forming the partnership within the region.

Ministry of Maori Development & Federation of Maori Authorities 2004, pp. 14–17; Committee of Management, Whangara B5 Incorporation 2007, pers. comm., 13 April.

Sources: Waerenga East and West Incorporation 2007, pers. comm.

A company allows commercial objectives to be separated from sociocultural objectives and provides a way for internal performance checks to be carried out. As a result, a company's commercial goals are clearer and its management more transparent. Kingi (2005) provides a description of alternative structures established by incorporations and trusts.

ACCESS TO CREDIT FOR LAND DEVELOPMENT

A major constraint facing Maori land structures stems from their difficulties in accessing credit. Several factors contribute to this, including:

- » multiple owners
- » the sale of land being restricted to other members of the landowning group or to other Maori with affiliations to the titleholder
- » owners and those involved in managing Maori land not having current and comprehensive knowledge of the requirements of financial institutions
- » financial institutions not having full information about the opportunities and possibilities of the Maori land tenure and administration system
- » the perception among financial institutions that lending risks are higher due to restrictions on trading land
- » the costs of loan recovery.

Access to credit has improved. However, changes to legislation and greater political will are still required to achieve, for example:

- » better information and education among owners and land managers about the availability of finance and the requirements of financial institutions
- » more facilitation services to help shape proposals
- » clear definitions of the powers of trusts and incorporations to provide security for debt
- » greater financial cooperation from third parties, such as other Maori authorities, who could assist in co-funding or in developing business cases and lending proposals.

Some Maori incorporations have demonstrated how venture capital can be raised by establishing a limited liability company and management regime that meets the requirements of financial institutions (Box 4). They have also shown how a commercial venture can succeed when decisions are made on a sound commercial basis as well as traditional cultural values. In recent years there have been instances where larger Maori incorporations and trusts have lent development funds to a smaller structure or become an equity partner. The 'big brother funder' approach is based on the rationale that Maori may be better able to detect default risks than 'mainstream' financial institutions. Also the cultural stigma resulting from defaulting on payments to a Maori lender (loss of *mana*) may have greater disciplinary influence than would a purely commercial debt (New Zealand Institute of Economic Research 2003, p. 88).

Facilitating land development

MINISTRY OF MAORI DEVELOPMENT

The Ministry of Maori Development or Te Puni Kokiri (previously the Ministry of Maori Affairs) is the lead agency for facilitating land development. It works closely with the Maori Land Court and the Maori Trustee to generate policy on Maori land use and development. The ministry has 10 regional offices throughout New Zealand, with many offices employing staff dedicated to land development. In 1997 the ministry introduced the Maori Land Facilitation Service to help Maori increase the commercial use of their land.

Other recent initiatives are focusing on:

- » improving or designing new governance structures
- » improving information on Maori land
- » increasing education and training for Maori to improve governance, management and administration
- » identifying and amending constraints associated with tenure
- » enhancing economic opportunities for Maori land.

THE OFFICE OF THE MAORI TRUSTEE

The role of the Maori Trustee, as outlined in the Maori Trustee Act of 1953, is to act as sole agent for owners of Maori land who do not have an ownership structure. The Maori Trustee is appointed by the Maori Land Court. Under the legislation Ahuwhenua trusts can appoint the Maori Trustee to carry out work for them. This is common where owners are unable to administer their trust affairs.

The Office of the Maori Trust is integral to the institutional framework available to help Maori manage and derive benefit from their lands (Maori Trustee 2005; 2007, pers. comm., 18 May). The office currently administers 135 400 hectares valued at approximately NZ\$180 million (Sanderson & Goodchild 2003). In recent years it has initiated projects to improve access to and use of Maori land by owners. This has included facilitating the process of obtaining landowner approval to establish a joint venture kiwifruit orchard in Te Kaha (Office of the Minister of Maori Affairs 2006, p. 7) and arranging legal access to Maori land in Kawhia and Pukeatua (Maori Trustee 2005, p. 10).

Lessons

ACKNOWLEDGE THE EFFECTS OF LAND REGISTRATION

lesson 1	A customary land registration system that focuses on individualisation rather than group ownership can give rise to considerable problems.
lesson 2	Programs of registration that are not well accepted or inaccurately represent true ownership may lead to problems that continue for decades and even centuries.

Maori land registration saw the transfer of the majority of customary land into deeds of title during the registration period in the 1800s and early 1900s, resulting in widespread land loss and alienation. The individualisation of Maori title has caused major problems for landowners and administrators. It has produced fragmented titles, absentee owners and conflicts between major and minor shareholders. It has also resulted in registration records becoming obsolete as people fail to update them. There are now two million owners recorded across 26 500 titles. Individual title and ownership of tribal lands is unacceptable to many Maori, who have explored ways to revert to 'group' or 'collective' ownership.

SUPPORT LANDOWNERSHIP STRUCTURES

LESSON 3	Incorporations or trusts can be effective mechanisms to represent group ownership of customary land.
lesson 4	Training programs or advisory services are needed for managers of incorporations or trusts, due to their complexity and the specialised skills needed to run them.

Maori landownership structures have evolved, with incorporations and trusts becoming the vehicles for reversion to group ownership. Improvements have been made so that they are being used effectively as mechanisms for group ownership. But these structures have had limitations, a major one being their managers' lack of skills to adequately govern, manage and administer the structures.

IMPROVE LAND INFORMATION

LESSON

Weaknesses in the quality of land information have adversely affected policy development and had a negative impact on investors.

For many Maori, quality land information has been difficult and expensive to obtain. For the past two decades commentators have highlighted the importance of accurate and reliable land information for investment and policy development. Recognising this, the New Zealand Government—through agencies such as Te Puni Kokiri and the Maori Land Court—has invested heavily in recent years to improve the accuracy of information on Maori land that is available to the general public and landowners. Even so, there is still debate about the actual area of Maori land. Harmsworth (2003) puts it at 800 000 hectares or 60 per cent of the current estimate of the Maori Land Court.

INCREASE ACCESS TO CREDIT

Individualised registration does not automatically lead to access to finance.

Despite the individualised registration of Maori land, the trusts and incorporations continue to have considerable difficulty gaining access to credit. This is due, in part, to the highly fragmented ownership of the land and weaknesses in information flows between the landowner organisations and financial institutions. But a key reason is the lack of a market for Maori land as a result of restrictions on its sale.

References

- Atihau-Whanganui Incorporation 2006, *Annual General Meeting 2006*, Atihau-Whanganui Inc., Whanganui.
- Boast, R, Erueti, A, McPhail, D & Smith, NF 2004, *Maori land law*, 2nd edn, LexisNexis, Wellington.
- Durie, M 2005, Ngā tai matatū: tides of Maori endurance, Oxford University Press, Melbourne.
- Harmsworth, G 2003, *Maori perspectives on Kyoto policy: interim results—reducing greenhouse gas emissions from the terrestrial biosphere* (C09X0212), research report no. LC0203/084, Landcare Research, Palmerston North.
- Kawharu, IH 1977, *Maori land tenure: studies of a changing institution*, Oxford University Press, London.
- Kingi, TT 2005, 'Where are all the Maori farmers?', *Journal of the New Zealand Institute of Primary Industry Management Incorporated*, vol. 8, no. 2, pp. 14–16.
- ——2006,'Indigenous agricultural commodity producers: case studies from New Zealand, Canada and Fiji', proceedings of the International Indigenous Business and Entrepreneurship Conference 'Fostering Indigenous Entrepreneurship', Albuquerque, New Mexico, 19–22 June, viewed August 2007, http://iibec.mgt.unm.edu/proceedings.asp.
- McHugh, P 1993, 'A role for the Maori Land Courts in the resolution of Waitangi claims?', Journal of New Zealand Law, June, pp. 229–32.
- Maori Land Court 2006, 'Introduction to the Maori Land Court', document presented to the Hui Taumata Land Tenure Review Group, Wellington.
- Maori Land Tenure Review Group 2006, *Maori land tenure review 2006*, Hui Taumata Action Taskforce, Wellington.
- Maori Trustee 2005, *Report of the Maori Trustee*, viewed 1 May 2007, http://www.tpk.govt.nz/about/structure/mto/annual_rep.asp.
- Ministry of Maori Development & Federation of Maori Authorities 2004, *He Mahi, He Ritenga He Whakatinana i te Turua Po*, Te Puni Kokiri, Wellington.
- Ministry of Justice 2005, 'Update on the Maori Freehold Land Registration Project', *Te Pouwhenua* (Te Kooti Whenua Maori, Wellington), issue 31, December, pp. 3–6, viewed August 2007, http://www.justice.govt.nz/maorilandcourt/pdf/Te-pouwhenua-31.pdf>.
- New Zealand Institute of Economic Research 2003, *Maori economic development: te ōhanga whanaketanga Maori*, New Zealand Institute of Economic Research, Wellington.
- Office of the Minister of Maori Affairs 2006, *Maori land development: the way forward*, Wellington.
- Sanderson, K & Goodchild, M 2003, *Review of the Maori commercial asset base—2001: report to Te Puni Kokiri*, no. 4031, BERL, Wellington.

- Statistics New Zealand 2007a, *Census 2006: QuickStats about Maori*, viewed 30 April 2007, http://www.stats.govt.nz/census/2006-census-data/quickstats-about-Maori/2006-census-data/quickstats-about-Maori/2006-census-data/quickstats-about-Maori-revised.htm.
- 2007b, Top 20 most requested statistics, viewed 30 April 2007, http://www.stats.govt.nz/top-20-stats.htm>.
- Te Puni Kokiri 1996, *Maori Land Information Database*, Ministry of Maori Development, Wellington.
 - ——1998, Maori towards 2000, Whakapakari: Tatauranga Taupori no. 1, Ministry of Maori Development, Wellington, viewed 30 April 2007, http://www.tpk.govt.nz/Maori/population/2000trend.pdf>.
- White, P 1997, 'How do Maori landowners judge whether the management of Maori incorporations is successful?', research report, Massey University, Palmerston North.

RECONCILING CUSTOMARY OWNERSHIP AND DEVELOPMENT

8

Absentee landowners in the Cook Islands: consequences of change to tradition

> Ron Crocombe » Professor Emeritus, University of the South Pacific Makiuti Tongia » Secretary, Ministry of Culture, Cook Islands Tepoave Araitia » Cook Islands Land Consultant

A snapshot

Absentee landowners in the Cook Islands: consequences of change to tradition

About 90 per cent of Cook Islanders do not live in the Cook Islands. Yet many of these people retain rights over land even though some of these absentee landowners were born overseas and have never set foot in the Cook Islands. This is due to changes to customary practice, under which rights to land were largely contingent upon the person being resident on the land and a participant in the community. The change occurred when customary land was converted and registered as native freehold and when a legal ruling gave all children the right to inherit equally. This has also resulted in other difficulties associated with both fragmented ownership of land and substantial cross-ownership.

The experiences of Cook Islanders provide some important lessons about land tenure, including the need for:

- » regular reviews of land tenure laws to ensure they meet the current and expected needs of the people
- » legislation and regulations to help protect the rights of resident landowners
- » careful design of land registration systems to prevent fragmentation of ownership
- effective mechanisms to allow landowners to consolidate their landholdings
- » mechanisms to make available low-cost residential land in commercial centres
- sufficient administrative capacity to support registration.

Contents

»	INTRODUCTION	156
»	BACKGROUND TO THE CHANGING LAND TENURE SYSTEMS	157
»	CUSTOMARY SYSTEMS FOR HANDLING THE LAND RIGHTS OF ABSENTEE OWNERS	159
»	CURRENT LEGAL AND ADMINISTRATIVE ARRANGEMENTS FOR ABSENTEE OWNERS	160
»	LEGAL FRAGMENTATION OF TITLE	161
»	LAND RIGHTS EXERCISED BY ABSENTEE OWNERS	162
»	ATTITUDES TO ABSENTEE LANDOWNERS' RIGHTS	163
»	THE IMPACT OF THE EXPATRIATE RENTAL MARKET AND THE UNIT TITLES ACT	165
»	SECURITY OF ACCESS TO LAND AND FINANCE	166
»	THE EXPERIENCES OF OTHER COUNTRIES OF THE PACIFIC	167
»	LESSONS Periodically review and adapt land tenure laws Legislate effectively for absentee landowners Avoid fragmented title to customary land Establish procedures to address land fragmentation, absentee ownership and development Address land issues facing people moving to commercial centres	168 168 168 168 169 169
»	BIBLIOGRAPHY	170

Introduction

Cook Islanders are confronting a problem common to many countries in the Pacific their land tenure arrangements are not evolving quickly enough to meet the rapidly changing nature of their societies.

The tenure systems of the Cook Islands and most other Pacific island countries evolved to meet the needs of societies in which:

- » population numbers were relatively stable
- » people depended on land for most subsistence
- » most people spent most of their lives in one location
- » land was not monetised or traded.

The social and economic context in which these tenure systems operate has changed radically, but few systems have adapted to adequately provide for the current or future needs of the people. This is particularly so in the smaller nations and territories, including the Federated States of Micronesia, French Polynesia, the Marshall Islands, Palau, Niue, Samoa, Tonga and Tuvalu, where people migrate to take advantage of opportunities abroad.

The Cook Islands provides a classic example of social and economic conditions changing faster than its tenure systems. There are an estimated 130 000 Cook Islanders, the vast majority of whom retain traditional rights to their customary lands. The problem is that about 90 per cent live or reside in other countries. Of those who continue to live in the island group, many do not live on islands where they have inherited rights.

Of those who live outside the country but retain rights to ancestral land in it:

- » 65 000 live in New Zealand, most migrating since 1945
- » 40 000 live in Australia, most migrating during or after the 1980s
- » 9000 live in Tahiti, most being ancestors of people who migrated in the late 1800s, the early 1900s or the 1940s
- » others are scattered, mostly in Europe, Asia and the Americas.

The rights of these absentee landholders are causing social and economic problems for the Cook Islanders who live in their country. The problems are exacerbated by the fragmentation of title, under which hundreds of people have rights to blocks of land no bigger than an average house block.

From some of these problems can be drawn lessons for other Pacific island countries facing similar issues. The main focus of this case study is Rarotonga, the largest island in the Cook Islands. It has an area of 67 square kilometres, 28 per cent of the island group's total land mass, and generates probably well over 90 per cent of the country's formal economic output. The main industries—tourism, international finance and government—are based there.

Background to the changing land tenure systems

The traditional tenure systems of the Cook Islands were underpinned by three factors:

- » Most landholders lived on or near the land for which they had rights and were likely to use it for building, gardening, hunting, gathering and other activities.
- » A landholder's right was primarily not to the land, but to membership of a descent group. This descent group held the main rights to the land and allocated the rights among its members.
- » Decisions about land were a matter for senior men of the relevant level in the family, clan or tribe. These senior men were responsible for caring for the rights and needs of all members, including women.

In 1823 the first mission arrived in the Cook Islands. In 1892 a centralised government formed under a British protectorate. The events that led to major changes in land systems began in 1901 when Britain handed the administration of the Cook Islands to New Zealand; it attached several conditions, two of which are relevant to this study.

- There would be no sale of land because Britain was dissatisfied with the New Zealand Government's handling of Maori land. This is why all Cook Islanders, including those living abroad, have land rights.
- 2 All Cook Islanders must automatically become New Zealand citizens. This is why so many Cook Islanders live in New Zealand, where incomes are higher and where modern facilities are available. In 1906 an agreement between Australia and New Zealand to allow citizens to move freely between the two countries meant Cook Islanders could live in Australia, where incomes are higher than in New Zealand.

In 1902 New Zealand set up a Land Court for the islands. The court's responsibilities were to:

- » resolve land disputes and record who owned land
- reduce chiefly powers over land »
- increase the commercial productivity of the land available to Cook Islanders »
- identify land surplus to indigenous needs to lease to Europeans to generate income. »

The last responsibility reflected the New Zealand Government's belief that the native population was dying out—in 1830 there were 7000 Rarotongans; in 1900 only 1600—and its expectation that Europeans would farm tropical produce for export to New Zealand.

The authorities adopted a policy of leasing land to Europeans while leaving ownership in the hands of Cook Islanders. Native land in the Cook Islands cannot be bought or sold, except to the government for public purposes. This is the case whether the land is registered as native freehold title or is land managed under customary practices.

In 1957 the Land Court, sitting as an Appellate Court, made a ruling that would significantly affect land tenure in the Cook Islands. It ruled that all children inherit equally in all registered native lands of all ancestors. In effect this meant that every person would inherit an equal share in all the lands of both parents, all four grandparents, all eight great-grandparents and so on. The court, conducted by visiting judges who knew neither the language nor the culture, based its decision on 'the principle of Maori custom that all children inherit equally' (Appellate Court Minute Book 3, p. 10) when no such custom ever existed in the Cook Islands. The ruling, which became binding on all Land Court decisions thereafter, legally destroyed custom on registered native lands and resulted in ever-increasing fragmentation of ownership. Many now accept this error as 'custom'.

The growth in population and the decline in the area of available land have also had an impact on land tenure. In 1902, when the Land Court was established, the population of the Cook Islands was almost half of the current resident population of about 15 000. While the population continues to grow the area of accessible land is shrinking as result of infrastructure developments such as roads, airports, ports and other public facilities, as well as commercial developments. With 90 000 tourists arriving each year, mostly in Rarotonga, tourism places major demands on available land and infrastructure.

The other major issue has been the mobility of the population, both between islands and internationally. In the early 1900s the only way to arrive or leave the Cook Islands was by ship, and sailings were few. Today, because Cook Islanders have more transport options and free entry to Australia and New Zealand, and visa-free entry to Europe, the United States and much of Asia, they are the most mobile of the Pacific islanders—as evidenced by the 90 per cent living and residing in other countries.

As a result of all these influences, there is now no consensus on what constitutes custom and how Cook Islanders should deal with land tenure issues confronting them, particularly the combined impact of absentee landowners and fragmented land rights.

The Cook Islands Act of 1915 states that Cook Islands custom shall apply in relation to land. Although the Act remains, the term 'custom' is still undefined. This is probably just as well because it varies between islands and over time. High chiefs (House of Ariki 1970, 1977) and other chiefs (Koutu Nui 1991) have attempted to define custom, but a common definition has never been adopted by the government or the Land Court.

Customary systems for handling the land rights of absentee owners

Customary systems had ways to handle the rights of absentee landowners. Several follow.

- At marriage, a woman usually left her father's village to live in her husband's village. Her rights from her family of origin were suspended but could be reactivated if she became widowed or divorced or returned to live in her family's village. A woman commonly sent one child, usually a boy, to live in her village of birth. The child would then inherit primary land rights there and did not usually activate rights where the father's family was located. The woman's other children, living in their father's village, did not normally exercise rights in their mother's family lands. Rarely did a child activate rights in the land of both parents at the same time.
- » Men absent from one island for a long time rarely returned. When a man married on another island he was unlikely to return to his birth island, although he may send one child there to maintain the blood–land connection.
- » Absentees wishing to return to their land had to seek approval from his or her descent group. It was conditional on relations being cordial and sufficient land being available. Land rights could not be exercised in absentia. A case that illustrates this dates back to pre-Christian times when Makea Te Ratu gave his wife to another chief. Her son by Makea Te Ratu was raised by the new chief. As an adult he returned to his father's land but had to fight to reclaim land from his father's clan. This case shows that even senior children in the male line did not retain automatic entitlement. Likewise, when a later Makea descendant was banished but the victors later relented and allowed him back, the victors decided his land boundaries.
- » People banished from their traditional land for serious crimes (*akata'a*) were not accepted back, nor were their descendants. Those banished for lesser crimes, or their descendants, could be accepted back on terms set by those accepting them, with appropriate atonement and compensation.

Other factors that were traditionally taken into account in handling the rights of absentee landowners included occupation, adoption, seniority, place of residence, effort invested in the land and whether appropriate community obligations had been met. These ways of handling land tenure have all been eroded (though not totally) in recent decades.

Current legal and administrative arrangements for absentee owners

There are no legal provisions that determine the rights of absentee landowners, even though land tenure today is radically different and demands new rules. As already noted, few Cook Islanders live on or near the land to which they have rights. Some who live on Rarotonga do not have inherited rights there. They come from one of the 11 inhabited islands beyond Rarotonga for jobs, higher education, and medical or other services.

Almost all valuable land in the Cook Islands is registered as native freehold title, including most of Rarotonga. On some islands, where land has not been surveyed or registered, land management and ownership largely follow customary practices.

The fragmentation of native titles has opened the way for the powerful, the knowledgeable and the rich to acquire disproportionate areas of land through occupation rights, leases or other means to the disadvantage of relatives. No government since independence in 1965 has successfully addressed the issue of fragmented titles brought about by Appellate Court judgement in 1957.

Successive governments have attempted to place limitations on the power of absentee landowners, but ways are often found to circumvent them and there is also no legal definition of what constitutes residence or non-residence. For instance, the Land Facilitation of Dealings Act of 1970 requires that at least 25 per cent of those making decisions about leasing land be resident landowners. However, many absentee landowners return for the meetings about their land, affirm their rights and leave again. Many also give power of attorney or proxy voting rights to a co-landowner living overseas, who is sent as a representative to claim their land at the Land Court. This means much of the power over land remains with the absentee landowners, who cannot be blamed for following the Appellate Court's compulsory ruling. In addition, the Land Facilitation of Dealings Act allows a member of any family present (usually the most senior) to represent other members of his or her family, whether resident or absent, provided they have succeeded to the land rights of their parents (or others). This is now usual and, as some allege, is often abused.

The right to occupy land is also influenced by absentee landowners. The allocation of formally recognised occupation rights (discussed later) requires the approval of 50 per cent of landowners 'normally resident' in the Cook Islands. However, written proxy votes usually count, including those from non-residents.

Legal fragmentation of title

In October 2005 the authors surveyed two randomly selected blocks of land in Avarua, Rarotonga, to investigate the extent to which land titles had been legally fragmented. The first block contains 6 sections on an inland road. Of a total area of 11.3 hectares, about 5 hectares are steep and largely unusable, leaving an average of about 1.1 hectares of usable land per section. The six sections were allocated by the Land Court in 1908 to 38 owners—an average of about six a section. In 2005 the number of owners registered was 1019—an average of 170 a section. But the latest recorded succession in one case was in 1916 and the register is still being updated. So the number of people with current or latent rights in each section could be 1000 or more.

The second block contained 14 house sites, averaging 0.2 of a hectare each. In its original determination, the Land Court recorded 68 owners for the 14 sections—on average, fewer than five owners a site. By 2005 these 14 house sites had 636 registered owners or an average of 45 each, but the registers were not up to date and staff still had many successions to deceased owners to record, some dating back several years. Moreover, some registered owners had died but successors had not claimed their rights before the Land Court. Today, if registers were up to date and if all those entitled to succeed had made their claims, there might be 70 or more owners for each house site. Indeed, following the Appellate Court ruling that all descendants succeed equally, each house site would also have hundreds of extra latent owners who will emerge as time passes.

In practice, co-owners of any section have to evolve an internal system to allocate use, as most sections have only one or a few sites suitable for houses. This requires family meetings, which are sometimes prolonged (even over years) and difficult because of the large numbers involved and the number of family members living in other countries. Disputes or fear of disputes over title or allocation are common. In addition, rental income is paid in tiny shares to all owners, many of whom might live overseas. Therefore, the resident Cook Islanders, who have more of the power to grant leases, have a reduced incentive to do so.

These circumstances result in land being underused, with perhaps thousands of plots of land unused. Investors seeking to gain secure access to land must work against these barriers.

Cook Islanders cannot legally inherit land rights until their parents die, but parents or family can allot land through occupation rights, partition orders, vesting orders or leases at any time. This is regularly done for housing, the most common land use. Nevertheless, because the ownership of land is very fragmented, many young people face difficulties acquiring suitably sized allotments—even in families with adequate land area.

The law does allow co-owners to consolidate their interests. One owner can give up his or her rights in one or more plots in exchange for rights in other plots. But this is seldom done as it is complex and cumbersome with high legal costs and has to be done every generation. There is provision for absent co-owners who do not intend to return to give or sell their rights to co-owners who live in the Cook Islands. (In New Zealand Maori land law, this is compulsory for highly fragmented lands.) This can be done by using vesting orders, and it is legal for a co-owner to accept money in return for vesting his or her rights to another Cook Islander.

The Land Facilitation of Dealings Act allows co-owners to use a trust to hold and manage a plot of land for the benefit of all owners, but this is rarely done. Administrative costs, politicisation of small plots, and expensive audits may make this option feasible only where there are large investments involved, such as hotels, supermarkets and ports.

Land rights exercised by absentee owners

Under formal native freehold title, land rights are determined by the proportion of shares held by the relevant family members. While many family leaders give priority to resident family members in decisions about how the land is used, some absentee owners take their family to court to get legal recognition of the shares they have in the land. While some judges try to give preference to resident landowners in legal disputes, this does not always happen.

As already noted, a common way absentee owners maintain an interest in land is through occupation rights. Occupation rights allow co-owners to give a plot (usually 0.25 acre or 1000 square metres) to one of their number for growing commercial tree crops, for building a home to live in, or for operating a small business. Many who are planning to emigrate try to get an occupation right before leaving so they have a plot to return to, even though few come back to live. Although occupation rights can be granted to any Cook Islander they are overwhelmingly granted to close relatives who usually co-own the land. There is no legal bar to paying for an occupation right, although no cases of doing so were uncovered during the research for this study.

Occupation rights are perpetual and can be inherited, subject to continued occupation. In law, if the holder has not built or otherwise developed land after seven years, the original owners can claim it back. This does not happen often, however, which is why so many people who live abroad hold rights to land for long periods. Survey work undertaken for this case study found that, of 87 occupation rights in two districts (Ruatonga and Arerenga), 53 were held by Cook Islanders living in other countries and, of 47 leases, 32 were held by people overseas. The extent of absentee owners using occupation rights can differ significantly, however, from island to island. Leasing and the granting of occupation rights generally occurred later in the district of Tikioki than in other regions, and family leaders were stricter about granting leases or rights to absent landowners. In Tikioki, of 108 occupation rights, only 20 were held by people living outside the village or in other countries. Of the 51 leases in Tikioki, only four were held by landowners living outside their village, but they were still in the Cook Islands.

Although landowning families can legally reclaim lands subject to occupation rights if the holders do not use the lands, many are too embarrassed to do so. Some holders of occupation rights allow relatives to plant on their land until they return, to dissuade others from trying to acquire it. Most want to retain the right to return or to pass their rights to their descendants. This reduces the amount of land available for development by those outside the family, but that is not considered a problem by most Cook Islanders because land is more highly valued as a source of identity and confidence. The loss of land by indigenous people in Australia, Fiji, Hawaii, New Caledonia, New Zealand and Tahiti is constantly referred to as a reason why Cook Islanders should retain land rights.

Attitudes to absentee landowners' rights

Conflicts and disputes over the rights of absentee landowners are due mainly to the fragmentation of titles. The 1996 Commission of Enquiry into Land began by stating: 'Our country is being torn apart by land disputes ...' and that '... the rich and powerful [and one might add the more knowledgeable] take advantage of the less sophisticated'. Both are valid comments.

This case study found that many Cook Islanders felt that long-term absentees who hold land rights pose an enormous problem because it causes constant acrimonious and expensive family disputes over succession. Those who felt it was not a problem seemed to have well-organised extended families, with leaders who allocate land only to residents or absentees they believe will return to use the land. Some did not have an issue with people holding a lease or occupation rights emigrating as long as they arranged for relatives living in the Cook Islands to care for the land until they return. This group opposes legal restrictions on the rights of absentees, believing land tenure is the responsibility of the extended family.

Others are content that lands are tied up in legal or family issues, or held by Cook Islanders living elsewhere. They believe this keeps land from being leased to non-citizens who often have higher incomes and can bid up the prices of leases, making it more difficult for Cook Islanders to take out leases.

Some families feel that having the co-owners living in other countries is not a problem, provided they accept the customary view that land decisions lie with those at home and that if they return they will be allocated a house site only if there is sufficient land. This view probably prevails more in most outer islands where population is declining and economic growth is limited. But this is also the view held by many who live in Rarotonga, where competition and prices for land are high. This has led to a number preferring to legally constrain the rights of absentee landowners.

As part of this study, 139 Cook Islanders residing in Auckland, New Zealand, were interviewed at church and community gatherings and individually. Of those interviewed, 95 felt their land rights should never be affected by how long they stayed away. Only 14 of the 139 felt that those who are settled in other countries should be prevented from holding land rights. Seventy-two expected to return to live in the Cook Islands, 41 did not, and 26 were unsure. However, in the 1950s almost everyone who left intended to save money and return, although very few did so. This is true of migrants in many parts of the world. There are migrants who do not intend to return to live in Cooks Islands but who intend to retain land there for the family. This group rents out their land until a family member chooses to move there. Of those who have lived in New Zealand for more than 20 years, only 20 per cent said they may return to the Cook Islands to live or retire.

Of the 139 interviewed, 110 wanted to give, lease or sell their rights to relatives in the Cook Islands who will use the land. Even so, 47 per cent of these people wanted this to be a conditional, temporary arrangement. This view was more prevalent among those who had been absent 20 years or more. Nevertheless, almost all wanted to retain their basic rights as a family heritage, as security for mortgages, or for tourist accommodation.

The impact of the expatriate rental market and the Unit Titles Act

Tourism in the Cook Islands began in earnest in 1974 with the opening of the international airport. Tourist numbers climbed rapidly and the number of resident expatriates grew due to tourism, the international finance centre, and government employment. The demand for rental properties on Rarotonga and Aitutaki was met mainly by residents building on land for which they held occupation rights or leases. But by the 1990s many Cook Islanders abroad, who intended to remain abroad, were claiming lands on these islands and building houses or units to rent or lease. This has resulted in land rights acquiring more of a monetary value than a cultural value and in more people trying to activate their rights.

Another factor increasing the monetary value of land is the Unit Titles Act 2006, which allows subdivision of house sites, hotels, apartments or office blocks. Almost all lessees of the resulting buildings are foreign nationals, and this is likely to lead to more of the most valuable residential land of Rarotonga and Aitutaki being leased to non-resident non-citizens. While some non-resident landowners and some big landowning families prefer this because it benefits lessors, resident Cook Islanders often resent the way this forces up rental and lease prices, and diminishes their chances of finding affordable accommodation. It also results in more foreign ownership of property in the Cook Islands.

A generation ago outer islanders coming to Rarotonga who needed land could obtain it by lease, occupation right, or permission from landowners. Now few can afford land. For this case study, valuers estimated the average cost of the 60-year lease of a 1000 square metre house site to be between NZ\$45 000 and NZ\$75 000. The basic wage in the Cook Islands is about NZ\$10 000 a year. To help address this problem some house sites are being reduced to 500–800 square metres, which does not provide much room for a home garden. The valuers also estimated that a house site with a good view would command between NZ\$65 000 and NZ\$100 000 and a beach site NZ\$250 000.

Acquiring leases is difficult, time consuming and expensive. Businesses can afford to engage lawyers and consultants to locate and lease land and pay higher rates for it. Most Cook Islanders could not afford to do this on their own. In Rarotonga, unless land is inherited it can only be leased for a maximum of 60 years. This means that Cook Islanders who do not have blood rights to land in Rarotonga, or who have rights that are too fragmented for practical use, find it difficult and expensive to access land, either for farming or for residential purposes. Difficulties in accessing land in Rarotonga, where jobs and other opportunities are more plentiful than elsewhere in the Cook Islands, have resulted in more outer islanders migrating than Rarotongans.

Security of access to land and finance

People who have blood rights to land often prefer to obtain difficult and expensive leases rather than occupation rights because banks lend against leases but not occupation rights. Also, leased land can be held unused for 60 years but occupation rights can be cancelled after seven years if the land is not occupied or developed in some way.

Once the Land Court approves a lease (almost always for the maximum of 60 years), it is considered secure. The banks—Bank of the Cook Islands (government-owned) and ANZ and Westpac (privately owned)—lend readily for financially viable purposes. Housing is the most common reason for lending, followed by small commercial developments and current consumption.

Loans to residents who build or intend to build but who then migrate and default on repayments have been a significant problem at times, especially when the Cook Islands' economy collapsed in 1995–96 and more than half of government staff were laid off. Mortgagee sales took place, often to expatriate residents, but no numbers are available on these sales. Usually the banks try to get a relative to take over the property and the mortgage.

The experiences of other countries of the Pacific

Other countries in the Pacific region are also facing increasing problems related to the rights of absentee landowners.

In Samoa the *matai* (the person delegated chiefly authority) administers land for the extended family. If a person emigrates the matai has the authority under custom to reallocate the land for farming (but not necessarily for housing) within the family. However, as emigration and the resident population continue to increase, and as pressures on land in Samoa build due to the demands for greater infrastructure and economic development, the problems related to absentee landowners will mount.

In Tonga, land is individualised on perpetual leases. When the government cancelled the leases of absentee landholders who took out foreign nationality this was challenged in court. Even though the Constitution states that only Tongans can hold land the court ruled that 'Tongan' is designated by ethnicity not citizenship.

Kiribati has a traditional rule that anyone absent for seven years or more can be treated as 'lost at sea' and their land reallocated to close relatives. But this has fallen into abeyance in many islands. Niue's tenure system is similar to that of the Cook Islands. In 1973 its government introduced legislation to cancel the land rights of anyone who had been absent for more than 20 years. However, Niue people depended heavily on remittances from relatives abroad. Absent relatives eventually sent a large delegation to Niue to protest and the government's proposal was dropped. However, today Niueans no longer depend on remittances and Premier Young Vivian announced recently that the country was again exploring ways to limit the rights of long-term absentees and of those born overseas. The Premier said he would prefer to work this out through mediation than through long-term court action.

Lessons

PERIODICALLY REVIEW AND ADAPT LAND TENURE LAWS

lesson 1 In a situation of rapid economic and social change, laws and regulations governing land tenure should be periodically evaluated (perhaps every five years) to ensure they continue to meet the current and expected needs of all people, especially residents.

When the Land Court was established in 1902, almost all Cook Islanders lived in their country. When the Appellate Court ruled in 1957 that all children shall inherit equally, most lived in the Cook Islands. Today, about 90 per cent of Cook Islanders live in other countries and this is unlikely to change. Yet the land tenure system has not evolved to accommodate these rapidly changing circumstances.

LEGISLATE EFFECTIVELY FOR ABSENTEE LANDOWNERS

LESSON 2

Effective legislation is required to deal with absentee landowners, especially when traditional authority has been eroded, to ensure that most of the power over decisions regarding land use (such as leasing and occupation rights) is vested in favour of residents. This should result in better decisions about how land is used.

Traditional land practices had a number of methods for dealing with absentee landowners, with favour given to resident landowners. Giving favour to resident landowners promotes better decisions about land use, because residents often have a greater interest in managing the land in a sustainable manner than do emigrants. As customary authority erodes and increasingly land becomes part of the formal economy, the power of absentee landowners needs to be controlled through formal legislation. Although the Land Facilitation of Dealings Act has mechanisms to control the power of absentee landowners, these rules have not been effective.

AVOID FRAGMENTED TITLE TO CUSTOMARY LAND

lesson 3	Great care needs to go into designing a registration system for customary land to ensure that it does not lead to fragmentation across generations.
lesson 4	Fragmented land titles are a risk associated with registering landownership at the individual level when the customary system manages ownership decisions at the group level.
lesson 5	A customary land registration system must be supported by sufficient administrative capacity to maintain the records and keep them up to date.

Despite landownership being managed at a group level, the program to register customary land at the individual level, converting it to native freehold title, contributes tothe fragmentation of land title in the Cook Islands. The 1957 Appellate Court ruling that all children inherit equally enshrined that fragmentation.

ESTABLISH PROCEDURES TO ADDRESS LAND FRAGMENTATION, ABSENTEE OWNERSHIP AND DEVELOPMENT

LESSON

Without effective procedures to transfer land between co-owners, especially if there are absentee landowners, consolidation of ownership is prevented and there is little incentive for landowners to release land for development.

Where landownership is fragmented and owners are absent, considerable difficulties can arise in making unused land available for economic development. Although the Land Facilitation of Dealings Act has mechanisms that permit land transfers between co-owners these mechanisms are not being used. This may be due to their complexity and cost and the inherent difficulties of coordinating landowners to make decisions when most are absent. When land titles are fragmented, landowners have few incentives to release land for development because of the small income streams their land shares would produce and the potential for disputes among so many owners, often very dispersed.

ADDRESS LAND ISSUES FACING PEOPLE MOVING TO COMMERCIAL CENTRES

lesson 7

If there is a shortage of land in urban areas and a potential for skilled labour to emigrate, the state needs to design mechanisms to provide access to lowcost land, especially for residential purposes, for people wanting to move to the commercial centres.

In the Pacific, accessing land in commercial centres comes at considerable cost. In the Cook Islands people migrating to Rarotonga face difficulties accessing land for residential, business or farming purposes. Elsewhere in the Pacific, the difficult urban land market has resulted in informal settlements nearby; in the Cook Islands the result has been more people emigrating from the outer islands, mainly to New Zealand.

Bibliography

- Baltaxe, James 1975, 'The transformation of the Rangatira: a case of the European reinterpretation of Rarotongan social organization', PhD thesis, University of Illinois, Champaign.
- Browne, Tina Pupuke 1994, 'Traditional rights and customary usage in the Cook Islands', in Ron Crocombe & Malama Meleisea (eds), *Land issues in the Pacific*, Centre for Pacific Studies, University of Canterbury, Christchurch.
- Crocombe, Ron 1969, Land tenure in the Cook Islands, Oxford University Press, Melbourne.
- ——1976, A discussion paper relative to the current Land Policy Review in the Cook Islands, Premier's Office, Rarotonga.
- ——1987, 'The Cook Islands: fragmentation & emigration', Land tenure in the Pacific, University of the South Pacific, Suva.
- ——1988, 'Land courts', *Pacific courts & legal systems*, University of the South Pacific, Suva.
- ——2005, 'Some basic elements of the tenure situation in the East Ngatipa Tapere in October 2005', University of the South Pacific, Rarotonga.
- 2007, 'Land tenure in a test tube: the case of Palmerston Atoll', in A collection of stories of Palmerston Atoll, Rarotonga, pp. 157–92.
- David, Rima 1984, 'The Cook Islands: occupation rights', in Ben Acquaye & Ron Crocombe (eds), Land tenure & rural productivity in the Pacific islands, University of the South Pacific, Suva.
- Jacob, Teariki 1983, 'The Cook Islands: public use without acquisition', in Peter Larmour, Ron Crocombe & Anna Taungenga (eds), *Land, people & government: public lands policy in the South Pacific*, University of the South Pacific, Suva.
- James, Margaret 1986, 'Cook Islands: approaching equality', *Land rights of Pacific women*, University of the South Pacific, Suva.
- Hanson, Alan 2007, 'The land belongs to everyone: the unstable dynamic of unrestricted cognatic descent in Rapa, French Polynesia', *Journal of the Polynesian Society*, vol. 116, no. 1, pp. 59–72.
- House of Ariki (High Chiefs) 1970, Maori customs approved by the House of Ariki, Rarotonga.
- ——1977, Second recommendation of the House of Ariki on ancient customs to the Legislative Assembly, Rarotonga.
- ——1977, Recommendation of the House of Ariki on the Koutu Nui paper 1977, Rarotonga.
- Koutu Nui (House of Chiefs other than Ariki) 1991, A report by the Koutu Nui on lands & traditional titles of the indigenous people of the Cook Islands, Rarotonga.
- Mataio, Tere 1984, 'Cook Islands: a perspective on land & productivity', in Ben Acquaye & Ron Crocombe (eds), *Land tenure & rural productivity in the Pacific islands*, University of the South Pacific, Suva.

- Matenga, Jeane 2006, *A choice of four worlds* (a set of four television documentaries on Cook Islander migration, with some mention of land as a factor), Mana Productions, Rarotonga.
- Parliament of the Cook Islands 2005, *Report of the Special Select Committee established by Parliament to review the Unit Titles Bill*, Rarotonga.
- Smith, Eliot, Mataio, Tere, Short, Cecilia & Tangaroa, Nikau 1996, *Report of the Commission of Enquiry into Land*, Ministry of Justice & Lands, Rarotonga.
- South Pacific Commission & Economic and Social Commission for Asia and the Pacific 1983, *Population of the Cook Islands*, Noumea.
- Vini, Nihi 1987, 'Outer islanders on Rarotonga', in Leonard Mason & Pat Hereniko (eds), *In search of a home*, University of the South Pacific, Suva.



DISPUTE RESOLUTION

CASE STUDIES

9	Mediating land conflict in East Timor	175
10	Resolving land disputes in Samoa	199
11	Settling customary land disputes in Papua New Guinea	223

DISPUTE RESOLUTION

9

Mediating land conflict in East Timor

Daniel Fitzpatrick » Reader/Associate Professor, College of Law, Australian National University, Canberra

The contribution of **Susana Barnes**, Research Associate, and **Rebecca Monson**, PhD candidate, at the Australian National University, to the writing of this case study is gratefully acknowledged.

A snapshot

Mediating land conflict in East Timor

A mediation model for addressing conflict over land was introduced in 2000 in East Timor by the UN Transitional Administration. The model is now managed by East Timor's Land and Property Directorate. Despite difficult circumstances and limited resources, mediation by the directorate has been successful in managing a large number of potentially violent disputes.

Land conflict mediation in East Timor is innovative and experience highlights the benefits of:

- using interim no-violence and land-use agreements pending final resolution
- » embedding the mediation system in land administration rather than judicial administration, which allows remedies unavailable in the courts, such as selling, leasing, dividing or swapping land
- » avoiding problems associated with a lack of capacity in the court system and having greater access to self-funding opportunities than the courts
- » creating a bridge between traditional dispute-resolution mechanisms and the courts and allowing use of ritual and customary institutions should the parties agree, and reference to the courts should the parties be unable to agree.

Contents

»	INTRODUCTION	178
»	THE SETTING	179
»	OVERVIEW OF LAND CONFLICT AND MEDIATION IN CUSTOMARY AREAS Mediation procedure General observations about land dispute mediation	181 181 183
**	OVERVIEW OF DISPUTE RESOLUTION IN MALIANA Dispute resolution prior to the involvement of the Land and Property Directorate Dispute resolution through the Land and Property Directorate Resolution of the dispute	185 185 185 186
»	CASE 1: MATEUS AND ABILIO Background to the dispute Dispute resolution process Observations about successes and limitations	187 187 187 188
»	CASE 2: THE TUGANATU GROUP AND THE AINUATU GROUP Background to the dispute Dispute resolution process Observations about successes and limitations	189 189 189 190
**	CASE 3: JOSE AND PEDRO Background to the dispute Dispute resolution process Observations about successes and limitations	191 191 192 192
»	CASE 4: LARIATO AND BIBILARO VILLAGES Background to the dispute Dispute resolution process Observations about successes and limitations	192 192 192 193
»	APPLICABILITY IN THE PACIFIC	193
»	LESSONS Give mediation a bridging role in resolving land disputes Embed conflict mediation in land administration Take advantage of no-violence agreements Support mediation with effective legislation and administration Use and train the right mediators Institutionalise women's roles in mediation Maintain political support	195 195 195 196 196 196 196
»	BIBLIOGRAPHY	197

Introduction

Pacific countries are affected by widespread disputes over customary land. In some instances, land remains subject to customary claims because it was alienated or leased without the involvement of traditional landowners or with the involvement of others who claimed ownership at that time. In others, land is claimed by different ethno-linguistic groups that have intertwined due to migration, displacement or economic development. Because the disputes involve land—the most fundamental socioeconomic resource—they are resistant to winner–loser models of formal legal adjudication. Where they involve different groups, they are also resistant to local arbitration through the traditional mechanisms that operate within groups.

In East Timor the issues underlying customary land conflict are extreme in degree but often similar in nature to land conflicts in the Pacific. In 2000 the UN Transitional Administration introduced a mediation model to resolve conflicts involving customary land in East Timor. The model is now managed by East Timor's Land and Property Directorate (the Direcção Nacional de Terras e Propiedades) and implemented on a decentralised basis by district officers of the directorate.

Despite difficult circumstances and limited resources, mediation by the directorate has been successful in managing a number of potentially violent disputes. Of the 972 disputes brought to the Land and Property Directorate between December 2000 and January 2006, 314 were resolved through mediation. This contrasts sharply with the poor record of East Timor's court system in resolving or managing land-related conflicts.

Although mediation and village-level dispute resolution is not new in the Pacific region, mediation in East Timor is innovative and potentially useful in at least two respects.

- » It involves interim no-violence agreements that may be sealed by ritual and witnessed by traditional, government and church representatives.
- Mediation is embedded in land administration, not judicial administration. This enables remedies not available in the courts to be used, including the sale, lease, sharing or swapping of land, as mechanisms for resolving conflicts.

This case study reviews the mediation procedures involved in four cases of conflict in Maliana and assesses the successes and limitations of those procedures in reducing and resolving conflict. It also explores whether East Timor's mediation model could be used in a Pacific context, recognising that any type of policy or policy model requires adaptation if it is to be adopted in another country.

The setting

East Timor has a land area of approximately 14 600 square kilometres. With 44 per cent of the land mass at an incline of greater than 40 per cent, large areas of East Timor are not cultivated. The bulk of agricultural activity is subsistence farming of corn, rice, root crops, vegetables and fruit, although there has been some production of coffee, tobacco, cloves, cocoa, vanilla and areca nuts. East Timor has not been self-sufficient in staple foods for 35 years, largely as a result of conflict and population displacement.

Culturally and linguistically, the country is a patchwork of 25 or so ethno-linguistic groups. Outside urban areas, most land is managed through affiliation with 'origin' groups that cluster around 'sacred houses' (*uma lulic* in the Tetum lingua franca).

The endemic nature of land conflict in East Timor stems largely from its history of colonisation, invasion and occupation. The first Portuguese governor of East Timor was appointed in 1701. After almost two and a half centuries of Portuguese rule, during World War II the Japanese invaded and occupied East Timor from 1942 to 1945. Following the end of the war the country returned to Portuguese rule. In 1960 the UN General Assembly nominated East Timor as a candidate for decolonisation and self-determination. In 1974 the Portuguese administration in East Timor was reorganised, and local political parties were allowed to be formed. This led to the establishment of two main parties: Fretilin (Frente Revolucionara de Timor Leste) and UDT (Uniao Democratica Timor. In response, UDT issued a statement, on behalf of a group calling itself the Anti-Communist Movement, asking for intervention by the Indonesian Government and integration of East Timor and Fretilin was driven underground as the party of resistance.

By the end of 1976 approximately 80 per cent of East Timor remained outside the control of Indonesia's forces. This led the Indonesian army to resettle villagers from the hinterland into coastal 'strategic camps'. By December 1978 Indonesian military statistics showed that 372 921 people—as much as half of the population—were refugees in these camps. Further military operations during the harvesting and planting seasons led to widespread famine in the early 1980s. As a result of both invasion and subsequent famine, it is estimated that between 160 000 and 200 000 East Timorese died between 1975 and 1981.

In early 1999, after years of intense international pressure, Indonesia agreed to allow the East Timorese people to vote for independence. At the time of the UN-organised independence vote in August 1999, Indonesian statistics estimated the population of East Timor to be almost 900 000. As a result of the pro-Indonesian militia violence, about 450 000 people were internally displaced within East Timor itself, and a further 300 000 fled or were forcibly transported across the border to West Timor. This widespread displacement—more than 75 per cent of the population—created a humanitarian crisis. It also reawakened endemic cycles of land conflict as some took advantage of displacement or abandonment to repossess lands allegedly lost as a result of dispossession in the Portuguese, Japanese and Indonesian periods. The cyclical phases of displacement and reoccupation are the primary cause of land-related conflicts in East Timor.

Compounding these problems of population displacement was the destruction of land records, housing and infrastructure. Most land title offices and records were destroyed. More than half the housing stock was seriously damaged or destroyed.

There was an understandable rush to occupy habitable houses when displaced people returned to seek shelter. This phenomenon of ad hoc occupation has also been a feature of historical cycles of displacement in East Timor, most notably in the 1940s (Japan) and the 1970s (Indonesia). The recent violence in East Timor also owes much to ad hoc housing occupations as longstanding Dili residents (Westerners) have acted—in the shadow of political and military instability—to expel 'Easterners' who occupied Dili houses during the chaos of displacement and return in 1999 and 2000. These recent acts of violence illustrate the way in which land and housing claims intertwine with assertions of local identity, political affiliation and alleged Indonesian collaboration to produce periodic outbreaks of civil conflict.

On 25 October 1999 the United Nations Security Council established the United Nations Transitional Administration in East Timor (UNTAET). UNTAET did not establish a land claims commission, or indeed any effective regulation of privately held land in East Timor. In September 2000 it rejected a draft regulation that envisaged systematically registering uncontested titles, beginning in Dili, while referring disputed claims to a proposed land claims commission. As a result of this decision, the UNTAET Land and Property Directorate (by then under the East Timor Transitional Administration) was authorised only to file and record property claims, and was not to continue preparations for a land claims commission, a systematic titles registration project, or indeed any form of normal land registry function. Its major task remained supervising systems for mediating land conflicts and allocating public and abandoned properties through temporary lease rights.

Some progress has been made on land regulation since the departure of UNTAET and the election of an East Timorese Government. The new Constitution guarantees rights to housing, private property and protection against expropriation without due process and compensation. There are now also regulations governing the definition and nature of state land, and the grant of leases over state and private land. However, the key issue of ownership—who owns land, where and under what title—is yet to be resolved. A law on land ownership restitution, with plans for a land claims commission, was expected in 2006 but has been delayed by political and social instability. The lack of legal certainty relating to land ownership in East Timor has undermined attempts to adjudicate land conflicts, and placed the primary burden for conflict management on local systems of mediation.

Overview of land conflict and mediation in customary areas

It is not possible to estimate the total number of land disputes in rural East Timor. There are many more disputes than those submitted for mediation by the Land and Property Directorate. These conflicts are often connected with migration and marriage patterns that have led outsider and subsidiary groups to occupy land traditionally belonging to an 'origin' group. In some cases, these groups see themselves as having joined traditional owners through marriage or agreement, even though others in the origin group may dispute the connection. In other cases, outsiders feel that long-term occupation has displaced the hunting and shifting cultivation rights of earlier users, or the rights of returning owners long displaced by Portuguese and Indonesian government policies. In yet other cases, the later group recognises the traditional authority of the origin group, but either has nowhere else to go or claims that the origin group has lost entitlements due to collaboration with the Indonesian administration. In many cases, allegations of collaboration with Indonesia complicate disputes over historical or customary entitlements.

MEDIATION PROCEDURE

In 2000 UNTAET granted the Land and Property Directorate authority to mediate land disputes. East Timorese mediators received intensive training in 2001 and 2005 but there are no mechanisms for ongoing or recurrent mediation training. The mediators are staff members of the Land and Property Directorate. They are paid a relatively small sum in addition to their standard salary to undertake mediations and to cover their costs. When they are not mediating, they perform their standard land administration duties. The mediation activities are funded from the general budget of the Land and Property Directorate. The directorate is a self-funding agency as a result of revenues from leases over public land.

Both Law 1/2003 on landownership and a draft law on mediation maintain the authority of the Land and Property Directorate to mediate land disputes. The following procedures apply under the draft mediation law and current directorate guidelines.

- 1 An individual claimant or a group of complainants goes to the national Land and Property Directorate or the district Land and Property Directorate office and requests mediation. A dispute may also be referred to the directorate by a village head (*chefe de suko*) if the parties have agreed to submit the case to the directorate.
- 2 The other parties to the dispute are informed of the claim. Mediation will proceed only when all the parties to the dispute voluntarily accept the mediation, and where there has been no previous legal or administrative resolution to a dispute regarding the same land. Mediation will not occur if the land that is the subject of the dispute is the property of the state, if one of the parties is an officer of government, or if the subject matter of the dispute is considered a crime.

- **3** The parties to the dispute agree to a Land and Property Directorate mediator or panel of mediators.
- 4 A directorate mediator visits the disputed land and gathers information about the history of ownership from local informants such as the village head, neighbours and other informed and credible witnesses.
- 5 The directorate mediator invites the claimant and the current occupant to separate meetings to hear each side of the dispute. Evidence presented during mediation may include public and private documents, witnesses and physical proof such as borders, trees, buildings and plantations.
- 6 The directorate mediator may then meet with the claimant and the current occupant together to attempt to find a solution that is acceptable to both parties. This may occur on up to three occasions. The draft law also allows for a further stage—mediation by a Mediation Panel of Appeal.
- 7 During the meetings the directorate mediator may facilitate interim agreements relating to land use and commitments not to engage in violence pending resolution of the conflict. The mediator will also suggest a variety of ways in which the dispute may be resolved, including selling, leasing, dividing or swapping the land.
- 8 The matter will be resolved if a solution is found that is agreeable to both parties. If the parties fail to reach agreement after three joint meetings, the dispute is referred to the courts.
- **9** If a settlement is reached, a report is produced and signed by the parties to the dispute and the directorate mediator or the panel of mediators. The settlement is registered with the Land and Property Directorate.
- **10** A reconciliation ceremony may occur if the parties resolve to do so and meet their responsibilities and costs incurred in doing so.

The draft mediation law acknowledges that traditional forms of mediation are practised, and provides for these to continue unregulated by the draft law, provided they are not contrary to the formal law or fundamental human rights. It also provides for the Land and Property Directorate's mediation process to use customary norms and processes, provided they are not contrary to law. There are no provisions relating to the involvement of women and there are no formal mechanisms for the directorate to monitor adherence to mediation agreements.

GENERAL OBSERVATIONS ABOUT LAND DISPUTE MEDIATION

Mediation of land conflicts by the Land and Property Directorate is more successful than resolution through the courts. According to East Timor's Judicial Monitoring Program, the court system, which had to be rebuilt from scratch after 1999, has prioritised its criminal case load. Very few civil cases involving land have proceeded to judgement, let alone successfully enforced orders. According to the head of mediation in Dili, the courts have yet to resolve a land dispute case.

East Timorese prefer to resolve disputes at the local (customary) level. Local mechanisms for resolving disputes are regarded as cheaper, faster, fairer, more accessible, easier to understand, subject to less corruption, and more likely to promote reconciliation than the courts. There is also evidence that disputants who take land disputes directly to the courts have penalties imposed on them or their community. This may reduce the load on the courts, but also places pressure on disputants to use local forums that one or more parties may wish to avoid (Timor-Leste Land Law Program 2004, pp. 48, 49, 52).

NUMBER OF DISPUTES BROUGHT TO THE LAND AND PROPERTY DIRECTORATE AND THE MANNER IN WHICH THEY WERE RESOLVED OR ARE BEING RESOLVED FOR EACH DISTRICT *

District	Resolved	Tribunal	In process	Total number
Oecussi	34	3	27	64
Aileu	22	2	16	40
Ainaro	-	-	-	-
Bobonaro	9	3	10	22
Baucau	-	-	-	-
Covalima	2	1	19	22
Dili	64	23	250	337
Ermera	12	3	3	18
Liquica	68	23	45	136
Lautem	14	4	11	29
Manatuto	1	3	3	7
Manufahi	6	-	7	13
Viqueque	8	-	49	57
Total	240	65	440	749

a These figures (copied from a Land and Property Directorate document) correspond to the period from May 2002 to June 2007. In 2006 mediation services were minimal due to the politico-military crisis. According to the head of Land Disputes and Mediation at the National Land and Property Directorate office, the reason no cases were brought for resolution/mediation in Baucau and Ainaro districts was that people in these districts preferred to use community-based mechanisms. Yet traditional community-based mechanisms for resolving disputes cannot solve all land conflicts in East Timor. There is a need for a system that provides a compromise or 'bridge' between customary mechanisms and the courts. Relocated, outsider or subsidiary groups have less access to customary mechanisms for resolving disputes than do members of the origin group. Customary forms of dispute resolution are less likely to succeed where land conflicts are between groups or involve individuals from different groups. The courts are also unlikely to succeed because origin group members will resist winner–loser models of judicial adjudication that grant ownership rights to relocated, outsider or subsidiary group claimants. Such models of adjudication are often unable to resolve conflict where there is little off-land employment, and the disputants are unlikely to move elsewhere should the dispute remain unresolved.

The mediation procedures of the Land and Property Directorate 'fill the gap' between local mechanisms for resolving disputes and the courts. They can incorporate traditional institutions and reconciliation ceremonies if the parties agree. They allow disputes that cannot be resolved to be referred to the courts. Mediation is by far the best means to resolve conflicts that involve complex questions of social identity, group relations and undocumented historical events. This is particularly true of conflict between groups.

Mediation is also important where coercive enforcement of legal determinations is unavailable, inappropriate or unlikely to prevent conflict and the dispute being referred again to the courts. Mediation is more likely to solve the enforcement problem and ensure the sustainability of land rights determinations, because it involves public and documented forms of agreement, and allows the parties to retain some access to land through sharing, petition or lease arrangements.

There are a large number of land conflicts in East Timor that are based on claims of dispossession by the Portuguese and Indonesian administrations. These conflicts now involve the East Timor state because state land in East Timor is defined to include all land owned by the Portuguese state, and all land acquired by the Indonesian administration. As already noted, the Land and Property Directorate cannot mediate land conflicts where one party is the state or a government official. This is a key limitation on East Timor's land conflict mediation model.

Overview of dispute resolution in Maliana

Maliana lies 149 kilometres south-west of East Timor's capital, Dili. It is the capital of the district of Bobonaro and has a population of approximately 22 000, most of whom depend on agriculture for their livelihoods.

DISPUTE RESOLUTION PRIOR TO THE INVOLVEMENT OF THE LAND AND PROPERTY DIRECTORATE

When a dispute occurs between members of the same family or extended family (*uma fukun*), the dispute is usually dealt with in the first instance by calling on family elders. If a meeting of the extended family occurs, the head of the house, community elders (*lia nain*) and any person with the task of monitoring land use might be involved. Most disputes concerning rice fields in Maliana do not involve members of the same extended family, in which case the dispute bypasses the family and goes directly to the subvillage head (*chefe aldeia*). The subvillage head may also call on customary officers to assist or attend meetings at the subvillage (*aldeia*) and village (*suko*) level.

DISPUTE RESOLUTION THROUGH THE LAND AND PROPERTY DIRECTORATE

Mediation

The Land and Property Directorate office in Maliana is the district office for Bobanaro. It has three members of staff and only one mediator, who is also the head of the district Land and Property Directorate. Cases are usually brought to the directorate office in Maliana after more localised attempts to resolve the conflict have failed. Sometimes parties to a dispute bring their cases to the subdistrict administrator, who then refers the case to the Land and Property Directorate. In other instances the police might be involved. If the police intervene in a fight between farmers over land, they often bring the parties to the conflict directly to the Land and Property Directorate.

Generally speaking, land conflict mediation in Maliana follows the procedures set out in the draft mediation law and the Land and Property Directorate guidelines. According to the Maliana mediator, it is necessary to emphasise the 'cultural' aspects of conflict resolution in order to obtain the respect of the parties to the conflict. This may occur by invoking 'sacred' boundaries and stressing the importance of attempts to resolve the dispute at the family or extended family level. However, the mediator also stressed that there is no toleration of 'criminal acts'. If the case involves any violence the Land and Property Directorate will refer the matter immediately to the police.

Interim 'no violence' agreements

No-violence agreements are not always a part of the mediation process, and the Maliana Land and Property Directorate does not use a standard template for such agreements. Sometimes agreements are signed for a specific stage of the mediation (for example, when mediator is to visit the disputed land), and the mediator prefers to discuss the wording of such agreements with the parties to the conflict.

In general, no-violence agreements include:

- » acknowledgement that the parties to the conflict have entered voluntarily into the agreement
- » commitment not to engage in violence while the case is going through mediation, and to continue the agreement if the case goes to court
- » some arrangement concerning the disputed land (for example, agreement that neither party can farm in the interim, agreement to rotate use, or agreement that one party can farm the land).

No-violence agreements are always documented and witnessed by local authorities, such as the village heads, the subdistrict administrator and the Land and Property Directorate. In Maliana, no-violence agreements are not normally witnessed or sealed by customary authorities.

RESOLUTION OF THE DISPUTE

In Maliana, the most common resolution is for the parties to the conflict to share the disputed land. In dividing the land, certain factors such as years farmed and investment in terracing are taken into account when calculating the entitlement of each party. There are no cases in Maliana involving resolution of disputes through share cropping or finding alternative land.

As with the no-violence agreements, the wording of final agreements is usually worked out with the parties to the conflict. Only if mediation fails is there communication with the courts. In such cases a recommendation letter is prepared for the courts by the district Land and Property Directorate. There does not appear to be any communication with the courts regarding successful mediations.

If cases are referred to the courts the Land and Property Directorate tries to encourage the parties to the conflict to come to an agreement on land use while the case is pending. For example, parties may agree to take turns to farm the land. In all cases, copies of agreements and recommendation letters are given to the parties to the conflict, relevant village heads, the subdistrict administrator, the district police and the national office of the directorate. A copy is also kept at the district office of the directorate.

In the following reviews of Maliana cases of dispute and mediation, all names have been changed to preserve confidentiality and because of the sensitivity of some allegations.

Case 1: Mateus and Abilio

BACKGROUND TO THE DISPUTE

The dispute concerned the ownership of an irrigated rice field covering approximately 2 hectares of land. According to Mateus, his father had farmed 4 hectares of rice field before and after the Indonesian invasion in 1975. Mateus claimed that Abilio began using the land under dispute in 1981 under a sharecropping agreement with Mateus's father. Abilio disputed this history and alleged that his father had owned and farmed the disputed plot of land until he gave it to the Catholic Mission just prior to the Indonesian invasion. According to Abilio, his family returned to Maliana in 1997 and began farming the land again. They were forced to flee the land once more in 1999 and returned later that year, recommencing farming in 2000.

DISPUTE RESOLUTION PROCESS

Intermittent disputes over the land occurred from 1983 to 2000. The dispute escalated in January 2001, when Mateus came to the rice fields with numerous members of his family and allegedly threatened Abilio, accusing him of having been an Indonesian collaborator and suggesting that the harvest from the rice field would be used to feed the proindependence Falintil soldiers who had returned from Aileu.

Abilio then made a complaint to the Land and Property Directorate office in Maliana, the police and the local village heads on 21 February 2001. A meeting was held the next day between the parties to the conflict, the police and community elders. One village head suggested to Abilio that he agree to share the land with Mateus, but Abilio refused. Abilio and Mateus ultimately agreed that neither party would farm the land while they took their case to the Land and Property Directorate. It seems that nothing further occurred until 2003.

Mateus filed a complaint at the Land and Property Directorate on 18 February 2003. Abilio wrote to the head of the Land and Property Directorate on 2 March 2003 outlining his arguments. Both letters were copied to the subdistrict administrator and the local village heads.

The Land and Property Directorate subsequently invited both parties to a meeting where the mediator asked each of them questions separately. The mediator told the parties that there were a number of options available to them. For example, one could keep all the land; both could share the land; or one could relinquish his claim to the land. The mediator advised the parties that if they could not reach an agreement through mediation, they should take their case to court.

Both parties demonstrated a reluctance to take the case to court and argued that it was the other party's responsibility to do so. In interviews for this case study, Mateus stated that he wished to resolve the problem through mediation because he and Abilio were from the same hamlet and were related through marriage, and should therefore try to resolve the case so that neither family lost out completely. He also wanted to avoid 'locking' the land in a dispute and ultimately having it 'taken back' by the state.

The parties ultimately agreed to divide the land. On 4 March 2003 an agreement letter was co-signed by the parties to the dispute, the head of the Maliana Land and Property Directorate office, the subdistrict administrator and four witnesses. It provided that the disputed land should be divided in two, with Abilio keeping the east side of the field and Mateus keeping the west side of the field. The division of the field was calculated according to the amount of rice produced, and it was agreed that, since Abilio had invested more in maintaining the terracing, etc. (*kabubu*), he should retain slightly more land than Mateus. The letter included an acknowledgement that the agreement was reached together and that no person had forced or threatened the parties to make the agreement.

After signing the agreement at the Land and Property Directorate office, both parties went to the field to establish the border with the subdistrict administrator, the head of the district Land and Property Directorate and the village head. The border was established by sight (they did not have a metre at the time) and marked using stakes and rope. It was decided that Mateus would make the mound/terracing along this agreed border. To date there has been no further conflict about ownership and use of the land.

OBSERVATIONS ABOUT SUCCESSES AND LIMITATIONS

The Mateus and Abilio case appears to be an example of successful dispute resolution by the Land and Property Directorate. However, the agreement was reached in the context of the displacement of one of the parties, Abilio, who may have had few options other than to agree to the division of the land. It was clear from discussions with Abilio that he is not fully satisfied with the agreement.

The case study demonstrates the manner in which 'ordinary' disputes over family ownership of land can become tangled in allegations about support for or opposition to the Indonesian occupation. For example, when Mateus tried to claim the land in 1997, Abilio accused him of wanting to use it to feed the resistance. In his written deposition to the Land and Property Directorate, Abilio stated that in 1999 Mateus's father had told Abilio to leave the land. At the time, Mateus's father was accompanied by a man called Luis. The suggestion in Abilio's written deposition was that Luis was a member of the armed resistance and his accompanying Mateus's father was a veiled threat.

The case demonstrates how the mediation process of the Land and Property Directorate provides an alternative to local dispute resolutions on the one hand and the state-based court system on the other. In addition, one of the noteworthy features of this case is the solution—dividing the land. This illustrates the flexibility of remedies available to the Land and Property Directorate compared with normal court remedies. It should also be noted that other parties and witnesses were present when the agreement was signed and the land was surveyed and measured.

Case 2: the Tuganatu group and the Ainuatu group

BACKGROUND TO THE DISPUTE

The land dispute between the groups from Tuganatu and Ainuatu villages concerns approximately 42 hectares of land in Aireu in Maliana. According to the current village head of Ritabou, who is from Ainuatu, 32 people from Ainuatu have lost their land, which is currently occupied by 11 people from Tuganatu. This dispute provides an example of inter-group conflict arising from Portuguese colonial policy. It is also part of a broader dispute over political disenfranchisement during the Indonesian occupation.

According to people from Ainuatu, during the 1960s the Portuguese administration organised workgroups from a number of the upland villages to farm on the Maliana Plain. As a result the land around Aireu was farmed by groups including Tuganatu and Ainuatu villagers. When Indonesia invaded East Timor in 1975, the people of Ainuatu either fled to the hills or to West Timor. According to local narratives of Indonesia's invasion around Maliana, people who fled to West Timor became associated with the Indonesians and 'pro-integration', while those who fled to the mountains were suspected of being Fretilin supporters and therefore loyal to the resistance and independence.

Informants from Ainuatu allege that they were punished because of their association with Fretilin. While this did not necessarily mean that the people of Ainuatu who had settled in and around Maliana were displaced, it did mean that they had no control over decisions made about 'their' village land. At around this time, local officials allowed people from other villages, notably Tuganatu, to take over the land they had farmed since their relocation by the Portuguese administration. Ainuatu people allege that the people from Tuganatu regularly threatened them and said they would never leave the land while Indonesia was in power.

DISPUTE RESOLUTION PROCESS

On 22 and 23 October 2000, members of the Ainuatu community attempted to make some reconciliatory moves towards the people from Tuganatu who were occupying their land. According to informants from Ainuatu, they wanted to try to resolve the problem according to customary relations of cousins and marriage (*maun-alin* and *uma mane*, *mane foun*), but the Tuganatu people were not interested in dialogue.

Two further attempts at dialogue were made on 9 January and 24 March 2001. During these meetings a number of 'outside' mediators were asked to facilitate the meetings. The people from Ainuatu claimed that they were happy to come to an agreement over the land, provided the people from Tuganatu recognised that the land under dispute was originally farmed by people from Ainuatu. They alleged, however, that the people from Tuganatu did not want to negotiate and continued to insult the people of Ainuatu. The readiness of the people of Ainuatu to participate in informal dispute resolution

appears to have been motivated in part by their belief that they would not receive a fair trial through the courts because a local traditional leader, with whom the Tuganatu group are close, has relatives in the court in Dili.

This dispute was officially taken to the Land and Property Directorate in January 2002. A memorandum of understanding between the parties to the conflict was signed on 11 January 2002. Under the memorandum the parties agreed to participate in mediation and agreed that while this was occurring neither party would farm the land under dispute.

The Land and Property Directorate organised a number of meetings between January 2002 and July 2003 in an effort to mediate between the two parties. However, the people from Ainuatu were not satisfied with the process and wanted more mediators to be involved, including the local church and human rights organisations. It appears that the people from Ainuatu did not want to discuss the land issue in isolation from other issues of disenfranchisement that occurred during the Indonesian period.

An agreement was signed on 7 March 2003 by representatives of the Ainuatu and the Tuganatu groups, and the local village head. The agreement provided that the parties to the dispute:

- » have the land at Aireu surveyed so that a map could be created for mediation purposes
- » not engage in violence during the survey process
- » send a representative from each group to a mediation meeting of the Land and Property Directorate together with the village head, subvillage head and the subdistrict administrator.

A group of mediators and staff from the national Land and Property Directorate office came to interview individuals involved in the conflict in April 2003. The National Chief of Mediation sent a letter to the head of the Maliana Land and Property Directorate on 23 July 2003 advising that the National Director of the Land and Property Directorate had directed that the case be resolved through the courts. According to the letter, this direction had been made due to the failure of mediation on 18 July 2003.

OBSERVATIONS ABOUT SUCCESSES AND LIMITATIONS

While this case involves a failure to reach final agreement, it is an example of a successful interim no-violence agreement. The case provides an example of conflict between groups and the extent to which disputes over land may be tied up with group identities, histories and rivalries. The success of a no-violence agreement is a notable achievement and has possibly prevented a dispute over land from escalating into inter-group violence.

Case 3: Jose and Pedro

BACKGROUND TO THE DISPUTE

The dispute between Jose and Pedro concerned the ownership of a 23 000 metre square irrigated rice field in Phoe Dolen, Maliana. This case illustrates a failure of the Land and Property Directorate to reach a final resolution, but provides an example of how an interim land-use agreement can enable the disputed land to be used until a court decision is reached. This dispute bears many similarities to some of those occurring in the Pacific as it concerns a claim by one party to original occupation and generational farming of the land, as opposed to the claim by the other party of having had the land allocated to them through a land use agreement.

Jose alleged in written testimony that his family had farmed the disputed land since the Japanese invasion. According to Jose, Pedro's father came to work on Jose's grandfather's land in 1964. When the Portuguese surveyed the land in 1966, Pedro's father was farming mixed vegetables in areas adjacent to Jose's family's field and continued to do so until 1969. Jose's testimony alleges that in 1970 his family was unable to farm their whole plot, so offered some of it to Pedro's father to farm 'temporarily'. Jose's family asked Pedro's father refused. According to Jose, there were disputes over the land intermittently during the 1980s and 1990s. In 2005, Pedro started planting coconut trees on the disputed land. Jose confronted him and told him—without success—that he could not plant the trees. In July 2006 Jose occupied the disputed land by clearing the field for rice cultivation. Soon afterwards Pedro and his family looked for Jose in the fields, allegedly to kill him. Jose believed that Pedro and his family would refuse to deal with the problem 'as family', so in December 2006 he took the matter to the authorities.

Pedro and his family dispute Jose's version of history. They claim to be descendants of the original occupants of the land, that their father was responsible for clearing the disputed land in 1966 and that prior to this the land was empty (*vadio*). According to Pedro and his family, at this time the Portuguese colonial administration was surveying the rice fields on the Maliana Plain. Although they did not distribute land certificates, Pedro and his family claim that they still own the hoe and other tools distributed by the Portuguese administration, proving they are the original owners of the land. When Pedro's father died in 1999, his land was passed to Pedro, his oldest son.

Pedro claims that neither Jose nor his family made any claim on the disputed land until February 2007, when Pedro claims that Jose and his group began clearing and preparing the fields for rice cultivation. Pedro asked Jose and his group to stop. On 5 February the dispute went to the village head, but neither party would back down on their claim. The dispute was then taken to the Land and Property Directorate.

DISPUTE RESOLUTION PROCESS

On 9 February the parties met with the Land and Property Directorate mediator but the mediation process was unable to help the parties to reach an agreement. On 23 February the mediator declared that the parties could not resolve the problem through mediation and had agreed to take the matter to court. The declaration was co-signed by the parties to the dispute. An interim agreement on land use was signed on 16 April 2007. The agreement states that neither party is permitted to farm the land until a decision is reached by the court.

OBSERVATIONS ABOUT SUCCESSES AND LIMITATIONS

Although this case involves a failure to reach final agreement, like case 2 it provides an example of interim or 'bridging' mediatory involvement by the Land and Property Directorate. The directorate can facilitate interim land-use agreements and, as in the previous case, the interim agreement helped to manage a dispute with substantial potential for violence.

Case 4: Lariato and Bibilaro villages

BACKGROUND TO THE DISPUTE

The case of Lariato and Bibilaro villages is another example of conflict between groups. It concerns a dispute over the border of a rice field of approximately 60 hectares between the two villages. The people from Bibilaro claim that in 1968–69 their community was involved in digging the irrigation channel to the disputed land and that in 1970 they started planting rice on the land. The people of Lariato argue that the land is theirs, they have been farming it since the end of the Japanese occupation and they were responsible for digging the irrigation channels to the disputed land.

The dispute over the land appears to have first emerged in 1974, at which time the district administrator ordered the village heads of Lariato and Bibilaro to resolve the problem. The people of Lariato claim that the village heads resolved the dispute at this time by agreeing to a border with witnesses from leading families of each village.

DISPUTE RESOLUTION PROCESS

The dispute came to the attention of the Land and Property Directorate in December 2002 when the district police responded to a fight between groups of farmers from each village. Police officers took four farmers from Bibilaro who had been involved in the dispute to the directorate office in Maliana. Forty farmers from Lariato also went to the Land and Property Directorate office and told staff there that when they went to their fields they found a group of farmers from Bibilaro working 'their' land. For their part, Bibilaro villagers alleged that the 1974 agreement was tainted by the two village heads' subsequent support for the Indonesian occupation.

An official complaint was made by a representative from Bibilaro who claimed that people from Lariato were 'occupying' Bibilaro land. The mediator told the groups to return in one week, and in the interim he talked to elders from both communities to learn more about the history of the rice fields. It became apparent that there were a number of people who had witnessed the establishment of the village boundary, including customary elders from the origin group. As a result the Land and Property Directorate decided to 'hand back' the case to customary authorities. In the interim, the directorate facilitated an agreement between the parties stating that:

- » Lariato may continue to farm
- » Bibilaro will pursue the case through legal channels
- » Lariato will participate in the justice process.

The agreement also included a no-violence commitment.

OBSERVATIONS ABOUT SUCCESSES AND LIMITATIONS

This case again demonstrates the advantages of the flexibility of remedies available to the Land and Property Directorate. By sending the dispute back to the customary authorities, the directorate recognised the significance of local dispute-resolution mechanisms and their capacity to adequately resolve disputes. However, it also provided an interim measure to prevent the dispute from escalating further by having the parties agree on the interim use of the land and commit to no violence.

Applicability in the Pacific

Customary land conflicts in East Timor bear some similarity to land conflicts in the Pacific.

- » Group migration, changes in agricultural production techniques, and colonial settlement policies have contributed to land disputes.
- » Generational disputes over ownership and occupation, in circumstances of uncertainty over historical events and a general lack of documentation, have contributed to conflicts among extended family groups.
- » Complex claims involving status and hierarchy within a group, often involving 'newcomers' asserting entitlements through marriage or historical agreement, have contributed to conflicts within territories managed by traditional 'origin' groups.

These types of conflict have been greatly exacerbated in East Timor—first, by historical cycles of dispossession and resettlement and, second, by social tensions created by the Indonesian occupation.

The potential applicability of East Timor's mediation model in Pacific island countries would be enhanced by the following:

- » a preliminary assessment of prevailing dispute-resolution mechanisms to ensure that mediation by local land officials does not overlap with or undermine effective existing systems such as village courts
- » a preliminary assessment of the financial capacity of the local land office and, if necessary, recommendations to apply revenues collected from the transfer and registration of titles or from the lease of public land to mediation programs, infrastructure and training
- workshops and consultations to gauge political support for mediation by local land officials, and to advocate the value of such mediation on the basis of its flexible, low-cost and high-potential attributes
- » further research into the types of customary land conflict that respond best to mediation by land administration officials
- » mandatory obligations for mediators to have adult female members of affected households attend and participate in the mediation process
- » comprehensive mechanisms and training in relation to recordkeeping at the district, regional and national levels of land administration, and in the court registry in cases of successful agreements
- » mechanisms and obligations to keep copies of successful agreements in the offices of village and subdistrict officials, so as to maintain local awareness of agreements over a long period
- » inclusion of provisions relating to the legal status and (simple) enforceability of mediated agreements in mediation laws and regulations
- » integration and harmonisation of mediation by local land officials with any mediation or alternative dispute-resolution functions adopted by the courts.

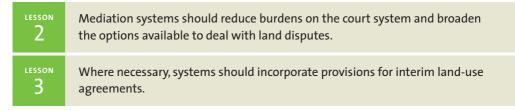
Lessons

GIVE MEDIATION A BRIDGING ROLE IN RESOLVING LAND DISPUTES

There should be ongoing efforts to identify and use customary disputeresolution mechanisms in ways that create a bridge to more formal mechanisms.

The current land mediation system in East Timor creates a bridge between traditional dispute-resolution mechanisms and the courts. It allows the use of ritual and customary institutions if the parties agree, and reference to the courts if the parties are unable to agree.

EMBED CONFLICT MEDIATION IN LAND ADMINISTRATION



The mediation of land conflicts in East Timor is embedded in land administration rather than judicial administration. This allows remedies unavailable in the courts, such as selling, leasing, dividing or swapping land and establishing interim agreements to allow the land to be used until the dispute is resolved. It also alleviates problems associated with a lack of capacity in the court system, including minimal facilities in rural areas. Land administration generally has greater access to self-funding opportunities than the courts. In East Timor the Land and Property Directorate generates substantial revenues from leases over public land.

TAKE ADVANTAGE OF NO-VIOLENCE AGREEMENTS

lesson 4	Mediation is often the most effective means of dealing with land conflict between groups with potential for violence.
LESSON 5	Where necessary, mediation systems should incorporate provisions for interim no-violence agreements.

The mediation system can be better suited to dealing with conflicts involving groups or individuals from different groups than traditional dispute-resolution mechanisms. It can manage the potential for violence in complex cases of conflict between groups. Where mediation has involved interim no-violence and land-use agreements, it has successfully managed a number of potentially violent conflicts, pending resolution through agreement or adjudication.

SUPPORT MEDIATION WITH EFFECTIVE LEGISLATION AND ADMINISTRATION

LESSON

The mediation system should be backed by an appropriately comprehensive legislative framework and administrative infrastructure capable of resolving more stubborn cases and cases that fall outside the jurisdiction of the mediation process.

A large number of land conflicts will never be resolved through mediation, not only because of their complexity and high stakes but also because of social tensions arising from the Indonesian occupation. East Timor needs to pass its draft law on land restitution and establish a land claims commission to complement existing mediation mechanisms. Also, the current system does not deal with cases where one party is the state or a government official. This excludes most claims of dispossession by the Portuguese and Indonesian administrations.

USE AND TRAIN THE RIGHT MEDIATORS



A balance needs to be struck between using mediators with local expertise and ensuring objectivity. In striking this balance important issues need to be addressed—providing appropriate training and building transparency and accountability into the mediation system.

District land officials have local knowledge and expertise but they are more susceptible than outsiders to allegations of bias and partisanship. There should be more resources devoted to training programs for mediators, and more transparency and accountability built into the mediation system.

INSTITUTIONALISE WOMEN'S ROLES IN MEDIATION

LESSON 8

Mediation systems should require specifically that gender issues are given adequate weight and should include some requirement for female mediators when appropriate.

The absence of women's voices and interpretations of law from the mediation process tends to encourage decision making that overlooks the land rights of women.

MAINTAIN POLITICAL SUPPORT

LESSON

Political support for mediation systems needs to be maintained, which requires ongoing monitoring at the local level and effort to maintain it.

In some districts of East Timor, mediation by the Land and Property Directorate has suffered a loss of political support since it was first established by the United Nations Transitional Administration.

Bibliography

- Commission for Reception, Truth and Reconciliation in Timor-Leste 2005, *Final report*, viewed June 2007, http://www.etan.org/news/2006/cavr.htm.
- De Sousa, P 2005, 'East Timor: land management—a long way to go but we have started', viewed June 2007, http://www.fig.net/commission7/bangkok 2005/papers/6 3 sousa.pdf>.
- Direcção de Terras e Propiedades & ARD Inc. 2003, *Report on research findings and policy recommendations for state property administration/lease of government and private property*, viewed June 2007, <http://landlawprogram.com/web/pdf/research/ StateProperty-e.pdf>.
- Fitzpatrick, D 2002, Land claims in East Timor, Asia Pacific Press, Canberra.
- —2002, Restitution and dispossession: international property norms in East Timor's new Constitution, refereed published proceedings of the Australia New Zealand Society of International Law Annual Conference, 17 June, Centre for International and Public Law, Australian National University, Canberra.
- —and McWilliam, A 2005, 'Waiting for law: land, custom and legal regulation in Timor-Leste', in H Hill and P Thomas (eds), *Cooperating with Timor-Leste: options for good development practice*, Development Bulletin no. 68, Australian National University, Canberra.
- Guasmao, X 2000, *To resist is to win: the autobiography of Xanan Gusmao*, ed. S Niner, Aurora Books, Melbourne.
- Monk, K, de Fretes, Y & Reksodiharjo-Lilley, G 1997, *The ecology of Nusa Tenggara and Maluku*, Periplus Editions, Singapore.
- Pederson, J and Arneberg, M (eds) 2000, *Social and economic conditions in East Timor*, International Conflict Resolution Program, School of International and Public Affairs, Columbia University, New York.
- Simo, J 2005, *Report of the National Review of the Customary Land Tribunal Program in Vanuatu*, Vanuatu National Cultural Council, Port Vila.
- Taylor, John G 1999, East Timor: the price of freedom, Zed Books, London.
- Tiffany, SW 1983, 'Customary land disputes, courts and African models in Solomon Islands', *Oceania*, vol. 53, pp. 277–90.
- Timor-Leste Land Law Program 2004, *Report on research findings and policy recommendations for a legal framework for land dispute mediation*, viewed June 2007, <http://www.jsmp.minihub.org/Traditional%20Justice/Reports/LLP_Mediation%20 Report/LLPMediationReportEnglish.pdf>.
- World Bank 1999, *Report of the Joint Assessment Mission to East Timor*, World Bank, Washington, DC.
- Wright, W 2004, 'An overview of the provisions of East Timor's Law No. 1 of 2003 on the juridical regime on immovable properties', *East Timor Law Journal*, vol. 6.
- —2004, 'Some observations on the report on research findings and policy recommendations for a legal framework for land dispute mediation prepared by Timor-Leste Land Law Program', *East Timor Law Journal*, vol. 10.

DISPUTE RESOLUTION

10

Resolving land disputes in Samoa

Jennifer Corrin » Associate Professor, TC Beirne School of Law, Executive Director—Asia Pacific Law, Centre for Public, International and Comparative Law, University of Queensland, Brisbane

> The contribution of **Leota Laki Lamositele-Sio**, Project Manager, ADB Small Business Development Project, Samoa, to the writing of this case study is gratefully acknowledged.

A snapshot

Resolving land disputes in Samoa

The importance of the customary system of land tenure has long been recognised by the Samoan people and their leaders. Government resources have been allocated to nurture the customary system, including the provision of forums to resolve customary land disputes outside common law courts. The principle forum for such dispute resolution is the Land and Titles Court, which has a number of advantages over the customary courts established by legislation in other Pacific island countries. Village councils are also recognised by legislation, highlighting their importance and reducing the potential for conflict with common law courts.

The system for resolving land disputes in Samoa provides important lessons on:

- ways to recognise, support and build on existing local customary systems and institutions
- issues to consider in the creation and sustainability of a specialist institution to resolve customary land matters
- » the benefits of legally recognising customary institutions and issues that may arise
- » the importance of the legal system being able to adapt to the changing status of institutions for resolving customary land disputes
- w the potential for alternative methods to reduce the time and costs associated with resolving disputes and increase compliance with agreed solutions.

Contents

»	THE SETTING	202
»	THE LEGAL SYSTEM The law and its evolution The courts	202 202 203
»	LAND TENURE	203
**	FORUMS FOR RESOLVING CUSTOMARY LAND DISPUTES Village council Land and Titles Court Land and Titles Court Appeal Division Supreme Court Land Investigation Commission Resolution within the family by the matai Arbitration	205 206 207 208 208 208 209 209
**	TENSIONS AND ISSUES RELATING TO CUSTOMARY LAND DISPUTE RESOLUTION The definition of custom The Land and Titles Court The matai system The village council Negotiation and mediation	209 209 210 213 213 213
»	INNOVATIONS Resources, leadership and cultural underpinnings The dual court system Avenues for developing customary land	215 215 216 217
**	LESSONS Build on tradition Create specialist institutions Address issues arising from a specialist institution Recognise customary institutions Recognise the challenges to tradition Provide alternatives for resolving land disputes	217 217 218 218 219 219 219
»	APPENDIX: PEOPLE CONSULTED	220
>>	REFERENCES	221

The setting

Samoa has been relatively successful in maintaining its traditions, and a complex code of social rules exists. The country is divided into 11 traditional districts, each of which is subdivided into villages. There are about 330 villages and each has several extended families (*aiga*). The power an extended family wields in village affairs is proportionate to its size.

The head (*matai*) of each extended family directs its social, economic and political affairs. The matai title is not automatically inherited (although blood relationship is a factor in selection). Rather, the honour is bestowed by the family, taking into account the candidate's record of service to the family and village. The role of the matai is complex and interwoven into the fabric of Samoan culture and history.

Each village has a council (*fono*) made up of the heads of the village families. The council is responsible for governing village affairs. The other strong influence in a village is the church, which is a focus of recreational and social life.

The legal system

THE LAW AND ITS EVOLUTION

In Samoa, originally laws were pronounced orally by the village chiefs (*ali'i*). At independence in 1962 laws introduced during the colonial period were retained. By virtue of its history, the law as it stands today is a complex mixture of formal laws made locally—that is, the Constitution (which is the supreme law) and legislation enacted by the Parliament or made by delegated authority—and common law made by the formal courts of Samoa. In addition, English common law and equity remain in force, so far as they are not excluded by any other law and so far as it applies to Samoa. Customary law is also formally recognised by the Constitution as a source of law. However, there are problems surrounding its application.

THE COURTS

Samoan courts follow the common three-tier model:

- » lower courts of limited jurisdiction (the District Courts)
- » a superior court of unlimited jurisdiction (the Supreme Court)
- » an appeal court (the Court of Appeal).

The Court of Appeal hears appeals from the Supreme Court. The Supreme Court has the right to conduct the trial of any matter, including matters relating to titles to non-customary land. It can interpret the Constitution and hear cases on breaches of fundamental rights. Its powers are guaranteed by the Constitution. The District Court's jurisdiction is not described here as it is not empowered to hear cases on customary land. Most disputes over alienated land are dealt with by these courts.

The Constitution (Art. 103) provides for a separate body, the Land and Titles Court, to deal with matai titles and customary land. The other forum authorised by legislation to deal with customary land is the village council, a traditional forum.

Procedure in civil cases in the Supreme Court is adversarial in nature. The rules have not been amended since they were introduced in 1980 and they need to be reformed.

Samoa is one of the few countries of the South Pacific region to have its own Evidence Act. This Act incorporates rules that are unsuitable for resolving customary land disputes. From the definition of 'court' in the Act, it appears to apply to all courts established by legislation in Samoa. However, in practice it does not seem to be used by the Land and Titles Court. The Act does not apply to the village council as it is not a court.

Land tenure

The Constitution recognises and defines three types of land tenure: freehold, public and customary. Of the total land area in Samoa, about 81 per cent was estimated in 2002 to be customary land, 4 per cent freehold land and 15 per cent public land (Taule'alo, Fong & Stefano 2003).

Freehold land provides extensive rights to the titleholder, including disposition by sale, gift, mortgage, lease or will. The only restriction on such disposition is that the transfer must be registered in the Lands Registry and sale to a non-citizen requires the consent of the head of state.

Public land is held by the state. Land below the high water mark is public land, thus avoiding the types of dispute that have arisen in other Pacific island countries on the ownership of reefs.

Customary land is held 'in accordance with Samoan custom and usage and with the law relating to Samoa custom and usage'.¹ Consequently, it is not owned individually. Authority over the land is vested in the holder of the matai title to which it is attached or, in the case of uncultivated land, in the chiefs and orators (*faipule*) of the village.

Customary land is fundamental to Samoan society and identity. Its value cannot be assessed in economic terms alone because of its symbolic and cultural value. It is protected from alienation by the Constitution under Article 102—the only article in the Constitution that requires a referendum to be changed. This article states that it is unlawful to alienate or dispose of an interest in customary land. However, there are three ways in which land may, in effect, be taken out of the customary system.

The only direct means of alienation is by compulsory acquisition under the Taking of Lands Act 1964. Another way is by granting a lease or a licence under the Alienation of Customary Land Act 1965. Compulsory acquisition and leasing or licensing are stated by the Constitution to be exceptions to the bar on alienation or disposal.

Another way is through registration of authority over land (*pulefa'amau*). Section 14 of the Land and Titles Act permits a Samoan to register authority over customary land in the name of an individual, whereas traditionally it would lie with the extended family and be attached to the matai title. The court accepts that registration of authority entitles the holder to exclusive rights of occupation and use of the land, which may be inherited by the heirs of the registered titleholder. In other words, it is treated as freehold land. Application for registration of an authority over land often accompanies an application to grant a lease of land.

Forums for resolving customary land disputes

Customary land disputes are common in Samoa. Where disputes cannot be resolved privately, the forum to be used depends on Samoan law. The Land and Titles Act 1981 states that the Land and Titles Court has exclusive jurisdiction in customary land matters, but this Act is subject to more specific provisions in other legislation.² The most relevant Acts and the main types of dispute they govern are listed in Table 1.

Legislation	Disputes governed	
Village Fono Act 1990	Disputes relating to uncultivated village land; disputes relating to the use of village land for betterment of the village; disputes over village land where the village's authority is still accepted.	
Land and Titles Act 1981	Disputes regarding authority over land and the right to register authority over land.	
Land Titles Investigation Act 1966	Disputes about the status of land.	
Alienation of Customary Land Act 1965	Disputes over authority to grant leases.	
Taking of Lands Act 1964	Disputes regarding title to land and compensation for taking land.	

The legislation provides five forums for resolving disputes involving customary land:

- » village council
- » Land and Titles Court
- » Land and Titles Court Appeal Division
- » Supreme Court (with an appeal to the Court of Appeal)
- » Land Investigation Commission.

There are two other ways to resolve disputes, the first arising from custom and usage and the second under the contract law in leases of customary land:

- » determination by matai
- » arbitration.

² It is a rule of statutory interpretation referred to as 'generalia specialibus non derogant' that general provisions in an Act do not derogate from more specific provisions (Bennion 2002, pp. 255–7).

VILLAGE COUNCIL

Unlike most other Pacific island countries, Samoa does not have village-level courts. However, each village has a council with some judicial functions. At present there are about 350 village councils. Some very large villages have more than one council.

The Village Fono Act 1990 recognises the authority of such councils to deal with village affairs in accordance with 'custom and usage'. The jurisdiction of the village council is limited to people usually resident in the village. It does not normally extend to people residing in the village on government, freehold or leasehold land who are not liable in custom to render service (*tautua*) to a matai of that village.

The Village Fono Act also gives the council power to make rules governing the development and use of village land 'for the betterment of the village'. However, while it can make decisions about land use, its jurisdiction to resolve disputes is limited in some areas to uncultivated village land. Decisions on cultivated land are normally made by the matai in consultation with the family.

Where there are disputes between matai on matters such as boundaries these are usually referred to the Land and Titles Court, not the council. However, the council can impose punishments in accordance with the custom and usage of the village. Punishments can be fines of money, mats, animals, food or a combination of any of these. Punishments can also include work on village land.

The Act does not permit appeals to the common law courts. Instead, they are made to the Land and Titles Court, which may allow or dismiss an appeal or refer it back to the council to reconsider. However, the Land and Titles Court cannot substitute its own decision for that of the council or entertain a second appeal after the council has reconsidered the matter.

There are no written rules governing procedure in the village council, but it must exercise its power and authority in accordance with custom and usage. Within the council there are strict rules of rank; the chiefs and orators form the core of the decision-making process. The orators take charge of the proceedings, but the chiefs have the final word, after listening to the deliberations of the lower ranked matai. Practices may differ slightly depending on the location of the village and the personalities of the matai involved.

LAND AND TITLES COURT

The Land and Titles Court has the powers of a court of record. It has jurisdiction to determine four types of dispute, conferred by three different Acts:

- » Land and Titles Act 1981—exclusive jurisdiction to determine all claims and disputes between Samoans relating to customary land and the right of succession to such land, and to deal with claims to a registration of authority over land. Exclusivity is interpreted narrowly and it refers to disputes concerning authority to deal with customary land.
- » Taking of Land Act 1964—jurisdiction to determine which matai has the authority over customary land being compulsorily acquired.
- » Alienation of Customary Land Act 1965—jurisdiction to hear objections to the granting of leases or licences over customary land.

The Land and Titles Court also hears appeals from the village councils.

The law to be applied by the Land and Titles Court is expressly stated to be:

- » custom and usage
- » the law relating to custom and usage
- » the Land and Titles Act and any other enactment expressed to apply to the court.

Otherwise, the court decides matters in accordance with what it considers to be fair and just.

The registry of the Land and Titles Court is in Apia but it has a subregistry in Savaii, where it also hears some cases.

The Act governing the Land and Titles Court provides for it to use the same rules of procedure as the Supreme Court. In practice, however, rules are largely ignored and the Land and Titles Court appears to take an inquisitorial approach.

Hearings are normally attended by the parties and their family members. The proceedings are formal and begin with a prayer and sometimes a brief kava ceremony. Traditional forms of address involving complex customary courtesies are used and the recital of village and district genealogies is undertaken by all parties to set the parameters of the dispute. Samoan judges are entitled to be heard on all questions before the court and can examine any party or witness. Legal practitioners have no right of audience before the Land and Titles Court.

Judgements are made against the land and are therefore binding on all people affected, whether parties to the case or not. Decisions must give reasons, be pronounced in open court and be published.

LAND AND TITLES COURT APPEAL DIVISION

The Appeal Division of the Land and Titles Court hears appeals from original decisions of the court with the leave of the President if there is:

- » new evidence
- » misconduct by a party or a witness
- » misconduct or mistake on the part of the court
- » lack of jurisdiction
- » error of law
- » a decision against the weight of the evidence.

Some of these appeals are also grounds for a judicial review by the Supreme Court.

SUPREME COURT

The Constitution names the Supreme Court as the forum that deals with disputes over compensation for land compulsorily acquired under the Taking of Land Act. The court can also resolve boundary disputes between neighbours arising out of decisions by the Land Investigation Commission. Where the commission has issued a title to land, the court may also deal with a claim by a person who was overseas during the investigation, provided the claim is made within a year.

The Supreme Court can also review decisions of the Land and Titles Court under the common law. The Supreme Court has held that it can review such decisions relating to customary land. Similarly, the Supreme Court can review decisions of the Land Investigation Commission, notwithstanding that these decisions are stated in its governing acts to be 'final and conclusive'.

The modern English law of judicial review applies in Samoa and the principal grounds on which decisions are reviewed include illegality, procedural impropriety and irrationality. Illegality includes cases where decision makers do not understand or give effect to the law.

The Supreme Court also has jurisdiction to review decisions of a village council and the decisions of a matai if they contravene the fundamental rights guaranteed by the Constitution.

LAND INVESTIGATION COMMISSION

The Land Investigation Commission deals with claims over individual landownership. The commission is empowered to determine whether land is customary, freehold or public and whether a claim has been established. Its decisions are by majority. It is important to note that the commission is not empowered to determine ownership of customary land; it must refer such matters to the Land and Titles Court. This avoids the determination of authority by a body other than the Land and Titles Court. The commission rarely sits and its existence is not well known.

RESOLUTION WITHIN THE FAMILY BY THE MATAI

Disputes over customary land, other than uncultivated village land, are determined by the matai with authority over the land, who usually consults other family members before reaching a decision. There is no set procedure for resolving disputes at the family level but consultation is usually relied on. Disputes between different matai—for example, those regarding land boundaries—are commonly referred to the Land and Titles Court rather than being dealt with by the village council.

ARBITRATION

The standard form of lease for customary land is prescribed under the Alienation of Customary Land Act. The Act provides for all disputes relating to leases to be referred to arbitration.

Arbitrators' powers and the procedures they must follow are outlined in the Arbitration Act 1976. Arbitrators may subpoena witnesses and take evidence on oath or by affidavit. The Supreme Court may intervene in the case of partiality by an arbitrator.

Tensions and issues relating to customary land dispute resolution

The underlying cause of tension in resolving disputes involving customary land arises from the two legal systems in Samoa—customary and introduced. These systems have different origins and values. Competition between values comes to a head over customary land. A further tension is the growth of the number of heirs to customary land and the increasing role of Samoa's absentee landowners in customary matters. Some of the most obvious conflicts and problems are outlined here.

THE DEFINITION OF CUSTOM

An important issue when a forum is applying custom is determining exactly what is being applied. The term 'custom' or 'customary law' is not defined in the Samoan Constitution, although the Land and Titles Act (Art. 2) defines 'custom and usage' as:

... the customs and usages of Samoa accepted as being in force at the relevant time and [including]:

- (a) The principles of custom usage accepted by the people of Samoa in general.
- (b) The customs and usages accepted as being in force in respect of a particular place or matter.

This definition avoids three problems that have arisen in defining custom in some other Pacific island countries:

- 1 Reference to custom instead of customary law avoids arguments about the often illusory line between the two.
- 2 Reference to customs 'in force at the relevant time' avoids the suggestion that 'custom' must be ancient to qualify.
- **3** Reference to customs 'in force in respect of a particular place' avoids arguments about how widespread a customary rule must be to warrant recognition.

Although custom is defined, its content is not written down. Lawyers from a common law background may see the lack of clear rules as a source of uncertainty. On the other hand, the flexibility of customary law may be an advantage, permitting a holistic approach to resolving disputes. So far, the Land and Titles Court has resisted declaring general rules of custom.

A related issue is the imprecise relationship between custom and other sources of law. While the Constitution and legislation are stated to be superior to other sources of law, the relationship between customary law and common law is not expressly stated, so it is not clear which takes precedence (see Corrin & Paterson 2007, pp. 41–2).³

THE LAND AND TITLES COURT

Procedure

As already mentioned, the Land and Titles Court seems to take an inquisitorial approach. Beyond that, little is known about how it operates although, outside Samoa, Samoans are increasingly adept at bringing and fighting claims before the Lands and Tiles Court. One important question that remains undecided is whether custom and usage must be proved as a fact or whether they are a matter of law (see Zorn & Corrin Care 2002). The uncertainty about the practice and procedure of the court has led to it being criticised for lack of transparency. It has also been suggested that the lack of clear procedure contributes to delays because parties are apparently allowed to tell stories at their own pace and to summon as many witnesses as they want to.

³ By way of contrast, legislation in Kiribati and Tuvalu—Laws of Kiribati Act 1989 (Kiribati), s. 6(3)(b) and Laws of Tuvalu Act 1987 (Tuvalu), s. 6(3)(b)—makes it clear that customary law is to prevail over the principles of common law and equity in relation to a specified list of matters.

Legal representation

At present, the Land and Titles Act prohibits legal representation in the court, although there is a specific right to have petitions prepared by a lawyer. There is also nothing to prevent a party from using a lawyer (if they can afford it) to prepare their case. The Law Society believes it is time to change the Act to allow representation by lawyers, who could save time by narrowing issues and preventing irrelevant evidence being put forward. The contrary view is that lawyers would introduce formal and adversarial procedures and, rather than reducing delays in the Land and Titles Court, lawyers would increase the length of hearings and party costs (Anesi & Enari 1988, pp. 107, 110).

Notice

Notice of proceedings in the Land and Titles Court must be published in the government newspaper, *Savali*. Many regard this notice procedure as inadequate because *Savali* has a relatively low circulation—estimated by one interviewee to be about 2000 copies of each edition. Steps have been taken to address this by giving copies to village mayors to circulate in their villages. However, there are still too few copies and some suggest that village mayors do not circulate the paper, to suppress notice of proceedings in which they have an interest.

There are also concerns about the content of notices when they describe land by reference to parcel numbers since this is not always recognised by those concerned. One complaint arising from the government's current attempt to acquire land for a hydroelectric project in Sili village is confusion over what land is affected. Another complaint is that the environmental impact statement cannot be understood because it is in English (*Samoa Observer*, 16 April 2007, pp. 1, 3). Most people interviewed for this case study agreed that an illustrated plan or picture showing the location of land would be more effective.

Another issue relates to the notice of decisions. As already noted, the Land and Titles Act requires decisions to be made in open court and be published. It requires the Registrar of the Land and Titles Court to publish decisions in *Savali*, and decisions are deemed complete on publication. However, since an amendment to the Act requires reasons to be given, decisions are no longer published because it is considered to be too expensive to publish a document that is likely to be 10–15 pages.

Failure to publish could be an issue when a party is trying to enforce a decision or when a decision is needed on whether the time for appealing has expired. It could be argued that a decision is not complete or enforceable until after publication. It could also be argued that the time limit relating to appeals does not begin until after publication. However, since the Act requires only 'particulars' of decisions to be published one option is to publish them without reasons and to supply full details directly to the parties concerned and members of the public for a fee.

Registration of judgements relating to customary land

An issue related to notice of proceedings and decisions is the requirement of the Land and Titles Act for the Registrar of the court to send every Land and Titles Court judgement on title or status of customary land to the Land Registrar for registration. Unfortunately this is not happening. There appears to be two related reasons for this. The first is the lack of resources to cope with the backlog of judgements and the second is that decisions do not translate well into registrable details. Customary land is often unsurveyed and described in narrative terms, referring to landmarks such as trees and rivers and undulations in the land. This problem is being addressed by surveying land in dispute and there are plans to devote extra resources to registering land.

Access to legal representation

There is no civil legal aid or public solicitor's office in Samoa, although there is a constitutional right to legal assistance in criminal cases where the interests of justice so require. The absence of legal representation may result in unequal bargaining power in negotiations of compensation for land acquisition and villagers are increasingly seeking legal advice at their cost. It may also lead to inequities in dispute resolution proceedings.

Delay

The Constitution of Samoa guarantees the right to 'a fair and public hearing within a reasonable time'. In the past there have been considerable delays in hearing matters, particularly in the Land and Titles Court. This issue is being addressed and cases are now listed within six months of a claim being lodged.

Binding effect of decisions

Because decisions of the Land and Titles Court are judgements in rem—against a thing rather than against a person—they are binding on all people affected, whether parties to the case or not. This has the advantage of instilling a sense of finality into court decisions. However, it may be contrary to the Constitution, which guarantees the right to a fair and public hearing in determining civil rights and the rights of people deprived of property to access the Supreme Court. This question has not been resolved by the courts.

THE MATAI SYSTEM

Issues also arise from the fact that customary land is 'attached' to matai title and that the titleholder has authority over that land. In recent years the number of titles has grown to extremes, even though there has been no corresponding change in population (O'Meara 1995, p. 138). In 1975 a government review of the matai system documented growing concern about the dramatic increase in titles caused by matai creating new titles and splitting existing ones, mainly for electoral purposes (Government of Western Samoa 1975, p. 2). This has arguably resulted in a move towards recognising individual rights and succession by heirs or children of matai to customary land. However, this move may be restricted to small tracts of land attached to newly created matai titles. Such a movement has the potential to give rise to conflict with community interests and to increased disputes about authority over land.

A related but more specific problem arising is the registration of authority over land. It has been suggested that this is being used as a device to individualise landholdings, which may affect the traditional basis of society (O'Meara 1995, p. 150). Cabinet approval has apparently been given for the development of legislation to abolish the registration of authority over land.

THE VILLAGE COUNCIL

Statutory recognition

The Village Fono Act highlights the importance of the village council at village and national government levels. This Act reduces the potential for conflict between the two court systems because village council punishments are taken into account in mitigation in common law courts. However, it has been argued that the Act may have limited the power of the council rather than enhanced it. By setting out available penalties it has been held to prohibit the imposition of other sanctions. It has also been argued that the legislation entrenches the patriarchal and status-based norms of customary law, and that these powers have sometimes been abused by traditional leaders (Meleisea 2000).

Conflict with fundamental rights

The village council has come into conflict with the Supreme Court over issuing banishment orders. For example, in a recent case the court held that the village council had breached the applicant's right to freedom of movement when they banished him and his family from Lotofaga village because of his son's bad behaviour towards the village pastor. The court concluded that the council was no longer empowered to make such orders (see Corrin Care 2006a).

One reason for the court's decision was that the council's procedure did not ensure that notice of proceedings was given to those involved or ensure their right to be heard. The court said that this conflicted with the constitutional guarantee of the right to a fair trial.

There are counterarguments to this, including the fact that proceedings in the village council are not a trial, nor do they purport to be. While there is no written or posted notice, those who offend against custom are informed by word of mouth. The council acts along 'fairly predictable lines and is capable of reaching clear decisions in matters of everyday concern to Samoans' (Gilson 1970, p. 48). Further, there is normally a hearing, and untitled men are usually entitled to make representations through their matai.⁴ The council can also act quickly, unhampered by the adversarial system and complex rules of procedure that restrict the formal courts (Gilson, p. 22). Customary procedure is also much more flexible, and this often works to the offender's advantage, although it could be argued that this flexibility allows for the arbitrary exercise of discretionary powers (see Corrin Care 2006a).

Gender discrimination is also an issue in dispute resolution. The number of females who are heads of extended families (matai) is gradually increasing, with most estimates being between 5 and 10 per cent. Females are involved in decision making at the family level and those who hold matai titles sit in the village council. However, they do not form part of the decision-making elite. This may change gradually as more matai titles are bestowed on women. The conflicts between constitutionally enshrined rights and the composition and actions of the village council raise complex questions about how to balance traditional values with those reflected in human rights (Corrin Care 2006b).

NEGOTIATION AND MEDIATION

Disputes arise in relation to customary land, as well as freehold land, over compensation for land acquisition. Although negotiators are experienced, the negotiation process is not clearly defined in theory or practice. If negotiation is unsuccessful the only avenue is to refer the matter to the Supreme Court, which will decide the matter in an adversarial setting. Once a dispute has been referred to the court, settlement is unlikely. Planned amendments to the Land and Titles Act will give statutory recognition to the informal mediation role currently played by court officers. Recent amendments to superior court rules in other countries, such as Vanuatu, have introduced compulsory mediation as part of the court process (see Corrin Care 2005).

⁴ See Mose v Mosame [1930-49] WSLR 140, where the village council's decision was set aside on the grounds that it had been imposed in the absence of any representation on behalf of the offender. The reference to 'men' in this sentence is deliberate as the responsible parties and 'advocates' in customary societies are much more likely to be male. Only a small percentage of women are heads of extended families, and the majority of these hold lesser matai titles bestowed solely for the purpose of standing for election to parliament (Aiono 1986, p. 102).

Innovations

In several ways Samoa's approach to resolving customary land disputes is unique in the Pacific. For example, it builds on the strength of tradition and attempts to balance continuity and change. Some of the most striking innovations are now discussed.

RESOURCES, LEADERSHIP AND CULTURAL UNDERPINNINGS

The cohesive force of custom and tradition has long been recognised by the central government. It contributes to preserving peace and harmony and has led the government to invest in nurturing the customary system by, for example, providing forums for resolving customary land disputes.

As with all justice systems, there is tension between the desire to give access to justice and the desire to have a sustainable 'user pays' system for resolving disputes. In Samoa there are court and registration fees. While these are manageable for the user they are insufficient to sustain the system. However, there is another source of revenue from customary land—the 5 per cent rent the government is entitled to under the Alienation of Customary Land Act.

Samoa has forthright, authoritative leaders at national and village levels. Both leaders and citizens are proud of their culture. The desire to retain the strengths of custom and usage, while allowing Samoa to adapt to the changing needs of 'modern' society, is evident in several leadership initiatives. An example is the 1975 review of the matai system, mentioned earlier. The resulting report, based on extensive consultation and analysis, addressed how to retain the best elements of the matai system while dealing with problems resulting from it.

A related and important initiative is the program linking the village council and central government through village mayors and government women's representatives. Village mayors are matai, although women's representatives may not be. Members of both groups are nominated by their villages to represent the villages at a weekly meeting at the Ministry of Women, Community and Social Development. They are paid a stipend by government and pass on information to each side about their plans and concerns. They also distribute the *Savali* in their village.

Having highlighted the strength of tradition, this case study acknowledges that the matai system—and custom more generally—faces challenges from the gradual breakdown of traditional patterns.

THE DUAL COURT SYSTEM

The Land and Titles Court

Although the court system provides a familiar common law environment for introduced law, the adversarial approach it embraces arguably makes it an inappropriate venue for deciding matters involving custom. Further, the adversarial approach is out of synch with the values of consensus and community decision making prevailing in Samoa.

These factors have led most Pacific island countries to seek alternative ways of resolving customary disputes, particularly over land. This usually involves establishing, through legislation, separate 'customary' courts that exist alongside western-style courts. This is the rationale behind Samoa establishing the Land and Titles Court. However, this court is unique in many ways and its differences allow it to avoid some of the pitfalls of 'customary' courts. One significant difference is that, apart from the Supreme Court, the Land and Titles Court has been accorded superior status as a court of record.

Another significant difference lies with the avenue of appeal. In Samoa, appeal lies only to the Appellate Division of the Land and Titles Court, whose decision is final. Together with the Land and Titles Court's status as a court of record, this helps to avoid the suggestion that it is inferior to the courts administering common law. In other countries appeal often lies from the 'customary' court to the superior court within the formal structure. Even where such appeal is restricted to questions of law, questions of fact are often 'dressed up' so as to gain re-entry to a system ill-equipped to deal with questions that should be decided in accordance with customary law.

As already noted, the Land and Titles Court has also avoided getting bogged down with common law procedure and rules of evidence by adopting an inquisitorial approach and does not permit lawyers in court, which helps to prevent an adversarial approach. Samoan judges are appointed on their knowledge of custom and usage and their standing in the community, not on their expertise in the common law system.

Customary resolution

Many issues are resolved at the family level in the customary way without interference. Further, Samoa is one of only two countries in the region that have attempted to integrate traditional dispute resolution with the formal court system (the other being Solomon Islands). The Village Fono Act recognises the village council's authority to resolve minor disputes in a customary way. Resolving matters in accordance with custom and usage without written record by the village council is endorsed by the Act. This is a far cry from the customary courts established by legislation that are burdened with written rules of procedures and western practices (see, for example, Island Court (Civil Procedure) Rules 1984 (Vanuatu), now repealed).

Robust judiciary

Samoa has a robust and well-qualified judiciary served by able administrators. The sensitive approach of the judiciary to custom has led it to find ways to reconcile conflicts with human rights so progress can be made without denigrating customary values. The introduction of universal suffrage in Samoa within a decade of a Supreme Court decision refusing to interfere with such practice has been referred to by the Samoan Court of Appeal as a 'striking illustration of how progress may be achieved if not unduly rushed'.

AVENUES FOR DEVELOPING CUSTOMARY LAND

Innovative ways to use customary land commercially also deserve mention. In some other Pacific island countries, such as Solomon Islands, the only way land can be used commercially is through alienation. However, Samoa has developed a system of using land for development without taking it permanently out of the customary system by leasing, licensing or, more controversially, registering authority over land.

Lessons

BUILD ON TRADITION

lesson 1

As a general principle an effective system to deal with disputes involving customary land will seek to recognise, support and build on existing local customary systems and institutions, rather than trying to introduce foreign ideas and institutions that do not resonate with society.

Customary land is fundamental to Samoan society and identity and this has long been understood by Samoan people and their leaders. Generally, government policy has been to build on the strength of tradition and to try to balance continuity and change. Resources have been devoted to nurturing the customary system, including establishing forums outside common law courts for resolving customary land disputes. An important initiative that might be valuably employed elsewhere in the Pacific is that of the village mayors and government women's representatives. This line of communication links the state to traditional society and avoids the disconnection apparent in some other parts of the region.

CREATE SPECIALIST INSTITUTIONS

lesson 2

One way of improving the resolution of customary land disputes is to create a specialist institution that is able to develop expertise in customary land matters and is not restricted by the normal rules of evidence.

In Samoa the principal forum for resolving customary land disputes is the Land and Titles Court. This court has an advantage over 'customary' courts established elsewhere in the Pacific in that it has been accorded superior status and the only appeal is to its own Appellate Division. The court's inquisitorial approach is suited to dealing with customary land disputes as it avoids a competitive battle between parties and unfair litigation tactics. Further, the court is not bound by technical rules of evidence, which make it very difficult for parties to prove their case in customary matters.

ADDRESS ISSUES ARISING FROM A SPECIALIST INSTITUTION

LESSON 3

Establishing and maintaining a specialist institution involves choosing from a complicated and sensitive set of options regarding jurisdiction, rules of evidence, handing down decisions and enforcing and supervising decisions.

Establishing and maintaining a specialist institution to deal with land disputes is not a simple exercise. The failure of the Samoa Land and Titles Court to give notice in ways that can be understood, to distribute decisions publicly and to register judgements has led to dissatisfaction and a sense of unfairness. More generally, the extent of the court's independence from the Supreme Court is unclear. A process is under way to determine the parameters of the Supreme Court's supervisory jurisdiction.

There are uncertainties about the practice and procedure of the Land and Titles Court and whether the rules of custom and usage are to be proved and whether they are subject to the common law. Delays are also a source of criticism. Queries also arise from the fact that judgements are made against the land and are binding on people who were not parties to the case. The lack of access to legal advice is also an issue, not only with representation in court but also in negotiating compulsory acquisitions or leases to third parties.

RECOGNISE CUSTOMARY INSTITUTIONS

4

Legal recognition of customary institutions makes dispute resolution more accessible to society, but it needs to be done carefully to avoid conflicts with other sources of law.

Samoa is one of only two countries in the Pacific region that have attempted to integrate traditional dispute resolution within the formal court system. Recognising the importance of the village council through the Village Fono Act reduces the potential for conflict with the common law courts. The Act expressly recognises that the council acts in accordance with custom and usage. However, it may have unwittingly limited the powers of the council. There are also conflicts between constitutionally enshrined rights and the composition and actions of the village council.

RECOGNISE THE CHALLENGES TO TRADITION



The level of recognition that a legal system gives to customary institutions should reflect the level of importance society gives to customary authority but needs to be able to adapt to new circumstances and changing social expectations.

Customary land is attached to chiefly title, and the titleholder has authority over that land. Outside formal avenues for resolving disputes in Samoa, the matai and the extended family are left to deal with customary land in a customary way, and many disputes are resolved at the family level. This appears to have worked well in Samoa, where customary authority is still well respected. However, the growth in the number of titles and the (mis)use of registration of authority are among the factors that pose a challenge to the traditional basis on which Samoan society operates.

PROVIDE ALTERNATIVES FOR RESOLVING LAND DISPUTES

6

Creating alternative methods for resolving land disputes, particularly disputes about land acquisitions, may reduce the time and costs of disputes and increase compliance with agreed solutions.

The negotiation process during land acquisitions is not well defined. Further, if negotiation is unsuccessful the only avenue available for resolving a dispute is to refer the matter to the Supreme Court. Once this occurs, avenues for settlement outside court are limited. Because not all disputes can be resolved through mediation, further options for settlement might be valuable in Samoa and in other parts of the Pacific.

Appendix: People consulted

- » Hinauri Petana, Chief Executive Officer, Ministry of Finance
- » Luagalau Foisaga Eteuati-Shon, Chief Executive Officer, Ministry of Women, Community and Social Development
- » Seve Keilani L Soloi, Soloi Survey Services
- » Afoa Arasi Tiotio, Chief Executive Officer, Samoa Land Corporation
- » Le'aula Tavita Amosa, Assistant Chief Executive Officer, Community Affairs, Ministry of Women, Community and Social Development
- » Le Taua Paul Philips, Assistant Chief Executive Officer, Ministry of Works, Transport and Infrastructure
- » Ming Leung Wai, Attorney General, Office of Attorney General
- » Patrick Fepuleai, barrister and solicitor
- » Masinalupe Tusipa Masinalupe, Chief Executive Officer, Ministry of Justice
- » Klaus Stunzer, President, Samoa Chamber of Commerce
- » Peleiupu Fuata'i, Principal Officer, Drafting Division, Ministry of Natural Resources, Environment and Meteorology
- » Hon. Fiame Naomi II, President, National Council of Women
- » Salota and Atalina, Government Women representatives, Ministry of Women, Community and Social Development
- » Pupualii Senio, representative of village mayors
- » Hon. Tagaloa Tuala DC Kerslake, President, Land and Titles Court
- » Roina Vavatau, Chief Executive Officer, SUNGO, and board members
- » Tu'u'u Dr leti Taulealo, Chief Executive Officer, Ministry of Natural Resources, Environment and Meteorology
- » Toleafoa Solomona To'ailoa, representative, Samoa Law Society
- » So'oialo Lalau David Fong, Assistant Chief Executive Officer, Land Management, Ministry of Natural Resources, Environment and Meteorology

References

- Aiono, F 1986, 'Western Samoa: the sacred covenant', in *Land Rights of Pacific Women*, University of the South Pacific, Suva.
- Anesi, T & Enari, A 1988, 'The Land and Chiefly Titles Court of Western Samoa', in G Powles & M Pulea (eds), *Pacific courts and legal systems*, University of the South Pacific, Suva, Fiji.
- Bennion, F 2002, Statutory interpretation, Butterworths, London.
- Corrin, J & Paterson, D 2007, *Introduction to South Pacific law*, 2nd edn, Routledge-Cavendish, London, chs 2, 3 & 10.
- Corrin Care, J 2005, 'Hemi go finis: reform of civil procedure in Vanuatu', *Asia Pacific Law Review*, vol. 13, no. 1, p. 19.
- 2006a, 'A green stick or a fresh stick: locating customary penalties in the post-colonial era', Oxford University Commonwealth Law Journal, vol. 6. no. 1, pp. 27–60.
- ——2006b, 'Negotiating the constitutional conundrum: balancing cultural identity with principles of gender equality in post colonial South Pacific societies', *Indigenous Law Journal* (Wilfred Laurier University Press, Toronto, Canada), (2006) 5, pp. 51–81.
- Gilson, R 1970, *Samoa 1830 to 1900: the politics of a multicultural community,* Oxford University Press, Melbourne.
- Government of Western Samoa 1975, *Report on matai titles, customary land and the Land and Titles Court*, Government of Western Samoa, Apia.
- Meleisea, M 2000, 'Governance, development and leadership in Polynesia: a microstudy from Samoa', in E Huffer and A So'o (eds), *Governance in Samoa*, Asia Pacific Press, Canberra, p. 198.
- O'Meara, T 1995, 'From corporate to individual land tenure in Western Samoa', in R Gerard Ward & E Kingdon (eds), *Land custom and practice in the South Pacific*, Cambridge University Press, Oakridge, Victoria.
- Taule'alo, TI, Fong, SD and Stefano, PM 2003, 'Samoan customary lands at the crossroads options for sustainable management', proceedings of the National Environment Forum 2002, Department of Lands, Surveys and Environment, Apia.
- Zorn, JG & Corrin Care, J 2002, *Proving customary law in the common law courts of the South Pacific*, British Institute of International and Comparative Law, London.

DISPUTE RESOLUTION

11

Settling customary land disputes in Papua New Guinea

> Norm Oliver » PNG Land Law Consultant, Australia Jim Fingleton » Development Law Consultant, Australia

A snapshot

Settling customary land disputes in Papua New Guinea

Land disputes are common to all regions of Papua New Guinea and cause social and economic disruption. Disputes may go back several generations, and settling them is complex. Papua New Guinea's Land Disputes Settlement Act 1975 created a three-tiered structure for settling disputes mediation, arbitration and appeal—based on a combination of Melanesian customs, principles and practice, and formal law of British origin. However, the system is struggling to operate effectively. Since 2004, and especially following the National Land Summit of 2005, there has been renewed interest in land policy reform and dispute settlement, with major structural and operational changes proposed.

Papua New Guinea's system for settling customary land disputes provides some important lessons.

- There are benefits from using existing customary norms and institutions as well as emphasising local expertise and decentralising decision making.
- » A land dispute resolution system based on customary norms and institutions requires ongoing review and monitoring and stable ongoing funding to remain operationally effective.

Contents

»	THE SETTING	226
	Historical and legal context	226
	The Commission of Inquiry into Land Matters 1973	227
»	THEME AND RATIONALE	228
>>	THE LAND DISPUTES SETTLEMENT ACT	228
	Main features of the Act	228
	From 1975 to 1994—slow progress	229
	From 1995 to 2004—system in decline	230
	From 2004 to the present—growing interest in reform	230
»	CONSTRAINTS ON THE SYSTEM FOR RESOLVING LAND DISPUTES	233
	Design issues in relation to the legislation	233
	Recording of customary law and case decisions	233
	Capacity and financing	233
	Divided authority and responsibility	234
»	APPLICABILITY AND TRANSFERABILITY TO OTHER PACIFIC NATIONS	234
	Melanesian principles	234
	Decentralised system	234
»	LESSONS	235
	Make use of existing cultural institutions	235
	Provide government support and adequate resources	235
»	APPENDIX: INTERVIEWS	236
»	BIBLIOGRAPHY	237

The setting

Papua New Guinea is a country with diverse natural environments, and social, cultural and linguistic groups. The country is made up of 19 provinces and the National Capital District. Most Papua New Guineans live on land under customary tenure. Customary land accounts for more than 97 per cent of the total land area. This case study focuses on the dispute settlement procedures that apply to customary land.

HISTORICAL AND LEGAL CONTEXT

Before Papua New Guinea's independence in 1975, several pieces of legislation had been introduced to deal with matters relating to customary land. In 1952 the Native Land Registration Ordinance established the Native Land Commission with authority to determine ownership of customary land if disputes arose during the registration process.

In 1963 the Native Land Commission was replaced by the Land Titles Commission. In its early years the Land Titles Commission had exclusive jurisdiction to hear disputes over customary land and applications for ownership of that land. Appeals from the Land Titles Commission were to the Supreme (now National) Court. The commission was staffed by experienced professionals with legal training and/or long-term field experience. Over time the jurisdiction of the Land Titles Commission has been reduced and for many years it was administered by an Acting Chief Commissioner.

Following a surge in tribal fighting in the early 1970s, the independent Committee to Investigate Tribal Fighting in the Highlands Districts was appointed. That committee's 1973 report argued that most fights were connected with land disputes and that pressures on land, created by population increases and the planting of permanent cash crops (coffee in particular), had produced high levels of anxiety about land and undermined traditional authority (Fingleton 1981, p. 225). The committee concluded that the introduced system of deciding land disputes under the Native Land Commission and later the Land Titles Commission had not worked effectively and it recommended replacing it with a decentralised system of village-based courts with powers to dispense justice based on local customs and sanctions and with the full backing of the government.

THE COMMISSION OF INQUIRY INTO LAND MATTERS 1973

In the period leading up to independence, land issues were prominent in Papua New Guinea's legislature. Four administration-sponsored land bills had been rejected by the House of Assembly from 1968 to 1972, an action seen by many as a turning point in the nation's history and as an early expression of growing independence. The Commission of Inquiry into Land Matters (CILM) was established by the subsequent House of Assembly (1972–75), which was the first Parliament fully constituted by elected members. CILM was a participatory and consultative inquiry and its members were all Papua New Guinea citizens. It covered all provinces and most districts and it was the most comprehensive commissioned inquiry ever to deal with the subject of land legislation. In its report of October 1973 the commission made numerous recommendations, including recommendations on basic principles of land policy, customary land, rural land, urban land, dispute settlement, land administration, surveying and forestry.

CILM's guiding philosophy was that land policy 'should be an evolution from a customary base, not a sweeping agrarian revolution'. The commission recommended an entirely new system for settling land disputes, based on the principles that:

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

It recommended that the Land Titles Commission, as an agency for settling disputes over customary land, be abolished and replaced by a three-tiered system of mediation, arbitration and appeal that was a part of the national judiciary and was decentralised to the provinces and the districts.

The current Land Disputes Settlement Act of 1975, drafted in accordance with these recommendations, was one of the earliest pieces of legislation to result from this inquiry.

Theme and rationale

Land disputes can cause social disruption and sometimes loss of life. They can have a negative impact on the development of land and ultimately on the local and general economy. An efficient and effective system for settling land disputes is an essential element of any country's land administration. It is generally accepted that in kinship-based societies a land dispute settlement system must be locally based, participatory, simple to administer, affordable and likely to receive the general support of village communities. But settling land disputes is complex. There are many basic questions involved, and how these are answered has a major impact on the nature of the system and its effectiveness. Such questions include:

- » Should the emphasis be on restoring peace rather than on determining landownership?
- » Should responsibility be imposed on disputants to resolve their grievances rather than on an outside body?
- » Should the emphasis be on mediation and arbitration rather than adjudication?
- » How binding should dispute settlements be, and on whom?
- » How restrictive should the opportunity for appeal be?
- » Should lawyers be allowed into the process?

Based on CILM's recommendations, the Land Disputes Settlement Act in Papua New Guinea addressed these questions in innovative ways, and important lessons can be gleaned from more than 30 years of the Act's operation.

The Land Disputes Settlement Act

MAIN FEATURES OF THE ACT

The Land Disputes Settlement Act sets out three stages for the attempted settlement of disputes over customary land. Stage one is compulsory mediation by a land mediator, an appointed local person—in practice always a male—who the local community agrees possesses the knowledge required. If mediation does not settle the dispute, stage two allows for the dispute to be taken to a Local Land Court for arbitration. A Local Land Court comprises a Local Land Magistrate as chairman and either two or four land mediators. The court has wide powers under the Act to reach a settlement between the parties, but if no agreement can be reached it can impose settlement. Mediated settlements are evidence of land rights but they do not bind the parties (unless approved by a Local Land Court), whereas arbitrated settlements do bind the parties. The Local Land Court is also authorised to deal with other matters 'inextricably involved' with the land dispute before it. In general, disputes cannot be taken further than the Local Land Court, but the Act does allow a limited right of appeal (against a Local Land Court's decision) to the Provincial Land Court (stage three). Grounds for appeal are confined to errors of jurisdiction, decisions made contrary to natural justice or cases of manifest injustice.

The Act is largely administered by the Provincial Land Disputes Committee for the province concerned, lawyers are in general excluded from appearing in Land Court hearings and the Land Courts are not bound by any laws other than the Act itself or any other Act expressly applied to them. In special circumstances, under Section 4 of the Act the national government may declare that a land dispute should be settled by some means other than those provided by the Act. Such special circumstances include that the dispute is longstanding and previous attempts at mediation have failed, or the dispute has already resulted in serious breaches of the peace. This section of the Act was included as a 'safety valve' to help resolve intractable cases. It was not envisaged as a mechanism to facilitate, for example, speedier access by resource companies to customary land (as has recently occurred in a number of cases).

FROM 1975 TO 1994—SLOW PROGRESS

The Land Disputes Settlement Act came into operation and Provincial Land Courts and Local Land Courts were established in mid-1975. The courts were designed to fit within the national judicial system, but be decentralised to the provincial level. The Act was introduced through regional workshops for magistrates and district officers, who were then required to convey what they had learned to their respective provinces and districts. Staff of the Land Titles Commission designed, produced and distributed manuals, registers, forms, flip charts and other publications to help introduce the new Act.

Although the dispute settlement system for customary land was introduced hastily and without adequate training of the major participants in its operation, it nonetheless began to work. Communities across the country gradually became accustomed to it and the system continued to function until the mid-1990s.

Regrettably the first 20 years of independence saw a steady decline in official interest in the fate of Papua New Guinea's land dispute settlement system, and herein lay a number of important lessons. One of the major lessons was that all systems of regulation and control, however innovative at the time, need to be reviewed regularly. While the Act had a virtual in-built review system via the Provincial Land Disputes Committees, like other elements of the Act these committees tended to atrophy over the years.

FROM 1995 TO 2004—SYSTEM IN DECLINE

The issue of land dispute settlement was back on the policy agenda briefly in 1995 during the World Bank-funded Land Mobilisation Project in Papua New Guinea. That year, as part of the project, a review of the first 20 years of the Act's operation and mechanisms was commissioned. The review was carried out by Norm Oliver, the principal author of this case study.

The purpose of the review was to examine the existing organisations and mechanisms responsible for resolving land disputes and make recommendations on their rationalisation and possible reinforcement. The review included discussions and interviews across the country with judges, magistrates, district officers, councillors, mediators, clerks of court and others involved in the dispute resolution process.

The review identified major shortcomings in the implementation of the Act and made a number of recommendations to address these issues. However, little official government interest was shown in the way the Land Disputes Settlement Act was working.

FROM 2004 TO THE PRESENT—GROWING INTEREST IN REFORM

By 2004 there was some evidence of growing interest in reforming Papua New Guinea's land dispute system.

Justice Ambeng Kandakasi

One example of the growing interest in reform came from Justice Ambeng Kandakasi, who was appointed Judge of the National Court in 2001 and who is currently (2007) Chairman of the Judicial Committee on Alternative Dispute Resolution. Judge Kandakasi has described the Land Disputes Settlement Act as relevant and appropriate to the needs, aspirations, culture and traditions of the people of Papua New Guinea.

In his view, mediation had a longstanding history in Papua New Guinea. At the centre of traditional dispute settlement processes was consultation and consensus, with customary leaders usually representing the disputant groups. The payment of reasonable compensation and the maintenance of existing relationships and the creation of new ones were the usual focus.

Judge Kandakasi identified some weaknesses in the system, training being a major problem. He suggested that better and more frequent training in the mediation and arbitration systems of the Act would create more understanding of the law and procedures and increase their effectiveness. Additionally, he suggested the act could be improved by adding definitions of the words 'mediate', 'mediation', 'custom' and 'customary law'. Without a clear explanation of these terms it is difficult to begin the proceedings of mediation and arbitration (Kandakasi 2003).

The Magisterial Service Land Court Review 2004

Further interest in reform was evident in the four Regional Land Court Review Workshops held in 2004 for district managers. These workshops identified the major causes of disputes over land and categorised them as either:

- » matters that should be brought under the provisions of the Land Disputes Settlement Act, or
- » matters that were within families or between families so closely related that they required no outside intervention.

A book on land mediation was discussed at the workshops and one is being prepared by the Magisterial Service. Another result of the workshops was the installation of an electronic database to keep track of cases brought before Land Courts.

The National Land Summit 2005

The largest contributor to the movement for land reform, including the land dispute settlement system, was the National Land Summit held in 2005. The Minister for Lands and Physical Planning, Dr Puka Temu, in August 2005 convened this national forum to identify the current problems with land administration, to help to develop appropriate policies and to advise on the way forward. The summit submitted a report to the National Executive Council. The council created the National Land Development Taskforce and appointed members to its three committees.

The National Land Development Taskforce 2006

One of the three committees formed by the National Executive Council was the Land Disputes Settlement Committee. It was chaired by the Acting Chief Commissioner of the Land Titles Commission and included senior public servants from the Department of Justice and Attorney General, the Magisterial Service, the Department of Lands and Physical Planning and a representative from the private legal profession. Meetings took place at regular intervals from February to July 2006. The committee submitted its report and recommendations to the Minister for Lands and Physical Planning in October 2006. It identified the following—by now familiar—shortcomings in land dispute settlement.

- » Land dispute settlement organisations were underfunded, understaffed and underprioritised, resulting in an unacceptable number of outstanding unheard matters.
- » The Magisterial Service gave precedence to hearing criminal and civil cases ahead of land disputes, which contributed to the backlog of unheard cases.
- » The delay in dealing with land disputes had led to social disharmony, inter-tribal and inter-clan fighting, and increased crime rates.
- » Unwarranted delays in hearing land disputes increased the costs of resource developments and slowed development implementation.

- The national government's continued use of Section 4 of the Land Disputes Settlement Act was contrary to its original intention and showed a lack of confidence in, and respect for, the legislation.
- » Confusion existed over which court or commission has jurisdiction over customary land.

Recommendation No. 48 of the National Land Development Taskforce concerning land dispute settlement simply reads 'That a single Land Court System be established in Papua New Guinea'.

In arriving at this recommendation, the taskforce concluded that having three separate bodies—the Land Titles Commission, National Land Commission and Land Courts—was cumbersome, confusing to the community at large and costly to the nation because of conflict, the waste of resources and delays in development (National Research Institute 2007, p. 84). It noted that the proposal for a single land court system was not new, having been made a number of times since the 1973 Commission of Inquiry into Land Matters.

Ministry for Justice white paper 2007

The most recent reform initiative arose from the national government's determination that major changes were needed in how institutions within the responsibility of the Ministry for Justice were organised. The National Executive Council asked the Minister for Justice to examine the recommendations of the 2006 National Land Development Taskforce and to prepare a response for its consideration.

The preferred option, set out in a white paper, was to establish a single land court system *within* the Magisterial Service. Other recommendations called for:

- » a specialist Land Division to be established, headed by a Deputy Chief Magistrate and staffed by specialist magistrates dedicated full time to disposing of land dispute matters
- » the Land Titles Commission and the National Land Commission to be abolished, and their jurisdictions transferred to a specialist District Court.

The white paper stated that a structure designed along these lines would be more cost-effective than establishing an entirely new single land court, as proposed by the taskforce.

Constraints on the system for resolving land disputes

DESIGN ISSUES IN RELATION TO THE LEGISLATION

Under the Land Disputes Settlement Act a Local Land Court sitting on any case is required to visit the disputed area twice: the first time to see what the nature of the problem is before beginning to hear evidence; the second time on completion of the hearing, to hand down the decision, give the reasons for it and indicate to the parties involved any boundaries decided. This is a necessary but costly and not always easy procedure to comply with because the area may be remote and access to it may require hours of walking over difficult terrain.

The prohibitive costs of accessing Local Land Courts could be seen as a legislative design fault. The introduction of computer and communication technology and the allocation of adequate funding may help to overcome this problem.

RECORDING OF CUSTOMARY LAW AND CASE DECISIONS

Land customs differ from place to place, and Local Land Courts must attempt to take account of this when disputes are referred to them for arbitration. No official attempt has been made to record customary law in relation to land since the Native Land Registration Ordinance was introduced in 1952. Decisions in arbitration or appeal cases have not been circulated among the courts. The magistrate of a Local Land Court has nothing to refer to for guidance, except to discuss local custom with local land mediators. Provincial Land Magistrates face similar problems when hearing an appeal against a Local Land Court decision based on local customs that relate to land.

CAPACITY AND FINANCING

The Magisterial Posting List for 2007 shows 103 magistrates posted throughout the country, leaving 52 districts without a magistrate on station. These districts are covered by circuits. The lack of magistrates is a constraint on the prompt hearing of land dispute cases. This situation was exacerbated when the minimum qualifications for appointment to the magistracy were raised to a degree in law plus three years practice. The pool of people available and qualified for appointment as local and provincial Land Court Magistrates is small and becoming smaller. The lack of government housing in provinces and districts limits the number of officials involved in the land dispute settlement system.

Finance remains the biggest constraint on the effective operation of the Land Disputes Settlement Act. Some provincial and community governments have realised that land mediators fill an important role in society by maintaining harmony, peace and stability and allowing peaceful contact and commerce to grow, and have decided to fund their salaries. However, this has not become common throughout the country and has been adopted by only the more prosperous provinces, such as East New Britain.

DIVIDED AUTHORITY AND RESPONSIBILITY

A major complication for funding and staffing the land disputes settlement system is that responsibility for it falls between two departments—Lands and Justice—and neither has taken leadership in resolving this hiatus. The reform efforts under way on land policy generally are expected to address this issue.

Applicability and transferability to other Pacific nations

MELANESIAN PRINCIPLES

Despite the constraints mentioned, the principles underlying the system for resolving customary land disputes remain popular and legitimate in the eyes of the people of Papua New Guinea. The underlying principles, which include mediation based on familiar custom and tradition, and personal involvement by disputants in a local setting, also have resonance in other parts of Melanesia and the Pacific islands.

DECENTRALISED SYSTEM

Land dispute resolution has been decentralised to fit into Papua New Guinea's system of provincial government. Being administered from the provinces brings the Act closer to the people. Local Land Courts have been established in smaller administrative districts bringing the system even closer to people. Many nations of the South Pacific have similar systems of administrative governance, which lend themselves to such decentralised and localised community involvement in dispute settlement.

Lessons

MAKE USE OF EXISTING CULTURAL INSTITUTIONS

lesson 1	A three-tiered system of land dispute resolution involving mediation, arbitration and appeal works well within the context of local Melanesian cultures and is regarded as a legitimate form of intervention.
LESSON 2	Mediation is more likely to be successful where procedures take place locally, the disputants personally take part in the resolution process, and local expertise in land and custom is drawn on.

Papua New Guinea's Land Disputes Settlement Act was designed by Melanesians for a Melanesian society. Its structure of mediation, arbitration and appeal is based on a combination of Melanesian customs, principles and practice, and formal law of British origin. The mandatory involvement of the disputing parties in mediation is based on the principle that a resolution by consensus is more permanent than one imposed by authority. The system is decentralised to district level to bring it closer to the community it is designed to serve.

PROVIDE GOVERNMENT SUPPORT AND ADEQUATE RESOURCES

LESSON
3A land dispute resolution system that makes extensive use of local custom does
not require less effort and resources from government and other stakeholders
to maintain it. It requires ongoing training and support for administrators
(mediators and arbitrators), cost-effective procedures for disputants, clear
leadership from bureaucracy, and ongoing financial commitment from
government.LESSON
4To remain relevant and effective, the system for settling land disputes needs
regular reviews that are supported by government commitment to implement
any major recommendations.

Although Papua New Guinea's dispute settlement system has a number of good features, it is now struggling to operate effectively. The major problems with the system reflect a lack of adequate resources, legislative design flaws, a lack of bureaucratic leadership and failure to maintain a pool of adequately trained people to administer it.

Appendix: Interviews

- » John Numapo, Chief Magistrate, Magisterial Service
- » Stephen Oli, Deputy Chief Magistrate, Magisterial Service
- » Rodney Togumagoma, Deputy Registrar, Magisterial Service
- » Josepha Kiris, Chief Commissioner, Land Titles Commission
- » Agi Ila, Registrar, Land Titles Commission
- » Micah Pitpit, Commissioner, National Land Commission
- » Oswald Tolopa, Director of Policy, Department of Lands and Physical Planning

Phone and correspondence interviews

- » Justice Ambung Kandakasi, Judge of the National Court of Papua New Guinea
- » Horim Ladi, Deputy Provincial Administrator, Policy, Planning and Evaluation, East New Britain Provincial Administration

Bibliography

- Colquhoun-Kerr, A & Lakau, AL 1983, 'Land tenure and land dispute settlement in Enga', *Melanesian Law Journal*, vol. 11, pp. 59–90.
- Cooter, RD 1989, *Issues in customary land law*, Discussion Paper No. 39, Institute of National Affairs, Port Moresby.
- Demian, M 2003, 'Custom in the courtroom, law in the village: legal transformations in Papua New Guinea', *Journal of the Royal Anthropological Institute*, vol. 9, no. 1, pp. 97–115.
- Fingleton, JS 1981, 'Policy-making on lands', in JA Ballard (ed.), *Policy-making in a new state: Papua New Guinea* 1972–77, University of Queensland Press, Brisbane.
- Government of Papua New Guinea 1973, *Report of the Commission of Inquiry into Land Matters*, Port Moresby.
- Kandakasi, A 2003, 'Customary mediation under the PNG Land Dispute Settlement Act', paper delivered to the National Mediation Conference, Darwin.
- Knetsch LJ & Trebilcock MJ 1981, *Land and economic development in Papua New Guinea*, Discussion Paper No. 6, Institute of National Affairs, Port Moresby.
- National Research Institute 2007, *The National Land Development Taskforce report*, NRI Monograph 39, National Research Institute, Port Moresby.
- Oliver, NF 1995, *Review of land dispute settlement organisations and mechanisms*, United Nations Development Programme report (TA 215), UNDP, Port Moresby.
- Westermark, GD 1984, 'Old talk dies slowly: land mediation in Agarabi', *Windsor Year Book of Access to Justice*, 3, University of Windsor, Ontario, pp. 186–203.



LAND FOR PUBLIC PURPOSES

CASE STUDIES

12	Acquiring land for public purposes in Papua New Guinea and Vanuatu	241
13	Accessing land for public purposes in Samoa	265

LAND FOR PUBLIC PURPOSES

12

Acquiring land for public purposes in Papua New Guinea and Vanuatu

Michael Manning » Mirel Ltd, Kokopo, East New Britain, Papua New Guinea Philip Hughes » HEH Pty Ltd, Canberra, ACT, Australia

A snapshot

Acquiring land for public purposes in Papua New Guinea and Vanuatu

The countries of the Pacific need land on which to build and supply social and economic infrastructure such as schools, health clinics, roads, ports, and electricity, water and sewerage services. Frequently the land must be acquired from customary owners. Government officials and private companies must negotiate with customary owners to acquire land but the laws and administration systems supporting all parties are usually inadequate. Problems arise for many reasons: old or missing records, disputes over ownership or rights, excessive compensation demands, long delays and failure to communicate adequately and to understand the attitudes of villagers.

Experiences in Papua New Guinea and Vanuatu on accessing land for public purposes highlight the need for:

- » having a well-functioning land administration system
- allowing adequate time and resources for comprehensive community consultation
- having alternatives to outright purchase or acquisition, and agreed transparent methods for valuing land
- undertaking legislative reform to improve and speed up the acquisition process.

Contents

»	THE SETTING	244
»	PAPUA NEW GUINEA	245
	The law and acquisition of land by the state	245
	The acquisition process in action—land for public roads	247
	Trends in the acquisition of public land	252
	Is it necessary to pay compensation?	254
	Recommended reforms to the procedures for acquiring customary land	255
>>	VANUATU	256
	The law and acquisition of land by the state	256
	Developing problems in Vanuatu	259
»	LESSONS	261
	Provide effective land administration	261
	Provide alternatives to outright land acquisition	261
	Emphasise negotiation rather than compulsory acquisition	262
	Consult landowners	262
	Value land in an agreed transparent way	262
>>	BIBLIOGRAPHY	263

The setting

Pacific island countries require land on which to build and supply social and economic infrastructure such as schools, health clinics, roads, ports, and electricity, water and sewerage services. Frequently, the land must be acquired from customary owners. The negotiations to acquire land usually involve government officials from several agencies, customary owners from several different groups, and often people from the private sector, sometimes from several different companies, one or more of which may be from overseas. Even with the best laws and processes in place, such negotiations would be complex.

Customary land is land owned by a citizen or a group of citizens who are regulated by custom. Customary land, also known as unalienated land, makes up about 97 per cent of the total land in Papua New Guinea. In Vanuatu 98 per cent of land is customary land. The 1980 Constitution of Vanuatu designated all land except land required for public purposes and urban land to be customary land (Art. 80).

This case study focuses on acquiring land for public purposes in Papua New Guinea and Vanuatu, particularly:

- » the legal structures used by the state to acquire land from customary owners for public purposes
- » the relationships between government officials and customary owners as land is being acquired
- » the payment of fair compensation to customary owners for the loss of their land
- » the problem of how to ensure negotiations are finalised so that customary owners do not repeatedly seek additional compensation from the government for the same piece of land
- w the poor funding and staffing of all aspects of the process associated with acquiring land for public purposes, including maintaining records
- » reports of illegal activity related to paying compensation for acquiring and disposing of land used for public purposes
- » proposed reforms to current laws and processes.

Many groups in Papua New Guinea and Vanuatu are willing to give up, or share rights over, parts of their land if it is used for the public good. Even so, when customary owners have been made to feel powerless or exploited they have been known to damage infrastructure being built on their land or threaten violence that has led to schools, aid posts, airstrips, and water and electricity supplies closing down.

While some landowners may threaten violence or closure of facilities to demand excessive rents or repeated compensation, it is also possible they are correct when asserting that the land was never purchased or they were not compensated for its loss. It is common to find that land acquisition records are poorly kept, damaged, lost or even stolen.

It is also possible that individuals pretend to represent landowners in a dispute to receive the payment supposed to be distributed among the owners. Such tactics can mean that landowners who rightly argue they have not been paid are not believed.

In many situations acquiring land outright and in perpetuity by alienating it from customary tenure may not be the best option. It may be a good option if there is no revenue to be shared—as is the case with most public purposes. If the land is to be used for commercial, urban or industrial uses that can generate income, governments should explore options such as long-term leases and revenue sharing with customary landowners.

Papua New Guinea and Vanuatu take similar approaches to using customary land for public purposes. These approaches involve the principles of due process and natural justice. Both countries are culturally diverse, especially Papua New Guinea, and any strategies to access land for public purposes must take this diversity into account.

Previous approaches to acquiring and using customary land for public services often have been flawed. Better ways need to be found to balance the needs of the community with the rights of customary landowners. The paper focuses mostly on Papua New Guinea due to its much greater size, diversity and amount of development activity compared with Vanuatu.

Papua New Guinea

THE LAW AND ACQUISITION OF LAND BY THE STATE

In Papua New Guinea the government's power to acquire land is contained in the Land Act 1996 and the Lands Acquisition (Development Purposes) Act 1974. The state can acquire land by agreement with landowners, or under some circumstances the Minister for Lands can decide to make a compulsory purchase (Land Act 1996, s. 7). The state can use the powers of compulsion only when land is required for a public purpose as defined in the Act. The legal and administrative procedures for acquiring land, whether by negotiation or compulsion, can be laborious and time consuming.

As well as acquiring land itself, the government can acquire an easement, a right or an interest in the land. The Land Act also covers lease and lease-back acquisitions¹ but only when granting special agricultural and business leases. The Land Regulations set out the procedure for buying or leasing land.

In Papua New Guinea the Land Act prevents customary landowners from directly leasing land to outsiders. But they can lease it to the state and then lease it back. Thus, landowners wishing to engage in direct land dealings are able to enter into a lease – lease back arrangement with the government. In this way, landowners acquire a leasehold interest in their land, which may then be mortgaged or subleased to investors.

The procedure for acquiring land by negotiation requires:

- 1 the government department concerned to identify the land and at least some of the owners to be involved in the negotiations, and to inform the Department of Lands that it needs the land for public purposes under the Land Act
- 2 the Department of Lands to issue a Land Investigation Instruction, which contains notice of the proposed acquisition and requires the landowners to negotiate
- 3 the Department of Lands to negotiate with the landowners to establish ownership and to prepare a Land Investigation Report.

If a dispute arises during negotiations (which is not uncommon and is often between local people who disagree over who owns the land), it can be mediated locally by a village land mediator or taken to the District Land Court and ultimately to the Provincial Land Court.

The procedure for compulsory acquisition requires the Department of Lands to:

- 1 serve a notice to landowners that they are legally required to negotiate with the government over the acquisition of their land
- 2 negotiate with the landowners over price and compensation
- 3 gazette the notice of acquisition.

Once the gazettal takes place the land becomes the property of the state and is free of all claims by any individual or group that had an interest in the land. No further payments or actions by the purchaser can be demanded by the former owners. The provision for assessing and paying compensation is set out in the Land Act.

An early problem with the Lands Acquisition (Development Purposes) Act was the number of appeals against decisions made under the Act, particularly those made by the Minister for Lands. The National Land Registration Act 1977 attempted to reduce the number of appeals against ministerial decisions by excluding appeals to a higher court over such matters as failure of landowners to respond to a notice to negotiate in the time allowed (two months). It also sought to limit appeals in relation to the absolute power of the minister to acquire land by compulsion and decide how much compensation should be paid. However, the National Court saw this legislation as an attempt to exclude the courts from reviewing the exercise of administrative powers by tribunals (Muroa 1997) and found that, despite the National Land Registration Act, the right to appeal continued to exist under the Constitution and in common law. An unintended consequence of this decision, or of the poor drafting of the original Act, has been the awarding of extraordinary amounts of compensation on appeal.

THE ACQUISITION PROCESS IN ACTION—LAND FOR PUBLIC ROADS

The acquisition of land for public roads in Papua New Guinea illustrates some of the problems that may arise in this process, such as the loss of records, as well as some of the solutions.

The way it was

In Papua New Guinea customary landowners are often quite willing to challenge the authority and power of the state if they believe they are being treated unfairly. Some of their attitudes stem from their experiences with the Australian administration prior to independence in 1975 and they do not always distinguish clearly between it and the modern nation state. Also, landowners often believe the state has unlimited resources that it is unwilling to share fairly.

To give some perspective, before the mid-1950s the Australian administration required customary landowners to give their land and labour freely for road building on the grounds that they would benefit from its construction. Many existing provincial roads were built this way and some provincial governments still apply the policy of landowners donating land although they are now paid for their labour.

As a result of this approach many provincial roads have been built on land that remains in customary ownership. This is often not understood by public servants planning to upgrade a road, who believe that the land has been properly acquired and that landowners are being obstructive and 'greedy' in demanding compensation. The fact that land records are frequently lost or destroyed—usually by decay and poor storage exacerbates the situation.

From the mid-1950s the Australian administration adopted a policy of purchasing in full the rights of way of national roads, such as the Highlands Highway. The process involved only a cursory investigation of landowning groups and was unlikely to ensure that all landowners and their rights were recognised and received due compensation. There was also no requirement to mark the boundaries of the purchase.

With the passing of the Land Act 1962, customary land was bought through a process called Native Land Dealing. This process fully investigated the relevant landowning groups and others with rights to the land in question, a valuation was made of the land and improvements, the land to be purchased was surveyed and the boundaries marked, a survey plan was attached to the Native Land Dealing documents, and these were registered in the Department of Lands.

The Land Act 1996 further revised the way the state acquired customary land and ensured compensation was for the value of improvements to the land. The requirements for surveying and marking boundaries became more rigorous than those in the Land Act 1962. As a result, the process of acquiring land for roads is now difficult and time consuming, taking several years to complete.

Recent compensation processes and issues

In recent years many new roads and road rehabilitation programs have been funded by international donor agencies such as AusAID, the Asian Development Bank, the World Bank, the European Union and the Overseas Economic Cooperation Fund of Japan. Before roadworks funded by these agencies are carried out the Government of Papua New Guinea must ensure all necessary land is acquired and compensation paid in accordance with the Land Act and associated laws and regulations.

If the negotiations with customary owners to acquire land go smoothly, the process can take only one to two years. Such was the case with an EU-funded project to reconstruct 127 kilometres of the Ramu Highway in Madang Province, which was completed in 2000. The land acquisition process was left entirely to the government. It took two years to buy the land and the landowners did not contest the purchase price or the compensation paid. In a few cases where there were disputes over ownership the money was placed in a trust fund to be disbursed when the disputes were settled. This reduced the likelihood of delays to construction.

But, if there are disputes over who are the customary landowners—which is usually the case—these can take much longer to settle. On average it is about three years and sometimes as long as five to ten years. On the Bereina–Malalau Highway project in Central and Gulf provinces, which was funded by Japan, the land acquisition process started in January 1993. In July 1993 the land was compulsorily acquired. A court injunction was then obtained to prevent the landowners from interfering with the project. The process of identifying landowners and determining compensation started at the beginning of 1993 and continued for the seven years of the project. Much of it involved the court resolving disputes while construction proceeded. Construction work started in March 1996 and the road was completed on schedule in early 2000.

The Bereina–Malalau area had poor roads and the people wanted the project to proceed. They accepted that the compulsory land acquisition and court injunction actions were necessary to allow construction to proceed while the land issues were resolved. Nevertheless, once the right of way was identified villagers planted crops and trees along it to benefit from compensation, which was duly paid to them. They also built 52 houses along the right of way. When compensation was refused on the houses, they accepted the decision. It was as though they were seeing how far the state could be pushed before it resisted. Importantly, the project team devoted considerable effort to community affairs, including preparing and distributing a package of information to ensure villagers were fully aware of the project and process involved. A lands officer was engaged full time for three years to work with the government officials responsible for acquiring the land.

If disputes cannot be resolved, or if the process for resolving them is cumbersome, a road project can be abandoned. The Asian Development Bank provided loans for road projects in several provinces in the late 1990s and early 2000s. Almost all had rights of way on customary land, which required the government to acquire the land before work began, a process that took about three years. The project had to fund the costs

of government officials from the Department of Lands and the Land Court involved in the land acquisition and compensation process. Even after issues were legally settled, most road subprojects were plagued by additional compensation claims and disputes. In some cases these caused further delays in project implementation. Land and compensation disputes, especially the delays they caused, were a factor in some of the road subprojects being abandoned.

Even where the right of way has been acquired, if road rehabilitation involves sealing an existing gravel road, the design invariably involves widening and straightening certain sections of the road and improving drainage, which may encroach on adjacent customary land. Given the difficulties in acquiring customary land in a timely fashion, ideal design requirements may be watered down to ensure works are confined to the existing right of way, which in turn compromises the safety of motorists and pedestrians.

In 2000 the AusAID Gravel and Resealing Project in seven coastal provinces confined their works to existing rights of way, even along road sectors where this was not the best design outcome. All gravel was obtained from existing sources. The PNG Office of Works handled all negotiations and paid only the standard government royalty and compensation rates. There were a few occasions where the project declined to implement proposed works because landowner demands were judged unreasonable and the work was moved elsewhere. Because the works were confined to existing rights of way, the project was not concerned with whether land was customary or government owned.

Problems with records

It is difficult to determine with complete certainty which existing road rights of way have been acquired by the government and which are still in customary ownership. The land registration records in both the Department of Lands in Port Moresby and the provincial capitals are in a poor state. The Department of Lands in Port Moresby has shifted office several times in recent years and in the process records have been wrongly filed, mislaid and lost. Records must be stored properly, particularly in a tropical climate so that they are protected from water, moisture, and insects such as silverfish. There are also anecdotal reports that occasionally files have been stolen and destroyed.

There is no centralised computer-based record of land registration. Under the Land Act 1996, once documents related to land have been returned to the Department of Lands for registration of a Native Land Dealing and the registration process has been completed, a designated departmental draughtsman checks the survey data and plots the area acquired (and the Native Land Dealing registration number) onto a master transparency copy of the relevant 1:50 000 map. In 2000 there was a two-to-three year backlog of Native Land Dealing registrations that required checking, revising boundaries and plotting onto master transparencies.

Australian-supported road reconstruction projects linking Southern Highlands and Enga to Mt Hagen in Western Highlands Province (Mendi–Kisenapoi and Wabag– Wapenamanda road projects) suffered extensive delays because acquisition records were not available.

Even where road improvement projects are confined largely to road easements previously acquired by the government, increasing numbers of demands are being made for further payments for land in the rights of way. The claims are usually based on arguments that 'the original price was too low', 'the money was paid to the wrong families', 'the purchase was not made in accordance with customary law', or 'the elders who agreed to the sale had no right to dispose of the birthright of future generations'. This situation arises mostly with land acquired before the Land Act 1962 came into force, as was the case for much of the Highlands Highway.

The state finds itself in a difficult situation when it cannot provide documentary evidence of a purchase. Despite these issues having considerable potential to disrupt road rehabilitation projects, with notable exceptions until the early 2000s claims made were mainly of a nuisance value rather than of the proportions to endanger projects. Most were successfully resolved by face-to-face negotiations with landowners. Such negotiations, however, are very time consuming.

Compensation issues on newly acquired land

The government pays compensation to landowners where a new road will destroy any improvements made by the owners such as a house, trade store, garden or irrigation system. Within the Department of Works, the Operations Division (through its Land Acquisition Unit) is responsible for commissioning compensation investigations from relevant staff of the Department of Works, the Department of Lands, the provincial administrations and District Services. Compensation is normally assessed about three months before construction work is due to start, with a view to compensation cheques being raised and paid to landowners just before construction begins. Valuations are supposed to be based on the Valuer-General's Economic Trees and Plant Price Schedule, but increasingly payments have been higher (a trend discussed later). Compensation for physical improvements made by the landowners such as houses or trade stores is generally determined by negotiation.

Valuations and associated negotiations with landowners are undertaken by District Lands Officers, District Services Officers or valuers from the Valuer-General's Office. In 2000 staff of the Valuer-General's Office in the Highlands reported mounting evidence of irregularities in the compensation process, especially exaggeration of amounts to be paid and payments to 'phantom' (non-existent) claimants. Because of this, the Valuer-General's Office began increasingly to undertake field assessments for compensation payments after District Lands Office staff had carried out the initial identification of landowners. The government departments and courts—national and provincial—involved in the land acquisition and compensation process are understaffed and poorly resourced, making it difficult for them to do their jobs. To expedite the acquisition process, road projects routinely fund some or all travel, vehicle hire and accommodation costs of government staff, as well as pay fees to non-government mediators.

A good example of this is the AusAID-funded Mendi and Wabag highway upgrade projects in Southern Highlands and Enga provinces undertaken during the late 1990s and early 2000s. The land had already been acquired, but it was clear from the start that there would be ongoing, complex compensation issues, especially for physical improvements (houses and trade stores) built on the rights of way. The project made use of the Lands Unit established in the Office of Works. The salaries and expenses of the government employees in the Lands Unit were paid by the road contractor out of project funds. The unit was effective in dealing with compensation issues on a day-to-day basis.

Another example is the Lae to Wau road in Morobe Province. The project team had believed that the necessary land had been acquired before the project began in the early 1990s. As the project progressed it discovered that many land problems were unresolved. When the land acquisition process began it was slow and there were delays during the early stages due to land and crop compensation issues. Fortunately, these problems did not become critical and lead to major delays or cause a halt to the project. That was because landowners were patient as long as they saw survey work in progress and as long as the project employed a full-time lands officer to whom they could talk. The contractor recommended that all future major road projects use such an officer to minimise disputes and delays.

It is common for gardens or buildings such as trade stores and tyre repair shops to gradually encroach onto previously acquired rights of way—to the edge of the road itself. If the state has acquired the land through the proper process and compensation has been paid, people that encroach in this way are squatters. There do not appear to be well-established procedures in rural areas for addressing this issue. To be fair to former customary owners, if the boundaries of acquired land are not clearly marked, after some time they assume that the land acquired is represented by the road itself and not by the wider right of way. On the other hand, people also deliberately try to extract the maximum possible amount of money from what they view as an infinitely wealthy state that does not distribute its wealth fairly. In practice, another round of compensation payments is usually negotiated, generally following the procedures outlined above.

Problems with the slowness of acquisitions

Conflict between the state and landowners can occur when the process of acquiring land has begun but many years later it is still not completed. This situation exists along numerous parts of the Highlands Highway and its feeder roads. In such situations landowners understandably become frustrated, anxious and confused.

It is important that road construction takes place as soon as possible after settlements have been reached and payments made (Egis Consulting Australia 1999; Hughes & Yok 2000). Delays beyond two or three months often result in further compensation demands. People often claim to have been wrongly excluded from the original negotiations, perhaps because they were living elsewhere at the time. Further demands are also commonly made in relation to crops or trees that landowners have planted in the right of way. The longer the delay the greater the number of extra demands. A good example is the 9.2-kilometre Ogelbeng–Ambra section of the Ogelbeng–Kotna–Banz road in Western Highlands Province. It was rehabilitated by a project funded by the Asian Development Bank (Egis Consulting Australia 1999). Acquiring and paying for land for this section of the road was reported to have been completed about a year before the technical feasibility study was carried out in 1999. During this time, extensive garden crops and commercial pineapple crops were planted to the edge of the existing road and District Services staff expected another round of compensation demands.

The sharing of administration costs

As mentioned, the lack of capacity and funding for national and provincial government agencies involved in land acquisitions means that donor agencies and project contractors often need to help them. This usually involves providing staff and funds to help government officials do the myriad of tasks involved in acquiring land.

At a minimum, major road projects need the full-time services of a lands officer, probably for the duration of the project. In addition, for complex projects such as upgrading major roads such as the Highlands Highway it is necessary to set up for the duration of the project a community affairs team, like those used by mining projects. As well as facilitating land investigation and acquisition and associated compensation negotiations, the community affairs team can implement community information programs (in Tok Pisin or the local language), address women's issues, arrange to employ local labour, support small business activities, plan road safety and carry out environmental management and monitoring. This increases the costs of infrastructure projects but helps to avoid more costly delays or conflicts. Project budgeting should take these costs into account.

TRENDS IN THE ACQUISITION OF PUBLIC LAND

The road-related examples exhibit trends that have been apparent over the past decade in the process of acquiring land for all sorts of public purposes.

Positive trends

A number of positive trends can be drawn out of the road examples.

» Customary owners are generally willing to provide land for roads from which they will benefit.

- Provided the acquisition process is transparent, is seen to be fair to all involved, and the officials involved in negotiations are competent, honest and do not have vested interests, land can be acquired for public purposes in a reasonably straightforward way.
- » Most disputes are not about whether the land should be acquired for the purposes set out, or even in many cases over the amount of compensation. Rather most disputes are between local people and about who are the real customary owners.
- » Lands officers who can competently identify owners and lead disputants to an agreement can resolve most problems in a relatively short time. Attempts to hurry the acquisition process by preventing local people from appealing decisions have failed in the National Court and resulted in disruptions at the local site.

Acquiring land is expensive, but governments have never provided sufficient funds to the agencies that must manage the process for the work to be done satisfactorily. Where private contractors pay lands officers to work full time on the acquisition process, land can be acquired within one or two years and, in some cases, construction of infrastructure can go ahead while final acquisition details are worked out. Problems are created and delays and cost blowouts occur in cases where the genuine concerns of customary owners are brushed aside or where the process is discontinued and started again a number of times through a lack of funding or poor administration.

Concerning trends

In Papua New Guinea there are a number of concerning trends in acquiring land for public purposes. One is that the amount of compensation paid is increasingly exceeding the amount specified by law. The road examples above noted that staff of the Valuer-General's office reported claims for compensation were increasingly being exaggerated. In the period 1999–2001, K45.5 million was paid out to 28 claimants—an average of K1.6 million per claim, with some significantly lower but some much higher than this average.² The claims applied to a range of different types of land acquired before independence. These claims were appealed by the state using a private law firm and most if not all appeals were allowed³ and referred back to the Land Commission. It is not clear how many claims were paid but some were. A commission of inquiry has been investigating the possibility that there was collusion with officers in the Attorney-General's and Finance Department to expedite payments.⁴

Another trend is the growing number of cases in which the process of acquiring land as set out under the law has not been properly followed. This is resulting in increases in public allegations of corruption and a loss of confidence in the acquisition process by landowners, who then become reluctant to make land available because they fear they are going to be 'ripped off'.

² Department of Lands, Summary Brief on Orders of Settlement Payment Over Lands Commission Awards-Under National Land Registration Act. These payments were part of a total of K157.6 million paid out in that period as opposed to K2.2 million paid out in the first 20 years of the scheme.

³ Jacob Wafinduo, Manager Customary Land, Department of Lands, pers. comm., 2007.

⁴ The investigation was terminated during Papua New Guinea's recent election campaign.

Another disturbing trend is where compensation is paid more than once on a single piece of land. The loss of records combined with a loss of corporate memory in government departments increases the potential for repeat demands to be paid. This is leading to more groups making repeat demands. It is also giving rise to allegations of individual corruption within government agencies responsible for paying compensation. Recently, large amounts of public money have been paid to individuals who claimed to be representing customary landowners, to compensate them for public land acquired some years ago. In 2001 the Land Commission was suspended pending a review of the Act and a court review of awards made by the commission.

Problems have also arisen around the opposite process to acquiring customary land. Questions have been asked recently about the disposal of some pieces of public land acquired from customary owners and said to be no longer required. In at least two cases such land was sold cheaply to individuals and some sold illegally. As a result, much suspicion and unhappiness have been created among the former customary owners of the land concerned and among the general public. Demonstrations and letters to newspapers have highlighted these concerns.

Causes of concerning trends

The Department of Lands has suffered a loss of skills and corporate memory as people who know the details of many cases retire. The department does not have a manual of procedures and files are misplaced. This is partly because the department has moved premises a number of times, but also because—as alleged by field visit officers—files were deliberately taken, especially those on contentious claims and unusual compensation payments. The loss of files on particular cases is systematic and extends to files in the National Archives, a separate building from the Department of Lands in Port Moresby.

As a result, it is fair to say that the management of and the process for acquiring customary land for public purposes need to be improved. It is necessary to be blunt about this situation, because it is one that can and should be avoided in other countries. If governments do not address the situation it will mean that customary landowners will resist the just and lawful acquisition of any land by the state for the public good.

IS IT NECESSARY TO PAY COMPENSATION?

Individuals who provide land for a public good are compensated because they have given up a possibly valuable asset for the benefit of the community. However, if it is a community that owns the land, as is the case with a customary landowning group, and if the land is acquired to provide a good that will benefit everyone in that community, some leaders in Papua New Guinea argue that compensation should not be paid. Some provincial governments have agreed with their constituents that compensation will not be paid in this circumstance. This approach to providing public land appears to be similar to the situation in Vanuatu. The East New Britain Provincial Government, for example, has a 'no compensation' policy for some forms of land acquisition or state land use that dates back to the need to clear trees from access roadways during a volcanic scare in the town of Rabaul in 1984. The policy aims to ensure that there are no 'unnecessary land compensation demands'. The policy establishes local and provincial compensation tribunals that deal with compensation for the removal of soil or trees to maintain or build roads or other infrastructure such as schools and aid posts, but not for the land itself if it is acquired for public purposes.

RECOMMENDED REFORMS TO THE PROCEDURES FOR ACQUIRING CUSTOMARY LAND

Bring finality to acquisitions

Present methods of calculating compensation for land used for public purposes in Papua New Guinea are haphazard and open to abuse. An amendment to the Land Registration Act that has been passed but is not yet in force will make it an offence to make a claim over land for which compensation has already been paid. The amended Act provides for a fine of K5000 (A\$2140) or 12 months in jail for this offence. Most people spoken to as part of the research for this case study agreed there has to be 'finality' in acquisitions so that the state is no longer subject to repeated and ongoing claims for compensation.

Create a single land court

Improvements to the procedures for acquiring customary land for public purposes, especially those relating to compensation, have been discussed by various governments in Papua New Guinea for a considerable time. Formal inquiries were undertaken by, for example, the Public Sector Interdepartmental Working Committee in 1995, the Institute of National Affairs in 2000 and the National Land Development Taskforce in 2007. Their reports and the 2007 white paper on law and justice in Papua New Guinea contain valuable, although sometimes contradictory, ideas about how to reform the acquisition process. They also recognise the trends already discussed and offer possible solutions, including creating a single land court to merge the National Land Titles Commission and the National Lands Commission, remove the Land Dispute Settlement Act from the Magisterial Service, and incorporate the village land court system (which deals with land and land mediation) into the new court system.

Provide adequate resources

The successful identification of customary land and customary landowners in the oil, gas, mining and road construction industries suggests that the problems do not lie with landowner negotiations, but in the implementation, administration and support of the laws and procedures that accompany the process of identifying land and landowners. It is important that the Valuer-General is properly resourced and capable of providing effective and lasting valuations. It also remains critical to have properly trained and funded staff for identifying landowners, for informing them of the process and their rights, and for mediating in negotiations.

Consider leasing land for public purposes

Some of the tensions surrounding the use of customary land for public purposes might be reduced if land were leased from owners rather than acquired outright through alienation. This would ensure that future generations also receive benefits, similar to those enjoyed in other lease arrangements between private users of customary land (for example, lease and lease back). If land were leased rather than acquired by the state, rents would need to be adjusted regularly relative to some measure such as the consumer price index, to ensure that the real value of the rental payment was maintained.

There is no simple way to balance the rights of customary owners with the interests of the wider community when land is acquired for public purposes. The only way to do it successfully is to ensure that the landowners receive 'fair and just' compensation based on a properly assessed value of their land at the time of acquisition or adjudication. A number of laws and agencies exist to handle this. These laws and the offices set up to administer them have demonstrated that they can work. An ongoing adjustable rent based on inflation or the unimproved capital value of the land may be a better way to ensure that owners and their descendants are fairly recompensed over time than outright acquisition.

In Fiji land can be returned to customary ownership if the public purpose lapses. This option, if incorporated into the system of land acquisition in Papua New Guinea, might help in some cases to address intergenerational issues if landowners knew that the land would be returned to them at some time in the future.

Vanuatu

THE LAW AND ACQUISITION OF LAND BY THE STATE

In Vanuatu the powers to acquire land in the public interest are set out in the Land Acquisition Act 1992. The first step is a decision by the Minister for Lands that land is required for a public purpose—defined as a purpose that is 'necessary or expedient in the public interest'. Then a sequence of steps follows: initial notification to landowners, investigation of the land, notice of intended acquisition, appeals, inquiry into compensation, further appeals, payment of compensation and possession by the state.

⁵ The authors are greatly indebted to Michael Mangawai, former Director of Lands, for his invaluable help and guidance in this section of the case study.

The Act sets out the procedures for acquiring land, which includes measures to compensate for damage while investigating the land as well as compensation for the land itself. The Act also requires that adequate notice is given and that adequate consultation takes place. The Government of Vanuatu has successfully used the Act many times to acquire land and, importantly, agreement has always been reached on compensation. This has meant that so far the government has not needed to use its powers under the Act for compulsory acquisition (Lunnay et al. 2007). In Vanuatu compensation demands for land on which public assets stand or are proposed are far less common than in Papua New Guinea.

At independence the Constitution of Vanuatu ceded ownership of all land to the people but also recognised individual land rights and the need to acquire urban land and land for public purposes. The Alienated Land Act 1982 (amended in 2000) enables customary owners to lease parts of their land. However, the Act requires the lessee—the individual or group that wants to lease the land from the customary owners—to apply for a Certificate of Registered Negotiator. This certificate is issued by the Minister for Lands and entitles the lessee, also called the alienator, to negotiate with customary owners for a lease (Land Reform Act 1980, consolidated 2004).

Under the amended Alienated Land Act the government can hold a perpetual lease of urban land and land used for a public purpose, and the customary owners are entitled to a continuing share of revenue from it. Customary owners can also continue to occupy some of the land. The length of a lease depends on how the land is to be used—30 years for rural uses, 50 years for urban uses and 75 years for large investment projects (Lunnay et al. 2007, p. 8). The Land Leases Act 1983, as amended in 2003 and 2004, deals with registering leases. The 2003 amendment allows leases of land for public purposes to be extended to 75 years if a premium is paid and the 2004 amendment defined the calculation of the premium to be paid.

The Alienated Land Act generated controversy when introduced. The Opposition argued that it was unconstitutional because the Council of Chiefs (*Malvatumauri*) had not been consulted, as required under Article 76 of the Constitution. The Chief Justice ruled that it was constitutional because the government's powers to acquire public land, provided to it under the Constitution, overrode Articles 73, 74 and 75 of the Constitution, which give protection to customary landowners (Holmes 1996).

When a dispute occurs over ownership or the valuation of a land parcel to be acquired by the government and when the land is required with reasonable urgency, landowners can agree that it is disputed and the land is then leased by the Minister for Lands who holds the proceeds in trust until the dispute is resolved. However, these powers have not always been used responsibly or in the interest of landowners (Lunnay et al. 2007, p. 4). A recent example of how the government carries out its obligations is its dealings on the Sarakata hydropower station.

THE SARAKATA HYDROPOWER STATION

The Sarakata hydropower station on the island of Santo has been operating since 1994 and provides 70 per cent of electricity to the area around the town of Luganville. The station owners intend to add another stage to the facility with Japanese aid.

The government now has to resolve land claims that have been outstanding since 1994. It appointed a technical advisory group to do so. The areas under dispute are 5.2 hectares that are part of land occupied by an agricultural company called Plantation Reunion de Vanuatu (PRV) and 13.9 hectares that are in customary ownership.

The ownership of the 5.2 hectares parcel was disputed. The customary owners had agreed to lease land to the company in 1986 but had never agreed about the location of the boundaries of the land belonging to the individual owners. Until the dispute was registered in 2005 the Minister for Lands was powerless to hold the lease. In July 2005 instructions were given to survey both portions of land, which was completed in October 2005. A village land tribunal began in September 2005 and awarded ownership. This decision was appealed in October 2005.

Meetings were held in November 2005 and unanimous agreement was reached to allow the lease to be issued to the minister until the customary owners were identified. Conditions regarding preferential employment and business opportunities for the customary owners were included and signed off. As of July 2006 the minister had not signed the lease although it had been prepared. Meanwhile, PRV had applied for and been awarded compensation payments for loss of income due to the dispute. In total, the government paid the company Vt3.5 million (around A\$40 000).

Source: Technical Advisory Group, Ministry of Lands and Natural Resources (2006).

Present government policy is to acquire only land that will be required by the state indefinitely or for more than 75 years⁶ because it is not possible to lease land for this long. This includes land for airports, roads, other infrastructure projects, provincial headquarters and commercial centres. Roads were declared state property at independence, but since independence little of the land on which other public assets are located has been acquired or had formal lease agreements completed. In 2006 and 2007 the government allocated Vt300 million (around A\$3.5 million) for compensation. Government officials admit that this is only a small start and that the task is formidable.⁷

Because roads were declared state property when Vanuatu gained independence, the government has not been subjected to the same pressure for compensation payments over roads as has the Government of Papua New Guinea. Also there have been few new roads built on customary land requiring government compensation since then.

⁶ Director General, Ministry of Lands and Natural Resources, pers. comm.

⁷ Director General, Ministry of Lands and Natural Resources, and others interviewed.

In isolated cases Vanuatu has negotiated non-cash payments for land. In the capital, Port Vila, for example, the government acquired land from the local Ifira, Erakor and Pango communities for urban use and provided allocations of land in kind as payment.

In September 2006 the Vanuatu Department of Lands and Natural Resources organised a National Land Summit, which emphasised the need for 'fair dealings' as a principle for all land transactions. The government is considering introducing a Fair Rental Act to embody this concept.⁸ The Department of Lands and Natural Resources prefers outright acquisition to leases, believing it is easier to administer and less likely to result in a dispute. Disputes over leases are probably occurring because the government is not organised properly to pay rents.⁹

In many parts of Vanuatu people are prepared to lease land freely to the state for public purposes. Land can be acquired or leased by the state without recourse to law if landowners agree. One main weakness of this arrangement is that the notices supposed to be given to landowners are often not properly served. Thirty days notice should be given and the government should ensure that the necessary criteria are met if land is to be used for a public purpose.

In some cases the government just states the value it proposes to pay landowners because customary owners often have no idea of the true value of their land. There is often also difficulty when the land has already been leased. For example, in acquiring the land occupied by Norsup airport, the lessee wants to receive the present market value of the land instead of the payment going to the customary owners. When leased land is acquired, lessees receive payments for improvements to the land, as well as compensation for the unexpired part of the lease.

DEVELOPING PROBLEMS IN VANUATU

Land in Vanuatu has strong cultural dimensions and the Constitution recognises this. Nevertheless, the emergence of a modern state means an increasing need for public land to cater for urbanisation, infrastructure and services. The Urban Lands Act 1994 recognises this and allows for urban zones to be created on the island of Tanna, and in the towns of Norsup and Lakatoro on the island of Malekula.

While acquiring land for public purposes in Vanuatu is not as difficult as it is in Papua New Guinea, there are signs that not all is well. Vanuatu can benefit from analysing difficulties in Papua New Guinea and seeing how fraught and expensive acquiring land for public purposes can become if problems are not addressed early.

⁸ Jon Marc Pierre, Director of Lands, pers. comm.

⁹ Jon Marc Pierre, Director of Lands, pers. comm.

Maintaining bureaucratic and political support for fair and transparent acquisitions of land is proving difficult in Vanuatu. Failure to pay compensation to customary owners for land acquired or being used for public purposes since independence has created a serious problem, which the present government acknowledges but which is going to require money and other resources that it may not have to solve the problem. Likewise, the need to balance the aspirations for development and the rights of customary landowners places politicians in a dilemma.

Senior bureaucrats believe land for public purposes should not be acquired at premium prices but rather at a minimum acceptable price because of the benefits it normally brings to the people giving up the land as well as the general public. Most ni-Vanuatu have not made large demands on the government for compensation or rents for land acquired for public purposes.¹⁰ Nevertheless, introducing the concept of market value in the Land Acquisition Act, along with an effective method for calculating market value, would significantly improve the acquisition process. It would remove the notion of a premium being paid on any land while adding greater transparency and a better sense of fair dealings.

Senior bureaucrats also favour outright acquisition of land over leasing, believing it is simpler and involves less long-term responsibility. However, landowners favour leasing because it ensures a long-term continuing interest in the land and maintains customary tenure. As discussed earlier, the present policy is to issue long-term leases for all land acquired for public purposes except land that is required indefinitely. Land for schools, aid posts and health centres is considered to be needed 'short term' because this infrastructure may be moved in the short term due to demographic and other changes.

An important matter is timeliness and the need for the government to meet its obligations to customary owners for acquisitions and leases. Failure to make timely payments for compensation and rentals or to meet other conditions undermines confidence in the state and encourages ni-Vanuatu to challenge the state on grounds of non-payment and failure to perform.

Speakers at the 2006 Land Summit in Port Vila argued that there is an urgent need to consolidate all legislation relating to land, resolve issues of individual and communal ownership, and remove or further restrict ministerial discretionary powers, in particular powers to lease land that is under dispute.

Vanuatu, like Papua New Guinea, needs to make greater efforts to devote adequate money and people to administering publicly owned land. The process of acquiring or leasing government land and administering that land requires well-trained and motivated staff and an adequately staffed departmental structure. The Vanuatu Department of Lands and Natural Resources is understaffed. It is also poorly housed and lacks adequate office space.

¹⁰ It is said that to make a high claim in public would bring shame on the clan making the claim.

Lessons

PROVIDE EFFECTIVE LAND ADMINISTRATION

Leggen

lesson 1

Fundamental to an effective system for acquiring customary land for public purposes is a supportive and well-functioning administration system that follows a transparent and consultative process.

An adequately funded administration system with well-trained staff is crucial to acquiring customary land for public purposes—whether through outright acquisition or lease. Papua New Guinea experiences greater difficulties in acquiring customary land than does Vanuatu. This probably reflects weaker administration of the acquisition process, including poor recordkeeping. The result is that customary landowners have less confidence in the system of land acquisitions in Papua New Guinea than is the case in Vanuatu, and people find ways to exploit weaknesses in the system. For successful acquisitions it is important to get the process right, follow the required procedures in a transparent manner, consult all parties prior to and throughout the process, and pay fair compensation calculated by a transparent and agreed method.

PROVIDE ALTERNATIVES TO OUTRIGHT LAND ACQUISITION

LESSON

When laws governing the acquisition of land for public purposes provide a mix of options that include leasing and land swaps rather than permanent alienation, there are more amicable outcomes for landowners and governments.

In general, leasing arrangements that involve regular payments are fairer for customary landowners than outright alienation. Leasing allows land no longer required for public purposes to more easily revert to customary owners and helps them retain a connection to traditional lands. Governments, however, prefer the certainty and security of alienation through outright acquisition. In Vanuatu the policy is to acquire land through leases unless the land is needed into the distant future. In-kind payments such as land swaps have also been used in some instances. The reduced emphasis in Vanuatu on outright acquisition has resulted in more amicable land acquisitions and fewer disputes.

EMPHASISE NEGOTIATION RATHER THAN COMPULSORY ACQUISITION

LESSON

Acquiring land through negotiation rather than compulsory acquisition creates more confidence in the process, achieves amicable outcomes, reduces grievances and disputes, and improves the prospects of secure long-term agreements.

In Vanuatu the emphasis is on achieving negotiated outcomes, whether the land is to be leased or purchased. In Papua New Guinea there is more emphasis on compulsory acquisition so that landowners become obliged to give up their land on the terms presented by the government, whether or not they approve. This makes landowners distrustful and dissatisfied, which is not conducive to secure, legitimate and long-term agreements.

CONSULT LANDOWNERS

lesson 4	Misinformation and misconceptions around the circumstances of land acquisitions can be avoided with comprehensive consultation.
lesson 5	Adequate time and resources must be allocated for community consultation over land and compensation issues.

Many landowner disputes and grievances, particularly in Papua New Guinea, are due to a lack of consultation. Experience in Papua New Guinea shows that better outcomes have been achieved where there is ongoing consultation with landowners. This has often been achieved by road contractors using their own money to employ land officers dedicated to consulting with local owners.

VALUE LAND IN AN AGREED TRANSPARENT WAY



The land acquisition process should incorporate transparent and agreed methods for calculating land values.

Arbitrary decisions about compensation, rental and other payments in the land acquisition process can create suspicion or dissatisfaction among landowners.

Bibliography

- Department of Lands, Survey and Lands Records 2007, *Aerodrome acquisition progressive report*, Port Vila, February.
- Egis Consulting Australia 1999, *TA No. 3037-PNG Road Upgrading and Maintenance Project, vol. 4, Initial social assessment,* report prepared by P Hughes, Asian Development Bank and Government of Papua New Guinea.
- Fingleton, J 2004a, Assistance with land tenure reforms in Papua New Guinea.
- -----2004b, 'Is Papua New Guinea viable without customary groups?', *Pacific Economic Bulletin*, vol. 19, no. 2, pp. 96–103.
- ——2006, Vanuatu National Land Summit, background paper, AusAID, Canberra.
- Government of Papua New Guinea 2001, National Lands Commission awards under the National Land Registration Act, NEC Decision 13/2001.
- Government of Vanuatu 2007, Final report of the National Land Summit, Port Vila.
- Holmes, Patricia 1996, 'Land tenure in Vanuatu: custom, culture, tradition ... and development?', thesis, available through <www.vanuatu.usp.ac.fj/library/Vanuatu.htm>.
- Hughes, P 2000, *Issues of governance in Papua New Guinea: building roads and bridges*, State Society and Governance in Melanesia Discussion Paper 00/4, Research School of Pacific and Asian Studies, Australian National University, Canberra.
- ——& Yok, D 2000, TA No. 3037-PNG Road Upgrading and Maintenance Project: Simbu and Enga Provinces—initial social assessment, Asian Development Bank and Government of Papua New Guinea.
- Institute of National Affairs 1981, Summary of proceedings of an INA seminar 'Land policy and economic development in Papua New Guinea', Port Moresby.
- Lunnay, Chris, Fingleton, Jim, Mangawai, Michael, Nalyal, Edward & Simo, Joel 2007, 'Vanuatu—review of national land legislation, policy and land administration', report prepared for AusAID, March.
- Malampa Province 2006, Sustainable land management and fair dealings to ensure progress with equity and stability, submission to National Land Summit, September.
- Muroa, GMS 1997, 'Judicial responses to legislative attempts to oust the judicial review powers of the courts in Papua New Guinea', *Melanesian Law Journal*, vol. 25, http://www.paclii.org/journals/MLJ/1997/2.html.
- National Research Institute 2006, *The National Land Summit: a report on the presentations and recommendations*, National Research Institute, Boroko, March.
- -----2007, The National Land Development Taskforce: land administration, land dispute settlement, and customary land development, National Research Institute, Boroko.
- Technical Advisory Group, Ministry of Lands and Natural Resources 2006, *Progress* on acquisition of the land occupied by the Sarakata Hydro Power Project, Port Vila, July (and July 2005 and November 2005).
- Valuer-General 2000, *Price schedule for acquisition of trees and plants, all regions,* Department of Lands, March.

LAND FOR PUBLIC PURPOSES

13

Accessing land for public purposes in Samoa

Chris Grant » Land Administration Consultant

The contribution of Leota Laki Lamositele-Sio, Project Manager, ADB Small Business Development Project, Samoa, to the writing of this case study is gratefully acknowledged.

A snapshot

Accessing land for public purposes in Samoa

Samoa has legislation to enable the government to acquire both freehold and customary land for public purposes. The legislation covers what may be taken, how it may be taken and how compensation is assessed and who receives it. While consensus and negotiation are integral to Samoan life and decision making, they are often not applied to how the government acquires land. Due process of law and procedures are often not adhered to and it is common for landowners to be inadequately informed of the processes and of their rights. This causes confusion, distrust and long delays in land development. The government is increasingly conscious of this and is acting to improve the situation.

The system for acquiring land for public purposes in Samoa highlights the benefits of:

- » consulting widely and taking care to reach all affected people
- properly informing landowners of the consequences of land acquisition, the process and their rights
- » negotiating with landowners before compulsorily acquiring land
- » ensuring landowners have access to independent expert advice during the acquisition process
- » ensuring there is coordination among government agencies
- ensuring objectivity in the valuation of land and that the land valuation industry is regulated
- » providing dispute resolution mechanisms for landowners.

Contents

»	INTRODUCTION	268
»	LAND CLASSIFICATIONS IN SAMOA Customary land Freehold land Public land	268 268 269 269
»	EXISTING LAWS AND PROCEDURES The Constitution Taking of Land Act 1964 Planning and Urban Management Act 2004	270 270 270 271
»	MISUNDERSTANDINGS AND ISSUES	272
**	ADDRESSING ISSUES Land valuation for compensation Mediation of compensation disputes Emphasis on consultation Fairness and equity	274 274 276 276 276 277
**	LESSONS Consult widely and provide full information Provide expert assistance Negotiate for land rather than compulsorily acquire it Adopt a whole-of-government approach Determine compensation for land regardless of its tenure Regulate and license land valuers	278 278 278 278 278 279 279 279
»	APPENDIX: PEOPLE CONSULTED	280
»	BIBLIOGRAPHY	281

Introduction

Samoa is recognised among Pacific nations for the stability of its government and its institutions. Nevertheless, Samoa is undergoing considerable reform and the speed of the reform process is catching many by surprise.

The Government of Samoa's *Statement of development strategy* focuses on enhancing the people's opportunities to improve their quality of life. One objective is 'land for development', with the goal of increasing investment to create employment. The government is committed to reforming the economy and public sector so as to provide a firm basis for achieving this goal and, with donor assistance, has initiated programs to improve land administration.¹

Samoa effectively has a dual land system. The customary system of land tenure is strong and authorities are committed to maintaining this integral part of the Samoan way of life. However, Samoa is subject to the same global pressures for development and improved living conditions as anywhere else. Samoa is attempting to manage the pressure on its limited land resources by balancing the traditional and the western-style approaches to land tenure.

In the past the Government of Samoa appealed to the loyalty and patriotism of people to allow roads and other works for the public good to proceed unimpeded. And many customary landholders agreed to provide land for public purposes without compensation. But this is no longer the case. Today landowners sometimes lodge complaints about compensation long after works are completed, even though a community's land may have been pledged to works designed for the public good. Compensation may not have been claimed because people were not aware of their rights to it. The Samoan community is now better informed and formal compensation is sought in most cases.

Land classifications in Samoa

In Samoa the Constitution classifies all land as customary land, freehold land or public land.

CUSTOMARY LAND

In Samoa, more than 80 per cent of land is held under customary ownership. Customary land is protected by the Constitution for the 'customs and usage' of the people of Samoa and is held in the name of a particular titleholder (*matai*) who has authority (*pule*) over the land.

One program is the Second Infrastructure and Asset Management Project, Component 5—Sustainable Land Administration & Survey, which is funded by the World Bank, and the other is Technical Assistance for Promoting Economic Use of Customary Land, which is funded by the Asian Development Bank.

Every Samoan can access land that provides a livelihood and means of family support. The matai determines how land is distributed among family members for their use.

Customary land is essentially outside the parameters of the formal land registration system and cannot be conveyed or mortgaged. Customary land can be alienated in only two ways.

- 1 Land can be leased to a person or corporation approved by the matai. The Alienation of Customary Land Act 1965 appoints the Minister of Lands to act as trustee for the owners and to sign the lease. The Act requires the Registrar of Lands to register the lease in the Land Registry, a public record administered by the Division of Land Management in the Ministry of Natural Resources and Environment.
- 2 Land can be taken by the government, pursuant to the Taking of Land Act 1964, for a 'public purpose'. The land taken must be registered as public land in the Land Registry.

The majority of customary land has not been surveyed. Boundaries are primarily based on years of occupation and traditional knowledge. The Land and Titles Court resolves disputes over ownership and boundaries. Under the Land and Titles Act 1981, its decisions are meant to be registered in the Land Registry. However, for a range of reasons, essentially to do with the poor state of the records of the Land and Titles Court, this does not occur at present. The Land and Titles Court has initiated a program to improve records.

FREEHOLD LAND

Freehold land accounts for about 12 per cent of Samoa's land. Most of it is in Apia and the surrounding urban area. Because of the limited area of freehold land and the increasing number of people seeking to purchase it, land values are increasing rapidly.

How freehold land is used is not subject to customary authority, even if the land is located in a village. Freehold land is registered in the Land Registry under a deeds system established before independence in 1962. The government is considering a proposal to convert the deeds registration system to a title registration system based on the Torrens system. It is important to note that the proposal applies to only freehold land. There is a false perception by some groups in the community that the proposal is a covert vehicle for government to convert customary land to freehold land.

PUBLIC LAND

Public land is defined as land vested in the state that is free from either customary or freehold title. Public (government) land is presently estimated to be about 34 500 hectares or 7 per cent of Samoa's land mass. The Land Board administers all public land.

Existing laws and procedures

THE CONSTITUTION

Article 102 of the Constitution states that customary land, or any interest in customary land, cannot be disposed of or alienated. Thus customary land cannot be sold or mortgaged. The Constitution explicitly allows the granting of a lease or licence over customary land and the taking of customary land for a public purpose.

Any amendment to Article 102 requires a referendum as well as a two-thirds majority vote of all members of parliament, thus securing the protection of customary land tenure.

TAKING OF LAND ACT 1964

Customary and freehold land can be compulsorily acquired for public purposes under the Taking of Land Act. The Act describes what may be taken, how it may be taken, how compensation is assessed and to whom it is paid.

Freehold land may be taken for a public purpose without using the Act by negotiating with the landowner and registering the transfer. However, the Taking of Land Act is always employed in the case of customary land.

The Ministry of Natural Resources and Environment administers the Taking of Land Act. General responsibility lies with the Assistant Chief Executive Officer, Land Management Division, who also has carriage of the Land Registry and the Land Valuation Section.

The ministry oversees the implementation of the Act and coordinates the negotiation with landowners and the consultation with the agency undertaking the public works for which land is required. In all cases the ministry notifies the landowners whose land is to be acquired and initiates a formal land survey to determine the extent and value of that land.

Procedure for taking land

When the government wants to take land for a public purpose the Minister of Natural Resources and Environment is required under the Act to:

- i) Ascertain from the Land and Titles Court if that Court has determined the matai who has authority over the affected land. [This step is not required in the case of freehold tenure.]
- Cause a survey to be made and a certified plan showing the land to be taken and the names of the owners and occupiers of the land to be taken so far as they can be determined.
- Cause a copy of the plan to be deposited in the office of the Ministry of Natural Resources and Environment in Apia.
- iv) Cause a notice to be publicly notified and sent to each owner, occupier and person having an interest in the land, stating the government's proposal to take the land, the public purpose for which the land is required and that any person affected may give notice of objection within 28 days of the first publication of the notice.

 V) Upon receiving from the Director of Natural Resources and Environment any such objection with any reason (other than an objection to the amount or method of payment of compensation) appoint a time and place in Western Samoa at which the objector may appear before the Minister or some person appointed by him and support the objection by such evidence and argument as the objector sees fit.

If the minister determines that the taking should proceed, the head of state may, by proclamation, take the land for the public purpose.

Compensation for land taken

The Taking of Land Act provides that every person having an estate or interest in land taken is entitled to full and just compensation from the minister as soon as reasonably possible. In ascertaining the amount of compensation the value of land is taken to be the amount that the land might realise if sold on the open market by a willing seller on the specified date. The Act makes no allowance for the land being taken compulsorily.

Compensation is not always monetary. The government may exchange land if it has comparable public land available. The Ministry of Natural Resources and Environment has reported that land of equal value is frequently exchanged when circumstances allow. Compensation can also be made in kind, in terms of favourable access to certain public services or infrastructure (Box 1).

BOX 1 » MAGIAGI HYDROELECTRIC PROJECT

In the village of Magiagi, which is adjacent to Apia, the Electric Power Corporation sought to establish a hydroelectric generation plant. In return for access to the land required, the corporation agreed that the village should retain access to the water resource and receive electricity free of charge in perpetuity.

While this resolved the compensation issue, the corporation now has serious concerns about the efficacy of this approach and the potential precedent it has established. It now realises that under this form of compensation it has no control over the use of water or electricity and there is no incentive for the village to economise with either resource or energy use. As a result, the corporation is finding use unreasonably high. Indeed, Magiagi has been anecdotally described by some people interviewed as the 'village from heaven'.

PLANNING AND URBAN MANAGEMENT ACT 2004

The Planning and Urban Management Act aims to ensure the fair, orderly, economic and sustainable development of land in Samoa. The Planning and Urban Management Board was created through an amendment to the Act. The board's specific role in relation to land taken for public purposes is to promote education and community awareness about urban and planning issues, and assist with coordinating the provision of infrastructure and services by ministries and public authorities for the benefit of the community. The board is supported by the Planning and Urban Management Agency, established

under the Act as a division of the Ministry of Natural Resources and Environment. The agency provides the ministry with a useful mechanism for achieving the essential whole-of-government approach to taking land for public purposes.

In administering both the Planning and Urban Management Act and the Taking of Land Act the ministry is in a position to recognise the need for land for public purposes from the outset and to ensure that land is acquired in an open and coordinated manner.

Misunderstandings and issues

The formal process of taking land for public purposes is clear under the law. However, the manner in which this process is undertaken often leads to misunderstandings and problems.

During discussions with stakeholders a number of individuals referred to instances of agencies acting unilaterally, with little or no coordination in undertaking public works. Stories emerged of separate agencies seeking access to the same land for different works connected with a public project. The widening of roads in urban Apia was cited as a general example.

The discussions gave rise to the following stakeholder concerns.

- » Negotiations are generally conducted by officials at an operational level who may not be aware of government land acquisition policy.
- » Villagers negotiating access are usually not familiar with compensation entitlements.
- » Villagers negotiating access may not have appropriate authority over the land.
- » Without overview by the Ministry of Natural Resources and Environment, agreements made are not adequately documented and may not be honoured later.
- » A general attitude of distrust develops when affected landowners do not receive the compensation promised.
- » The priority becomes completing the program of public works without regard to the overall impact on affected landowners.

A summary of other issues raised during discussions with stakeholders follows.

» Notices concerning the taking of land are published in the government newspaper *Savali*.

Savali is not widely circulated and, in the case of family land, does not reach all affected people. Instances were cited where the first time a landowner became aware that his/ her land was required for a public purpose was when a surveyor arrived. In addition,

the comment was made that the description of land published in *Savali* was technical, making it difficult for owners to recognise it as their own. Describing land graphically or by photograph could help overcome this confusion.

» Provisions of the Planning and Urban Management Act can be misunderstood.

The Planning and Urban Management Act requires that, for the subdivision of land to be approved, land needed for public purposes must be provided free of compensation. At times this appears to be misunderstood. An example was cited where a landowner agreed to cede an area for a road to procure development approval. Approval was gained. However, at a later date and contrary to the agreed condition, the owner forcefully prevented access by the road constructing authority.

» Land is taken without notification or with little consultation because of the perceived urgency of the works.

There are many instances where public works have been completed without land being formally proclaimed as public land for the purpose, because of the perceived urgency of the works. Road construction is an example.

» Customary land often has overlapping or multiple rights, creating difficulties in determining who has authority over the land.

Often the customary owners of the land to be acquired are not clearly identified and, as a result, compensation may not be paid or may be paid to the wrong person or persons. In some cases compensation may be paid to a matai who may not use it appropriately or distribute it to family members. This can result in a subsequent claim for compensation by family members for the same land.

» Government uses the Taking of Land Act to convert customary land to freehold.

Some people in Samoa claim that the government uses the Taking of Land Act to convert customary land to freehold and that land surplus to public purposes is then sold as freehold land by tender. This claim reflects the sensitivity of the issue and the potential for misinformation and misunderstanding. The Act provides that surplus land must be offered to the original owner in the first instance and an adjacent landowner in the second instance. In these cases the land is returned to its customary status.

» Difficulties arise when assessing the value of customary land.

The Taking of Land Act states that compensation must be based on 'market value', yet customary land cannot be sold or mortgaged in a market situation. This dilemma has been largely resolved by a court decision arising from the Salelologa Township case (Box 2). The appeal court ruled that for the purposes of assessing compensation there is no longer any distinction between customary and freehold land.

BOX 2 » SALELOLOGA TOWNSHIP

The government acquired, by proclamation, close to 1215 hectares of customary land to develop physical infrastructure for the Salelologa Township on Savaii, Samoa's second main island. The acquisition was to encourage Savaii citizens to remain on the island and spend their energies developing its land and human resources.

The acquisition began in 1997–98 and continues to be vigorously disputed by the affected landowners because of the extent of land taken and the low compensation offered.

The compensation offered was determined as a result of a number of formal meetings between the political leaders and the village leaders of the day. It included a commitment to preserve forest land as part of the town site. It also included monetary compensation of Tala 4.5 million (US\$1.6 million). This amount was not necessarily based on market value because market value principles do not apply to land held under customary tenure. Two independent valuations subsequently assessed the value of compensation for the Salelologa Township to be in the order of Tala 45 million (US\$16 million). This figure was based solely on market value.

The amount of government compensation was hotly disputed and, as required under the Taking of Land Act, referred to the Supreme Court. On appeal the court decided that 'there was to be no distinction between freehold and customary land' for the purposes of assessing land value for compensation. This landmark decision has essentially resolved the dilemma faced by the government in assessing market value of customary land.

Many of the people party to the original meetings have moved on and the case remains pending. In the interim the government has returned 970 hectares of land to the original owner(s).

Addressing issues

LAND VALUATION FOR COMPENSATION

By normal definition market value requires a willing seller and willing purchaser. This is not the case when the landowner is not a willing seller. In other jurisdictions, while market value may be used as a basis for assessing compensation, there is usually an amount paid (*solatium*) in excess of market value to recognise the compulsory nature of the transaction.

Under the provisions of the Taking of Land Act, the only avenue landowners have for resolving disputes about compensation is the Supreme Court. Taking such action against the government is a daunting prospect and beyond the experience and capacity of most affected landowners. It no doubt contributes to the long delays that characterise many land acquisitions (Box 3).

BOX 3 » VAITELE STREET

Vaitele Street is a primary road linking the airport and the city of Apia. The World Bank's Second Infrastructure and Asset Management Project is providing finance to widen the street and several bridges. Construction required land from 158 holdings. Because most of the land that needs to be acquired was in Apia and the surrounding urban area, only 26 affected landholdings were under customary tenure.

The project began in 2003 and, by April 2007, 70 freehold landowners had received compensation and 13 customary landowners had been identified for compensation. For the remaining customary land, the Minister of Lands, Surveys and Environment requested that ownership be resolved through the Land and Titles Court.

The World Bank insisted that the land acquisition for Vaitele Street comply with its Land Acquisition and Resettlement Framework. The overall aim of this framework is to ensure that affected landowners are fairly compensated for their losses and receive assistance to at least maintain their pre-project situation. The framework is based on the World Bank's operational policy on involuntary resettlement and outlines these principles to govern project implementation:

- » avoid or minimise involuntary resettlement where feasible
- » assist displaced persons to improve their former living standards, earning capacity and production levels or at least restore them
- » encourage community participation in planning and implementing resettlement
- » provide assistance to affected people regardless of the legality of title to the land.

After making reasonable attempts to determine landownership and negotiate compensation, the usual practice in Samoa is for the government to enter the affected land. Under these circumstances the assessed amount of compensation is deposited in a trust account held by the Public Trustees Office pending a future claim by the eligible landowner.

However, the Land Acquisition and Resettlement Framework requires that issues surrounding ownership be resolved and that compensation be negotiated and paid *before* works begin. This has added substantially to the time taken to complete the Vaitele Street construction program. Because of the delays often encountered in determining customary landownership through the Land and Titles Court, the impact of the framework is greater when customary land is involved.

The Land Acquisition and Resettlement Framework is essentially a result of World Bank experiences with projects elsewhere and is not unique to Samoa. The bank insists it be applied because acquisitions of land in Samoa have sometimes been haphazard with insufficient consultation and notification. To a large extent the issues raised during stakeholder discussions add weight to the World Bank's position.

Although complying with the framework has added significantly to project completion time it has had the desired effect of increasing discipline in the land acquisition process and reinforcing the need for full and transparent consultation as a prelude to taking land.

The determination of fair land values is a critical element of compensation when taking land for public purposes. Samoa does not have a system of land tax and there is no program of annual valuations of freehold land. Land valuation has been ad hoc and valuers have not been regulated by law. As a result, there often have been large differences between valuations of the same area of land.

The need for a uniform and reliable system of land valuation has been recognised by the Government of Samoa. Draft legislation, the Valuation Act, and regulations aimed at standardising the registration and licensing of valuers were being prepared in 2007. Adopting this legislation will strengthen the valuation profession in Samoa. It will also help to introduce mediation to resolve compensation disputes.

MEDIATION OF COMPENSATION DISPUTES

The use of mediation to resolve disputes over compensation is being considered by the government. In the case of disputes over land values the following mediation process, which has been successfully applied elsewhere, could be considered for Samoa.

- The government's valuer (the Principal Valuer of the Ministry of Natural Resources and Environment) assesses the land's market value.
- » An independent valuation is obtained if the affected landowner is dissatisfied with the compensation offer.
- » A qualified independent valuer arbitrates when the government's valuation and the landowner's valuation differ, and makes a determination accordingly.
- » The parties in dispute agree to accept the independent valuer's decision as final.

This process depends on a private valuer being available to provide an independent valuation service. Currently such a service is not available but it may develop if the proposed legislation to regulate land valuation is enacted. If enacted, the Valuation Act will establish a solid foundation for adopting a mediation process in the future.

EMPHASIS ON CONSULTATION

While anecdotal in many cases, issues raised during stakeholder meetings reflect the potential for misunderstanding (at best) or misinformation (at worst) on the sensitive issue of taking land.

Consensus and negotiation are central to Samoan life and decision making. Recognising this cultural norm, the government is increasingly conscious that time and energy invested in the widest possible consultation will minimise obstacles to development.

There are many ways to facilitate consultation, including:

- » the Association of Village Mayors (Pulenu'u)
- the Committee of Government Women, comprising representatives of local women's committees who are designated as government agents (the female equivalent of the Association of Village Mayors)
- » the village parliamentary representative, who is usually aware of public works affecting his constituency
- » the Ministry of Works, which can use committees that advise the minister and comprise prominent matai from the district to facilitate consultation.

In a relatively small country such as Samoa, it is not unusual for people with matai or other chiefly status in the villages to also have senior positions in the bureaucracy. If conflict of interest can be avoided, these people can help with consultation.

FAIRNESS AND EQUITY

For most villagers the taking of land is an unusual event, perhaps once in a lifetime. Because they do not have the negotiating experience and expertise of the government, in the interest of fairness and transparency villagers should have access to appropriate expert advice, at no cost to them, during negotiations.

Lessons

CONSULT WIDELY AND PROVIDE FULL INFORMATION

lesson 1	In view of the number of people affected by the taking of their land— individuals, families and whole villages—it is important to consult as widely as possible to gain landowner approval and acceptance.
LESSON 2	To gain approval and acceptance members of the affected community require complete and accurate information on: the purpose for which the land is required the process by which land is to be taken their rights to receive fair compensation and to object to the process.

For most landowners, especially customary groups, the taking of land for public purposes is an unfamiliar experience. Unfortunately landowners are often not made fully aware why the government is acquiring the land or of their rights under legislation.

PROVIDE EXPERT ASSISTANCE

To promote fairness and to minimise the potential for conflict and future legal challenges landowners need to have access to experts who can either provide them with advice during negotiations or act on their behalf.

Affected landowners usually cannot bring to the negotiating table a level of expertise and experience to match that available to the government. Fairness and transparency would be enhanced if landowners had access to expert assistance to match the negotiation position of the government.

NEGOTIATE FOR LAND RATHER THAN COMPULSORILY ACQUIRE IT

lesson 4

3

Irrespective of the legislative framework, when a government consults, coordinates and negotiates with landowners, the outcomes are usually more successful and fair, avoiding costly protracted disputes.

How the sensitive issue of taking land for public purposes is handled often determines the extent to which obstacles are put in the path of development. Consensus and negotiation remain key features of Samoan communities and most other Pacific island communities. Governments in the region are increasingly acknowledging this cultural norm and are starting to adopt a coordinated approach based on the widest possible consultation with

communities affected by development. The powers given to government under legislation to acquire land compulsorily should be used only as a last resort and in these cases special care needs to be taken to ensure compensation is fair, to avoid costly and ongoing disputes.

ADOPT A WHOLE-OF-GOVERNMENT APPROACH

LESSON 5

Having one agency responsible for and coordinating the acquisition of land for public purposes can ensure that information is relevant and timely, and that negotiations are undertaken at the correct level on both the government and landowner sides.

Coordination among government agencies involved in acquiring land for public purposes is essential. Sometimes a lack of coordination has resulted in proper processes not being followed and government officers taking on improper responsibilities.

DETERMINE COMPENSATION FOR LAND REGARDLESS OF ITS TENURE

lesson 6 To determine the value of customary land that is to be acquired for public purposes, it is appropriate to assume that it has inherent economic value irrespective of its tenure status.

Although customary land has no 'market value' because market value principles do not apply to customary tenure, it should be assumed that the land can be sold on the open market when valuing it for compensation. Once the land is converted to public ownership, its previous tenure arrangements are irrelevant. This approach was recently confirmed in the Samoan Supreme Court, which found that in terms of assessing compensation there should be no distinction between customary and freehold land.

REGULATE AND LICENSE LAND VALUERS

lesson 7

To increase the objectivity of land valuations used to determine compensation for government acquiring land for public purposes, governments in the Pacific may want to consider regulating and licensing professional land valuers and providing access to mediation for landowners who wish to challenge land value determinations.

A problem with land valuations is that the market in land is not large and the number of land valuers is small. This often results in considerable differences in the valuations of customary land obtained by the government. This has significant implications for the level of compensation received by landowners and is the source of tension and disputes. Landowners need user-friendly ways to challenge land value determinations made by the government, as it is a quite daunting prospect to take a dispute to an appeals court.

Appendix: People consulted

With the valuable assistance of Australian High Commission staff, especially Asenati Tuiletufuga, key people were consulted over the period 16–20 April 2007:

- » Hinauri Petana, Chief Executive Officer, Ministry of Finance
- » Luagalau Foisaga Eteuati-Shon, Chief Executive Officer, Ministry of Women, Community and Social Development
- » Afoa Arasi Tiotio, Chief Executive Officer, Samoa Land Corporation
- » Tu'u'u Dr leti Taulealo, Chief Executive Officer, Ministry of Natural Resources and Environment
- » Masinalupe Tusipa Masinalupe, Chief Executive Officer, Ministry of Justice
- » Roina Vavatua, Chief Executive Officer, SUNGO, and board members
- » Aumua Ming Leung Wai, Attorney General
- » Le'aula Tavita Amosa, Assistant Chief Executive Officer, Ministry of Women, Community and Social Development
- » Le Taua Paul Philips, Assistant Chief Executive Officer, Ministry of Works, Transport and Infrastructure
- » So'oialo Lalau David Fong, Assistant Chief Executive Officer, Division of Land Management, Ministry of Natural Resources and Environment
- » Peleiupu Fuata'i, Principal Officer, Drafting Division, Ministry of Natural Resources and Environment
- » Patea Setefano, Principal Valuer, Ministry of Natural Resources and Environment
- » Klaus J Stunzer, President, Samoa Chamber of Commerce
- » Seve Keilani L Soloi, Soloi Survey Services
- » Hon. Tagaloa Tuala DC Kerslake, President, Land and Titles Court
- » Toleafoa Solomona To'ailoa, Samoa Law Society
- » Patrick Fepuleai, barrister and solicitor
- » Pupualii Senio, representative of village mayors
- » Salota and Atalina, Government Women representatives, Ministry of Women, Community and Social Development

Bibliography

- Asian Development Bank 2004, *Economic use of customary land*, discussion paper ADB TA no. 3549–SAM, Capacity Building of Financial and Business Advisory Intermediaries Project, October.
- Land Equity International 2005, *Samoa registration system—review, analysis and future strategy*, Second Infrastructure and Asset Management Project, Component 5.01 Land Administration & Survey, technical assistance report no. 2, Samoa, March.
- —2006, *Customary land tenure—review*, Second Infrastructure and Asset Management Project, Component 5.01 Land Administration & Survey, technical assistance report no. 25, Samoa, January.
- World Bank 1999, *Land acquisition and resettlement framework*, Second Infrastructure and Asset Management Project, Project Implementation Plan, Section 4, Annex 1, Washington, DC, June.

POLICY REFORM AND ADMINISTRATION

CASE STUDIES

14	The paths to land policy reform in Papua New Guinea and Vanuatu	285
15	Strengthening land administration in Solomon Islands	307
16	Training and educating land professionals: the value of institutional partnerships	327

POLICY REFORM AND ADMINISTRATION

14

The paths to land policy reform in Papua New Guinea and Vanuatu

Michael Manning » Mirel Ltd, Kokopo, East New Britain, Papua New Guinea

A snapshot

The paths to land policy reform in Papua New Guinea and Vanuatu

Papua New Guinea and Vanuatu recently consulted broadly on land policy reform. Both held land summits to discuss reforms and to chart ways forward—Papua New Guinea in 2005 and Vanuatu in 2006. The summits were landmark national events that laid the foundation for the countries to move forward on land policy reform. Since the summits, both countries have taken significant steps in reform. In Papua New Guinea the National Land Development Taskforce has held wide-ranging consultations relying on people and resources from within the country, and a land program is now in place to implement policy reforms. In Vanuatu a steering committee was appointed to oversee the design and implementation process of land policy reforms.

The land policy reform processes in Papua New Guinea and Vanuatu provide some important lessons.

- Successful land policy reform requires a comprehensive process of consultation in order to reach broad consensus.
- » The consultation process needs to be well resourced.
- » A national land summit is a powerful way to motivate reformers of land policy.
- » To have ongoing political support, strategies are needed to bring together opposing groups and harness community support.
- » A strong institutional framework for land policy reform is a prerequisite for the process to be sustainable.

Contents

»	THE DRIVE FOR POLICY REFORM	288
»	PAPUA NEW GUINEA Historical context of land policy reform The 2005 National Land Summit The National Land Development Taskforce	289 289 291 293
**	VANUATU Historical context of land policy reform The genesis of the National Land Summit Provincial summits Other consultation prior to the national summit The National Land Summit After the summit	295 295 296 297 298 298 298 301
**	LESSONS Consult widely on the need for land policy reform Allow sufficient time and resources for comprehensive consultation Generate public interest and debate through a national summit Gain and maintain political and community support Institutionalise land policy reform Recognise that donors have a limited role in the reform process	302 302 302 303 303 303 303
»	APPENDIX: PEOPLE CONTACTED	304
»	BIBLIOGRAPHY	305

The drive for policy reform

In Papua New Guinea and Vanuatu population pressures and the demand to modernise mean that the citizens of these countries want sustainable economic development. Recently there have been attempts in both countries to gain support for land policy reforms with a view toward such development. In Papua New Guinea the concern is to improve access to land for economic development. In contrast, the concern in Vanuatu is to rein in what is commonly perceived as out-of-control development of land.

Land policy reform in all countries of the Pacific, however, is difficult to carry out. Landownership has social, cultural and economic dimensions as Rowley (1968) and Crocombe (1973) pointed out decades ago. It involves a 'complex network of customary rights', including a form of 'psychological and social security' that is especially important as customary owners grow old. Changes to land tenure, therefore, need to be tailored to the specific needs of communities and undertaken at a pace with which they are comfortable. To be effective, changes and adaptations in tenure cannot be 'too far from the realities of life in the particular society'. The number, diversity and complexity of individual societies in Melanesian countries compound the legal and administrative tasks—and financial costs—of formulating and implementing land policy reforms.

The land summits held in 2005 in Papua New Guinea and in 2006 in Vanuatu recognised that land policy and administration had been seriously neglected over the three decades since their independence and that philosophical and practical issues relating to land needed to be addressed. The two countries, however, followed different paths to gain public support and acceptance for land policy reform.

The underlying theme for the summits was the relationship between land and development. There is strong debate about whether and/or how development can take place while accommodating the fundamental desire and need for Melanesians to retain customary ownership of their land. In Papua New Guinea the summit was preceded by other public attempts to define policy both before and after independence, while in Vanuatu it arose from the National Summit for Self Reliance and Sustainability held in July 2005. Both land summits aimed to ensure that their results would be implemented and, encouragingly, both have already achieved broad government acceptance.

Papua New Guinea

HISTORICAL CONTEXT OF LAND POLICY REFORM

Governments and citizens in Papua New Guinea wrestled with land policy reform long before independence in 1975 and the debate continues today. The main debate is about freeing up land for development—both residential development resulting from urban drift and natural population growth, and rural development for agriculture, mining, forestry and tourism.

Fingleton (2004) provides an exhaustive list of relevant acts and changes to them dating back to the Native Plantation Ordinances 1918 and 1925 of the then Territory of Papua. A striking feature of most reforms and changes was that they were imposed by governments, albeit benevolent ones, trying to 'protect' native land from exploitation. Also, they recognised the need to maintain customary land management systems for cultural reasons.

In 1973 Chief Minister Somare set up a Commission of Inquiry into Land Matters (CILM) chaired by Papuan Magistrate Sinaka (later Sir Sinaka) Goava. The commissioners ranged widely in age, occupation and experience. The commission was helped by a number of, mostly expatriate, technical experts drawn from academia around the world and lawyers from the public service, but there were no officers from the Department of Lands (except the Commission Secretary). It instituted a truly consultative process, holding 141 public hearings throughout the country and receiving hundreds of submissions.

The commission's final report in October 1973 treated all aspects of land administration as an integral whole and stressed its fundamental importance as the basis of social, political and economic relations. Just as the colonial land administration system had underpinned the colonial development strategy, the commission believed the new system had to be the vehicle for social, political and economic reform. The final report stated that to implement these new development objectives it would be necessary to repeal and replace all existing land legislation.

In the years following independence the CILM report formed the basis for a number of significant land policy reforms and the introduction of new land legislation, much of which still operates. But momentum was soon lost and the reform agenda of the CILM report was not fully implemented. This was symptomatic of a decline in political interest.

Since that time there has been little further land policy reform, although it has been much talked about and there have been many failed attempts at reform. In 1981, for example, the government engaged a consultancy firm to address the underlying weaknesses of the land systems. The firm identified administration as well as the 'inherent problems of integrating land held under customary practices into a modern cash economy'. A lack of interest at the bureaucratic or political level and virtually no public pressure ensured that its recommendations were largely ignored (Fingleton 2004, p. 13).

In 1986 a World Bank mission visited Papua New Guinea and proposed the Land Evaluation and Demarcation (LEAD) Project with the objective of improving land administration and land planning activities to create more favourable conditions for implementing agricultural and forest development projects (Fingleton 2004, p. 20). The main components of the proposed project involved strengthening and developing institutions, creating a new information system for land and resources and mobilising alienated and customary land. The mission recommended that the latter component start with two years of trialling and evaluating two main options: tenure conversions and 'lease – lease backs', and the East Sepik Customary Land Registration Act 1987. Only after these trials had been assessed was new legislation for customary land registration to be considered. In 1989 a World Bank loan to Papua New Guinea was approved for the Land Mobilisation Project based on this LEAD feasibility study (World Bank 1989).

LEASE – LEASE BACK ARRANGEMENTS

In Papua New Guinea the Land Act prevents customary landowners from directly leasing land to outsiders. But they can lease it to the state and then lease it back. Thus, landowners wishing to engage in direct land dealings are able to enter into a lease – lease back arrangement with the government. In this way, landowners acquire a leasehold interest in their land, which may then be mortgaged or subleased to investors.

The aim of the Land Mobilisation Project 1989–95 was to implement the main components of the LEAD feasibility study. But with limited progress in the Land Mobilisation Project, in 1995 the World Bank proposed attaching a condition to a loan to Papua New Guinea that the fundamental tasks of the project should be completed. Papua New Guinea officials insisted, however, that this condition be withdrawn (see Filer 2000, p. 32).

The World Bank project was discredited by some politicians and groups, who likened it to a commercial bank mortgage whereby customary landowners would lose their land if the government defaulted on its loans to the World Bank.¹ This led to riots prior to the election in 1997 and again in 2002, when four people were shot. Central to the failure of the World Bank's efforts was that reform proposals were urged on the government from outside. This approach is untenable for issues related to land, about which the people are passionate. The results of these efforts contrast with the relative success of the CILM reform process, which was locally driven, designed and implemented.

THE 2005 NATIONAL LAND SUMMIT

In 2005 the Papua New Guinea Government decided to pursue an agenda to reform land administration and land management, partly in response to lobbying by various groups including a privately funded local think tank, the Institute of National Affairs. The newly appointed Minister for Lands, Dr Puka Temu, arranged for a land summit to be convened. He set up the National Land Summit Coordinating Committee to organise the summit. Importantly, it was chaired and resourced by the publicly funded research centre, the National Research Institute, and included key research centres and public sector stakeholders. Representatives came from the Institute of National Affairs, the University of Papua New Guinea, the University of Technology, the Department of Lands and Physical Planning, the Land Titles Commission and the Department of National Planning and Rural Development.

The coordinating committee met for several months to discuss the summit's agenda and agree on the broad framework. This was then fleshed out by the National Research Institute, which managed the process, obtained funding and issued invitations. There was considerable debate about whether to have foreign speakers and, if so, who they might be. It was decided that, in the interests of ensuring that the summit's proceedings were locally driven, participation by foreigners should be strictly limited. Key foreign participants who were accepted included a professor emeritus from the University of the South Pacific and an indigenous Australian.

Before the summit a media publicity campaign ensured that the general public was aware of its existence. Care was taken to include senior politicians and the National Executive Council in this awareness campaign to build support and encourage 'buy in' to the project.

The National Land Summit was held from 23 to 25 August 2005 at the University of Technology in Lae. The summit brought together members of the public, private sector representatives, lawyers, land practitioners, public servants and politicians to enable them to discuss the issues in a full and frank manner. The fact that it was well attended showed how passionate people were about land matters and how much they wanted solutions to the problems.

There was strong political support for the summit. All of the scheduled addresses and presentations were attended by the ministers for Finance and Treasury, Lands and Physical Planning, and Justice, the Member for Rabaul and the Chairman of the Law Reform Commission. The summit was well received and well publicised with a live broadcast on radio. Unfortunately summit proceedings were not recorded and all that remains is a compendium of abstracts. The opening address was given by the Deputy Prime Minister, who outlined some of the problems associated with land and affirmed the government's commitment to an agenda to reform land policy. The closing speech was by the Minister for Finance and Treasury, who reaffirmed that the government's commitment to reform was an essential foundation for development. The minister also drew attention to the poor state of land administration.

The summit's theme 'Land, Economic Growth and Development' was set by the two conceptual papers—'Making land more productive in Papua New Guinea' and 'Social issues affecting land and development'. The paper on making land more productive by Yala, Chand and Duncan² argued that even though land was in a 'stable institutional equilibrium' the status quo was costing Papua New Guinea in terms of economic and technical efficiency. Not being able to use land as collateral makes it 'dead capital' and these experts implied that this has to change if the majority (approximately 90 per cent) of Papua New Guineans who still live on the land are to defeat the sometimes real threat of poverty (National Research Institute 2006, p. 22).

The summit's other conceptual paper, by Kalinoe and Kanawi³, argued that the traditional, subsistence lifestyles of Papua New Guineans had changed, placing 'immense pressures' on people to make money to enable them to access basic services. They pointed out that customary land has been the 'keeper and absorber' of Papua New Guineans and questioned whether this could continue and, if not, what should be done (National Research Institute 2006, pp. 22–3).

The summit had sub-themes on:

- » land administration (four papers) plus group discussion
- » land and development (ten papers) plus group discussion
- » land and financial institutions (four papers) plus group discussion.

The summit resulted in 67 recommendations. However, many were 'motherhood' statements and many overlapped. The organisers established a small working group to synthesise and refine the recommendations into two main areas:

- 1 alienated land, which included recommendations on administration, compensation and dispute settlement
- 2 customary land administration, which included recommendations on registering customary land, incorporated land groups and using land as collateral for credit.

² Dr Charles Yala of the National Research Institute, Prof. Satish Chand of the Australian National University and Prof. Ron Duncan of the Australian National University and the University of the South Pacific.

³ Prof. Lawrence Kalinoe of the University of Papua New Guinea and Mrs Josepha Kanawi, Land Titles Commissioner.

The working group then presented 16 resolutions to the summit, which endorsed them. The National Land Summit was a success, generating substantial public support, enjoying highly accommodating media coverage, and successfully building a broad political will to see the resolutions move forward. Its success came from being locally driven, although AusAID did fund the summit. Importantly, AusAID provided the funds unconditionally, not seeking to influence the process.

THE NATIONAL LAND DEVELOPMENT TASKFORCE

The report of the National Land Summit Coordinating Committee was presented to the National Executive Council (Papua New Guinea's cabinet) in December 2005 by the Minister for Lands. The National Executive Council adopted all of the recommendations in the report, which included establishing the National Land Development Taskforce. The taskforce essentially comprised the members of the National Land Summit Coordinating Committee, but the National Executive Council also directed that three subcommittees be established to look at the key areas of administration, customary land, and dispute resolution. The subcommittee members included lawyers, anthropologists, economists, surveyors, valuers, land administrators, physical planners, non-government organisations and bankers. These people gave freely of their time and no payment was made for their services, which helped to reduce the overall cost of the process. It was a 'home grown' effort with no foreign consultants involved.

Between February and June 2006 the taskforce met every month to review the progress of the subcommittees, which were meeting more frequently. It held consultations with political heads at the national and the provincial levels, bureaucrats at all levels, representatives from the business sector, non-government interest groups, as well as the general public through public forums. Consultations were held in all four regions of the country and in two centres of each region as well as those with specific interest groups. Recommendations were published in the press and comments sought from the general public. The taskforce also presented an interim information paper to the National Executive Council.

In short the National Land Development Taskforce made every effort to consult the people and key stakeholders, ensuring that 'ownership' of the proposed recommendations would be Papua New Guinean. Overwhelmingly the public sought action as a result of the report, stating that they were tired of 'hearing about good ideas that never get implemented' (National Research Institute 2007, p. 111).

However, there are differing views about the degree of consultation, especially at the provincial level where meetings and consultations were sometimes seen to be rushed and to involve a limited audience. This was in part dictated by the tight timetable for reporting and the availability of taskforce members to be part of the consultative teams.

The taskforce made 18 recommendations to the National Executive Council. These included 16 on land administration reform, ranging from improving customer relations to storing files electronically so as to make titles more readily accessible to the public and to improve their protection. It recommended that land disputes be brought under a single court or tribunal, although it refrained from nominating whether this should be housed under the National Court as a national land disputes tribunal or under the Magistrates' Court.

The recommendation on customary land was to reform the Land Groups Incorporation Act 1974 to make incorporated land groups 'vehicles for development'. The groups would have management powers over land development and control over rents and income from land. However, this recommendation also allows individuals to 'secure their own piece of land', which would remain under the ownership of the 'landowning unit', presumably the incorporated land group (National Research Institute 2007, p. 21). The recommendation also included coordinating incorporated land groups to have 'their land surveyed, radical title issued ... at the initial stage, on some pilot projects' (p. 22).

At the end of 2006 the recommendations of the taskforce were adopted in full by the National Executive Council, and a Land Development Programme to be administered within the Department of Lands and Physical Planning was established to implement the recommendations. Seed funding of K1 million was provided, demonstrating the government's strong endorsement of the taskforce's recommendations and commitment to their implementation.

Importantly, the Land Development Advisory Group reporting directly to the National Executive Council was established to oversee the implementation of the Land Development Programme. This institutionalisation of the reform process should help to make implementation robust. The strong oversight powers of the land group will enable it to push through reforms, even in the face of hostility to reform within the bureaucracy, most particularly within the Department of Lands and Physical Planning. Its institutionalisation also helps to overcome reliance on the individual champions for reform—if these champions move on, the institution will remain. The key remaining vulnerability is the long-term sustainability of funding.

The process of land policy reform in Papua New Guinea has gone through a number of phases and has had input from foreign consultants, lending agencies and scholars. During the current phase, reform proponents have firmly expressed their view that there is little need for further such input, the primary needs now being to obtain political 'buy in' from the National Executive Council and the Parliament, and to generate consensus and support from the people and key stakeholders throughout the country. Reform proponents believe that land administration issues are already well known and that the technology is available to solve them. Following the 2007 national elections in Papua New Guinea, the Minister for Lands, Dr Puka Temu, retained his portfolio and was elevated to the position of Deputy Prime Minister. In view of his known commitment to land policy reform, the considerable work done on preparing draft legislation and specific administrative reforms, and the careful groundwork carried out by the Land Development Advisory Group, the stage has been set for steady progress in improving the use of land as part of Papua New Guinea's national development.

Vanuatu

HISTORICAL CONTEXT OF LAND POLICY REFORM

The impetus for Vanuatu's independence in 1980 lay in the increasing frustration about the alienation of customary land. At independence, all alienated land reverted to customary ownership; customary land can no longer be alienated, except to the state. Since independence, Vanuatu has had little land policy reform and land policy has not been subject to the sustained debate and intellectual input that took place in Papua New Guinea (Lunnay et al. 2007, p. 18). However, a number of new minor laws relating to land have been passed by the Parliament, often without any public consultation.

Through the 1990s and into the new millennium, the same concerns about land alienation were building up, except this time land was being alienated as a result of long-term leases to foreign developers and a few influential ni-Vanuatu. It was on this basis that the push for land policy reform gathered momentum. In recent years a coalition including the Vanuatu National Cultural Centre, the National Council of Chiefs (*Malvatamauri*) and the Vanuatu Association of Non-Government Organisations began moving for land policy reform with a view to winding back the rapid rate of land alienation and development.

In 2003 the media began to run stories about how much land on Efate was tied up in leases to foreigners—at the time it was reported to be 25 per cent—and this sparked a seminar in Port Vila on sustainable land management at the local campus of the University of the South Pacific, which attracted a lot of public interest. Also, the proliferation of subdivisions and the clearing of bush since the late 1990s have provided tangible evidence of land alienation for all to see. The growing number of often foreignowned real estate companies advertising lots with long-term leases at prices substantially higher than that originally paid to landowners contributed to the groundswell.

THE GENESIS OF THE NATIONAL LAND SUMMIT

The National Summit for Self Reliance and Sustainability was convened in 2005 with a broad agenda of development issues. The coalition led by the National Cultural Centre used this opportunity to tap into this sentiment of disenchantment over land. A key outcome of the summit was a resolution calling for a national land summit. Specifically, it required that a land summit be held before July 2006 to address all issues of concern about land raised at the National Summit for Self Reliance and Sustainability. The major issues of concern included dispute resolution processes for customary landowners, subdivision, strata title and land speculation. The resolution of the summit required the National Land Summit to:

- » have ni-Vanuatu values and principles and be held as soon as possible, certainly within a year
- » have a working committee
- » hold provincial consultations and workshops on land issues prior to the national summit
- » identify local consultants to investigate other governance systems in each region and background material for the national summit.

Champions for the land summit began within civil society—the National Cultural Centre, the National Council of Chiefs and the Vanuatu Association of Non-Government Organisations—which joined forces with the bureaucracy (the Director General of Lands, in particular) to make it happen. The momentum to have the land summit was sustained by the Department of Lands, with the National Cultural Centre, the National Council of Chiefs and the Vanuatu Association of Non-Government Organisations tracking progress.

Donors did not play a role at the summit other than as observers. Provincial summits and the Port Vila summit were all funded out of the government's recurrent budget. Australia's and New Zealand's aid agencies assisted with funding for international land experts to attend the summit and, with Wan Smol Bag (a non-government organisation and widely known performing group that popularises social, environmental and governance issues), ran a successful competition about land issues aimed at youth. Throughout the process politicians maintained a respectful but distanced interest.

PROVINCIAL SUMMITS

The land summit process began with two provincial summits in each of the six provinces, beginning in March 2006. These were open to the public, although some provinces restricted entry. For example, Tanna restricted entry to the head chiefs who were 'representatives of all the people'. In Malampa Province, which includes Malekula, Ambrym and Paama islands, the provincial administration (namely, the Secretary-General) denied knowing about the provincial summit whereas its Council of Chiefs proudly proclaimed full knowledge of it.

The summit team, with its headquarters in Port Vila, comprised representatives of the National Cultural Centre and the National Council of Chiefs and three officers from the Department of Lands (from sections involved with enforcement, land tribunals and planning). These officers visited each province to complete a questionnaire that had been distributed in advance so participants could discuss them with their people. This process worked better in some provinces than in others. In general, the questionnaire raised issues more to do with technical land administration and leasing processes rather than broader issues, such as threats to customary landownership or issues of indigenous-led development.

The questionnaire and its results were discussed at the first provincial summit and provincial resolutions were recorded. The summit team returned to Port Vila to draft resolutions and then two officers returned to the provinces to present the resolutions to the provincial summits for approval. There is some dispute about whether this worked as intended. For example, Eric Tulman, President of Malampa Province, said he did not attend the second summit nor was he aware that a questionnaire was sent out. The National Council of Chiefs also claimed they were not consulted (*Vanuatu Independent*, 17 September 2006). Many people thought the provincial summits were closed events and did not try to attend them, instead opting to attend the National Land Summit for which public attendance was clear.⁴ The Malampa provincial summit was attended by 80 people but the President claimed it did not represent all districts. These concerns highlight the difficulty of consulting widely, particularly when there are constraints on time and money.

The provincial summits considered landownership, fair dealings and sustainable development. The main topics and questions discussed⁵ were:

- » **Ownership**—who owns land, how to identify customary landowners, how to manage disputed land, how to manage public land and how to manage land boundaries
- » Fair dealings—land dealings through custom, land dealings through lease, agreement to lease, sale of land (speculation) and mineral ownership
- » Sustainable development—need to understand population pressure and its effects on land (greater use overall, cutting timber, greater use of foreshore, and planting gardens too close to rivers) and access to sea and rivers (to allow for fishing and other uses prevented by fenced leasehold land).

⁴ Anna Naupa, pers. comm., June 2007.

⁵ Based on analysis of submissions from three provinces, Malampa, Sanma and Penama.

OTHER CONSULTATION PRIOR TO THE NATIONAL SUMMIT

Other forms of consultation took place before the national summit. Radio and television were used to publicise it, raise awareness about issues to be discussed and engage the public. Publicity included a radio program every Friday from 4 May until 7 June 2006 and a television panel show featuring the head of state. The National Cultural Centre fieldworkers, the National Council of Women and ni-Vanuatu volunteer networks also made people aware of the national summit.

Before the summit, the government also called together 67 companies from the private sector—representing accountants, banks and other financial institutions, insurance companies, lawyers, real estate agents and developers—and asked them to put together a private sector view to present at the summit. The original meeting attracted 45 private sector attendees, who elected a steering committee. The steering committee met every two weeks from June to September and prepared and presented a representative submission to the summit.

Ahead of the summit a comprehensive set of 40 recommendations was made by the National Council of Chiefs (also representing the National Self-Reliance Committee and Advocacy Coalition on Economics, a non-government group supportive of the 'kastom' economy). Fourteen of these were included in some form in the final 20 resolutions adopted by the summit.

THE NATIONAL LAND SUMMIT

The National Land Summit was held in Port Vila from 25 to 29 September 2006 at the National Council of Chief's *Nakamal*, the traditional meeting place for all cultural matters that affect the nation. The *Nakamal* was full or close to capacity throughout the summit and there was easy access for the general public. The summit was broadcast, covered in the print media and generated a great deal of interest in Port Vila. Political support was strong and the President, the Acting Prime Minister, the ministers for Lands, Agriculture, and Women's Affairs, members of parliament, the President of the National Council of Chiefs and many chiefs attended.

The National Council of Chiefs, provincial governments and the private sector made formal submissions. Oral presentations were made by the Director of the National Cultural Centre, representatives of women, a representative of youth, Department of Lands officials, the sustainable development adviser from the South Pacific Forum Secretariat, delegations from Fiji, Solomon Islands and Papua New Guinea and a number of invited technical experts from the region. More than 20 papers were presented (Government of Vanuatu 2007, p. 7). Discussion played a central role during the summit, which:

- » encouraged the general public to participate in discussions and provide their understanding of land issues
- » made it possible to develop recommendations and resolutions, including changes in some laws concerning land
- » alerted foreign investors in Vanuatu to the changes taking place with land in the country
- » raised awareness among the Vanuatu people about the seriousness of looking after and maintaining the environments that affect their land
- » provided for formulating a national land policy (Government of Vanuatu 2007, p. 19).

The papers presented at the summit included a host of landownership issues such as custom, reefs and the sea, understanding leases and land values, strata title and ministerial intervention. Sustainability issues included landowners' understanding of sustainable development, environmental issues covering access to the sea, rivers and lakes, and issues related to law enforcement, the importance of zoning, and population pressures on land and the environment. Gender issues included problems faced by women from the sale of land, especially losing their ability to provide for their families, and the consequent social pressures this brings about in ni-Vanuatu society. Half a day was set aside to discuss women's issues.

Summit resolutions were distilled by a small working group, which took the original 1000-plus recommendations and reduced them to only 20 resolutions. After this the summit broke into provincial groups to discuss the proposed resolutions in greater detail and to add to, delete or change them.

Given that about 1000 recommendations were reduced to 20 resolutions in the national summit it is interesting to look at the success rate of the provincial resolutions. From the Malampa Province resolutions, two relating to ownership were clearly embraced, six were probably included and five do not seem to have been included. Under the heading 'fair dealings' nine resolutions were embraced, and five were ambiguous (they covered the same ground but did not use specific wording). Under 'sustainable development' all three resolutions were adopted.

The resolutions adopted by the summit covered:

- » landownership (3 resolutions)
- » fair dealings (2)
- » certificate of negotiation (3)
- » power of minister over disputed land (1)
- » strata title (1)
- » agents/middlemen/women (1)
- » lease rental and premium (1)

- » sustainable development (2)
- » conditions of lease (1)
- » public access (1)
- » enforcement (1)
- » zoning (2)
- » awareness (1).

As well as these 20 resolutions the summit adopted an Interim Transitional Implementation Strategy recommending a moratorium on subdivisions, the surrender of existing agricultural leases and the powers of the Minister for Lands over land under dispute (although he can continue to sign leases on behalf of customary owners where there is a dispute over land to be used for public purposes), some temporary administrative measures and a long-term strategy.

On 21 November 2007 the Council of Ministers endorsed:

- » the Interim Transitional Implementation Strategy
- » the establishment and composition of a steering committee
- » a commitment to find funding to implement the resolutions
- » its own changes to the 20 summit resolutions, which included:
 - writing a more general definition of customary ownership, recognising that different societies have different traditions
 - involving all members of the landowning group—men, women and youth (the important addition of women to this resolution goes some way to addressing the issues raised by women regarding the damage caused by indiscriminate disposal of customary land)
 - giving chiefs power to agree to lease agreements (but not approve them as permitted in the summit resolution)

AFTER THE SUMMIT

The steering committee appointed by the Council of Ministers has 12 members including public servants and representatives from the National Council of Chiefs, the National Cultural Centre, the Department of Women's Affairs, the National Council of Women, and youth, and a private sector representative. The steering committee's role is to monitor and manage the process of moving forward with the summit resolutions. A technical assistance team was commissioned to assist in the implementation process. This team, consisting of two foreign advisers and three ni-Vanuatu consultants, used the 20 resolutions to create a framework of action for the steering committee to follow.

The steering committee met four times, its most recent meeting being in September 2007. Although meetings have been infrequent, regular email discussions have been held, although more commonly between civil society actors and Department of Lands officials, with private sector and other departmental representatives reportedly being somewhat distant from that dialogue.

The moratorium on issuing strata title was reported to have been lifted after threats of legal action.⁶ However, during the months before the 2006 summit more than 300 lease applications were lodged, which the Department of Lands is duty-bound to process. This processing has been perceived as a lifting of the moratorium.

The issues of public ownership of reform and the direction of that reform are by no means settled. The underlying reasons for land policy reform in Vanuatu are still being debated despite the summit resolutions. Interviews carried out for this case study revealed an ideological rift between those who support custom as the paramount ideal guiding land matters and pragmatists who state that population pressure on land and the need to provide income-earning opportunities require land to be freed up and better used.

The 'battle lines'—if they can be called that—are between the National Council of Chiefs, the National Cultural Centre, non-government organisations and some women's groups who want more emphasis on custom and traditional values, and the government and private sector, which want land to be freed up for economic development and the country's future. While the debate is far from over, the summit and follow-up activities mean the issues are now on the table and the resolution process under way.

It is also important to note that the differences are ones of degree and that custom and economic development are not mutually exclusive. The process of embracing reform and continuing consultation will help to reduce these tensions, as will the eventual introduction of a Land Act based on the outcome of this debate.

⁶ Doug Patterson, private sector representative on the steering committee, pers. comm., September 2007. The Director General of Lands says that the moratorium is still in effect but it is unclear how strictly the moratorium is being enforced (Anna Naupa, pers. comm., September 2007).

Lessons

CONSULT WIDELY ON THE NEED FOR LAND POLICY REFORM

LESSON An essential prerequisite for successful land policy reform is comprehensive and ongoing consultation in order to reach and maintain broad consensus.

The most important lesson to be drawn from the land policy reform experiences in Papua New Guinea and Vanuatu is that gaining broad consensus through consultation is an essential prerequisite for a successful reform process. Targeted roundtables with key stakeholders, such as the private sector, before the land summits allowed for a broad participatory process and the formulation of concise recommendations representative of the sector. To gain support for reform the community has to be consulted, not only to understand and support the proposed changes, but to provide input to the directions of change. That is why the consultation processes in both Papua New Guinea and Vanuatu were successful. And all stakeholders need to be kept aware of the reform process and consulted after the summits to maintain the momentum of land policy reform.

ALLOW SUFFICIENT TIME AND RESOURCES FOR COMPREHENSIVE CONSULTATION

The consultation process needs to be sufficiently resourced to be comprehensive. 2

Sufficient time and resources must be made available for the consultation process. This is because consultation must be comprehensive to succeed, engaging with all stakeholders, including community representatives. In Papua New Guinea post-summit consultation was constrained by a tight budget and a tight timetable. But such was the desire for change, many prominent people in the community, including from the private sector, gave their time to the process at no cost.

GENERATE PUBLIC INTEREST AND DEBATE THROUGH A NATIONAL SUMMIT

A national land summit is a powerful part of the consultation process. 3

In Papua New Guinea the consultation process and the design of the land policy reforms began after the summit. In Vanuatu this mostly occurred prior to the summit. There is no reason to suggest one way is better than the other, so long as an extensive consultation process is undertaken and it includes, at some point, a national summit. In both countries such an event proved to be essential to generate the necessary public interest and debate.

GAIN AND MAINTAIN POLITICAL AND COMMUNITY SUPPORT

lesson 4

Strategies to bring together groups with opposing viewpoints and to harness and maintain community support are essential for securing ongoing political support.

The reform process depends on political support and bureaucratic action; if either of these is not present it will not happen. It is therefore imperative that people within the political and bureaucratic systems are 'harnessed' to the implementation of reform. Central to achieving this is broad community support. Regular discussions on radio and appearances on television and in the press by prominent reformers help to maintain momentum and community awareness. It is important that those seeking to implement reform identify their potential allies for support, but especially their opponents so that they can be included in the process and either converted or compensated. This was done in Papua New Guinea, and in Vanuatu key groups representing opposing view points were brought together in an institutional framework.

INSTITUTIONALISE LAND POLICY REFORM

A strong institutional framework for land policy reform is the key to the sustainability of a reform process.

Individuals will not be able to drive change in land policy. A broad coalition needs to be formed to drive the process and educate and inform the public. The process of land policy reform has to be institutionalised and embedded within the government to be able to succeed. An early 'road map' of reform, as in Vanuatu and Papua New Guinea, provides continuity for the reform movement. A committee that reports directly to cabinet has been set up by both countries to oversee the implementation phase of reform. With an issue as far reaching and invoking as much passion as land, anything less is likely see implementation come 'off the boil'.

RECOGNISE THAT DONORS HAVE A LIMITED ROLE IN THE REFORM PROCESS

LESSON

LESSON

5

For donor support of land policy reform in the Pacific to be effective, it must support the initiatives of the local people rather than be the driver.

The role of donors has been important in both Papua New Guinea and Vanuatu. Although AusAID provided financial support it has not sought to influence or be part of the reform process. Donors must recognise that land policy reform can work only if it is initiated and supported by the people of the country.

Appendix: People contacted

- » Brian Aldrich, AKT Associates, lands consultant, Papua New Guinea
- » Paul Barker, Director, Institute of National Affairs, Papua New Guinea
- » William Ganileo, National Land Summit Coordinator, Vanuatu
- » Selwyn Garu, Secretary-General, Malvatumauri, Vanuatu
- » Loani Henao, lawyer and lands consultant, Papua New Guinea
- » National Council of Chiefs, Vanuatu—19 chiefs
- » Anna Naupa, AusAID
- » Douglas Patterson, Island Properties, Vanuatu
- » Cathy Rarua, Gender Adviser, Department of Women's Affairs, Vanuatu
- » Lai Sakita, National Commercial Development Trust, Vanuatu
- » Joel Simo, Vanuatu Cultural Centre, Vanuatu
- » Stephen Tahi, Consultant, National Land Summit, Vanuatu
- » Oswald ToLopa, Director of Planning, Lands Department, Papua New Guinea
- » Eric Tulman, President, Malampa Provincial Government, Vanuatu
- » Henry Vira, Secretary-General, Vanuatu Association of Non-Government Organisations
- » William Williamson, Adviser, Malampa Provincial Government
- » Thomas Webster, Director, National Research Institute, Papua New Guinea
- » Pierre Chanel Worwon, Vice President, Malampa Provincial Government

Bibliography

- Cooter, RD 1981, *Land policy and economic development in Papua New Guinea*, Institute of National Affairs, Port Moresby.
- Crocombe, RG 1973, The new South Pacific, Reed Education Books, Christchurch, New Zealand.
- Dodson, M & McCarthy, D 2005, 'Customary land as the key for future development-empower those who want to use their land and protect those that don't', National Land Summit 'Land, Economic Growth and Development', Papua New Guinea University of Technology, Lae, August.
- Filer, C 2000, *The thin green line: World Bank leverage and forest policy reform in Papua New Guinea*, Research School of Pacific and Asian Studies, Australian National University, Canberra.
- Fingleton, J 2004, Assistance with land tenure reforms in Papua New Guinea.
- Gorevski, S, Hughes, H and Windybank, S 2004, 'Is Papua New Guinea viable?', *Pacific Economic Bulletin*, vol. 19, no. 1, pp. 134–8.
- Government of Vanuatu 2007, Final report of the National Land Summit, Port Vila.
- Institute of National Affairs 1981, *Summary of proceedings of an INA seminar: land policy and economic development in Papua New Guinea*, Port Moresby.
- Jones, LT & McGavin, PA 2000, *Creating economic incentives for land mobilisation in PNG*, Institute of National Affairs, Port Moresby.
- Knetsch, J & Trebilcock, M 1981, *Land policy and economic development in Papua New Guinea*, Institute of National Affairs, Port Moresby.
- Levants, T & Manning, M 2002, *The business and investment environment in PNG: the private sector perspective—a private sector survey*, Institute of National Affairs, Port Moresby.
- Lunnay, C, Fingleton, J, Mangawai, M, Nalyal, E & Simo, J 2007, *Vanuatu review of national land legislation, policy and land administration*, Report to Steering Committee, March, viewed June 2007 http://www.ausaid.gov.au/publications/pubout.cfm?ID=9890 470 5909 2050 163>.
- Millett, J (ed.) 1993, *Seminar on employment, agriculture and industrialization*; Institute of National Affairs, Port Moresby.
- National Research Institute 2006, *The National Land Summit: a report on the presentations and recommendations*, National Research Institute, Boroko, March.
- ——2007, The National Land Development Taskforce: land administration, land dispute settlement, and customary land development, National Research Institute, Boroko.
- Rowley, CD 1968, The New Guinea villager, Cheshire, Melbourne.
- Sowei, J, Lahari, W & Vatnabar, M 2003, *Rural informal sector study*, National Research Institute, Port Moresby.
- World Bank 1989, *Staff appraisal report: Papua New Guinea Land Mobilisation Project,* Washington, DC.

POLICY REFORM AND ADMINISTRATION

15 Strengthening land administration in Solomon Islands

Douglas Larden » Land Administration Consultant, Australia

Marjorie Sullivan » Visiting Fellow, Resource Management in Asia-Pacific Program, Australian National University, Canberra

A snapshot

Strengthening land administration in Solomon Islands

The AusAID-funded project to strengthen land administration in Solomon Islands was recently completed after more than seven years. It improved systems, processes and staff capacity in the Department of Lands and Survey and allowed the public to gain better access to land information. The implementation strategy of this project allowed for flexibility, which meant it could respond to opportunities such as the development of a geographic information system, the initiation of pilot activities in informal settlements and the recording of details of land held under customary ownership. However, the implementation of the project's core activity—to strengthen the capacity of the lands department—was too inflexible, which caused a number of problems.

Land administration systems are fundamental to any economic development related to land-based resources. Such systems must be developed within a strategic framework that supports wider government objectives and outlines clear goals.

This Solomon Islands project provides some key lessons for future land administration activities in the Pacific.

- » It is important for the partner agency to own and control the support project, and for the project to maintain effective communication with all stakeholders.
- When working on complex issues such as informal settlements and recording customary land, pilot activities can provide valuable insights.
- » Assistance to build the capacity of an agency needs to have a flexible design and to take into account both the constraints imposed by and any changes in the local context.

Contents

»	BACKGROUND TO THE PROJECT	310
»	FORCED CHANGE—INTERMITTENT PROJECT DEVELOPMENT The original design A halt and new challenges in the face of conflict Refocusing the design New opportunities in land administration	310 310 311 312 312
»	SIISLAP IMPLEMENTATION—KEY ACHIEVEMENTS Governance and capacity building within the ministry Land administration systems and processes Revenue generation Land tenure support The Melanesian land group	313 313 314 315 316 318
»	A RETROSPECTIVE OVERVIEW OF ACHIEVEMENTS	318
»	IMPLEMENTATION ISSUES AND PROBLEMS Parallel systems inhibited capacity building A rigid project structure imposed constraints Senior managers did not own the project and communication was poor	320 320 320 321
**	LESSONS Ensure aid projects are owned locally Engage and communicate with all stakeholders Build capacity Measure project outcomes Adopt flexible approaches to both design and implementation	322 322 322 322 322 323 323
»	BIBLIOGRAPHY	324

Background to the project

Land in Solomon Islands is distributed over nine provinces comprising seven major (provincial) islands and hundreds of smaller ones. The complex task of administering this land lies with the Ministry of Lands, Housing and Survey. The land administration system was inherited from the colonial period, well before independence in 1980, and although the system was broadly sound more than 20 years of poor governance and a lack of funds meant it had become run down.

By the late 1990s the then Department of Lands and Survey (DoLS) could reasonably be described as dysfunctional. The old colonial buildings were in need of repair, the public inquiry area was scuffed and dusty, there was no protected public waiting area and members of staff were rarely seen at the service counter. Staff morale was low absenteeism was high, and service was virtually non-existent. Land records, including aerial photographs, registered titles and survey plans, were not maintained and were in decaying brown envelopes. The retrieval of records to meet customer requests was slow, tedious and often unsuccessful. Land transactions were very slow and, correspondingly, customer satisfaction was very low. Most senior managers were aware that the department needed outside assistance.

In 1998 the Solomon Islands Government requested AusAID support for what became the Solomon Islands Institutional Strengthening of Land Administration Project (SIISLAP). The project, which began in January 2000 in the Department of Lands and Survey, focused on upgrading and establishing functional systems for land administration. It had an emphasis on activities to generate revenue and to build the capacity of the department. The project was completed in June 2007.

Forced change—intermittent project development

THE ORIGINAL DESIGN

The project's objective was to improve the efficiency and effectiveness of Solomon Islands' land administration system. The design approach was influenced by a similar project in Papua New Guinea. An early design proposal included a sophisticated computerised management information system but both AusAID and the land ministry felt this was too ambitious. The focus was restricted to a centralised ministry and to alienated land, even though this represented only 13 per cent of the total land area (AusAID 1999a, 1999b). Customary land was not included as the associated issues were perceived to be too sensitive and complex. The design team undertook an organisational review of the ministry and the design placed priority on building the technical capacity and skills of DoLS staff where these were low, to enable the staff to meet basic operational requirements such as procedure documentation, land registration, land transactions, cadastral mapping and valuations. Further activities included decentralising the delivery of services through regional land offices, improving customer service and making better use of mapping data.

A HALT AND NEW CHALLENGES IN THE FACE OF CONFLICT

The original SIISLAP design was completed just a few months before ethnic tensions erupted in 1998. Disputes over land were fundamental to the tensions, and land issues were later identified by a UNDP (2004) analysis as a structural cause of the conflict:

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 poor management of urban growth ... (p. 1)

Australia's broad response to the conflict focused on three areas: peace and reconciliation, the links between poverty and conflict, and public sector reform to improve economic management. The land ministry was central to these responses. The SIISLAP design had been based on the assumption that public sector reform would continue, law and order would be maintained, and the operating costs of the land ministry would be stable, but that situation had changed before the project commenced.

When the project began in January 2000 its term was intended to be three years. Unfortunately this period coincided with the peak of civil and political unrest, which undermined the ability of the ministry to function effectively and hampered SIISLAP's activities. Between 2000 and 2003 project staff were evacuated for a brief period to Australia, there were three changes of governments, four ministers, two permanent secretaries and four different project coordinators appointed by the governments.

Some of the consequences of the conflict included:

- » forced shutdowns of the public service
- » uncertainty and a deterioration of security in the workplace
- » a general lowering of staff morale
- » frequent instances of opportunism and exploitation
- » widespread breakdown of decision making.

SIISLAP continued to 'wobble along', overcoming some of these constraints by focusing on non-controversial components of the land administration system and using contracted national staff. But during those three years few core activities were completed and no sustainable outcomes were achieved.

REFOCUSING THE DESIGN

Once peace and stability had been restored the Solomon Islands Government sought assistance to move the project into a new phase, and in 2003 AusAID revised the project design. The modified design drew on experience and lessons from the first phase as well as from other AusAID-funded land administration projects in Papua New Guinea, Vanuatu, Kiribati and China. It identified the need for political and senior bureaucratic commitment and for a long-term commitment by donors to build confidence and consolidate incremental improvements.

The design advocated the use of simple computer systems—with manual systems to back them up—to support administrative functions, and it included support for improved land administration and improved revenue benefits from that. It also adjusted the original approach to focus more on:

- » building the capacity of staff within the ministry
- » responding to the growing recognition being given to customary land as a national economic asset
- » promoting good governance to underpin the integrity of the land administration system
- » strengthening the links between the land and justice sectors in resolving land disputes
- » addressing issues of equitable land distribution, land accessibility and security of tenure.

SIISLAP adjusted its plans and approaches to implement the revised design in late 2003, and began to implement its second phase in March 2004, with an increased budget that initially required more resources and skills than the ministry had.

Priorities for the second phase of SIISLAP, which ran until June 2007, were to:

- » improve the capacities of both senior managers and supervisors
- » consolidate gains made in systems and processes during the first phase
- » establish capability in mapping and geographic analysis
- » introduce pilot land tenure activities.

NEW OPPORTUNITIES IN LAND ADMINISTRATION

Because of the unpredictable political and social environment, the revised design was explicitly flexible. Its annual planning process ensured that the project's overall objectives were reviewed every year. This enabled DoLS and SIISLAP to respond to demands that emerged in the land sector. For example, it allowed SIISLAP to support DoLS as it addressed the growing problem of unauthorised settlements in Honiara and took the opportunity to develop a conceptual model for recording and potentially registering customary land.

Activities resulting from the intervention of the Regional Assistance Mission to Solomon Islands (RAMSI) in 2003 and subsequent increases in aid led to a huge demand for thematic maps from new development programs. The project was able to respond to this expanding market for mapping products, as it had set up a computer-based geographic information system (GIS). Over the longer term this mapping unit could form the basis of a land resource information system that could help to support more effective use of the nation's resources for social and economic development.

SIISLAP implementation—key achievements

GOVERNANCE AND CAPACITY BUILDING WITHIN THE MINISTRY

The approach to project implementation was pragmatic and the pace of implementation reflected the conditions in the public sector. The second phase of the project began at a time when there was a strong emphasis on good governance and staff were returning to a changed workplace after enforced absences during the tensions. SIISLAP's first new activity after the RAMSI intervention was to build up the capacity of the lands department and improve its systems of governance. Capacity building involves strengthening all systems used by an organisation and its staff. That means training staff to improve their administrative and technical skills and to provide new skills, improving the management skills of the senior officers as well as the processes of planning, communication and corporate functions like human resources management, and possibly introducing computer systems.

Capacity building was a major component of the project and was successful within the project's timeframes and resources. The project sought to build the capacity of managers and supervisors by:

- » developing an organisational structure to reflect the department's functions¹
- » introducing a corporate plan and budget-based work plans as management tools
- » establishing procedures to recruit senior and middle managers
- » designing and delivering a significant staff training program
- » preparing standard operating procedures.

These activities to improve processes and develop systems demanded a lot of the department's resources. A high enough priority was not put on increasing staff capacity at management and supervisory levels to cope with the workload. So the systems established by SIISLAP are fragile and require ongoing support.

¹ The current government's policy framework outlines new directions for land reform. Structural changes have already commenced, with the creation of the Land Reform Unit in 2006.

The interaction of project advisers and the DoLS staff had a major positive impact on staff competence, self-confidence and morale. A high proportion of the project's effort went into developing the technical skills of staff to a high level. Training was delivered mainly through on-the-job support from technical advisers hired by the project. Postgraduate distance education programs in spatial mapping and business management were successful despite being demanding on the staff. All advisers were required to develop operational manuals for the upgraded systems, and those manuals are a comprehensive source of information on how to maintain the systems.

LAND ADMINISTRATION SYSTEMS AND PROCESSES

Digital land register and land transaction register

Two key systems implemented by SIISLAP are the computer-based land register to give staff rapid and efficient access to land records and the register to track the status of land transactions. Both systems were designed to bring transparency and accountability to the land administration process. These were major improvements, especially for records that were completed during the period of SIISLAP support, but a few customers continue to express concerns about processing backlogs that affect older registrations and which, in the Registry of Titles Office, could still take up to a year to clear. Additional resources are still needed to deal with the backlog and bring all title records into the computerised databases.

The computer-based land register will need further support to ensure its continued use. Adherence to the system's procedures will be important and the support, motivation and leadership of senior managers will be essential. Commitment from the ministry is also required to keep transaction processing up to date, particularly if the system is to accommodate an anticipated expansion in the administration of customary land.

Regional Land Centres

A strategy to decentralise in stages the management of land administration and the distribution of services was adopted by the ministry during the project.² SIISLAP supported the establishment of Regional Land Centres in Gizo, Western Province, in 2003 and in Auki, Malaita Province, in 2005 and the establishment of a Land Office in Taro, Choiseul Province.

These regional centres mean customers do not have to travel to Honiara to undertake land dealings or query land transactions. However, they are relatively high-cost operations, requiring experienced staff. Budgets, staffing and computer support from the ministry remain concerns and the link between the regional centres and Honiara still needs to be strengthened.

Power sharing with provinces has been the subject of political debate for many years. The term 'decentralise' is used here to describe an outreach delivery mechanism aimed to improve land administration services to local communities. It does not yet involve the devolution of decision-making powers to the provinces from the Minister of Lands.

Spatial information and mapping

Geographic information and mapping products and services in Solomon Islands are now provided by the National Geographic Information Centre. The centre has become a flagship within the ministry, which continues to demonstrate the importance of having good quality maps of all types and geographic reports to support national planning and economic development (SIISLAP II 2006a).³

Demand for thematic maps has always exceeded the centre's ability to supply them, and this led the centre to develop service agreements for the supply of products and services. Sales data indicate a modest income stream, not yet sufficient to achieve full cost recovery. A business plan for the centre is now needed to address structural and management options, including prospects for commercialisation or privatisation, as well as sustainability issues (data management, funding, staffing, training and markets).

Survey data and plan records provide the geographic integrity for land administration. This information underpins the valuation and rent collection systems and is the basis for land tenure mapping. The centre now faces growing customer expectations, the need for advanced staff skills and new product specifications, and an increase in the demand for special products such as land tenure maps. It is important that new systems in the centre are affordable and that any cost recovery through sales can be afforded by the users.

REVENUE GENERATION

To support activities that generate revenue for the lands department, a computer-based system was developed for collecting land rents but it was not implemented because government priorities changed (SIISLAP II 2006b). Inadequate staffing was an impediment but the system requires the ministry to formulate specific policies on how it should work and to officially endorse the use of the system. In a market where the value of land has soared in recent years there are concerns about its impact on land rent and land taxes such as city council land rates, which are based on the value of the land or property on it. SIISLAP introduced a formula-based approach for determining valuations but its uptake was limited. The ministry and Honiara City Council need to collaborate to ensure increased land values do not trigger excessive sudden increases in the council rates. The Honiara City Council's system for collecting rates also needs urgent repair as currently only about 25 per cent of a total of more than SI\$2 million (A\$400 000) a year is collected.

An inventory of government-owned/controlled land was prepared with a view to assessing the value of the land, the extent it is used, and its physical assets. The aim was to identify land not being used and to reallocate it for revenue generation. This was not supported by project stakeholders and was therefore not pursued, but as one of the current government's policies is to optimise the economic use of vacant Crown land this inventory will be a useful information base.

³ Clients include RAMSI, AusAID, other donor agencies and non-government organisations and there is still considerable scope for providing services to other government agencies, provincial organisations and the private sector.

LAND TENURE SUPPORT

SIISLAP embarked on two land tenure activities with the potential to realise significant longterm social and economic benefits. The first activity aimed to provide secure tenure through long-term leases to people who had migrated to urban areas, mainly Honiara, looking for work and had settled on government-owned land without any formal permission. The second assisted the land ministry in its role in recording customary land in Malaita Province where the customary owners, with the support of the Department of Agriculture, wanted to devote some of their land to growing oil palm as a commercial enterprise.

Converting tenure within unauthorised settlements

For many years a growing percentage of government land has been occupied by informal or unauthorised settlers, particularly in Honiara City (see also Case Study 5, 'Informal land systems within urban settlements in Honiara and Port Moresby'). The unauthorised settlements in Honiara include more than 3000 households with a population of approximately 20 000. During the 1970s the pre-independence administration had tried to deal with settlers by issuing them with temporary occupation licences. As the number of settlers grew, successive governments stated that they would convert the temporary occupation licences into a more secure form of tenure. However, as the Solomon Islands economy grew and more people moved to urban areas looking for job opportunities the governments stopped issuing the occupation licences. This made the policy issue of tenure conversion even more difficult as now most unauthorised settlers do not have valid or even lapsed occupation licences.

SIISLAP supported a pilot project to demonstrate a way of converting the small pieces of land occupied by households in the unauthorised settlements to a more secure form of long-term lease, known as fixed-term estates (SIISLAP II 2007). International experience shows that when residents in unauthorised or squatter settlements gain security over their piece of land it produces wider social and economic benefits. This is because people with a secure title to their home are more likely to find and hold onto secure employment and then are more likely to invest in improving their living conditions. When this happens to thousands of people and households in a city the positive effect on social and economic development can be enormous.

The pilot project involved creating in three stages 310 parcels of land with secure tenure in Honiara. The task significantly increased the workload of the land ministry, but all survey and registration processes were completed over several months, which implied that there are no inherent barriers in the land administration system. By early 2007 the ministry had begun the process of offering the long-term secure leases (in the form of 50-year fixed-term estates) to individual residents. The leases are not free; residents are required to pay an initial fee for the conversion and a subsequent annual fee for rent. This will create a significant revenue stream for the government and the Honiara City Council. These fees could be used to improve services to households such as water, sanitation, electricity and roads. The outcomes of the pilot project exceeded expectations because it was well planned and funded and involved local staff with the rapport and skills to conduct public awareness campaigns, consultations and negotiations within the local communities. Previous attempts (with support from the European Union) had achieved little beyond design and land surveys. The project adopted a participatory 'people-centred' approach that focused on the needs of the squatter communities. This well-planned and consultative approach helped to ensure that fears of significant social disruption from the process were not realised.

The pilot project was able to build capacity within the Honiara City Council and the Town and Country Planning Board while focusing on community outreach. It also provided on-the-job training, engaged senior managers, established a land development advisory group, progressed the Site Development Fund and involved private sector survey companies. In addition, planning expertise was improved and it was recognised that an integrated approach to planning, which incorporates social, environmental and physical perspectives, is required. There is now a critical mass of reliable information from which better policies can be formulated.

The pilot demonstrated that the ministry has limited capacity to manage land development in the face of increasing demand for land, and highlighted the importance of community awareness and engaging all stakeholders in the physical planning process. If land tenure and related issues are not managed, a sector of society will be living in unacceptable conditions. Solving these issues is paramount to maintaining peace in Honiara City, improving access to the settlement areas and meeting basic levels of health and environmental control.

Recording and registering customary land

Many people in Solomon Islands want customary land tenure to be formalised but there is no simple framework for developing and implementing programs to achieve this objective. Legislative mechanisms are cumbersome, and their requirements arouse the suspicion of landowners. In response to an oil palm initiative of the Ministry of Agriculture, the Ministry of Lands was asked to provide support for recording the custodianship of customary land in the Auluta Basin area of Malaita Province.

SIISLAP assisted with the pilot project, which is described in Case Study 3, 'Recording land rights and boundaries in Auluta Basin, Solomon Islands'. Lessons from that pilot could inform the government's new land reform agenda and its impact on policy, procedures and legislation as they relate to customary land. Such reform should involve review, further research, careful monitoring, extensive awareness and information, consultation and other pilot applications in different cultural and tenure settings before the reform is implemented.

Resolving disputes

SIISLAP cooperated with a law and justice aid program run under RAMSI to look at improving the resolution of disputes involving customary land. This cooperation focused on efforts from within the Solomon Islands justice system to establish a Tribal Land Dispute Resolution Panel. This incorporates the Melanesian concepts of consensus resolution as opposed to a western system perceived as adversarial and implemented through the Land Courts. It recognises that a systematic policy on customary land tenure must be developed in concert with procedures for resolving disputes (Hamilton 2006).

THE MELANESIAN LAND GROUP

SIISLAP played an important role in coordinating and providing resources for the initial meetings and workshops in 2004 and 2005 of an informal Melanesian land group. This brought together academics, technical specialists and senior staff from land administration agencies in Solomon Islands, Fiji, Papua New Guinea and Vanuatu and enabled them to share information, experiences and lessons in land administration, and to develop a communication and peer-support network in the Pacific. At a workshop in September 2005 that group spelled out some common principles, including the need to support customary land tenure systems while facilitating the productive use of customary land.

A retrospective overview of achievements

SIISLAP began with a focus on systems of land administration that would provide financial returns—more efficient registration of land titles, lease title verification, urban land valuations, and land rates. It later expanded into thematic (GIS-based) mapping and pilot projects in customary land recognition and informal settlements, with a capacity-building focus throughout all activities. There was some formal training as well as workshops that involved personnel from other Melanesian land agencies to share experiences and lessons.

There were notable successes in formalising titles for unauthorised settlements, in demonstrating a process for recognising and recording customary land, in establishing a highly successful national geographic information centre that can produce thematic maps and reports to meet customer needs, and in consolidating efficient land administration functions.

Ultimately this project resulted in an improved land administration agency, with good functioning systems and improved institutional morale. However, the sustainability of the improvements is not guaranteed. The records management area still had a backlog of work when the project ended, which was likely to increase without ongoing assistance. The required knowledge of the systems and level of operational skills is shared by only a few staff. Without ongoing and extended support what has been achieved through the project will not be sustained.

The circumstances in the Ministry of Lands, Housing and Survey in March 2003 and the changes since—at the time of a review in December 2006 and at the end of the project in June 2007—can be seen in the table.

THE CIRCUMSTANCES IN THE MINISTRY OF LANDS, HOUSING AND SURVEY AND SUBSEQUENT CHANGES IN THE CONTEXT OF THE PROJECT

Factor	March 2003	December 2006	June 2007		
Budget	Budget is virtually non-existent.	Budget is available but not released.	Budget is released.		
Staffing	Levels are about 35 per cent below approved levels.	Levels are about 15 per cent below approved levels.	Levels are less than 15 per cent below approved levels.		
Redundancy program	Staff identified for redundancy and retirement are still on the payroll.	Staff identified for redundancy and retirement are no longer with the ministry.	-		
Workplace culture	Staff morale is low, salaries are in arrears, work attitudes are poor, and absenteeism is high.	Staff morale has improved, salaries are paid on time, work attitudes are poor, absenteeism is high but reduced.	Staff morale is high with some concern over sustainability, and absenteeism is slightly reduced.		
Revenue generation	Average annual collection rate to 2003 was 28 per cent. Map sales are low (no GIS products).	The equivalent rate to 2006 was 29 per cent. Demand for maps and GIS products is high.	Ongoing high demand for thematic products. A cost-recovery plan is needed.		
Governance	Operating environment is unstable, with no transparency and accountability.	Operating environment is more stable and systems to improve transparency and accountability have been introduced.	Transparency and accountability systems continue to function, but support is still needed.		
Land equity	Law and order is better than in previous years but issues of land equity have not been addressed.	Law and order is still a major concern and land reform issues are on the policy agenda.	A Land Reform Unit has been established in the ministry.		

Implementation issues and problems

Despite SIISLAP's achievements it had some problems and issues during implementation.

PARALLEL SYSTEMS INHIBITED CAPACITY BUILDING

The project was designed to provide on-the-job support for DoLS staff. The best way to achieve this is for project technical advisers to work directly with departmental staff in their work areas but a simple decision on office allocations undermined this approach.

When SIISLAP began there was no secure office. As part of improving the general workplace, which included minor repairs and better lighting, the project set up a locked office for its key staff and expensive equipment. This had the effect of immediately separating the international technical advisers from DoLS staff. A few long-term advisers chose to move into DoLS offices to work closely with their counterparts in the lands department, especially as functions became progressively computer-assisted. Most advisers, however, were encouraged to work in the separate project office, and this effectively generated a separate system. Even as DoLS work-spaces were improved and made more secure the project's technical advisers were not integrated into the workplace.

Some project technical advisers developed work systems and procedures in the isolation of the project office, and where these were complex—for instance, the computing chain of the land administration process—the DoLS staff almost certainly did not attain the level of competence and confidence required to manage and maintain those systems.

As the project was implemented there were several changes to activities for justifiable reasons. But because DoLS staff and most of the support project team were physically separated, there was some uncertainty and confusion about the scope of the project. This might have been avoided if a more participatory and more integrated approach had been used to select activities.

A RIGID PROJECT STRUCTURE IMPOSED CONSTRAINTS

At a broad strategic level SIISLAP had flexibility to take on new project components such as the pilot projects on customary land and the unauthorised settlements. However, the core activity that sought to strengthen the land department had a rigid structure with given timelines and clear outputs. A program design, which is much more flexible and is not geared to timelines, would have been more appropriate, although the political instability at that time did not encourage such flexibility.

With hindsight it is clear that the project design caused several problems. A major problem was that a parallel work-planning system evolved in which the project worked in parallel with the department rather than as part of it. SIISLAP managers and advisers were driven by fixed timelines, an outputs schedule and associated payment milestones, while DoLS remained without clear institutional goals.

Despite project support to address staff issues, SIISLAP never slotted in effectively to assist DoLS to achieve its objectives. Because SIISLAP advisers were driven by relatively fixed timelines and milestones, rather than supporting the departmental staff in doing many of the project's activities, on many occasions the project team did the work themselves to meet the deadlines. DoLS staff were participants, but not the leaders, in improving and developing land administration systems.

There are clear lessons from this on the need for any donor project to have the flexibility to respond to the agency's needs—not to attempt to define those needs and not to be driven by schedules that require delivery of particular outputs. The in-country agency should be the primary partner in developing the design and know from the outset that they own and control the project.

SENIOR MANAGERS DID NOT OWN THE PROJECT AND COMMUNICATION WAS POOR

Because the project was designed during a period of increasing instability there was no strong leadership from within the ministry at that stage. DoLS had no strategic plan or clear goals and objectives that the project could support, so project goals were established in isolation during the design, and the ministry had no real ownership.

Communication between the project team and the ministry was inadequate, particularly in the latter years. Had SIISLAP been better integrated into DoLS workplaces as it was implemented, senior managers might have become more aware of the project's achievements. Many DoLS staff were initially reluctant to use new standard operating procedures because of problems in getting them officially approved. This arose because project advisers had not worked with DoLS counterparts to develop the procedures, nor with DoLS managers to have them integrated into agency operations.

Departmental staff generally lacked basic and routine workplace skills such as report writing, file management, document control, quality assurance and supervision. The lack of these skills was a capacity constraint and undermined the project's ability to introduce more complicated procedures. The high incidence of absenteeism, ongoing high vacancy rates and the lack of counterpart funding made it difficult to achieve some project outcomes. All of these internal issues required senior managers to engage and own the project. Overall there was a lack of political or senior management commitment to consolidate the project's achievements or to endorse key policy and regulatory changes.

Closely associated was the lack of adequate project and inter-agency and intra-agency cooperation. Good relationships are essential for successful project outcomes. In an environment of political and social instability it is easy for relationships to become strained. During SIISLAP there was confusion about the reporting obligations of the project to the ministry, and failing to keep the ministry fully informed undermined acceptance of the project. The government would almost certainly have valued SIISLAP more highly had there been more effective communication and extensive and continuing consultation with stakeholders.

Lessons

ENSURE AID PROJECTS ARE OWNED LOCALLY

lesson 1	For donor activities in the land sector to be successful, the land agency must be the primary partner in developing the design and be fully involved in implementing the project or program to ensure that it owns the project or program from the outset and that the activities are aligned with government policies.
lesson 2	Pilot activities are an effective and prudent way of exploring solutions to complex and sensitive land issues but they must use and build on local customs and practices, and include community awareness and full community participation in the activities.

Donor-supported projects in the land sector require a context of clear government policies for both alienated and customary land. Improvements to land policy require political leadership, a champion for change within the land agency and a long-term partnership with and commitment from the donor. Systems being introduced must match the skills and resources of the land agency, and marketable products and services must be affordable to customers, yet cover product costs if they are to be sustainable. All processes used must be culturally appropriate.

ENGAGE AND COMMUNICATE WITH ALL STAKEHOLDERS

LESSON 3

A flexible and responsive approach to selecting project activities is necessary, especially when operating in a dynamic environment, but that approach must be underpinned by effective and ongoing communication with all project stakeholders.

All stakeholders need to understand the objectives and benefits of the project so that it is recognised primarily as a process for improving resources, not just a mechanism for providing additional resources. For SIISLAP poor communication between its managers and the ministry reflected badly on the project, but there was effective communication with external stakeholders when activities (conferences, summits, workshops and forums) were organised outside of formal project meetings, involved senior land representatives from the Pacific region and were designed to address specific themes.

BUILD CAPACITY

lesson 4 Agency resources and the needs and skills of staff should be assessed before undertaking activities such as developing systems and process, to ensure these fit within local expertise and budgets. LESSON 5 For activities that may generate conflict, it is important to identify and use local people who have rapport with the communities as well as the necessary skills and knowledge, or have the potential to develop those skills through appropriate training.

SIISLAP demonstrated that the competence, confidence and morale of the staff in an in-country agency can be increased through hands-on training to provide technical and organisational skills. It also demonstrated the need to integrate advisory roles into the partner agency's work plans and structure, to provide ongoing support to build the capacity of managers and decision makers, and to engage more with staff to assess their individual needs. Specific skills are needed for work that could generate conflict, such as in settlement areas and involving customary land.

MEASURE PROJECT OUTCOMES

lesson 6

LESSON

7

To demonstrate the benefits of strengthening land departments, it is critical to collect a broad range of social and economic data, including baseline data, and measure improvements against economic and social indicators, not just project outputs.

SIISLAP is able to demonstrate a number of achievements in terms of improvements to land administration services. However, a failure to collect data and measure improvements against economic and social indicators (such as the number of land transactions or level of land disputes) has prevented project evaluators from making an accurate assessment of the value and benefits of the project to the broader Solomon Islands community.

ADOPT FLEXIBLE APPROACHES TO BOTH DESIGN AND IMPLEMENTATION

A flexible program design is more suited to future land initiatives in Solomon Islands than a project design.

Initiatives to strengthen land systems and tenure arrangements depend on human and organisational change. Such changes cannot be easily planned and sequenced in a project design format.

SIISLAP had a flexible implementation strategy enabling new components to be incorporated in the project. But for the core activity of strengthening the land department, once annual plans were approved the project team was driven by timelines and milestones that did not make allowances for the ability of the land agency and related areas of the public service and political system to adjust to the changes.

Unlike a project, a program does not have structured timelines or reporting but does have clear outputs such as the installation of a functioning records management system. It can also allow a stronger focus on broader social and economic outcomes that flow from improved land administration.

Bibliography

- AusAID 1999a, 'Solomon Islands institutional strengthening of land administration', project design document, Australian Agency for International Development, Canberra, June.
- ——1999b, 'Solomon Islands short term expertise in management of land administration and registration', final report, Australian Agency for International Development, Canberra, August.
 - —2000, Improving access to land and enhancing the security of land rights: a review of land titling and land administration projects, Quality Assurance Series No. 20, Australian Agency for International Development, Canberra.
- ——2001, Undertaking land administration projects: sustainability, affordability, operational efficiency and good practice guidelines, Quality Assurance Series No. 26, Australian Agency for International Development, Canberra.
- ——2003, 'Solomon Islands Institutional Strengthening of Land Administration Project', final report, Technical Advisory Group Mission, Australian Agency for International Development, Canberra, April.
- ——2006, 'Solomon Islands Lands Sector Mission', draft report, Australian Agency for International Development, Canberra, August.

— 2007, 'Solomon Islands Institutional Strengthening of Land Administration Project (Phase 2)', final report, Evaluation Mission, Australian Agency for International Development, Canberra, February.

- Deininger, K 2004, 'Land policies for growth and poverty reduction: key issues and challenges ahead', paper presented to UN, FIG, PC IDEA Inter-regional Special Forum 'The Development of Land Information Policies in the Americas', Aguascalientes, Mexico, 26–27 October, viewed June 2007 http://www.fig.net/pub/mexico/.
- Hamilton, L 2006, *Tribal Land Dispute Resolution Panel issue paper: land tenure policy,* Solomon Islands Law and Justice Institutional Strengthening Program, March.
- Land Equity 2007, *Land administration reform: indicators of success and future challenges*, Agricultural and Rural Development Discussion Paper 37, World Bank, Washington, DC.
- Scheudler, D, Rajabifard, A & Williamson, IP 2004, 'Evaluation of land administration systems', *Journal for Land Use Policy*, vol. 21, no. 4.
- SIISLAP 2003, *Action and policy plan to improve the income from land rent*, Australian Agency for International Development, Canberra, April.
- SIISLAP II 2006a, *Establishment of a National Geographic Information Centre*, milestone report #5, Australian Agency for International Development, Canberra, July.
- ——2006b, Transaction processing control, milestone report #2, Australian Agency for International Development, Canberra, August.
- ——2007, Lessons learned: tenure conversion of unauthorised settlements in Honiara, milestone report #3, Australian Agency for International Development, Canberra.

- Solomon Island Government 2001, *Economic and Structural Reform Action Plan 2001/2003*, Ministry of Economic Reform and Structural Adjustment, April.
- -----2002, *Programme of Action Policies, Priorities, Strategies and Target 2002–2005,* National Government for Peace, Unity and Restoration.
- ——2006, 'Policy translation and implementation document', Grand Coalition for Change Government, August.
- UNDP 2004, Solomon Islands peace and conflict development analysis: emerging priorities in preventing future conflict, an independent study commissioned by the United Nations Development Programme with the support of the Department of National Unity, Reconciliation and Peace and the National Peace Council, United Nations Development Programme, viewed June 2007 <www.undp.org/cpr/documents/prevention/integrate/ country_app/sol_is/Solomon_Islands_-_PCDA_Report.pdf>.

POLICY REFORM AND ADMINISTRATION

16

Training and educating land professionals: the value of institutional partnerships

Chris Lunnay » Director, Land Equity International, Wollongong, Australia

A snapshot

Training and educating land professionals: the value of institutional partnerships

For land administration to be effective it requires professionals in areas such as surveying, cartography, land use planning, and valuation. To improve land administration in the Pacific island countries, emphasis needs to be placed on educating and training land professionals. Currently, there are tertiary programs available in the region's universities, but they have limited resources and are not linked to the respective international fields of expertise. A donor-funded project in Laos addressed similar problems by establishing a partnership between a Lao tertiary institution and an Australian tertiary institution. The results have been very good and the project has proved a very cost-effective way of improving education and training outcomes.

The Lao project provides some important lessons.

- » Substantial benefits can flow from establishing partnerships with tertiary institutions in other countries to improve the quality of education for land professionals.
- » A partnership arrangement is a cost-effective and sustainable way of raising the quality of courses.
- Engaging with governments and professional associations when developing courses for land professionals benefits both public and private sectors.
- Education institutions need adequate resources to develop and maintain professional links, courses and standards.

Contents

»	INTRODUCTION	330
»	OVERVIEW OF EXISTING CAPACITY IN THE PACIFIC	330
»	INSTITUTIONAL PARTNERSHIP—THE CASE OF LAOS Course delivery and accreditation Cost and sustainability	331 332 333
»	THE CONTINUING PARTNERSHIP	334
»	THE SUCCESS OF THE LAO APPROACH	335
»	LESSONS Establish partnerships with tertiary institutions Build in financial sustainability Customise education material Build links between education institutions and government and private sectors	336 336 336 337 337
»	APPENDIX A: TRAINING AND EDUCATION— OVERVIEW OF EXISTING CAPACITY IN THE PACIFIC	338
»	APPENDIX B: PEOPLE CONSULTED DURING RESEARCH	343
»	BIBLIOGRAPHY	345

Introduction

Donor programs to assist developing countries to improve their land administration and tenure systems often include education and training components to build the capacity and skills of professionals and officials in the those countries. The education and training may involve supporting students while they study at institutions in the donor country or, where courses are available, in the recipient country.

Evidence suggests that building the capacity of institutions in developing countries to educate their own students can lead to more sustainable results in the longer term. In the Pacific, this might also mean building up the relationships between the smaller countries and the education institutions in Papua New Guinea and Fiji—and possibly Australia and New Zealand—that have the potential to serve the region.

A major project supported by AusAID and the World Bank provides an example of how an education institution in Laos was strengthened to serve the needs of the land sector. The Lao–Australia Property Rights and Land Titling Project focused on building capacity within the tertiary education sector in Laos. It provides useful lessons on how local institutions in developing countries can establish partnerships with institutions in a donor country to increase their capacity in a sustainable way.

Overview of existing capacity in the Pacific

There is strong anecdotal evidence of severe shortages of land professionals in Pacific island countries in such areas as surveying, planning and valuation. And the demand for land professionals will increase as many of these countries realise that their land administration, land management and tenure systems need to be more effective if they are to meet their social and economic development needs.

According to the report of the Papua New Guinea National Land Development Taskforce, there is an urgent need to train more physical planners. The country's education institutions do not offer degrees in this field, so there is little prospect of the situation improving soon. Government officials in Fiji have been concerned that there are not enough professionals in government with technical qualifications in land administration or surveying. There are large numbers of professional surveyor positions vacant, but without a surveying degree at the University of the South Pacific these are unlikely to be filled. The university offers only a diploma course in this field. Solomon Islands, Vanuatu—indeed most countries in the region—lack professional expertise in land administration and the impact is clearly visible in each country's land administration structures.

Most Pacific island countries have little if any capacity of their own to train land professionals. Tertiary education in the required fields is available in the region at the University of the South Pacific, based in Fiji, and at the University of Technology in Papua New Guinea (see Appendix A for more details). Courses in urban and rural planning, in applying data from specialised remote sensing and geographic information systems and in more general spatial sciences are provided through the University of Papua New Guinea. These institutions have difficulty meeting the education and training needs in land-related areas for their host countries, let alone for the region.

The quality of the land-related courses provided by the three universities is mostly of an acceptable level although, as already noted, no degree-level qualifications in surveying are offered at the University of the South Pacific. The courses generally meet the requirements of the government and private sectors. But the lack of financial resources is having an impact on their ability to deliver courses effectively. Student numbers are high but limited survey equipment and library and computer facilities mean lecturers cannot provide high-quality course content and practical classes. The lack of lecturers also means that lecturers struggle to undertake research or other professional development activities. This makes it difficult for lecturing staff to keep abreast of the developments in land administration.

Institutional partnership—the case of Laos

In the early 1990s the Government of the Lao People's Democratic Republic decided to implement the Lao Land Titling Project—subsequently called the Lao–Australia Property Rights and Land Titling Project. The broad aims of the project were to encourage the efficient use of land and improve economic and social development. One challenge in implementing the project was the lack of national expertise in land administration and related areas that were needed to support the project's development and implementation. These skills included surveying, dispute resolution (resolving competing claims over a boundary or over access), land registration, and community education.

During the project's design phase, education and training were seen as key factors in ensuring the long-term sustainability of project activities. However, potential trainees lacked the foundation knowledge and skills needed for the project's training and the Lao education system did not have the capacity to provide those skills or subsequent technical and professional expertise.

After examining several possibilities, it was decided to develop an in-country course in surveying and land administration through the Lao Polytechnic School. The course would provide an internationally recognised professional qualification and meet national needs for a skilled workforce to operate a modern land registration and administration system.

It was proposed that the course would be developed through a partnership with a foreign tertiary institution, with the course's modules delivered by visiting lecturers who worked with a full-time national education adviser and full-time translator. Staff from the Polytechnic School would also assist. The Australian Government agreed to provide funds to establish and run the course in Laos, including funds for providing technical assistance, refurbishing lecture rooms and providing lecturing facilities.

COURSE DELIVERY AND ACCREDITATION

An open tendering process was run for the delivery and accreditation of the course. The Western Australian Central Technical and Further Education College won the tender. Technical and further education (TAFE) colleges are an education stream in Australia that sits between high school and university. These colleges focus mainly on vocational, technical and trade training. A requirement of the course in Laos was that students must graduate at a level equivalent to an Australian TAFE Certificate IV, an award level for technical and trade courses in Australia, or to a diploma, which is the basic award level provided by Australian universities.

The course was designed initially to upgrade the skills of 23 government officials and three Polytechnic School staff. It was originally designed to have 11 modules but three of them were removed because lecturing staff at the Polytechnic School lacked the qualifications to teach them.

The modules offered initially were:

- » Module 1: Land Valuation
- » Module 2: Surveying, Maths and Survey Computations 1
- » Module 3: Surveying, Maths and Survey Computations 2
- » Module 4: Surveying, Maths and Survey Computations 3
- » Module 5: Total Stations and GPS
- » Module 6: Land Administration and Registration
- » Module 7: Cadastral Surveying and Mapping
- » Module 8: Survey Project Management.

A set of comprehensive lecture notes was developed for each module, in English and Lao languages. Each student received a copy of the notes at the beginning of the module and many copies were included in the Polytechnic School library as reference material.

All 26 students who began the two-year course graduated. Following the completion of modules 1–8, the Western Australian college obtained Australian accreditation for the course, with certificates of accreditation being issued for Certificate II, Certificate III and Certificate IV in surveying and land administration.

An objective of the course was to 'train the trainers' so that lecturing staff at the Polytechnic School would have the qualifications needed to teach the modules at levels equivalent to Australian Certificate IV and Diploma. So during the first two years the course also focused on upgrading the skills of the lecturers. AusAID then provided funding for the remaining three modules of the course's original design:

- » Module 9: Land Adjudication
- » Module 10: Customer Relations and Service/Gender and Development
- » Module 11: Control Surveys.

The Western Australian college developed the curriculum so that a number of the subjects had a specific project-related focus. For example, customer relations and service and dispute resolution skills were seen as high priorities within the project and whole modules were developed around them. It is doubtful whether this would have been possible if the course had been developed around existing subject material and without the partnership support provided by the land project for developing course materials.

COST AND SUSTAINABILITY

The cost of setting up and presenting the first 8 modules over two years was about A\$0.5 million. With 26 students educated, this amounted to just A\$20 000 a student. This is substantially less than the cost of providing alternative education arrangements such as scholarships. These typically range from A\$50 000 to A\$100 000 a year per student. Moreover, unlike scholarship programs, this project built sustainable capacity in the local tertiary institution. The low cost of the project makes it a particularly attractive model for Pacific island countries to follow.

The course was designed to ensure that the Polytechnic School would be able to operate and maintain the courses in surveying and land administration at an acceptable standard once the partnership with the Western Australian TAFE college finished. So, while the lecturers of the Polytechnic School undertook the course, at least one was selected to assist in presenting each module of the course. This approach proved extremely successful and led to the development and approval of the High Diploma in Surveying and Land Administration at the school, which is now providing graduates to the land titling project, government agencies and the private sector.

Early efforts to publicise the course through radio and newspapers and inform potential students of the course proved very successful. The Lao Government has seen the success of the courses as an opportunity to generate revenue and now runs two streams—one fee paying and the other the normal annual tertiary institution intake. This has resulted in large increases in student numbers. With only 11 full-time and 4 part-time lecturers, the increase in student numbers has been well beyond the capacity of the school to manage. This issue will have to be addressed if the course is to remain sustainable.

The Lao approach to the education and training of land professionals has succeeded in developing a significant level of financial sustainability, mainly through fee-paying students. Despite the introduction of fees, student numbers have increased substantially.

The Polytechnic School continues to receive donor funding, but funding responsibility is gradually being transferred to the Lao Government. There are issues to be addressed in how to obtain a balance between cost recovery and course quality and how donors can develop an appropriate exit strategy.

STUDENT INTAKE AND NUMBERS IN THE HIGH DIPLOMA IN SURVEYING AND MAPPING AT THE LAO POLYTECHNIC SCHOOL							
	Intake numbers			Total numbers enrolled			
Year	Male	Female	Total	Male	Female	Total	
2002-03	23	9	32	23	9	32	
2003-04	56	33	89	79	42	121	
2004–05	89	57	146	168	99	267	
2005-06	52	10	62	187	100	287	

Source: 'Education status report', Lao–Australia Property Rights and Land Titling Project report, Canberra, 2005.

The continuing partnership

The partnership between the Western Australian TAFE college and the Polytechnic School was initially purely a business relationship based on the contractual requirements and funding provided through the aid project. However, as the education support evolved, a strong academic and professional relationship developed between the staff of the college and the Polytechnic School.

After the college had completed the contract to develop the course, additional technical support was provided through the land project to improve the management and administration of the Polytechnic School. This support, which covered curriculum development, lecturer training, course scheduling and education management, was terminated when the school achieved an acceptable level of sustainability.

But a strong professional relationship continued between the two institutions, with support and communication at a distance. In June 2006 the Western Australian college donated more than 100 second-hand computers and 20 printers to the Polytechnic School, which enabled the school to establish two computer laboratories. Its remaining obsolete computer equipment was made available to other AusAID-funded projects.

The success of the Lao approach

Building the capacity of tertiary institutions to educate and train land professionals and ensuring the institutions can maintain the skills and financial resources needed is a major challenge. The Lao model of partnering with a foreign tertiary institution has been particularly successful. That model:

- » is low cost and sustainable
- » is an efficient and sustainable way to transfer knowledge to lecturers and build capacity in the tertiary education system
- » substantially raises the institution's capacity to develop new courses
- enables the introduction of affirmative action in relation to gender (the top students were females)
- » builds cooperation between tertiary institutions.

The success of the Lao project was contingent on the success of the partnership arrangement. A strategy of building capacity by, for example, employing individual consultants could not have achieved many of the project's positive outcomes. Some of the factors that formed the basis of the successful partnership included:

- » excellent cooperation between the institutions, with the establishment of close links, including personal links
- » a willingness of the Polytechnic School to accept capacity-building measures and changes in curriculums
- » the willingness and commitment of lecturers to participate in the capacity-building process
- » a strong commitment from the partner institution
- » the availability of follow-up support with the partner institution when required
- » sufficient funding to facilitate the partnership.

Lessons

ESTABLISH PARTNERSHIPS WITH TERTIARY INSTITUTIONS

lesson 1	The tertiary institutions of the Pacific should establish partnerships or twinning arrangements with tertiary institutions elsewhere that can provide high-quality education in land administration and land management.
LESSON	Funds made available to train and educate land professionals (whether donor funds or government funds) can be effectively spent through a partnership with a tertiary institution.

Land courses at the universities in the Pacific region have few resources, inadequate facilities, and poor access to international developments in methods and technology. By partnering with the Western Australian Central Technical and Further Education College, the Lao Polytechnic School overcame many of these hurdles. In particular, the partnership helped the school access the latest methods, technology and literature, and has allowed the school to present courses at a significantly raised standard. In addition, the partnership provided a very cost-effective and sustainable basis for building the skills of land professionals in Laos.

BUILD IN FINANCIAL SUSTAINABILITY

LESSON 3	The financial sustainability of a capacity-building program through an institutional partnership requires a plan for ongoing funding and an exit plan for donors.
lesson 4	The introduction of student fees to help fund land courses (and possibly other vocational courses) is a feasible strategy when the standard of the course is good and this is publicised.

The capacity-building program and partnership arrangement between the Western Australian college and the Lao Polytechnic School were funded by donors. To maintain the higher standards achieved and the partnership arrangements, resources need to be maintained at a higher level. Donors need an exit strategy, which means that funding responsibilities over the medium term need to be taken over by the local authorities. In Laos some of the funding has been gained by imposing student fees. Despite the fees, the higher education standards on offer and appropriate publicity have ensured student numbers have increased. But the higher student numbers have, in turn, raised pressures on resources.

CUSTOMISE EDUCATION MATERIAL

LESSON 5

Course development needs to be context-relevant so that graduates are well prepared for the circumstances in their countries.

In the Pacific there are many unique issues that are not well addressed by tertiary institutions, which tend to continue to focus on technical subjects. These issues relate to understanding customary rights and land practices. The Lao project allowed for the development of a curriculum that was context-specific, rather than simply transposing a curriculum from the partner institution. The result was that much of the course material was unique to the Polytechnic School, better preparing graduates for the circumstances in Laos.

BUILD LINKS BETWEEN EDUCATION INSTITUTIONS AND GOVERNMENT AND PRIVATE SECTORS

LESSON 6

Education institutions need to have the resources to forge closer ties to the government and private sectors that need their education services.

The Lao Polytechnic School and the Lao government land agencies benefited immensely from the close links forged by the land project. Such links mean that the education provider can better meet the needs of the government and private sectors. In the Pacific, it is difficult for most countries (except Fiji and Papua New Guinea) to forge such links because they do not have education institutions that can deliver such courses. Most countries are unlikely to develop that capacity for many years.

Appendix A: Training and education overview of existing capacity in the Pacific

In the Pacific, tertiary education for land professionals is available in three places:

- » University of the South Pacific based in Fiji
- » University of Technology (UniTech) in Lae, Papua New Guinea
- » University of Papua New Guinea in Port Moresby, Papua New Guinea.

There are other institutions and development assistance arrangements that could possibly support an education and training program for land professionals in the future, including:

- » Vanuatu Technical College
- » Solomon Islands College of Higher Education
- » National University of Samoa
- » Australian Development Scholarship
- » Australia–Pacific Technical College.

UNIVERSITY OF TECHNOLOGY (UNITECH)—DEPARTMENT OF SURVEYING AND LAND STUDIES

At UniTech the Department of Surveying and Land Studies has been producing land professional graduates for more than 25 years and many graduates now occupy senior positions in government and the private sector in Papua New Guinea and elsewhere in the Pacific region. The department offers courses that broadly cover the collection, collation, analysis, interpretation and application of spatial and economic data associated with land. The use of technology is emphasised, as is the role of the professional in the economic development of a country.

The department offers programs in three discrete disciplines:

- 1 Surveying
 - four-year degree course leading to a Bachelor of Surveying
 - two-year diploma course leading to a Diploma in Surveying

2 Cartography

- four-year degree course leading to a Bachelor in Cartography
- two-year diploma course leading to a Diploma in Cartography

3 Land Studies

- four-year degree course, including one semester of industrial training, leading to a Bachelor of Land Studies
- one-year diploma course leading to a Diploma of Land Administration
- one-semester course leading to a Certificate in Land Administration.

The **surveying program** focuses on the technical aspects of surveying and spatial measurement assessment as well as techniques associated with land, engineering, mining and hydrographic surveying, with land administration, and with property management.

The **cartography program** focuses on preparing, analysing and using digital and paper maps and plans as well as applying digital data, including digital mapping, desktop publishing, geographic information systems, and remote sensing (the collection of geographic information by remote means, such as aircraft, ships or buoys).

The **land studies program** focuses on land issues such as property development, estate and plantation management, and valuation.

Students are encouraged to develop broad skills by taking subjects in one of the other disciplines or one of the common subjects available during the first year. Postgraduate studies are also available, although few have taken advantage of the opportunity in recent times. All courses offered are accredited by the appropriate professional association.

The Department of Surveying and Land Studies has 14 academic staff (two of them females) and a Head of Department. The Head of School was recently appointed, the department having been without a permanent head for a number of years.

Each year around 80 new students are accepted for the three programs and at any point approximately 300 students are enrolled. There is an equal mix of male and female students in the diploma and degree courses for land studies but only a small number of females in surveying and cartography courses. The number of students from countries other than Papua New Guinea undertaking any of the courses on offer is minimal, with only two students from Solomon Islands and one from Nauru currently enrolled. This has not always been the case. During the 1980s and 1990s there were large numbers of students from other Pacific countries. The reduction in numbers is a direct result of reduced funding at the university to sponsor students and due to reduced support from donor agencies in providing scholarships.

Surveying and other land administration subjects are also taught to students in the departments of engineering and architecture. With this added responsibility, the small team of academic staff has a heavy workload. The Head of Department believes the number of academic staff needs to be increased by approximately five to enable the department to deliver its programs effectively and to enable lecturers to participate in research and other professional development activities. At present this is not possible.

Departmental facilities can be described as basic. The library has few current publications and there are not enough funds to subscribe to professional journals. The department has only small quantities of survey equipment—such as levels, total station theodolites and global positioning system (GPS) equipment—far less than required for students to receive adequate practical training. Access to computers is limited, which restricts the assignments that can be undertaken by students and the way assignments are presented. The department also has limited copies of survey software, which restricts the level of technical training on offer.

A Melanesian Land Studies Centre has been established within the Department of Surveying and Land Studies. Some activities have been undertaken but the centre is now 'on hold' due to a lack of funding. Until 1998, UniTech also trained government land officers and other officials in land administration. This is now the responsibility of the Institute of Public Administration, which provides this training on an ad hoc basis only when it has a trainer with appropriate land-based experience.

In 2006 the department began a review of its curriculum, as part of the university's regular review process and in recognition of the need to bring courses and subjects into line with modern developments. The curriculum review involves widespread industry consultation with the public and private sectors and with professional associations in surveying, spatial information and valuation. It addresses issues in Papua New Guinea relating to licensing surveyors, including the extended time taken for graduates to become licensed, which has caused a decline in the number of licensed surveyors. Following an approach by the Association of Surveyors, it was proposed to develop a one-year postgraduate course for surveying, which will enable surveyors to get their licences as soon as they graduate. This is similar to the model adopted by the University of Queensland.

UNIVERSITY OF PAPUA NEW GUINEA

The University of Papua New Guinea is well recognised in the Pacific. It focuses on business administration, humanities and social sciences, medicine and health sciences, natural and physical sciences, and law. Through the School of Natural and Physical Sciences the university provides several courses in environmental science and geography, which cover a range of environmental subjects and focus strongly on spatial subjects. Spatial subjects include human and physical geography, geographic information systems, remote sensing and urban and rural planning. These subjects along with some legal courses offered through the Law School are vitally important for land administration.

Under the current land reform process in Papua New Guinea, there is a planned initiative to reform and upgrade the land dispute settlement process. The university will therefore need to look to its Law School to upgrade its delivery of relevant land-related legal courses and training.

UNIVERSITY OF THE SOUTH PACIFIC—DEPARTMENT OF LAND MANAGEMENT

The limited capacity of individual Pacific island nations to educate and train land professionals, the potentially small student numbers, the geographic spread of the nations and the need to ensure appropriate capacity and sustainability in the education system for land administration, all constitute considerable challenges.

The University of the South Pacific is tasked to meet these challenges and has 14 campuses, located in Fiji (3), Vanuatu, Samoa, Solomon Islands, Tonga, the Cook Islands, Tuvalu, Kiribati, Nauru, the Marshall Islands, Tokelau and Niue.

The university's Department of Land Management is in the Faculty of Islands and Oceans based on the Suva campus and delivers courses related to land administration and land management. These courses have evolved, the most significant change being made in 2005 when the then Bachelor of Arts in Land Management was divided into four discrete but complementary disciplines:

1 Geomatics

- Certificate in Geomatics
- Diploma in Geomatics

2 Land Use Planning

- Certificate in Land Use Planning
- Diploma in Land use Planning
- Bachelor of Arts in Land Management (Land Use Planning)

3 Real Estate

- Certificate in Real Estate
- Diploma in Real Estate
- Bachelor of Arts in Land Management (Real Estate)
- Postgraduate Diploma in Real Estate

4 Land Management

- Master of Arts in Land Management
- Doctor of Philosophy in Land Management.

Geomatics combines the surveying technologies of remote sensing, geographic information systems and global positioning systems, to provide spatial, positioning and mapping information for professionals working in the built and natural environment. At this point the department does not offer a Bachelor of Arts in Land Management (Geomatics).

Land use planning incorporates land tenure, land use, planning principles, development control, planning law, property development, and land economics—all of which cover the optimal use of land as a communal resource.

Real estate incorporates property acquisition, appraisal, development, management, investment, agency (sales and lettings), economics and law.

The Department of Land Management has five lecturers (one a female who is also acting head), with the head of the department giving all lectures in geomatics. Student numbers have progressively increased and now as many as 130 students are enrolled. This is more than double the student numbers prior to the changes in 2005.

The workload for all lecturers is heavy and they find it difficult to participate in professional development and to devote sufficient time to developing distance and flexible learning (DFL) materials. The department cannot therefore expand the number of courses it offers.

In addition, the Department of Land Management has limited survey equipment and computer facilities for practical training and is often forced to borrow equipment from government departments in Suva. It faces a unique set of issues in providing practical training in its distance education program.

UNIVERSITY OF THE SOUTH PACIFIC—DISTANCE AND FLEXIBLE LEARNING

In 1970 the University of the South Pacific began offering courses through distance education. This has been extensively supported and has evolved to include more than 350 courses covering a significant number of subjects, which are now available through DFL. These courses are offered to students at each of the university's 14 campuses. The DFL approach has a number of cost advantages, enables education to be provided to students in smaller countries and enables students to remain in their home country while studying.

Even though its resources are limited, the Department of Land Management has attempted to adopt the university's strategy for distance and flexible learning and has developed most first-year subjects and many second-year subjects so that they can be presented through the DFL program. While the department proactively supports DFL it is restricted in developing more course material by the limited number of staff and the time they have available.

The university's overall concept and approach for delivering DFL is a cost-effective way of providing education to people living in the geographically dispersed Pacific island nations. However, there are important constraints to this form of education. For example, delivering quality regional education and training programs requires adequate resources, lecturers and finance, and sufficient resources are not always available. The lack of facilities such as computers, internet access and tutors and equipment for practical training at its satellite campuses is an impediment to the successful delivery of land programs through DFL.

The Department of Land Management has attempted to address this by working through the surveyors general or heads of land departments in relevant countries. In most cases the department relies on the 'good will' of relevant agencies to provide survey equipment and government staff to support student training. In most Pacific island countries professionals are prepared to support this aspect of education and training, but there are no formal arrangements. An alternative approach, although expensive, may be to engage mobile tutors.

Appendix B: People consulted during research

FIJI

- » Mele Rakai, Head of Department of Land Management, University of South Pacific
- » Sevanaia Dakaica, Lecturer, Planning, University of South Pacific
- » Abdul Hassan, Lecturer, Valuation, University of South Pacific
- » Ken Chambers, Lecturer, Law, University of South Pacific
- » Paula Raqeukai, Lecturer, Valuation, University of South Pacific
- » Eroni Bakikawai, graduate student, University of South Pacific
- » Koroata OBrien, Communication Assistant, University of South Pacific
- » Silvia Dewiyanti, Instructional Designer, University of South Pacific
- » Nimillote Naivalumaira, Executive Officer, Native Land Trust Board
- » Kemueli Masikerei, Acting Deputy Permanent Secretary, Ministry of Lands and Mineral Resources
- » Luke Rokomokoti, Acting Director of Lands and Surveyor General, Department of Lands and Surveys
- » Paserio Samisoni, Principal Surveyor, Control, Department of Lands and Surveys
- » Eparaman Ravaga, Manager, Central/Eastern Region, Native Land Trust Board
- » Silika Tuivoalavoa, Spatial Information Coordinator, Native Land Trust Board
- » Padric Harm, Program Manager (Education), AusAID

PAPUA NEW GUINEA

- » Dilip Pal, Head of Department of Surveying and Land Studies, PNG University of Technology
- » Wycliffe Antonio, Deputy Head, Department of Surveying and Land Studies, PNG University of Technology
- » Jacob Sinne, Lecturer, Department of Surveying and Land Studies, PNG University of Technology
- » Flora Kwapena, Lecturer, Department of Surveying and Land Studies, PNG University of Technology
- » Jones Taugaloidi, Senior Technical Instructor, Department of Surveying and Land Studies, PNG University of Technology
- » Andrew Pal, Senior Technical Instructor, Department of Surveying and Land Studies, PNG University of Technology

- » Zebedee Sombo, Senior Technical Instructor, Department of Surveying and Land Studies, PNG University of Technology
- » Greg Kasen, Senior Technical Instructor, Department of Surveying and Land Studies, PNG University of Technology
- » Oswald Topiavu Tolopa, Director, Policy Division, Department of Lands and Physical Planning
- Chris Mek Kabauru, Valuer General, Department of Lands and Physical Planning

Bibliography

- AusAID 2000, *Improving access to land and enhancing the security of land rights: a review of land titling and land administration projects*, Quality Assurance Series No. 20, Canberra.
- ——2001, Undertaking land administration projects: sustainability, affordability, operational efficiency and good practice guidelines, Quality Assurance Series No. 26, Canberra.
- ——2004, 'Gender and scholarships in the high diploma of surveying and mapping and high diploma and land administration at the Polytechnic School', Lao–Australia Property Rights and Land Titling Project report, Canberra.
- 2005a, 'Pacific 2020—background paper: land', Canberra.
- -----2005b, 'Pacific 2020---background paper: framework for growth', Canberra.
- ——2005c, 'Core Group recommendations report for a white paper on Australia's aid program', Canberra.
- -----2005d, 'Education status report', Lao–Australia Property Rights and Land Titling Project report, Canberra.
- Lunnay, CW 2006, 'Surveying and land administration—sustainable education for developing countries', XXIII FIG Congress, Munich, Germany, 8–13 October.
- Uegama, W & Buchanan, J 2004, 'A mid-term review of the AusAID Distance and Flexible Learning Project at the University of the South Pacific (USP)', AusAID, Canberra.
- UN-ECE 1996, 'Land administration guidelines', Meeting of Officials on Land Administration, UN Economic Commission for Europe, viewed July 2007, <www.unece.org/env/hs/wpla/ docs/guidelines/lag.html>.

Annex: Contributors to the case studies

Process

A customary land consultant developed the preliminary themes and topics for the case studies in consultation with AusAID's Pacific Land Program team. These were appraised by a panel of experts and reviewed and adjusted by the steering group.

The case studies were drafted in 2007 by academic and sectoral experts and practitioners. Five of the case studies with an emphasis on Papua New Guinea were produced under the supervision of the State, Society and Governance in Melanesia Program at the Australian National University. All but two of the case studies are based on in-country research and consultations by authors.

Early drafts of the case studies were reviewed by a panel of independent experts and practitioners during a series of four meetings at Apia in Samoa, Port Vila in Vanuatu, Nadi in Fiji and Brisbane in Australia. Each panel reviewed four or five case studies. At each meeting, the authors of the studies being reviewed were present in all but one case and they acted as peer reviewers of the other case studies considered at the meeting. Following this review the studies were prepared for publication by an editorial team within AusAID.

Members of the steering group

- » Ms Judith Robinson (Chair for first meeting) Assistant Director General, Pacific Branch, AusAID
- » Ms Stephanie Copus-Campbell (Chair for second meeting) Assistant Director General, Pacific Branch, AusAID
- » Dr Tony Banks
 Social Analysis and Livelihoods Advisor, NZAID, Ministry of Foreign Affairs and Trade, New Zealand
- Professor Ron Duncan
 Emeritus Professor, Crawford School of Economics and Government, Australian
 National University, Canberra (former Executive Director, Pacific Institute of
 Advanced Studies in Development and Governance, University of the South Pacific)
- » Mr Peter Forau Deputy Secretary General, Pacific Islands Forum Secretariat, Fiji

- » Dr Stephen Howes Principal Adviser and Chief Economist, AusAID
- » Hon. Tuala Tagaloa DC Kerslake President, Land and Titles Court, Samoa
- » Mr Steve Likaveke
 Land Consultant (former Permanent Secretary of Solomon Islands
 Department of Lands and Survey)
- » Mr Bob Lyon Chairman, ANZ Pacific, Fiji
- » Mr Russell Nari Director General, Ministry of Lands, Vanuatu
- » Dr Jimmie Rodgers Director General, Secretariat of the Pacific Community, New Caledonia
- » Dr Charles Yala Senior Research Fellow, National Research Institute, Papua New Guinea

Preliminary topic selection, design and appraisal

Jim Fingleton, Development Law Consultant, in collaboration with AusAID Pacific Land Program staff, was responsible for preliminary topic selection and design.

The following people provided an appraisal.

- » Bryant Allen, Land Management Group, Research School of Pacific and Asian Studies, Australian National University, Canberra
- » Steve Darvill, Humanitarian/Peace-Conflict Adviser, AusAID
- » Colin Filer, Resource Management in Asia-Pacific Program, Research School of Pacific and Asian Studies, Australian National University, Canberra
- » Padma Lal, Sustainable Development Adviser, Pacific Islands Forum Secretariat
- » Ken Lyons, Land Administration Consultant, Queensland
- » Charles Yala, Senior Research Fellow, National Research Institute, Papua New Guinea

Apia peer review of case studies

The first peer review meeting was held in Apia on 9 and 10 July 2007.

CASE STUDIES AND AUTHORS

7 Maori land ownership and management in New Zealand

- » Tanira Kingi, Institute of Natural Resources, Massey University, Palmerston North, New Zealand
- 8 Absentee landowners in the Cook Islands: consequences of change to tradition
- » Ron Crocombe, Professor Emeritus, University of the South Pacific
- » Makiuti Tongia, Secretary, Ministry of Culture, Cook Islands
- » Tepoave Araitia, Cook Islands Land Consultant

10 Resolving land disputes in Samoa

- » Jennifer Corrin, Associate Professor, TC Beirne School of Law, Executive Director— Asia Pacific Law, Centre for Public, International and Comparative Law, University of Queensland, Brisbane
- » Leota Laki Lamositele-Sio, Project Manager, ADB Small Business Development Project, Samoa (contributor)

13 Accessing land for public purposes in Samoa

- » Chris Grant, Land Administration Consultant
- » Leota Laki Lamositele-Sio, Project Manager, ADB Small Business Development Project, Samoa (contributor)

CHAIR

» Peter O'Connor, Director, Pacific Land Program, AusAID

FACILITATOR

» Lyla Rogan, RPR Consulting, Canberra

PANEL MEMBERS

Authors

- » Tanira Kingi
- » Ron Crocombe
- » Jennifer Corrin
- » Chris Grant
- » Leota Laki Lamositele-Sio

Others

- » Brenda Heather-Latu, Consultant, Samoa (former Attorney General, Samoa)
- » Masinalupe Tusipa Masinalupe, Chief Executive Officer, Ministry of Justice and Courts Administration, Samoa
- » Tu'u'u leti Taulealo, Chief Executive Officer, Ministry of Natural Resources, Environment and Meteorology, Samoa
- » Sione Nailasikau Kitefakalau Halatuituia, Secretary, Ministry of Lands, Survey, Natural Resources and Environment, Tonga
- » Tupou Faireka, former Minister for Justice and Lands, Cook Islands
- » Padma Lal, Sustainable Development Adviser, Pacific Islands Forum Secretariat
- » Theo Levantis, Economics Adviser, AusAID

Port Vila peer review of case studies

The second peer review meeting was held in Port Vila on 7 and 8 August 2007.

CASE STUDIES AND AUTHORS

The Native Land Trust Board of Fiji and development within communal tenure¹

- » Chris Lightfoot, Independent Economist, Australia
- » Kaliopate Tavola, Consultant, Fiji
- » Jim Fingleton, Development Law Consultant, Australia
- 2 Village land trusts in Vanuatu: 'one common basket'
- » Jim Fingleton, Development Law Consultant, Australia
- » Anna Naupa, Senior Program Officer, AusAID, Port Vila, Vanuatu
- » Chris Ballard, Division of Pacific and Asian History, College of Asia and the Pacific, Australian National University, Canberra

12 Acquiring land for public purposes in Papua New Guinea and Vanuatu

- » Michael Manning, Mirel Ltd, Kokopo, East New Britain, Papua New Guinea
- » Philip Hughes, HEH Pty Ltd, Canberra, Australia

14 The paths to land policy reform in Papua New Guinea and Vanuatu

» Michael Manning, Mirel Ltd, Kokopo, East New Britain, Papua New Guinea

¹ As a result of a delay in agreeing to the final text of this case study, it is not included in this volume. It will be published on AusAID's website and in any reprint.

CHAIR

Peter O'Connor, Director, Pacific Land Program, AusAID

FACILITATOR

Lyla Rogan, RPR Consulting, Canberra

PANEL MEMBERS

Authors

- » Chris Lightfoot
- » Jim Fingleton
- » Anna Naupa
- » Mike Manning
- » Philip Hughes

Others

- » Russell Nari, Director General, Ministry of Lands, Vanuatu
- » Selwyn Garu, General Secretary of the Malvatumauri National Council of Chiefs of Vanuatu (alternating with Ralph Regenvanu)
- » Ralph Regenvanu, Director, Vanuatu National Cultural Council (alternating with Selwyn Garu)
- » Betty Lovai, Lecturer in Social Work, University of Papua New Guinea
- » Stephen Kassman, Kassman Lawyers, Port Moresby
- » Charles Yala, Senior Research Fellow, Economic Studies Division, National Research Institute, Port Moresby
- » Padma Lal, Sustainable Development Adviser, Pacific Islands Forum Secretariat
- » Semi Tabakanalagi, Deputy General Manager of Operations, Native Land Trust Board, Fiji
- » Eric Gorapava, Undersecretary, Ministry of Lands, Housing and Survey, Solomon Islands
- » Satish Chand, Associate Professor, Crawford School of Economics and Government, Australian National University, Canberra
- » Theo Levantis, Economics Adviser, AusAID

Nadi peer review of case studies

The third peer review meeting was held in Nadi on 14 and 15 August 2007.

CASE STUDIES AND AUTHORS

3 Recording land rights and boundaries in Auluta Basin, Solomon Islands

- » John Cook, Consultant Anthropologist, Australia
- » Genesis Eddie Kofana, Consultant, Solomon Islands

6 The role of the Central Land Council in Aboriginal land dealings

- » Mick Dodson, Director, National Centre for Indigenous Studies and Professor of Law, College of Law, Australian National University, Canberra
- » David Allen, Specialist Legal Consultant, Indigenous and Human Rights
- » Tim Goodwin, Research Assistant, National Centre for Indigenous Studies, College of Law, Australian National University, Canberra

9 Mediating land conflict in East Timor

- » Daniel Fitzpatrick, Reader/Associate Professor, College of Law, Australian National University, Canberra
- » Susana Barnes, Research Associate, and Rebecca Monson, PhD candidate, at the Australian National University (contributors)

15 Strengthening land administration in Solomon Islands

- » Douglas Larden, Land Administration Consultant, Australia
- » Marjorie Sullivan, Visiting Fellow, Resource Management in Asia-Pacific Program, Australian National University, Canberra

CHAIR

» John Munro, Adviser, Pacific Land Program, AusAID

FACILITATOR

» Lyla Rogan, RPR Consulting, Canberra

PANEL MEMBERS

Authors

- » Mick Dodson
- » Daniel Fitzpatrick
- » Doug Larden

Others

- » Harry Waitara, Director of Physical Planning, Ministry of Lands, Housing and Survey, Solomon Islands
- » Esther Maelanga, Chief Lands Officer, Ministry of Lands, Housing and Survey, Solomon Islands
- » Steve Likaveki, Land Consultant, Solomon Islands
- » Riby Tupiti, Program Officer, AusAID, Honiara, Solomon Islands
- » Pedro de Sousa Xavier, Director of Land and Property, East Timor
- » Semi Tabakanalagi, Deputy General Manager of Operations, Native Land Trust Board, Fiji
- » Iris Wielders, Conflict Prevention Adviser, Pacific Islands Forum Secretariat
- » Theo Levantis, Economics Adviser, AusAID

Brisbane peer review of case studies

The fourth peer review meeting was held in Brisbane on 20 and 21 August 2007.

CASE STUDIES AND AUTHORS

- 1 Incorporated land groups in Papua New Guinea
- » Tony Power, Land Administration Consultant, Papua New Guinea
- 4 Land registration among the Tolai people: waiting 50 years for titles
- » Jim Fingleton, Development Law Consultant, Australia
- » Oswald ToLopa, Director of Policy, Department of Lands and Physical Planning, Papua New Guinea
- 5 Informal land systems within urban settlements in Honiara and Port Moresby
- » Satish Chand, Australian National University, Canberra
- » Charles Yala, National Research Institute, Port Moresby
- 11 Settling customary land disputes in Papua New Guinea
- » Norm Oliver, PNG Land Law Consultant, Australia
- » Jim Fingleton, Development Law Consultant, Australia

16 Training and educating land professionals: the value of institutional partnerships

» Chris Lunnay, Director, Land Equity International, Wollongong, Australia

CHAIR

» John Munro, Adviser, Pacific Land Program, AusAID

FACILITATOR

» Lyla Rogan, RPR Consulting, Canberra

PANEL MEMBERS

Authors

- » Tony Power
- » Jim Fingleton
- » Oswald ToLopa
- » Satish Chand
- » Charles Yala
- » Norm Oliver
- » Chris Lunnay

Others

- » Lawrence Kalinoe, Professor of Law, University of Papua New Guinea
- » Kaluwin Potuan, PNG Chamber of Commerce, Port Moresby
- » Lillian Holland, New Britain Palm Oil, Papua New Guinea
- » Max Kep, Director, Office of Urbanisation, Papua New Guinea
- » Padma Lal, Sustainable Development Adviser, Pacific Islands Forum Secretariat
- » Anna Naupa, Senior Program Officer, AusAID, Port Vila, Vanuatu
- » Theo Levantis, Economics Adviser, AusAID

AusAID editorial team

- » Theo Levantis, Economics Adviser, AusAID Advisory Group
- » Marjorie Sullivan, Environment Adviser, AusAID Advisory Group
- » Peter O'Connor, Director, Pacific Land Program
- » John Munro, Adviser, Pacific Land Program
- » Steven Wawrzonek, Policy Officer, Pacific Land Program

State, Society and Governance in Melanesia Program supervisory team

- » David Hegarty, Convenor, State, Society and Governance in Melanesia Program, Australian National University, Canberra
- » Bryant Allen, Land Management Group, Research School of Pacific and Asian Studies, Australian National University, Canberra
- » Jim Fingleton, Development Law Consultant, Australia

Land policy reform is on the agenda in the Pacific region. Papua New Guinea, Vanuatu, Solomon Islands, Samoa and East Timor, for example, are either undertaking or considering land policy reforms to ensure that land contributes to national social and economic development.

The growing push for reform is not coming from governments alone. Customary landowners in many countries recognise that their present and future livelihoods depend on sensible and sustainable development of traditional lands. But there are challenges. Reconciling customary land and development requires:

- » linking customary land into formal economic and legal systems
- » broad community consensus
- » extensive technical and managerial skills
- » long timeframes and adequate funding

Making land work is a resource for Pacific countries grappling with these challenges. Both volumes seek to provide ideas and inspiration for Pacific governments, officials, landholders and the private sector on how to increase the contribution of land to communities and economies while protecting traditional tenure systems.

