LAND FOR PUBLIC PURPOSES

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Acquiring land for public purposes in Papua New Guinea and Vanuatu

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A snapshot

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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.

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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
- 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 acquisitions[1] but only when granting special agricultural and business leases. The Land Regulations set out the procedure for buying or leasing land.

1 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 allowed[3] 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[5]

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 years[6] 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

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 2

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 3	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

LESSON 6	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.

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