

PACIFIC LAND TENURES: NEW IDEAS FOR REFORM

**BY
JIM FINGLETON**

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ABOUT THE AUTHOR

Dr Jim Fingleton

J. S. (Jim) Fingleton is a lawyer-anthropologist, who has worked on land matters in the Pacific Islands in various capacities over nearly four decades. He has been legal counsel in land cases and official inquiries, an academic researcher into changes in customary land tenures, a senior adviser to governments on land policy reform and a drafter of new land legislation.

He has worked as a legal consultant for FAO since 1980 on many projects, including legislative reforms in land, forestry, fisheries, agriculture, plant and animal health and conservation. He has working experience in two dozen countries in Asia, Africa, the Pacific and the Caribbean.

His four previous Legal Papers Online were on the legal recognition of indigenous groups, Pacific Islands forestry legislation, veterinary drugs legislation and agricultural levies. At present, he practices as a freelance development law consultant and a part-time farmer.

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Summary

Land reform is never easy but, after many decades without much change in their land laws, there are signs of a mood for change in the countries of the Pacific. With legal systems which place great emphasis on custom, traditional authority and customary land tenures, land policies and legislation in the Pacific must steer a middle course between the need to encourage growth and economic development, and the fundamental importance of protecting the social, political and cultural values reflected by customary land tenures. Their land systems aim to protect land ownership at the customary group level, and land use at the individual land developer level.

This paper examines the results of thirteen case studies, conducted during 2007, into customary land tenure issues across a spread of countries from East Timor to the Cook Islands. Six of the case studies look at measures for strengthening rights in customary lands, including by the recording of existing tribal lands and by the registration of land titles under a "Torrens system", and by setting up legal entities to hold and manage group-owned lands. Four case studies look at the facilitation of land dealings – in two cases by the use of an intermediary in negotiations between the customary owners and potential developers, and in the other two cases where dealings are occurring as a result of urban migration. The final three case studies look at different measures used for the settlement of disputes over customary lands.

The goal of the case studies is to see how countries in the Pacific region have dealt with common issues affecting the development of customary land. Therefore, after treatment of each of the case studies, the paper then attempts to identify the main lessons for reform which can be drawn from them. These are grouped under four headings, and are illustrated by examples from the case studies. The headings are – the basic approach to reform of customary tenures, the pre-conditions for reform, the methods of reform and sustaining reform. Fifteen key lessons are identified, which can be taken into account in considering any land reform proposals for the region.

Pacific Islanders are great innovators, who are always interested in the experience of other countries. But the lessons from these case studies are of more general application, and can be used by those involved in policy development for land tenure reforms elsewhere. For those who, like the present author, believe that there is no need to abolish customary tenures, but that there is a need to adapt them to the new demands being placed on customary land, this paper provides important guidance on how that adaptation can be achieved.

1. INTRODUCTION

Independence came relatively late to the nations of the Pacific Islands, about a decade after most African countries. Customary law and traditional groups had always been seen as important in African countries, but the independence Constitutions adopted by Pacific Islands states in the 1960s and 1970s gave unprecedented emphasis to custom, traditional authority and customary land tenures, installing them as hallmarks of their national identity, and the basis for their future development. National goals promoting Polynesian, Melanesian or Micronesian values and practices were adopted as a deliberate break from the colonial past, and custom was recognised as part of their national legal systems, standing together with the introduced western laws.

All the new Pacific Islands nations retained the land legislation introduced by their previous colonial administrations, but the expectation was that these laws would be progressively reformed or replaced, as the country's parliaments enacted laws based on their new national goals and priorities. Three or four decades later, however, it is remarkable how few new land laws have been passed, and how many of the pre-independence laws remain in place. When it is considered that these laws were usually brought in many years ago – designed by colonial authorities to suit their attitudes and developmental goals, imposed undemocratically with little or no local participation, and implemented by western-style administrative systems very different from their under-resourced counterparts in these countries today – the continued prevalence of these laws raises questions about the commitment of Pacific Islands governments to reform their inherited land tenure systems.

This is not to underestimate the difficulties. The centrality of land to human existence and well-being makes it a vital matter for political decision-making everywhere, but in the nations of the Pacific, where in most cases the great majority of their peoples live in rural areas under customary land tenures, any reform proposals are viewed with great

suspicion. Customary land tenures are fundamentally connected to the social, spiritual, economic and political life of Pacific Islanders, and any proposals for reform must be mindful of the risks they could present to the social fabric of these countries.

There are risks for the political leadership as well. In Papua New Guinea in 2001, even quite modest reform proposals sponsored by the World Bank led to widespread protests, rioting and the fatal shooting of four people by police. Although the Government at the time denied that it had any land reform agenda, it was punished in the ensuing election. It was another six years before steps were taken to re-open the land reform agenda in PNG.

A much bigger debate lies behind the subject of land tenure reform – the debate over the relationship between land tenure and development, and the kind of land tenure reforms which will contribute to growth and poverty reduction. It is generally understood that effective land use is the vehicle for achieving economic goals, and that land rights must be established in a way which allows the economic use of land. There are three basic requirements – the user must have secure tenure, any necessary payment for that security must be certain and the period of the tenure must be specified. In addition, it is highly desirable for the tenure to be transferable, within the terms of its grant.

While there may be agreement on the goals, there is disagreement on the way to get there. Some people call for the abolition of customary tenures, which they see as an impassable barrier to development, and their replacement with the individual ownership of land. This “individualisation” approach came out of Africa half a century ago, and it still has its adherents despite the evidence that full individualisation of customary tenures is neither necessary, desirable nor possible.¹ Others, the present author

¹ For a recent contribution to the debate, see “Privatising Land in the Pacific: A defence of customary tenures”, Jim Fingleton (ed.), *The Australia Institute*, Discussion Paper No. 80 (June 2005). (Website: www.tai.org.au)

included, while they see no need for the abolition of customary tenures, *do* see the need for their adaptation, to adjust them to the modern circumstances and new demands being placed on land. This is the basic approach which underlies the present paper.

Adaptation rather than *abolition* of customary tenures is also the approach which underlies a recent initiative, the Pacific Land Program. After many decades without much change in their land laws, there are signs of a new mood for change in the Pacific. A regional body, the Pacific Islands Forum Secretariat, has responded to the wishes of its member states by undertaking the Land Management and Conflict Minimisation Project, and in 2006 Australia's international aid agency, AusAID, recognising the growing interest in reform, began the Pacific Land Program.

This paper examines the Case Study Project, the first phase of the Pacific Land Program, under which seventeen case studies were conducted in 2007 into land tenure issues across a spread of Pacific Islands countries. The topics covered by the case studies were – managing the land reform process; land administration; dispute resolution; recognition and protection of customary tenure; facilitation of land dealings; and land for public purposes. The countries covered were Papua New Guinea, Vanuatu, Solomon Islands, Fiji, Samoa, Aboriginal Australia, Maori New Zealand, Cook Islands and East Timor (see Annex).

Part 2 of the paper examines the results of thirteen of the case studies, under the main headings –

- strengthening of land rights;
- facilitation of land dealings; and
- settlement of land disputes.

Each of the case studies was written up in a report, which will be collected together in an AusAID publication. In the present paper, all that is possible is a brief account of the case studies, but readers are referred to the case study

reports themselves for their full details and analysis.

Part 3 of the paper is where the present author identifies the main lessons to be drawn from the case studies. The fifteen lessons are discussed under four main headings –

- i) the basic approach to reform;
- ii) pre-conditions for reform;
- iii) methods of reform; and
- iv) sustaining reform.

2. RESULTS OF THE CASE STUDIES PROJECT

The design of the Case Study Project aimed to get a reasonable coverage of the most important land topics in the Pacific. A Background Paper on land, prepared for AusAID by the present author, had concluded that the most suitable land system for Pacific Islands countries was one which “protects land ownership at the group level and land use at the individual level”, and that such a land system would:

- strengthen land rights;
- facilitate land dealings;
- settle disputes effectively;
- provide appropriate and adequate land administration services; and
- provide land for public purposes and other special needs.²

These five “developmental criteria” were used in designing the Case Study Project, and the studies were intended to explore the main issues, make findings and draw conclusions which would shed light on what worked and what didn't, why, and what lessons could be learnt for possible future application.

² “Background Paper: Land”, prepared by Jim Fingleton for *Pacific 2020: Challenges and Opportunities for Growth*, AusAID, Canberra, 2006.

Of the above five criteria, the present paper is only concerned with the first three – strengthening of rights in customary land, facilitation of dealings in customary land and settlement of customary land disputes. The last two criteria – land administration services and access to land for public purposes –, while important aspects of a working land system, lie beyond the scope of this paper. The main concern here is customary land tenures, and the ways by which they can be adapted to modern conditions. The following treatment will outline the 13 case studies which came under the first three criteria and their results.³

i) STRENGTHENING OF LAND RIGHTS

One of the characteristics of customary tenures is that they are usually not written down. In some circumstances (eg, more intensive land settlement and use) this may cause uncertainty about who can allocate use of particular land, and therefore may act as a deterrent to land development. To deal with this uncertainty, greater security of tenure is often sought through some method of recording land rights. In many Pacific countries, the “Torrens system” of registering titles has been introduced, and applied to land which has been alienated from customary tenure. While this system provides one of the best forms of security of tenure, it has generally been unsuccessful when applied to lands previously held under customary tenure in the countries of the Pacific. An alternative – and less “interventionist” – option is simply to record existing land rights, without proceeding to the next stage of registration. Two of the case studies examine the Pacific experience under each option – recording of land rights in Solomon Islands, and registration of land titles in Papua New Guinea.

Where land is owned by individuals, the nature of the rights and how they are

exercised is straight-forward. It is a different matter, however, in countries where land is owned by customary groups. The nature of the land-owning entity, what powers it has over the group’s land and how those powers may effectively be exercised are important issues which arise in the case of group-owned lands. A land system which is based on group ownership of customary lands must recognise and protect the group dimension of land ownership, as well as provide for the group to enter into dealings with its land. This latter aspect is examined under the next heading (Facilitation of land dealings), but four of the following case studies look at legal entities set up to hold and manage group-owned lands in New Zealand, Papua New Guinea, Vanuatu and Australia.

Recording of customary land rights at Auluta Basin, Solomon Islands

Auluta Basin, with an area of some 12,000 hectares, is a large watershed on the east coast of the island of Malaita, which has for a long time attracted the interest of agricultural planners. It is all customary land, with around 6,000 villagers living there. A feasibility study for a possible oil palm nucleus estate was conducted around the year 2000, and the Department of Lands was asked to identify the ownership of the lands which would be affected.

The Department developed a recording process, the main steps of which were as follows – conduct of a public awareness campaign, declaration of recording zones, identification of recording centres, declaration of existing “land units” within each recording zone, applications by the tribal groups claiming ownership of the land units, a period for verification by the area’s chiefs of the applications, the raising of any objections, and finally recording of the documentation – the tribal genealogies, land boundary surveys and membership of the group’s “land trust board”. Standard forms were prepared and people were trained in completing them.

The recording process at Auluta Basin was essentially an administrative exercise, and there was some

³ The following treatment is based on the case study reports as originally written by their authors. AusAID is publishing revised versions of these original reports.

uncertainty over whether it would lead to registration under the *Land and Titles Act* or recording under the *Customary Land Records Act*. This latter law was enacted in 1995, but never became fully operational. The case study report concludes that a range of issues limited the success of the exercise, including poor strategic planning, poor understanding of the complexity of genealogical issues, inter-departmental politics and lack of transparency, political interference, inadequate staff resources and poor leadership.

The recording process was, however, a trial and, while some aspects of it might be uncertain, early indications are that it was understood and valued by the customary landowners. A private lawyer was engaged in 2006 to assist the tribal groups in preparing to operate as the owners and managers of their recorded lands, and to grant a lease over them to an eventual land developer. The case study concluded that the main problems arose “not because of a conceptual flaw in project aims ... but rather a combination of circumstance, poor planning and management.” On the positive side, the process was seen to have been “remarkably successful at building trust and transparency at the village level”, particularly with regard to land dealings. It “offered villagers an acceptable means of forging a relationship with western agreements and styles of land tenure.”

So far, there has been no oil palm development at Auluta Basin, and the land recording process has lost momentum. Nevertheless, the experience there has been valuable in showing how land tenure arrangements can be designed which combine what the customary landowners want – confirmation of the customary groups’ land ownership – with a secure tenure for commercial development of the land – in this case, a lease. Whether such arrangements can form the basis for successful land development, and whether land recording is sufficient or should be followed by land title registration, can only be meaningfully tested if the political, financial and administrative problems which undermined the Auluta exercise are

overcome. This is, essentially, what AusAID’s Pacific Land Program is intended to address.

Customary land registration among the Tolai people of Papua New Guinea

With a population of some 200,000, the Tolai are one of the largest ethnic groups in Papua New Guinea. European settlement in the Tolai area began in 1875, and a century of colonial rule followed. With a strong gardening tradition, the Tolai were soon recognised for their readiness to innovate, and many new measures (eg, local government, cooperatives, cocoa marketing) were first introduced in the Tolai area. When moves began in the 1950s for registration of titles in customary land, the Tolai area was once again selected for its introduction.

The case study outlines the Tolai’s matrilineal society and their customary land tenure system, in which the clan⁴ continues to play a central role in land affairs. While the basic character of their customary land tenure has been retained, the circumstances in which it operates today are very different. Greatly increased mobility and the modern emphasis on the nuclear family mean that many Tolai now live away from their own land.⁵ A rapidly-growing population puts even more pressure on the Tolai system of customary land tenure.

Tolai have responded to these new demands by manipulating traditional methods for acquiring land. Some non-Tolai commentators see these land “purchases” as evidence of a trend towards the individualisation of customary land, but such acquisitions are usually only possible within existing relationships based on kinship or marriage, and often their long-term effect is to transfer land from one clan to another. Tolai have strongly resisted attempts to abolish the clan’s control over their customary lands.

⁴ Called *vunatarai* in the Tolai language, being the group of persons who trace their matrilineal descent from a single female ancestor.

⁵ Children are growing up on their father’s land to which, under a matrilineal system, they have no rights.

The land registration measures introduced since the 1950s to the area ranged from laws for the registration of group titles in customary land, to laws for the conversion from customary ownership to individual freehold titles. The earliest legislation was based on Fijian precedents, aiming to register the ownership of clans to their traditional territorial units. During the 1960s, the option was introduced of converting from clan ownership to individual freehold titles, thereby abolishing customary tenure over the land. Further reforms were proposed by the Australian Administration before independence, and by PNG's Commission of Inquiry into Land Matters in 1973, but neither initiative led to the enactment of new legislation. The results of all these measures over the last 50-odd years are minimal – no group titles, and only a handful of individual freeholds, were ever registered in the Tolai area.

There are many reasons for this failure, including changes in official land policy and, more recently, a lack of finance and administrative resources to support land registration. Some of the measures were far too ambitious, failing to take account of the real need and actual demand for registration, and the limited administrative capacity to carry out the operation successfully. Despite the lack of tangible results, the Tolai highly valued the work done in preparation for registration of group titles. Ten years ago, the Provincial Government for the area began a land registration program which was a conscious attempt to revive the methods of a previous generation – ie, basing land registration on the local social structure.

The case study reviews this Provincial Government initiative, and concludes that a registration system which is based on Tolai territorial and social units, and which co-opts the traditional leadership in the determination of land rights, would be highly acceptable – politically, socially and culturally. But it asks the question: would such a system – which basically records the land tenure *status quo* – meet Tolai needs for economic development? Groups have never been the users of land in Papua New Guinea, and the case study concludes that more

is needed than group titles. A suitable system must also provide for the rights of individual land users.

The study concludes by giving strong support to recommendations made by the Commission of Inquiry into Land Matters, set up in 1973 just before Papua New Guinea's independence. It recommended a system which provides for the registration of customary groups as the owners of land, and then registration of rights of use (eg, leases) granted by the groups to the users of the land. Such a system, built on a customary base but providing security for the land users, would be "far more likely to succeed than those which seek to replace existing tenures".

Maori land incorporations and trusts in New Zealand

This case study, and the next three, turns to the subject of how group-owned customary land can be held and managed. The Maori people, indigenous Polynesians who make up 14.6% of New Zealand's population, have a long experience of adapting their customary tenures to meet the needs of modern society. Much land is owned by Maori under the category of "general land", but a special category of "Maori freehold land" (estimated to be 5.6% of the total land area) can be owned only by Maori. These are the Maori ancestral lands, owned today by the descendants of the original owners, handed down through successive generations. The present case study examines the main bodies involved in the ownership and management of these Maori freehold lands – the Maori incorporation and the Maori trust.

The Maori Land Court, established in 1862,⁶ awarded titles in Maori lands in a form which allowed individuals to dispose of their share in the title. Loss of land, together with increasing "fractionation of titles"⁷, led Maori leaders to call for changes to restore greater tribal control

⁶ Originally, the Native Land Court.

⁷ "Fractionation of titles" is the modern term used to distinguish multiple shares in the same title from "fragmented titles" – ie, title in multiple parcels of land. (Alan Ward, pers. comm.).

over the land, and to facilitate development by the owners themselves. In 1893 provision was made for legal bodies known as “Maori incorporations”, to hold and manage Maori lands. Sixty years later, the *Maori Land Act* of 1953 invoked the trust concept to allow for a more flexible structure. The statutory requirements governing the formation, modification and dissolution of Maori trusts, the powers and functions of trustees and oversight of trusts by the Maori Land Court are much simpler and less onerous than the requirements governing Maori incorporations.

Since 1960 trusts have largely taken the place of Maori incorporations. Today, 129 Maori incorporations and over 20,000 trusts manage more than 70% of Maori land. Much of it is developed under sheep and cattle grazing, dairying or forestry, but large areas are located in fragile natural environments where land uses are restricted. Apart from the two main Maori land management bodies, there are three other special legal and administrative bodies involved in the management of Maori lands. The case study provides the following account of the roles of these different bodies.

Maori incorporations bring the titles of Maori land under a single administrative and management structure. The owners elect a committee, with land development and management powers. The incorporation holds the land on trust for the owners, whose individual interests in the land are represented by shares in the incorporation. Each owner’s shares are recorded in a “share register” maintained by the corporation, the number of shares reflecting the proportion of the land owned. The committee reports to general meetings of owners and to the Maori Land Court, which has general powers of supervision. Sale of land, other than sale of individual interests to other owners, is strictly limited, but the incorporation can lease the land (including to some of their own shareholders) or nominate owners to develop parts of the land. The committee also has a limited authority to borrow development capital.

Maori trusts, under the current law (the *Te Ture Whenua Maori Act* 1993), can be formed at family, sub-tribe or tribal levels,

and all are subject to the general law of trusts. There are five categories of trusts, the most common of which (the *whanau* trust) is used by members of an extended family to promote their social, cultural and economic welfare, as descendants of the original land owners. In 2006, there were 15,673 *whanau* trusts. The category of trust which administers the largest area of Maori land is the *ahu whenua* trust (5,201 trusts in 2006, managing almost 50% of Maori land). *Ahu whenua* trusts embrace wider social groups, and are intended to facilitate management of an area of land owned by sub-tribes or tribes comprising many families. The three remaining categories of trust cover exceptional situations, and control less than 2.5% of Maori lands.

Apart from these special provisions for holding and managing Maori lands, there are also three special bodies with responsibilities over Maori lands. The Ministry of Maori Development (Te Puni Kokiri) is the lead agency for facilitating land development. It has 10 regional offices, and works on improving Maori governance structures and overcoming tenure constraints. The Maori Land Court, first established in 1862, currently has the broad charter to “give effect to the wishes of the owners ... , provide a means whereby owners may be kept informed of any proposals relating to any land... [and] promote practical solutions to problems arising in the use or management of any land”. Transactions in Maori land are regulated by the Court, it plays an important role in resolving disputes, and it is the main repository of records relating to Maori lands. The Maori Trustee is a statutory officeholder, who administers land on behalf of Maori landowners when authorised by them or when appointed by the Maori Land Court. These three bodies work closely together to generate policy on Maori land use and development.

Like other Pacific Islanders, Maori see land not only as important in their economic advancement, but also as a source of their identity and a “centre of cultural pride”.⁸ These added dimensions impose a major influence on decision-

⁸ So termed by the author of the case study, himself a Maori.

making. Drawing on their long experience of dealing with the interaction between the traditional and modern spheres, the Maori leadership continues to look for ways to adapt the customary and western institutions to suit their changing needs. The present case study concludes that land ownership and management structures should be built on traditional property rights systems – that is, group rather than individual ownership. At the same time, the structures must be flexible enough to enable operation as a commercial entity. One innovation which the Maori have found useful in this regard is the subsidiary company – what the author calls “a dual arrangement of traditional structures owning and controlling commercial entities (limited liability companies)”.

Incorporated land groups in Papua New Guinea

Traditional groups (tribes, clans, etc.) based on kinship and common territories retain their importance in contemporary society, and over the decades many attempts have been made to provide for their legal status and ongoing operations.⁹ Often this is done to recognise the rights of such groups to their lands, and to provide for the management of their land-based resources. Many early measures adopted concepts from the mainstream legal culture. Sometimes traditional groups were treated as corporations (as we have just seen), cooperatives or councils; often a representative approach was taken, using trustees or agents to act on a group's behalf. These attempts to *assimilate* traditional groups to their supposed modern counterparts are still commonly found today, but some countries have looked instead for ways to *recognise* existing structures (clans, etc.) and their decision-making processes.

One such measure was the *Land Groups Incorporation Act*, passed in Papua New Guinea in 1974. It was another innovative product of the Commission of Inquiry into

Land Matters of 1973 (see above), which had recommended that, for purposes of the registration of titles in customary land, land-owning groups should be incorporated, with a constitution defining their membership, powers and decision-making processes. Key features of the Act are –

- it is a process for the recognition of existing customary groups – ie, bodies which already have a corporate identity under custom;
- groups have considerable freedom in preparing their constitutions – the Act prescribes certain matters upon which rules must be made (on membership, the way the group acts and its acts are evidenced, etc.), but it does not dictate the contents of those rules;
- incorporated land groups (ILGs) remain subject to custom – they must nominate the custom which applies to them, but there is no requirement for it to be written down;
- the powers of ILGs are confined to their land – its ownership, use and management, and the distribution of its product and profits;
- protection is given to outsiders dealing with an ILG – any dealing entered into in accordance with its constitution generally cannot be challenged;
- special machinery is provided for settlement of internal disputes within the ILG.

The case study examined results after some three decades of the Act's operation. It found that, while more than 10,000 ILGs had been incorporated, the great majority were purely vehicles for entering into resource-extraction arrangements – in particular, for forestry, mining and petroleum. Because the intended law for registration of titles in customary land was never enacted, the main purpose of the legislation was frustrated. Instead, the Act became a convenient way for resource companies to fulfil their legal obligations to negotiate access to customary lands, and pay royalties to the landowners. The Act was rarely used as a property management system, and ILGs were reduced to “a conduit for receipt of cash”. Problems

⁹ See, generally, *Legal Recognition of Indigenous Groups* by J. S. Fingleton, Paper #1, FAO Legal Papers Online, available at <http://www.fao.org/Legal/default.htm>, 1998.

inevitably arose as customary groups split up, so as to maximise their share of the cash.

The oil palm industry, however, was found to have used the Act more in line with what was intended. Nucleus estates were extended over many thousands of hectares of undeveloped customary land, by first incorporating the land-owning groups as ILGs, which then entered into leases with the oil palm company, committing the land to oil palm development. In the absence of a suitable customary land registration law, other “stop gap” measures had to be used to get registered titles.¹⁰ But the oil palm model shows that customary land can be brought into commercial development by using customary principles of land management, and by involving the traditional leadership of customary groups. Income from the oil palm plantations is being used for community development, as well as being distributed among the individual landowners.

Among the lessons to be drawn from the 30-odd years’ experience of ILGs, the case study shows how a law intended for one particular purpose can be undermined, if it is mainly used for unintended purposes. In most cases, ILGs were “thrust on groups by circumstances they had little or no control over”. The report found –

“When incorporation is made necessary by outside events, it is clear that people do not properly understand the reasons behind the process and that they attempt to adapt their ‘custom’ to take the best advantage of the situation they find themselves in.”

The case study found that there had been inadequate allocation of funds to the government bodies responsible for administering the incorporation of ILGs. As a result, the private enterprise companies interested in the resource concerned (forests, minerals, oil and gas)

¹⁰ One device was for ILGs to lease their land to the Government, which then gave them back a registered lease in their own land, which they sub-leased to the company.

took over the job of incorporation. Their goals were, naturally, self-interested, and usually limited to gaining reliable access to the resource. As a result, many ILGs were reduced to passive rent collectors, rather than being the active land management bodies that were intended. The positive experience of ILGs in the oil palm industry, however, shows that ILGs can perform a constructive role in the management of customary land, provided that they are given sufficient administrative and financial support.

Village land trusts in Vanuatu

When the former Anglo-French Condominium of New Hebrides became the independent Republic of Vanuatu in 1980, it inherited a major problem caused by colonial land alienations.¹¹ The independence Constitution took radical action to address this problem, by returning all rural lands immediately to their indigenous custom owners.¹² While this achieved the political goal, little attention could be given at the time of independence to the mechanisms for identifying who the custom owners were, and how they would make decisions over the management of their customary lands. A basic set of laws was brought in to provide for the transition from foreign-owned titles to leases from the custom owners, but, for the future, the Constitution called for a National Land Law to be prepared, to lay the framework of the new land system.¹³

The “village land trust” was a concept developed in Vanuatu around the time of independence, to meet the pressing need at the time for a legally-recognised body to make decisions on behalf of the custom owners whose alienated lands were being returned. The concept involved, first, incorporating a trust company under local legislation, and then vesting certain village lands in the trust

¹¹ Around 20% of the land area, and a far greater percentage of the land suitable for agriculture, was owned by foreign interests. This degree of foreign ownership played a critical role in the mobilisation of pro-independence sentiment in the 1970s.

¹² This is the term used in Vanuatu for customary owners.

¹³ The National Land Law has still not been introduced.

company, to be held for the benefit of the village community. While there was nothing unusual about these legal steps, what was original was the way that village decision-making practices were included. In one of the cases studied, behind the board of directors of the trust company lay an elaborate structure, in which the village chief and his council, a committee of elders, and a “land council” made up of the representatives of the 29 “families” of the village, all played major decision-making roles. This careful blending of the traditional and the modern bodies for making land management decisions worked well for a decade, but broke down when a younger generation of villagers overthrew the role of the traditional authorities.

In the decades since independence, although the use of village land trusts has not spread around Vanuatu, the two main ones established – Ifira Trustees Ltd. and Mele Trustees Ltd.¹⁴ – have enjoyed considerable success. They filled a critical gap in allowing customary groups to be effectively involved in decision-making over their lands. Trusts 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 an important symbol of village solidarity.

But not all has been well with village land trusts. The case study shows that, when a trust combines the traditional elements of custom – the village leadership, kinship groups and family ties – with the modern structure of a company – boards of directors, annual meetings and reports – the trust worked well. But when traditional controls were removed, decision-making suffered, revenues collapsed, village services were not funded, and the trust’s authority over village landholdings – its main source of revenue – was threatened. A great deal more land was alienated under long-term leases, during the period when traditional controls were absent.

¹⁴ Ifira and Mele are two villages adjacent to the capital, Port Vila.

The village land trust is an attempt to reconcile the vital social and cultural aspects of customary land tenures with the need for greater security of tenure for individuals, to underpin investment. It is a sensitive balancing act, between the traditional and the modern, and the interests of customary groups and individuals. The village land trust in Vanuatu provided some protection against loss of village land, but the case study shows the importance of putting safeguards in place, to ensure that the trust acts in the best long-term interests of the village.

The case study also shows the importance of setting up representative bodies at the level which is most appropriate for land ownership and management. In Vanuatu’s case, problems arose because the village land trusts were incorporated at too high a level – ie, the village, which is a settlement unit, but not a traditional land-owning or land-managing body. Another lesson was to keep land management and business operations separate. Each requires a different kind of structure and regulation, and it is advisable to “quarantine” land tenure from the risks of business failure.

The village land trust arose in Vanuatu at a time of heightened political activity, led by a nationalist leadership which was prepared to innovate. In the decades since, this home-grown concept has been allowed to languish. This is a pity, because it has great potential to meet contemporary needs through balancing the traditional and the modern, the community and the individual. As commercial development spreads around Vanuatu, the safety of numbers provided by the land trust could be a vital safeguard against hasty and ill-considered decisions, with long-standing consequences.

Native title bodies corporate in Australia

Papua New Guinea and Vanuatu are independent Melanesian states, while in New Zealand the Maori form a sizable Polynesian minority which has always been influential in its affairs. These positions of power contrast with the

status of Australia's indigenous people – the Aboriginals of the mainland and the Torres Strait Islanders. It was only 40 years ago that indigenous people were included in the national census and, until the High Court's decision in the *Mabo Case* of 1992, their customary rights to land were not even legally recognised. In 1993, the Commonwealth Parliament passed the *Native Title Act*, setting up a process for determining native title claims.

The Act recognises the source of native titles as customary law, and that native title is a group-owned interest. In providing for the vesting of native titles and their ongoing management, however, the Act invokes three familiar concepts from the mainstream legal system – the body corporate, trust and agent. Once a native title claim has been recognised, the claimants must nominate a corporation to exercise their rights and interests, and state whether the corporation will hold the title on trust or only act as their agent. The law also requires that the corporation be a body incorporated under the *Aboriginal Councils and Associations Act*, and operate according to rules approved under that Act. The case study under the project examines how these provisions have operated for one such Aboriginal corporation, vested with native title on behalf of the Miriuwung and Gajerrong people of north-west Australia.

The first point to note is that the nature of the corporation in this case study was heavily influenced by external factors – the terms under which the native title claim was settled after lengthy litigation, the provisions of an agreement providing a package of benefits to the claimants in compensation for the extinguishment of rights over parts of the land claimed, and the requirements of the law under which they were obliged to incorporate. The two Aboriginal groups had formed their own “self-help” organisations over a 30-year period to further group interests and provide services, so the new corporation was “established in a landscape already populated with Aboriginal community organisations with a thirty year history of self-management”. A second complicating factor is that there are, in fact, three new Aboriginal corporations –

two set up with identical rules and memberships to hold the native title recognised in two separate determinations, and an “umbrella” corporation to hold the benefits of the compensation package, manage any businesses of the first two corporations and deal with outside parties.

The case study concentrates on the “umbrella” corporation. The report notes that its rules reflect aspects of traditional social organisation in its structure, and it is required to use traditional processes for many of its crucial functions (eg, decision-making). But attempts to reach compromise between traditional practice and the “modern” requirements of economic development and good governance, and to satisfy the formal requirements of the law while retaining the flexibility of custom, lead to many problems with the rules. Examples include –

- Aims: To attract tax concessions, the body must be charitable (not for-profit). The people are thus typified as the recipients of charity rather than the motivators of their own development.
- Membership: The legislation imposes a lower age limit of 18 years on members. This excludes those younger members of the native title-holding group from their legal entitlements.
- Governing committee: Rules providing for the election of committee members, alternate members, quorums for meetings and voting majorities owe their inspiration to western ideas of democratic government rather than Aboriginal culture, and set up clashes between the two.
- Codification: Where attempts are made in the rules to reflect traditional culture (eg, on decision-making), there are two problems – one is a failure to reflect the true position accurately, and the other is the tendency to “freeze in time” those aspects of traditional culture, preventing them from adapting to change.

Given the developed state of Australia's legal and property rights system,

measures like the legal recognition of native title are likely to be complicated and legalistic. The “dominant” legal culture will inevitably prevail over the “subordinate” one, and in the process the latter will suffer. While it is too early to examine the present corporation’s experience,¹⁵ this case study from Australia shows the risks involved in converting concepts and practices from one culture to another – in particular, that the dynamics of a customary group’s internal operations will be so interfered with as to become unworkable in either culture. This is a general problem with all attempts to adapt traditional institutions to meet modern needs and circumstances, and one which will be returned to in seeking lessons in the next part of this paper.

ii) FACILITATION OF LAND DEALINGS

Although the strengthening of land rights – either by the recording of existing rights or the registration of land titles – is mainly aimed at confirming the existing rights in customary land, one of its advantages is that it provides security to those who deal with the recorded or registered owners. This security is a benefit for both parties in a land dealing, and can be a major incentive for land development and economic growth. A country’s land system will aim to create a legal and administrative environment in which land dealings permitted by law can take place efficiently and cost effectively.

All countries impose restrictions on land dealings. In some Pacific countries (eg, Papua New Guinea), customary land can only be transferred or otherwise dealt with between citizens and in accordance with custom.¹⁶ Other persons can only acquire rights in State-owned lands, usually by a government lease. At the other end of the spectrum, in Vanuatu it is possible for anyone to acquire interests in customary land, by dealing directly with the landowners. State-owned land exists in towns, but in rural areas leases

can be negotiated between the custom owners and the developer, subject to certain government controls.

In Papua New Guinea and many other Pacific countries, the supply of State-owned lands is almost exhausted, and there are increasing demands to free up access to customary lands. In Vanuatu, on the other hand, there is concern that the access to customary land is too free, and the customary owners are the losers in land dealings. Some countries have found it desirable to involve an intermediary in the negotiations between customary owners and potential developers of their land, to protect the landowners’ interests. Two examples of such intermediaries are examined here – the Native Land Trust Board in Fiji, and Aboriginal Land Councils in the Northern Territory of Australia.

The other two case studies examine the impact on land tenures of migration, in particular of people moving closer to the facilities, services and opportunities of cities and towns. Urbanisation is increasing rapidly, and is radically changing the context in which traditional land tenure systems operate. Migration – either internally, from rural to urban areas of a country, or externally, from an island country to a large neighbour (eg, New Zealand or Australia) – creates new pressures on land tenures, as the composition of the groups who own the land and who occupy the land changes. No longer is the “owner” necessarily the “occupier”, as would have normally been the case in the past.

The effects of migration show up particularly in land dealings. It is to meet the needs of the “migrant” that the new dealings are entered into, and it is migration away from their home areas which raises the issue of the rights of “absentees” to continue to exercise control over their lands at home. One of the following case studies examines dealings being entered into to provide land for new settlers in the urban areas of Port Moresby and Honiara, and the other case study examines how the ability of Cook Islanders to adapt their land tenure system to modern needs is frustrated by the involvement of absentees in their land dealings.

¹⁵ The corporation had only been operating for a year, at the time of the case study.

¹⁶ Provision is also made for acquisition of customary land by the State.

Fiji's Native Land Trust Board

Customary land in Fiji is inalienable, and for over a century the government there has had to reconcile the protection of native land rights with the competing demands for development. Since the early 1900s, the ownership of native lands has been systematically registered across the islands of Fiji on the basis of some very clear principles –

- all native lands are owned by Fijians¹⁷ in accordance with native custom;
- under Fijian custom, all lands are owned by traditional groups;
- registering the ownership of land by groups does not affect internal land allocation and land use rights, which continue to be governed by the relevant native custom.

The clan (*mataqali*) was recognised as the main land-owning unit under Fijian custom, and, under the Fijian system, not only was the land registered, but also the names of all members of the land-owning clan. This register of names is regularly updated from the official register of births and deaths. Land registration in Fiji, therefore, involves both recording land and recording people.

As the registration of native land ownership was completed, attention turned to making land available for productive purposes. Given the commitment to avoid permanent land alienation, the most suitable form of tenure for making land available for development was seen to be the lease. In 1940, with the aid of a prominent Fijian chief, the colonial administration brought in a major reform, which sought to satisfy the demands for security of tenure from both leaseholders and Fijian landowners. This it did by vesting control of all native lands in a high-level statutory body – the Native Land Trust Board (NLTB) – with wide powers to administer the lands “for the benefit of the Fijian owners”. The NLTB was given sole power to grant leases or licences over unoccupied native lands surplus to the Fijian owners’

¹⁷ The term “Fijian” refers to indigenous Fijians, about half the population.

needs, and the power to grant or refuse consent to all dealings in such leases and licences.

Leases granted by the NLTB are registered under Fiji’s “Torrens system” law, thereby gaining indefeasibility of title. As the case study report concludes, the NLTB provides “a firewall” between landowners and tenants:

“Landowners cannot capriciously interfere with tenants’ rights of use and occupancy and tenants must deal directly with a statutory authority with the power and capacity to enforce agreements.”

Provision is made for the distribution of rents and lease premiums, under which a sum not exceeding 25% is deducted to pay for the NLTB’s expenses.

Since its establishment in 1940, the NLTB has played a key part in the administration of Fijian affairs. It operates in conjunction with the Fijian Affairs Board and the Ministry of Fijian Affairs, which are responsible for Fiji’s provincial and district administrative system and other matters concerning Fijian culture and custom. The inter-relationship between the different bodies is demonstrated by the membership of the Native Land Trust Board, which consists of the President of Fiji, the Minister for Fijian Affairs, five Fijian members appointed by the Great Council of Chiefs, three Fijian members appointed by the Fijian Affairs Board and two other members appointed by the President.

The NLTB has a head office and four regional offices, and a staff of land use planners, valuers, lawyers and other land professionals. It negotiates lease terms and conditions with potential tenants, and collects and distributes rents. In 2004, the NLTB had nearly 34,000 leases covering close to 100,000 hectares under its control. Over the past 60 years, this system has underpinned investments ranging from sugar cane production to international tourist resorts. Under this system, virtually all the available land in Fiji has been brought into production, giving Fiji one of the strongest economies in the Pacific. All this has been done while keeping the land under customary

group ownership, thus maintaining the villagers' safety-net.

The system is not without its critics, who attack the NLTB for being slow, expensive, inflexible and paternalistic. The formula for distribution of rents is also regarded as favouring the chiefs over other members of the land-owning group. The case study report finds most such criticisms to be valid, although it points out that in recent years the NLTB has reduced costs and improved its administrative performance. It is also giving more authority to the *matqali* to manage their clan lands, involving them in lease negotiations and acting more as their adviser and mentor. Despite considerable pressure for radical change, native lands remain inalienable and Fiji's economy has grown and broadened.

Aboriginal Land Councils in Australia

Aboriginal ownership of their customary lands was only given legal recognition in Australia in 1992, with the High Court's decision in the *Mabo Case* (see above). Before then, laws had been enacted in the different States and Territories of the Commonwealth to vest rights in certain lands in their traditional owners. One such law was the *Aboriginal Land Rights (Northern Territory) Act of 1976*. The Act provides for an "inalienable communal title" in certain lands to be vested in their Aboriginal owners. With regard to dealings in such land, key features of the Act are –

- it protects the rights of traditional landowners while also providing clear and efficient procedures for parties seeking access to Aboriginal land;
- at its heart is the principle of "informed consent" to any development proposal;
- it protects sacred sites;
- it creates a funding regime, based on the payment of royalties for mining operations on Aboriginal lands;
- it provides for the creation of Land Councils, to advance the interests of Aboriginal people.

One such is the Central Land Council (CLC), the subject of the present case study.

The CLC is a statutory body, with statutory functions over Aboriginal lands in its area of responsibility. That is an area of 771,747 square kilometres of remote, rugged and often inaccessible land in the southern half of the Northern Territory, whose centre is Alice Springs. Some 18,000 Aboriginal people live in the area, which is divided into 9 regions, each of which elect 10 people to the 90-member Council. The main economic activities in the area are cattle-breeding on large pastoral properties, tourism and mining.

The full Council meets three times a year, and is the supreme policy-making forum of the CLC. An Executive is made up of a Chair and Deputy Chair elected by the full Council, and a member from each of the nine regions elected by each regional 10-member delegation (see above). The Executive meets about monthly, and holds extensive powers delegated to it by the Council. The day-to-day running of the CLC is managed by the Director, in consultation with the Executive.

The Director oversees around 120 staff to carry out the CLC's responsibilities. The main function of the Land Council is to consult with the traditional Aboriginal owners on any proposal relating to the use of their land and negotiate on their behalf, and the CLC provides policy and legal advice for this purpose through its legal, mining, anthropology and land management sections. Land Councils are funded from royalties paid by mining companies for minerals extracted from their land.¹⁸ The CLC reports annually to the responsible Commonwealth Minister, with fully-audited financial reports. The most recent report (for 2006-07) shows total revenues of AUS\$16.8m and expenses of AUS\$16.6m, some AUS\$9.4m being in payment for employees and Council members.

The legislation spells out the decision-making process for any development

¹⁸ The royalties are paid to government in the first instance, and "mining royalty equivalents" are then distributed according to a formula under which Land Councils receive a share. Until 2006 that share was 40%, but it is now determined by the responsible Commonwealth Minister on the basis of performance.

proposal, in which three main entities are involved – the traditional Aboriginal landowners, Aboriginal Land Trusts and Aboriginal Land Councils. Any land transferred to Aboriginal ownership under the Act¹⁹ is vested in an Aboriginal Land Trust, consisting of persons appointed from among the traditional landowners. The Aboriginal Land Trust can only exercise its powers over such land in accordance with directions given to it by the Land Council for the area where the land is situated.

The basic approach is that decision-making rests with the traditional owners, based on their “informed consent”. The Act requires the Land Councils to ensure that the traditional Aboriginal owners of land understand the “nature and purpose” of any proposal relating to the use of their land, and that they have – as a group – consented to it, before the proposal can proceed. Group consent is taken to have been given if the decision was made in compliance with their traditional decision-making processes. Once the Land Council is satisfied that such consent has been given, it instructs the Aboriginal Land Trust for the land to execute the dealings necessary to give effect to the decision.

The benefits flowing to Aboriginal landowners from dealings have mainly taken the form of income from mining royalties or lease rentals. Income from mining is distributed between the traditional landowners and other Aboriginal people living in the areas affected by the mining (30%), with the rest going to Land Councils and in community grants for the benefit of all Aboriginal people in the Northern Territory. The traditional landowners’ share is passed on to “royalty-receiving associations”, which usually invest part of the funds and distribute the remainder to various sub-committees, who allocate them to community projects or to individuals.

The land rights legislation has been in operation in the Northern Territory for

¹⁹ The *Aboriginal Land Rights (Northern Territory) Act* also provides machinery for claiming Aboriginal land, and transferring land to Aboriginal ownership if the claim succeeds.

over three decades now, and the CLC case study looks at how the processes in the Act have been used more recently “as a catalyst to draw in external funding, expertise and experience to develop a deeper economic base on Aboriginal land”. The CLC has also been innovative in negotiating for “add on” benefits, in addition to the landowners’ normal statutory entitlements. Mining companies and others have proved willing to support community development projects in health, education, training and communications on Aboriginal lands, with the shared aim of building sustainable economic and social benefits. Company representatives value the CLC’s inputs in negotiating these arrangements. Whereas once the negotiation process was criticised for causing “transaction costs”, now the private sector appreciate the clarity and certainty of the processes under the Act, and the professionalism of the Land Councils in delivering clear and certain outcomes.

Settlers on customary lands in Port Moresby

The spontaneous occupation of vacant urban lands is a growing phenomenon in the Pacific Islands, with the attendant problems of unplanned urban settlement everywhere – inadequate water supply and sewerage, health risks, environmental damage, social conflict and criminal activity. At the same time, such settlements and their occupants usually form a vital part of the urban community and its workforce. Finding a “land management model” which satisfies the security requirements of customary landowners, settlers, banks and service-providers is a high priority.

Port Moresby is the national capital of Papua New Guinea, a city of over 250,000 people in 2000, more than twice its population 20 years before. Many migrants to Port Moresby settle on vacant land, sometimes on State-owned land but, as the supply of this is exhausted, more often on customary land within or adjacent to the town boundary. Sometimes this settlement is without authority from the customary landowners, but often the settlers (or some of them) are paying rent or making other contributions to the landowners (or some of them).

The case study under the project examined “informal” settlements in Port Moresby and Honiara, the capital of Solomon Islands, and it included settlements on State-owned lands as well as customary lands. The present paper is only concerned with customary land. There is no customary land within the town boundary of Honiara, so the issues there are not relevant here. Nor is this paper concerned with the issues regarding “informal” settlements on State-owned land in Port Moresby. It is interesting, however, that the case study found that settlers on customary lands felt a greater security of tenure than those on State-owned lands.

Of greater interest for present purposes is a recent study commissioned by the National Capital District Commission (NCDC), the body responsible for the urban management of Port Moresby.²⁰ As part of its settlements strategy, around 2002 the NCDC undertook the June Valley Pilot Project as a trial for settlements on customary land. The land in question, an area of about 34.5 hectares, was already occupied by 270 households (1,626 persons). The settlement had begun about a decade before, when migrants from various parts of PNG, displaced by a freeway construction, moved onto the subject land. Since then, the original settlers had been joined by relatives and other landless families, with different language groups forming settlement clusters.

The customary land-owning clan, which had incorporated under the *Land Groups Incorporation Act*,²¹ had been using a crude form of leasing of the land to individuals and groups, and settlers had even been buying and selling blocks, to some extent with the landowners’ consent. The NCDC wished to regularise these arrangements, and enable the provision of urban services (roads, drains, electricity, water, etc.) to the settlers. But the NCDC was also conscious of the critical role which

orderly access to customary lands would play, in the future expansion of the city. Therefore, it chose the June Valley settlement as a pilot project, for development of a “model” for the many other settlements on customary land in and around Port Moresby.

In the late 1980s, the present author had been involved in designing a model for the settlement of urban customary lands, under the UNDP-funded Urban Settlement Planning Project. That model, which was developed in consultation with the customary landowners and the settlers, involved “direct dealing” between landowners and settlers, and was based on the recommendations of PNG’s influential Commission of Inquiry into Land Matters (see above). It was because of that involvement that the NCDC commissioned the present author to design a suitable customary land management model – for the June Valley settlement, but also for possible application to other customary lands in the urban area.

The main features of the intended model are that it is based on “direct dealing” between the two main parties – the landowners and the settlers – without the need for government to intervene, and the land stays under customary ownership.²² To provide the necessary security of tenure to the parties, and to underpin provision of urban services (roads, electricity, etc.), legal arrangements are put in place, which can be summarised as four basic steps –

Step 1: Incorporation of the land-owning groups

Each of the land-owning groups (clans, etc.) owning land within the settlement incorporates as an incorporated land group (ILG) under PNG’s *Land Groups Incorporation Act*. This gives them legal status, a constitution and legal decision-making powers over the management of their customary lands.

²⁰ The settlement which was the subject of this study (June Valley) was not included in the case study conducted under the AusAID Case Study Project.

²¹ See the case study on incorporated land groups in PNG, under the previous part of this paper.

²² The land does not have to be registered, although there are clear practical advantages in registering the titles of the landowners and the lessees, if a suitable system is available.

Step 2: Reincorporation of the ILGs as a company

The land-owning ILGs then re-incorporate as a company under PNG's *Companies Act*, with the ILGs being the shareholders. This sets them up for commercial operation, in particular for the management and development of their urban customary lands.

Step 3: Entry into a Management Agreement

The ILGs then enter into a Management Agreement with their land management company, giving it exclusive authority to manage the land involved in the settlement on their behalf. This includes authority to execute Lease Agreements with individual settlers, administer the terms and conditions of those Agreements and collect and distribute rents.

Step 4: Execution of Lease Agreements

The Lease Agreements are executed by the two parties – the management company (acting on behalf of the ILGs) and the lessee of each block. Lease clauses cover the period of the lease, permitted land use, rent, maintenance, approval of transfers, rights to mortgage the lease, etc.

The above steps are only a bare outline of the model, which is fully elaborated in the legal documentation (management agreement, lease agreement, etc.) which accompanies the June Valley pilot project report.²³ That documentation is now being finalised by the NCDC, in consultation with the landowners and the settlers. It is especially important to “fine tune” the arrangements for involving members of the land-owning groups in decision-making over the lands in question, and to ensure that they receive their fair share of the benefits.

Absentee land ownership in Cook Islands

²³ *Report on the June Valley (Uguha Dubu) Pilot Settlement Project: Scoping Study*, July 2007.

Possibly no other country has a higher incidence of absentees than Cook Islands, where 91% of the population live overseas (mainly in New Zealand, Australia and Tahiti). Migration abroad is a long-standing phenomenon, and a high proportion of today's absentees were born outside Cook Islands. Of the remaining 9% who live in their country, about half live in the capital of Rarotonga, the country's largest island (67 square kilometres), where almost all the country's economy is based. Many of these have migrated there from outer islands, living on land to which they have no customary rights. Equitable access to land in Rarotonga is a big problem for Cook Islanders, not only for those who have settled there from outer islands, but also for those whose ancestral lands there have been fully allocated. Access to available land is greatly complicated by the land rights of absentees.

Land access for resident Cook Islanders is also complicated by some special legal factors, including –

- the citizenship of its people – Cook Islands is a self-governing state in “free association” with New Zealand, and all Cook Islanders hold New Zealand citizenship;²⁴
- Cook Islands law recognises that all Cook Islanders can exercise rights to their customary land, without regard to the question of their residence;
- since around 1900, land in Cook Islands can only be leased, not sold; and
- while custom applies to such land, “custom” has not been defined.

When it comes to a land dealing (eg, a lease), the question of who is entitled to be involved in making the decision is further complicated by a court judgment made in 1957. The Appellate Court, in a judgment binding on the lower courts, decided that it was “the principle of Maori custom that all children inherit equally”.²⁵

²⁴ Cook Islands was a territory of New Zealand until self-government in 1964, but the Cook Islands Maori (the name they call themselves) also share many language and other cultural links with the New Zealand Maori.

²⁵ The Appellate Court, made up of visiting judges “who knew neither the language nor the culture of the Cook Islands”, overturned the decision by a Land Court judge that only those

As the case study authors²⁶ point out, no such custom has ever existed. The judgment meant that “every person would inherit a share in all the lands of both parents, all four grandparents, all eight great-grandparents, all 16 great-great-grandparents and so on”. There are now enormous numbers of owners for most parcels of land.

Such a principle would be unworkable enough anywhere, but in a country where the great majority of landowners live abroad, it has created enormous practical problems for land availability. When leases are being proposed, absentee landowners either return to the country briefly to affirm their rights, or they give powers of attorney or appoint proxies to maintain them. Rental incomes are paid in tiny shares to all owners, so that those who have the power to grant leases have no incentive to do so. The case study authors conclude, “Hundreds, probably thousands of plots of land are unused because of disputes, or fear of disputes, over title or allocation”.

Added to the disincentive to lease is the cultural resistance. Land is highly valued by Cook Islanders as an important source of identity and confidence. The authors found, “Indigenous lands lost by original owners in Australia, Fiji, Hawaii, New Caledonia, New Zealand and Tahiti, are constantly referred to as examples of why Cook Islanders should retain land rights.” They conclude –

“Those who do not live in the islands – absentees – impact on economic growth in two conflicting ways. Since most Cook Islanders live overseas, more land is available to those who remain in their country. On the other hand, although some absentees want to make money by leasing or renting the land they have left and may never use, most prefer to hold it in their family. Identity and a sense of belonging form a higher priority than income for this group.”

entitled under custom could inherit land rights, not all descendants.

²⁶ Two of the three authors are Cook Islands Maori.

The authors point out that, as with other Pacific Islands, the customary land tenure systems in Cook Islands were designed to meet different needs and circumstances, and the context in which they operate today has changed radically from the past. Cook Islands “is a classic example of the context changing faster than the tenure systems so that they no longer work to maximise the benefits for those who remain in their country”. The authors conclude –

“In a situation of rapid economic and social change, land tenure should be periodically evaluated (perhaps every five years) to ensure it continues to meet the current and expected needs of the people. This has not been done in the Cook Islands.”

The case study finishes with a review of options suggested by Cook Islanders themselves, to limit the exercise of land rights by absentees. Among such reform options are those suggesting limits based on period of absence, place of birth, number of plots or area an absentee can inherit. One suggestion is to concentrate not on rights to ownership, but on entitlement to take part in decision-making. The authors recognise the political sensitivity of the issues, however, and the difficulty of generating support for the necessary reforms.

iii) SETTLEMENT OF LAND DISPUTES

Land disputes not only cause social disruption and loss of life, but they also have a negative impact on the economy and land development. However, they are a fact of life everywhere, especially where major changes are taking place in society. The nature of land disputes differs, depending on whether the land is State-owned, privately-owned or under customary tenure. As the disputes differ, so do the parties to the dispute, and the mechanisms for their solution. For example, a dispute over whether land is State-owned or not, or a disagreement over the terms of a lease, is quite different from a dispute over the ownership of customary land. This paper, with its focus on customary land tenures,

is only concerned with the settlement of disputes involving customary land.

All societies have traditional ways to settle disputes over customary land, and, to some extent, these traditional practices survive to the present day. Three of the case studies under the Case Study Project examine modern mechanisms for land dispute settlement which, while based partly on traditional methods, rely mainly on the new legislative, administrative and judicial processes introduced during the modern era. The land dispute settlement systems in the three countries concerned – Samoa, Papua New Guinea and East Timor – share the general aims for the system to be locally-based, participatory, simple to administer, affordable and likely to receive the general support of village communities.

Some Pacific Islands countries have been reviewing their systems for the settlement of customary land disputes. There are many basic questions involved, including –

- should the emphasis be on restoring the peace, rather than on determining land ownership?
- should responsibility be imposed on the parties to resolve their dispute, rather than on an outside body?
- should the dispute-settlement forum be independent, or can it have an interest in the dispute?
- should the emphasis be on mediation and arbitration, rather than adjudication?
- how binding should the decisions be, and on whom?
- how restrictive should the opportunity for appeal be?
- should lawyers be allowed to represent parties?

How these questions are answered will have a major impact on the nature of the land dispute settlement system and its effectiveness.

Land dispute settlement in Samoa

In 1962, Samoa (then Western Samoa) gained independence, the first Pacific Islands country to do so in the Twentieth

Century. Its Constitution set a precedent for later countries by recognising custom as a source of the country's law, and by other provisions incorporating Samoan values and institutions. The Constitution provides for the Land and Titles Court to deal with *matai* (chiefly) titles and customary land, and specific statutes preserve custom and traditional village-level institutions in Samoa's modern system of government. The case study report summarises the position regarding customary land –

“Generally, government policy on customary land has been to build on the strength of tradition while balancing it with change. Government resources have been allocated to nurture the customary system, including the provision of forums for customary land dispute resolution outside common law courts. Disputes relating to land are common and there is significant tension between the customary and introduced law and legal systems, which are founded on different values.”

The Land and Titles Court has exclusive jurisdiction to determine all claims and disputes between Samoans relating to customary land. The court is usually made up of six members – the President or a Deputy President, three judges and two assessors. To be appointed as a Samoan judge or assessor, a person must be a *matai* - ie, titled head of a kinship group. The court applies Samoan custom and usage, in formal proceedings involving traditional forms of address and customary courtesies. Samoan judges can examine any party or witness, under what is more an “inquisitorial” than an “adversarial” approach. Lawyers are not entitled to represent parties.

Decisions of the Land and Titles Court are judgments *in rem* – ie, they are binding on all persons, whether parties to the case or not. Appeals from the court's decisions lie to the Appellate Division of the Land and Titles Court, made up of the President and two Samoan judges appointed by the President. Appeals are only “by leave” of the President, and on specified grounds, including new evidence, mistake by the Court or that

the decision was against the weight of evidence. Decisions made by the Appellate Division of the Land and Titles Court are final.²⁷

The other main forum which can be involved in land disputes is the village *fono*. The *Village Fono Act* of 1990 was introduced to provide legislative support to the authority of a traditional Samoan institution, the village *fono*. This is an assembly of the village chiefs and orators, meeting in accordance with custom and usage to exercise authority over village affairs. Its statutory powers generally relate to maintaining village health and welfare, but it can make rules for the use and development of customary lands. The village *fono*'s jurisdiction is limited to persons resident in the village, and, in the case of land disputes, is confined to uncultivated land. Appeals lie from the village *fono* to the Land and Titles Court, which can allow or dismiss an appeal or refer it back to the village *fono* to reconsider.

Many disputes over customary land are determined by the *matai* or family head with traditional authority over the land, who usually consults other family members before reaching a decision. The village *fono* sits, in a sense, midway between this traditional settlement of disputes by the *matai*, and the more structured processes of the Land and Titles Court – although it, too, is clothed with traditional authority, applies custom and acts in customary ways. The case study author regards Samoa's approach to customary land disputes as "unique" in the South Pacific in several ways. Among its "most striking innovations", she notes –

Resources, leadership and cultural underpinnings: Samoa's Government has long recognised the cohesive force of custom and tradition. This "allows custom to remain strong and contribute to preserving peace and harmony". This recognition has been backed up by the investment of resources in supporting the customary system. Samoa's leaders are forthright and authoritative, are proud of their culture and want to retain the

²⁷ But see the footnote below, regarding the Supreme Court's powers of review.

strengths of custom. To this end they continue to innovate, a recent initiative being to link the village *fono* to central government through village mayors and government women representatives.

The dual court system: The Land and Titles Court is not established as an inferior court at the bottom of the hierarchy (like many other "customary" courts), but is given the same status as the western-style courts. Its status is further enhanced by the fact that appeals can only be made to the Appellate Division of the Land and Titles Court, whose decision is final.²⁸ This helps to "avoid the suggestion that it is inferior to the courts administering common law". It has also "avoided getting bogged down with common law procedures and rules of evidence". Lawyers are not allowed to appear, which "helps prevent an adversarial approach". Samoan judges are appointed to the court on their knowledge of custom and usage, and their standing in the community. Furthermore, the traditional land dispute settlement system of the village *fono* is legally recognised, and integrated into the formal court system. The Supreme Court judges take a "sensitive approach" to custom, allowing the court to "find ways to reconcile conflicts with human rights", so social progress can be made "without denigrating customary values".

The Land and Titles Court is criticised for delays and lack of transparency, although action is being taken to remedy these weaknesses. Another concern is that its judgments are *in rem*, ie, they bind everyone, not just the parties before the court. Where court decisions have such a wide-ranging impact, there are risks of people's rights being infringed without their getting notice and being able to protect them. This may not be such a problem in a small and close-knit community like Samoa – another somewhat "unique" factor which underpins the Samoan system for land

²⁸ The case study author points out that, as part of its supervisory role, the Supreme Court has an inherent power of judicial review over decisions of the Land and Titles Court. It also has jurisdiction to review a decision which contravenes the fundamental rights guaranteed under the Constitution.

dispute settlement. A greater threat to the system is the increasing individualisation of customary land, but this trend poses a threat to the traditional basis on which society operates not only in Samoa but in most Pacific Islands countries.

The Land Disputes Settlement Act in Papua New Guinea

PNG's Commission of Inquiry into Land Matters (CILM), which reported on the eve of independence in 1973, found general dissatisfaction with the former system for settlement of disputes over customary lands, which was seen as too legalistic, too distant from the parties in dispute, and concentrating more on trying to determine land ownership than looking at land use. In its place, the CILM recommended an entirely new system, based on the principles that people should be involved in the settlement of their own disputes (not pass that responsibility on to officials), that the dispute settlement process must be brought much closer to the people, and that hearings should not be confined to determining who owns the land, but should consider the use rights being exercised and the needs of the parties in dispute.

Based on those recommendations, the *Land Disputes Settlement Act of 1975* brought in a 3-tier system –

Mediation: This is a compulsory first step. The main responsibility of a Land Mediator is to promote the settlement of disputes by agreement between the parties.

Arbitration: Where a mediation is unsuccessful, a dispute can be brought before the Local Land Court. This court is chaired by a magistrate, with other membership from the Land Mediators for the area concerned. Again, mediation is attempted, but if unsuccessful the court can arbitrate a settlement to the dispute. The court has power to make a wide range of orders, with a view to promoting compromise and restoring social balance.

Appeal: There is very limited scope for appeal from an arbitrated settlement. Appeals can only be made to the Provincial Land Court, on the grounds of errors of jurisdiction, decisions made

contrary to natural justice, or manifest injustice.

Other features of the Act are – 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 can deal with other matters which are “inextricably involved” with the land dispute; the administration of the Act is decentralised; and parties are not allowed legal representation.

After some years of successful operation, the new land disputes settlement machinery under the Act began to collapse. By the mid-1990s, a UNDP report found that, starved of funds and other resources, the Provincial Land Dispute Settlement Committees were not meeting, Provincial and Local Land Courts were not sitting, Land Court records were not being kept, there was no training or inspection of Land Magistrates, and Land Mediators were reluctant to undertake mediations, because their payments were many years in arrears. The case study under the present project showed that these problems had grown even worse since then.

Although the Government showed little interest in the operation of the Act, a number of academics were impressed by its novel approach to land dispute settlement. They have generally endorsed the principles on which the Act is based, as did the findings in 2004 of a National Court judge, who was then chairman of PNG's Judicial Committee on Alternative Dispute Resolution. The judge had no problem with the exclusion of lawyers and the technical rules of evidence, which he felt kept proceedings informal, flexible and within a reasonable cost.

The case study report reviews this literature, and agrees with the commentators that the *Land Disputes Settlement Act* is well suited to PNG's political, social and cultural conditions. The problem is not with the Act, but with its implementation – inadequate funding, training, record-keeping and supervision. A minimum level of Government support

is essential for the law to have any chance of operating as it was intended, and the most urgent need is to give it that support. Moves are under way in PNG to rationalise the bodies with jurisdiction over land disputes, but real progress will require an improvement in the resourcing of land dispute settlement.

Land dispute mediation in East Timor

East Timor's troubled history has presented that newly-independent country with some special issues in customary land disputes, but the author of this case study points out that it shares some underlying issues with its Pacific Islands neighbours to the east – the disputes are “resistant to winner-loser models of formal legal adjudication” and, where they concern different groups, they are also “resistant to local arbitration through the traditional mechanisms that operate within groups”. After three centuries of outside occupation, “Land conflicts arising from historical displacement and resettlement are an endemic problem in rural East Timor”.

In 1999, the UN established the United Nations Transitional Authority in East Timor, which then brought in a mediation model to begin addressing the backlog of land conflicts. The model is managed by the National Land and Property Directorate, and implemented on a decentralised basis by district Land and Property Directorate officers. Trained mediators follow standard procedures, which start with a request for mediation of a land dispute, followed by notification of the claim and acceptance of mediation, agreement on the mediator or mediators, a land visit to collect information on the background of the dispute, separate meetings with each party, and joint meetings to try to mediate an acceptable solution. If a settlement is reached, a report is produced and signed by the parties and the mediator(s), and registered with the Land and Property Directorate. If a settlement cannot be reached after three joint meetings, then the dispute is referred to the courts.

One novel aspect of the procedure is the provision made for the mediator to facilitate “interim

agreements” relating to land use, and commitments not to engage in violence pending settlement of the dispute. Another novel aspect is that a “reconciliation ceremony” may be held following settlement of a dispute, if the parties agree and are willing to cover the costs. Its main feature, however, is that the system is “embedded in land administration rather than judicial administration”. It “creates a bridge between traditional dispute-resolution mechanisms and the courts – ritual and customary institutions can be used if parties agree and the courts can be used if parties are unable to agree”.

The case study reports that, despite difficult circumstances and limited resources, mediation has succeeded in managing a number of potentially violent disputes. In a 5-year period to January 2006, of the 972 disputes brought to the Land and Property Directorate, 314 were resolved by mediation. This contrasts sharply with the poor record of East Timor's court system in resolving land-related conflicts. Because mediation lies outside the court system, remedies can be used which are not available to the courts, including the sale, lease, sharing or swap of land as mechanisms for resolving conflicts.

These special arrangements for land dispute mediation were introduced in East Timor by the UN Transitional Authority, in the absence at the time of legislation for the determination of land ownership and registration of land titles. Since the election of an East Timorese Government, progress is being made on the introduction of the nation's basic land laws.²⁹ The case study shows that care must be taken when legislating for more formal arrangements, to ensure that the flexibility which has enabled the present “transitional” arrangements to resolve many land disputes is not lost.

²⁹ The *Land Law* passed in 2003 only concerns the management of State land, and does not affect the land dispute mediation procedures described here.

3. LESSONS FROM THE CASE STUDIES

The immediate aim of the Case Studies Project is to inform Pacific Islands governments and officials how countries in the region have dealt with common issues affecting the development of customary land. The attempt will now be made to identify the main lessons which can be drawn from the 13 case studies outlined above. First, however, a few points should be made about the scope of what is being attempted here.

The focus of this paper is customary land. The amount of land under customary tenures varies between countries, being the great majority of the land in large island countries like Papua New Guinea (97%), Solomon Islands (84%) and Fiji (83%), but less than half the area of some of the smaller states. Custom, customary land tenures and traditional institutions play a major role in all the Pacific Islands countries, gaining recognition in their Constitutions, courts and legislation. Land is more than just an economic resource; customary land tenures are fundamentally connected to the social, spiritual, political and economic life of the people. For the foreseeable future, customary tenures will be a fact of life in the Pacific.

This being so, the crucial question is – how can customary tenures be adapted to meet the modern needs and circumstances of people living on customary lands? As the authors of the Cook Islands case study point out, although the context in which the tenure systems of the Pacific Islands operate today has changed radically from the past, few have adapted sufficiently to provide for the current and future needs of their people. The most important lessons to take from the case studies are those which show how customary tenures can be adapted to meet people's modern needs and circumstances. The following treatment will look for these lessons under four headings – the basic approach to reform of customary tenures, the pre-conditions for reform, methods of reform and sustaining reform.

i) THE BASIC APPROACH TO REFORM

Lesson 1: Measures which build on and adapt existing customary tenures are more likely to succeed than those which try to replace them.

There are many examples in the Pacific of the failure of attempts to abolish customary tenures. Alienations of land from customary tenures, even those carried out over a century ago, are still hotly contested today by the descendants of the original owners, and more recent measures for converting land from customary tenures to individual freehold titles have failed to remove the land from customary claims. The general experience around the Pacific (and elsewhere) is that measures which try to make radical reforms to customary tenures are unlikely to succeed.

Lesson 2: Only reform to the extent necessary to meet the need.

The history of land reforms in the Pacific reveals one key fact – it is very difficult to succeed. As the Tolai case study shows, even in the days when the full support of a colonial administration, with its authority, funds and experienced personnel, could be brought to bear on a measure like systematic registration of customary lands, the results from many years of effort were minimal. It has been a similar experience with land registration schemes elsewhere. The measures went further than was necessary to meet the real need for adapting customary tenures, and so outreached the political will, funds and administrative resources available to implement them. These factors impose an even greater limit on what can be achieved, when the authority and capacity of the State is weak.

The lesson is, don't be too ambitious. Measures like the recording of existing customary ownership, being trialled in the Solomon Islands, may meet the present need there for greater clarity of land rights, without going to the next stage of registration of titles. In East Timor, difficult land disputes were settled with greater success under an administrative

system for the mediation of disputes, than under the judicial system. Disputes which could not be mediated to agreement had to go into the court system, but introducing a preliminary step of mediation clearly met the immediate need.

Lesson 3: Reforms must be consensual.

Nations in the Pacific are highly democratic, with developed legal systems, independent courts and “bill of rights” provisions in their Constitutions protecting their citizens’ property rights. In these circumstances, any attempt to impose a reform of land tenures on their citizens would be forcefully – and, most likely, successfully – resisted. Apart from reasons of principle, therefore, there are strong practical reasons why any reforms of customary tenures must be based on consent. This applies most critically at the level where the effects of the reforms will be felt – ie, in the case of customary tenures, at village level, where the affected landowners live.

While this is not strictly a “lesson” from the case studies, it is crucial to recognise the necessity of reforms being based on a real demand for the measure. Some of the measures examined in the case studies were initiated by the landowners (eg, village land trusts in Vanuatu, and the land arrangements for settlers in Port Moresby), but the others all relied on voluntary participation, even if the landowners did not initiate the measure (eg, the group recognition measures in New Zealand, Papua New Guinea and Australia, and the dispute settlement measures in Samoa, PNG and East Timor).

Lesson 4: The reform must balance the traditional and the modern.

How to balance the “traditional” and the “modern” is examined under “Methods of reform” below, but this is a crucial general lesson about the basic approach to reform which arises from the case studies. It follows from Lesson 1 (adapt, not replace) that, in responding to modern needs and circumstances, reforms of customary tenures must strike a balance between what has worked for

many centuries under a traditional context, and what is now required under the modern context. In the case of customary tenures, reform measures must find this balance in three main areas – land rights, land use and land management. The case studies provide many examples of attempts to find the right balance.

In the case of land rights, the balance is mainly between the rights of traditional land-owning groups and the rights of individuals wanting greater security to invest in land development. These might be members of the land-owning group, or outsiders. In the case of land use, not only is land being put to different uses (eg, long-term agriculture, urban settlement), but a new value is attached to land for the purposes of dealings (eg, sales, leases or mortgages). These recent innovations put new demands on customary lands, and require adjustments to landowners’ rights as between themselves, and between themselves and their group. In the case of land management, the nature of decision-making requires adjustment to the modern environment. While the traditional methods remain critically important, there are new requirements to be more equitable, reliable and accountable – both to group members and outsiders.

A final matter to mention is that reforms of customary land tenures have their limitations, and it is not possible to use such reforms to achieve broad social change. Reforms like greater democracy, gender equity and other “liberal” goals must be pursued at a national level, and across the whole community. Customary land reforms must be careful not to worsen the situation, and there may be opportunities for improvement, but these cannot be pushed too far in advance of public opinion.³⁰ Similarly, other reforms will be necessary to provide a more “enabling” environment for land tenures – changes in credit facilities, produce

³⁰ It is critically important, however, to ensure that the land rights of women are specifically recognised and specially protected. Experience shows that, without such special treatment, women’s rights inevitably suffer under land reforms.

marketing, service delivery, infrastructure, “good governance” and so on. Reform of customary tenures can play an important part in overall reform, but it cannot do the whole job itself.

ii) PRE-CONDITIONS FOR REFORM

Lesson 5: Political leadership and commitment to the reform are indispensable.

Reforms of customary land tenures are always very sensitive, and in democratic countries a strong commitment from the national leadership will be necessary if the reforms are to be introduced and supported. Often new legislation will be necessary, and new demands will be put on financial and administrative resources. Experience shows that there is a high potential for misunderstanding, and even misrepresentation of the reforms, which can easily undermine their chances of successful introduction. Land reforms are difficult enough, but they are impossible without a strong political commitment.

The case studies provide examples of reforms which were successful because of strong political support (the Native Land Trust Board in Fiji was only introduced after a number of years of gathering support around the country), and of reforms which suffered without political support (the trial project for recording of customary land rights in Solomon Islands has stalled in the absence of political support). Samoa’s system for land dispute settlement is underpinned by the Government’s strong commitment to supporting custom and traditional bodies. Where adjustments are needed, the Government has been willing to respond. The project for settlement of urban migrants on customary lands in Port Moresby has been facilitated by the government responsible for the city’s development. It could not have proceeded without that support.

Lesson 6: Administrative capacity and adequate funding are major limiting factors on reform

Some reforms are more demanding on administrative and financial resources than others. For example, customary land registration is a very demanding operation, with long-term inputs of skilled staff necessary both to carry out the initial registration, and to maintain the titles register into the future. As the Tolai case study shows, the registration measures from the 1950s and 60s were too ambitious, and produced minimal results. By contrast, stopping short of full registration and only recording existing land rights is much less demanding, and, as the Solomon Islands case study shows, it can be accomplished by relying mainly on local knowledge, skills and manpower. It is true that recording does not provide the same indefeasibility of tenure as registration of titles, but it does make some progress, rather than failing altogether for lack of administrative capacity.

While providing adequate support is more a matter of sustaining the reforms, which is discussed below, the level of government capacity is a major consideration in planning any reform. The support required must be identified, and then a realistic assessment made of whether it can be expected, over the necessary period of time. All reforms will require a certain minimal level of government support in order to have any chance of achieving their policy goals, and if that support cannot be guaranteed then it would be better not to proceed with the reform.

iii) METHODS OF REFORM

Lesson 7: Provide legal recognition to customary institutions.

If the goal is to “build on and adapt existing customary tenures” (see Lesson 1), then it may be useful to begin by providing the main customary institutions which relate to land tenures with formal legal recognition. Examples of this method from the case studies are the legal recognition given to traditional units

of territory and customary land-owning groups (in New Zealand, Fiji, PNG, Solomon Islands and Australia), to traditional leadership (in Fiji, Samoa, Solomon Islands and Vanuatu), to traditional decision-making processes (in Samoa, PNG, Solomon Islands and Australia) and traditional land dispute settlement bodies (in Samoa). The challenge is to recognise such customary institutions without upsetting the way they operate.

Lesson 8: In giving such legal recognition, it is essential to allow customary institutions to adapt.

Custom is evolving in response to the new demands on land, and, with the right encouragement, its evolution can be steered towards developmental goals. There are two main risks involved in giving legal recognition – one is to change the customary institutions too much so that they no longer function, and the other is to “freeze” custom, so that it can no longer adapt to change. A dramatic example of these risks can be found in the Cook Islands case study. Fifty years ago, a court consisting of visiting judges made a binding decision that, under custom, all land is inherited equally by all a landowner’s descendants. Despite the fact that no such custom existed, this imposed change has been applied ever since, and is responsible for much of the present-day difficulties in land allocation in the Cook Islands.

Another example of changing custom too much is provided by the Australian case study on native title bodies corporate. In that case, the nature of the body set up to manage native title lands was heavily restricted by the incorporation legislation, the general rules applying to such corporations, and the terms upon which native title had been recognised. Even though attempts were made to reflect traditional social organisation and decision-making in the body’s structure, the result was an unhappy compromise, with many tensions between customary practice and what the law requires.

Fiji provides a good example of a customary institution adapting to change. In modern-day Fiji, the role and authority

of the traditional leadership is under pressure. Ordinary landowners are expecting a greater say in how their land is used, and they are pushing for a more equitable distribution of the income from their land. The Native Land Trust Board is responding to these demands by increasing the extent of involvement of the land-owning groups in negotiations with potential lessees.

All measures for the legal recognition of custom and customary institutions will, of necessity, change custom to a greater or lesser extent. The very fact of giving formal recognition and recording how the customary institutions will operate will, of itself, introduce a novelty. No longer will custom be as flexible as before, but that flexibility has been sacrificed for the greater certainty which modern conditions require. But just as trying to change custom too much is a mistake, it is also a mistake to try to “freeze” custom. The same case study from Australia illustrates the risks of attempting to codify custom as a set of rules, and thereby preventing aspects of traditional culture (eg, on decision-making) from adapting to change.

Lesson 9: There are both suitable and unsuitable ways of adapting custom.

The case studies show how reform measures can influence the evolution of custom. Even central customary institutions can be changed quite substantially, without losing their validity and vitality. Nothing could be more central to Pacific Islands societies than their kinship systems, yet there are two examples in the case studies of these being substantially modified, with beneficial rather than harmful results.

In Fiji, at an early stage in the process of systematic registration of all customary lands in the country, an administrative decision was made to apply a standard model of Fijian social structure. The *mataqali*, or clan, was recognised as the general land-owning unit under Fijian customary tenure. The main reason was administrative expediency, and many authors have pointed out that the *mataqali* was not the most appropriate level of Fijian society for recording land ownership in every area across the

islands. But having adopted it and applied it consistently, after a century it has become accepted as having existed “since time immemorial”. Today, it is a powerful cohesive force, and has helped to minimise land disputes.

The second example is the case study from Vanuatu. The village land trusts examined in that case study were from an area around the capital, Port Vila, where indigenous Melanesian culture had been heavily overlain by Polynesian influences. This had produced a hybrid kinship system, which combined matrilineal “families” with patrilineal “bloodline” allegiances. Despite the apparent contradictions, the present kinship system is now regarded widely as “traditional”.

Obviously, the line between a “suitable” and an “unsuitable” way to adapt custom is not fixed, but the signs of unsuitable adaptations soon become apparent. The case study on incorporated land groups (ILGs) in Papua New Guinea shows that it is a mistake to undertake a reform, but then only introduce part of it. The law for recognising customary land-owning groups was part of a new scheme for the registration of customary land, but the accompanying registration law was never introduced. As a result, the incorporation law was used almost exclusively by mining and other companies to facilitate the payment of resource rents, and the main purpose of managing customary lands was ignored. Inevitably, the incorporation process was abused, and customary groups were invented and split up, in order to maximise rental receipts.

Lesson 10: Customary institutions, even when adapted, are not always sufficient, and it may be necessary to “import” legal elements from elsewhere.

There are aspects of the modern context which are foreign to custom, and which cannot be accommodated simply by adapting customary institutions. In such cases, legal elements may be “imported” from more developed legal systems. A classic example is the need for a system to settle land disputes. While traditional means were available for settling

disputes within customary groups (eg, the role of the *matai* in Samoa), land disputes between groups often led to warfare, and the taking of territory by conquest. As the author of the East Timor case study points out, land disputes are “resistant to winner/loser models of formal legal adjudication”, and, where they are between different groups, they are “resistant to local arbitration through the traditional mechanisms that operate within groups”.

The case studies on land dispute settlement from Samoa, Papua New Guinea and East Timor provide different models which, to some extent at least, rely on the introduced judicial or administrative systems for resolving disputes. What is critical to their operations, however, is that they have all adapted the “imported” parts of the system. The “adversarial” approach (including legal representation and the strict laws of evidence) has been abandoned, at least in the early stages, in favour of mediation, and a more “inquisitorial” role for the arbitrators handling the dispute. The aim is restoration of the peace and social balance, rather than just adjudication on rights. Wider remedies are available (eg, land swaps) than those available to courts. The measures provide a bridge between the traditional dispute settlement mechanisms and the courts.

Another classic example of a legal “import” is the lease. While there are customary ways by which one person can use another’s land, usually this depends on some pre-existing relationship. There is no customary equivalent to a commercial lease, with its detailed provision for the permitted use, period of time, payment of rent and all the other written conditions governing the relationship between the landowner and the lessee. In every country of the Pacific, leases have been adopted as the main legal mechanism for regulating the use of customary lands by persons with no customary rights to the land.

Lesson 11: Where legal elements are imported, they too must be adapted.

Early legal attempts to come to terms with customary groups adopted concepts

like corporations, on the simple understanding that a customary group was essentially the same as a corporation. But western-style corporations cannot reflect the complex relationship between the members of a kinship group and its leader, nor can they protect the essential connection between the group and its customary land. If legal elements like corporations, trusts, agents, etc., are adopted as part of the modernisation process, their limitations for this purpose must be recognised, and provision made to adapt them to their new uses. It is especially important to make it very clear what powers such bodies hold over customary land, what the limitations on those powers are, and how they must be exercised.

An initial requirement when applying imported elements like corporations to their new uses is that they must be applied at the right level of indigenous society. In the case of land tenure, that level is where the main decisions are taken over land use and management. The village land trusts in Vanuatu were set up at village level, which is not where decisions over the management of clan lands are normally made. This incorporation at too high a level has led to tensions between the land trusts and the land-owning clans.

One way of dealing with the problem is to incorporate twice, as is sometimes done with native title bodies corporate in Australia. In the case study, the two corporations vested with native title had established an “umbrella” corporation, to manage the businesses of the first two corporations and deal with outside parties. A similar approach was taken in the settlement model used in Port Moresby, where incorporated land groups owning the land had re-incorporated as a company, to manage the settlement scheme on the landowners’ behalf.³¹

The case studies include many cases where the western legal concept of the trust has been applied to the ownership and management of customary lands –

the village land trusts in Vanuatu, Maori trusts in New Zealand and the use of trusts and trustees in the management of Aboriginal lands in Australia. In Fiji, the Native Land Trust Board has control of all native lands, which it administers for the benefit of the Fijian owners. There is something about the English term “trust” which inspires confidence, but without safeguards that confidence can be misplaced.

The trust is a highly-specialised artefact of western jurisprudence, involving particular duties between the trustee and those intended to benefit from the trust. Its great advantage from a practical point of view is that it allows the trustee to “sign off” on an agreement, which then becomes binding on those persons on whose behalf the trustee has signed. When used with customary land tenures, it allows decisions to be made by the trustee on behalf of a land-owning group, without the need for gathering consents from the individual members. Such powers over customary lands should only be given under strong and effective safeguards. The case study from Vanuatu provides one example of how customary lands can be lost, if controls are not applied to exercise of the trustee’s powers.

The sort of controls which can be applied – to achieve a balance between the convenience of a trust and the desire to protect customary lands – is shown by the case study on Aboriginal Land Councils in the Northern Territory of Australia. The law applying there is based on the notion of “informed consent”, and requires the professional staff of Land Councils to ensure that the traditional Aboriginal landowners understand the nature and purpose of any proposal relating to use of their land, and that they have as a group consented to it in accordance with their traditional decision-making processes. Only then can the trustees for the land be instructed to “sign off” on the proposed dealing.

It is not just the landowners whose rights might require protection. Outsiders dealing with a customary land-owning group cannot be expected to check that all the requirements for group decision-making have been met, so it is

³¹ In fact in the Port Moresby case study there was only one land-owning group, but it still re-incorporated as a company.

reasonable to protect outsiders in these circumstances. In Papua New Guinea, the law provides that a person dealing with an incorporated land group (ILG) can generally rely on the fact that the ILG's decision has been made in accordance with the formalities spelt out in its constitution, and does not have to need to check any further. Similarly in Fiji, a person granted a lease over native land by the Native Land Trust Board is protected from any claims by the Fijian landowners.

Another important adaptation to consider, when importing legal elements like corporations into customary land management, is the need to keep the domains of land and business separate. Land management and business development are two different operations, which require different kinds of legal structures and regulation. There are, of course, overlaps between a group's land tenure and its business operations on its land, but the lesson from the case studies is to handle each domain separately, and then spell out how the two domains interrelate. In the case of one of the village land trusts in Vanuatu, the failure to "quarantine" land tenure from the risks of business failure put village lands at risk, when business ventures failed.

Ways of handling the relationship between land tenure and business include the use of subsidiary companies, as Maori have done in setting up commercial entities owned and controlled by traditional bodies. In the case of the Port Moresby settlement arrangements, leases and mortgages are used as mechanisms in the relationship between the customary landowners, their management company and the individual lessees. As is often the case, anticipating in advance what the needs of the various parties will be, and then designing legal arrangements which accommodate them and allow them to adapt over time, is the most fruitful approach. In some cases, the best option is to design a new legal entity, tailored to the particular needs in hand, as was done by the *Land Groups Incorporation Act* in Papua New Guinea.

Lesson 12: Special institutional inputs may also be necessary.

In order to build on and adapt customary tenures, special institutional inputs have sometimes been felt necessary. It is common for special courts to be established to deal with claims to customary lands and land disputes (eg, in New Zealand, Fiji, Papua New Guinea, Samoa, Cook Islands), while other bodies are given statutory powers over dealings in customary lands. New Zealand's Maori Land Court regulates transactions in Maori land, while Fiji's Native Land Trust Board has the sole power to grant leases over native lands, and to give approvals to land dealings.³² The Aboriginal Land Councils in Australia's Northern Territory have a statutory role in advising landowners on proposed dealings, and in arranging for their "informed consent". Also in the Northern Territory, special bodies called "royalty-receiving associations" invest funds on the landowners' behalf, while other funds are allocated to community projects. In the absence of such bodies, mining and other royalties received by incorporated land groups in PNG have been squandered.

Two of the countries studied have three special bodies to support customary institutions and guide their development – New Zealand with its Maori Land Court, Maori Trustee and Ministry of Maori Affairs, and Fiji with its Native Land Trust Board, Fijian Affairs Board and Ministry of Fijian Affairs. Such bodies are noticeably lacking in most of the other countries of the region. Where these bodies exist, there is probably more attention given to guiding changes in the customary sector, but they are expensive to run, and criticisms are made of their old-fashioned paternalism. The NLTB in Fiji has recently responded to such criticisms by acting more as an adviser to landowners (along the lines of Aboriginal Land Councils), than as the effective landlord of all native lands, which is its statutory role. No doubt such bodies

³² The NLTB was introduced by the British colonial administration 30 years before Fiji's independence. It is highly unlikely that customary landowners would surrender such sweeping powers to such a body today.

must continue to modernise, to stay relevant.

Lesson 13: Carry out trials first.

The final lesson is an obvious one, but one often overlooked. In introducing any reforms, especially on the highly sensitive subject of customary land, it is very desirable to carry out a trial first. To be meaningful, such a trial needs to be adequately funded, staffed and otherwise resourced, and the trial must be supervised and its results methodically collected. Then, based on those results, the intended reform can be refined, forms and procedures developed, and training in their use conducted, before the reform is implemented on a wider scale. The “trial” of a system for recording customary land rights at Auluta Basin in Solomon Islands, although it was useful, would have been more valuable if it had received the support and resources necessary to make it a meaningful test of the recording model.

iv) SUSTAINING REFORM

Lesson 14: The political, financial and administrative commitment to reform must be sustained.

Reform is an ongoing process, not something achieved by the stroke of the lawmaker’s pen. Under the three previous headings, the lessons to be drawn from the case studies on the successful introduction of reforms of customary tenures have been examined. But a number of the case studies reinforce a basic point about reform – there is no point in successfully introducing a reform if it is not sustained. As acknowledged in Lesson 6 above, the level of government capacity is a key consideration in planning any reform, and a realistic assessment must be made of the support which can be expected over the time required to implement the reform. But where a reform measure collapses because government has withdrawn the necessary administrative and financial support, it will be impossible to know whether it was a well-designed reform or a reform with design faults.

This is the policy predicament faced by two of the major land reforms introduced in the Pacific Islands over the last three decades – PNG’s *Land Groups Incorporation Act* of 1974 and *Land Disputes Settlement Act* of 1975. The case studies show major malfunctions with these two laws, but they also show a loss of political interest in the fledgling laws, and withdrawal of administrative and financial support for their most basic operations. The laws themselves have been blamed for these malfunctions, but this criticism is misdirected when the new laws were given no reasonable chance of success.

Compare this PNG experience with the situation in Samoa. There, the case study shows a genuine government commitment to building on the strengths of custom, followed up by the allocation of resources to the customary system and ongoing support for traditional authorities. The leaders are proud of their culture, and want to retain the strengths of custom. To this end, government and the courts are constantly seeking ways to innovate, “to build on the strength of tradition while balancing it with change”.

Lesson 15: Reforms must be monitored and reviewed, and adjustments made where necessary.

It is highly unlikely that a reform measure will be successful in meeting all its aims in the first instance. In addition, with a sensitive and complex subject like land tenure, it is impossible to see in advance all the consequences of a reform, both good and bad. While this cannot deter policy-makers from embarking on necessary reforms, it is important to acknowledge this uncertainty, and to see how the measure actually performs in “real life” situations. Just as it is necessary to provide the reform measure with the resources necessary to sustain it, it is also necessary to monitor its operation, and be ready to adjust the measure where problems with its operation become apparent.

Using the same examples from the previous lesson, if the two new laws in PNG had been monitored during their early years of operation, it would have become clear that problems were

occurring. A review at that stage would have revealed whether the problems arose from defects in the design of the laws, or from a failure to provide them with the necessary administrative and financial resources to allow them to function as intended. Depending on the outcome of such a review, the appropriate remedial action could be taken. Of course, it is still necessary to act on the review's findings. The political commitment to reform is just as indispensable over time as is the provision of administrative and financial support.

4. CONCLUSION

Pacific Islanders are great innovators, who are always interested in the experience of other countries. The Case Study Project was designed to identify land tenure innovations, and to make that experience available to other countries in the region. There were a number of instances in the case studies where mention was made of Pacific Islanders intentionally adopting aspects of another country's land tenure system – for example, Vanuatu's leadership used Fiji's

Native Land Trust Board as a precedent for village land trusts, and a Provincial Government from Papua New Guinea sent a delegation to Fiji in 2003, to study how the indigenous social structure was used there as the basis for customary land registration.

Around mid-2008, the results of the Case Study Project will be published by AusAID. This will allow the lessons from the case studies to be studied by governments in the region, and ideas formed on possible solutions to common problems. Under the next phase of the Pacific Land Program, AusAID will hold discussions with individual countries to identify land reform initiatives which they are interested in pursuing, and which can be included for funding in AusAID's bilateral aid program. By this process, the lessons from Pacific Islands experience can be translated into reform measures which have the support of a country's political leadership, and the funds and other resources necessary for the reforms to be trialled meaningfully, and implemented effectively and sustainably.

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ANNEX: Case studies, their subjects, countries and authors

- 1. Managing the land reform process**
 1. Ownership of the land reform process (Papua New Guinea and Vanuatu)
Author: Michael Manning
- 2. Land administration**
 - 2.1 Training and educating land professionals in Papua New Guinea, Fiji and Laos
Author: Chris Lunnay
 - 2.2 Institutional strengthening of land administration in Solomon Islands
Author: Douglas Larden
- 3. Dispute resolution**
 - 3.1 Mediating land conflict in East Timor
Author: Daniel Fitzpatrick
 - 3.2 Land dispute resolution in Samoa
Author: Jennifer Corrin
 - 3.3 The system of land dispute settlement in Papua New Guinea
Authors: Norm Oliver and Jim Fingleton
- 4. Recognition and protection of customary tenure**
 - 4.1 Recording existing land rights and boundaries in the Auluta Basin, Solomon Islands
Author: John Cook
 - 4.2 Land registration among the Tolai people: waiting 50 years for titles (Papua New Guinea)
Authors: Jim Fingleton and Oswald ToLopa
 - 4.3 "One common basket" – the use of village land trusts in Vanuatu
Authors: Jim Fingleton, Anna Naupa and Chris Ballard
 - 4.4 Ownership and management of Maori land in New Zealand
Author: Tanira Kingi
 - 4.5 Incorporated land groups in Papua New Guinea and Australia: two case studies
Authors: Tony Power and Patrick Sullivan
- 5. Facilitation of land dealings**
 - 5.1 Indirect dealings in Aboriginal land through the Central Land Council (Australia)
Authors: David Allen and Mick Dodson
 - 5.2 The Native Land Trust Board of Fiji
Authors: Chris Lightfoot, Kaliopate Tavola and Jim Fingleton
 - 5.3 Informal land systems within urban settlements in Honiara and Port Moresby (Solomon Islands and Papua New Guinea)
Authors: Satish Chand and Charles Yala
 - 5.4 Absentee land ownership in the Cook Islands
Authors: Ron Crocombe, Makiuti Tongia and Tepoave Araitia
- 6. Land for public purposes**
 - 6.1 Accessing land for public purposes in Samoa
Author: Chris Grant
 - 6.2 Security of land for public purposes in Papua New Guinea and Vanuatu
Authors: Michael Manning and Philip Hughes