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**USING TRUST STRUCTURES TO MANAGE CUSTOMARY LAND IN MELANESIA:
What lessons can be learnt from the iTaukei Land Trust Board in Fiji**

SPIKE BOYDELL & ULAI BAYA

UTS: Asia-Pacific Centre for Complex Real Property Rights
Faculty of Design, Architecture and Building
University of Technology, Sydney, Australia
spike.boydell@uts.edu.au & ulai.baya@uts.edu.au

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Abstract:

At a time when external influences seek access to customary land in Melanesia for commercial gain (including mineral exploration, forestry, palm oil, agriculture and tourism), we question what institutional arrangements best serve customary landowners in administering their land. Fiji has recorded genealogies since the 1880s and is, as a result, potentially better placed than its Melanesian neighbours.

Commercially, Fiji has benefited from the establishment of the Native Land Trust Board (NLTB) in the 1940s as a quasi-governmental body that has administered all customary land in Fiji on behalf of indigenous groups. In 2011 the NLTB changed its name to the iTaukei Land Trust Board (iTTLTB). The iTTLTB employs 60+ professional staff, and has demonstrated in Fiji that leasing is an instrument that can render the freedom of doing business on customary owned land. We review the iTTLTB using a research design of phenomenological transdisciplinarity. We find the iTTLTB model offers a template that can be encouraged in wider Melanesia (rather than incorporated land groups), but its operation needs constant review in order to nurture aspects that assuage fear of loss of control from the landowners' perspective whilst assuring stability and certainty to potential investors.

Key Words:

Land Trusts, Incorporated Land Groups, ILGs, NLTB, iTTLTB, leases, customary land, Melanesia

USING TRUST STRUCTURES TO MANAGE CUSTOMARY LAND IN MELANESIA:

What Lessons can be learnt from the iTaukei Land Trust Board in Fiji

Introduction

In indigenous cultures, there are two recognized paradigms in which land and property are managed in modern times. These are the customary and the western. This Plurality of Registers (Boydell & Baya, 2012) has to be navigated when attempting to articulate disconnected worldviews between indigenous values and capitalist interests. Where they meet, the inalienable notions of land held by the customary stewards (or guardians) are very much at odds with the commodity view of the West that emphasizes individual ownership. In this paper, we take an innovative approach by attempting to leave the customary structure intact whilst finding less disruptive options for how the two registers can evolve and overlap to satisfy a pro-development and economic growth agenda.

The notion of a land trust in the Melanesian context is to provide support to customary landowners (as a familial or tribal group) in formalizing the institutional arrangements that allow other users (prospective tenants) rights of access to utilize their surplus land productively. This support comes in a number of ways, first by providing *locus standi* or legal identity on behalf of a customary landowning group so that they can be recognized within western legal understanding (which is mainly an Anglo-Australian perspective in Melanesia). Second, some trusts (such as the iTaukei Land Trust Board in Fiji) provide legal, valuation, financial, lease management and spatial advice to the beneficiaries to protect their customary rights and share the returns that emanate from the surplus lands (land that is surplus to their subsistence lifestyle needs) that are owned by the beneficiaries of the trust. Other trusts structures, such as incorporated land groups in Papua New Guinea, do not offer this level of professional capacity to their membership and have to secure it externally. Third, the trust serves as a trustee for income received from the land, its reinvestment and equitable distribution to beneficiaries (after management and related expenses have been paid).

At a time when external influences seek access to customary land in Melanesia for commercial gain (mineral exploration, forestry, palm oil, agriculture and tourism), the question arises as to whom, or what institutional arrangement, should help customary landowners administer their land. Currently, limited, moderate or substantive solutions are available and these differ significantly from country to country. In the Solomon Islands, a Land Trust Board was established in 1962 to administer legislative provisions regarding vacant land, but these provisions were repealed under the Land and Titles (Amendment)

Ordinance 1964, which effectively made the Land Trust Board defunct. A voluntary trust arrangement is in place in the Aluta Basin to protect customary interests on land identified for future palm oil production (the first trust of its kind in the country) within the Noro/Munda area of Malaita, whilst the Kazukuru Land Trust Board in New Georgia remains contested. There is scope for the establishment of land trusts under the provisions of the Charitable Trusts Act (Cap.55) 1966, such as Sipo tribe in Western Province creating the Sipo Land Trust Board Charity.

In Vanuatu, there are currently only three formal trusts in place; the Mele and Ifira peri-urban trusts on the fringe of Port Vila, on Efate, and the Boetara peri-urban trust in Luganville, on Espiritu Santo (the latter being the subject of ongoing boundary litigation). Elsewhere in Vanuatu customary landowners are formalized into neither a trust nor incorporation, and are not professionally represented.

In Papua New Guinea, the Land Groups Incorporation Act (1974) enables custom owners to formalize as a legal entity, recognized by the Minister of Lands as the appropriate party in land dealings.

Unfortunately, the system appears to have been abused, with examples of multiple parties establishing Incorporated Land Groups (ILGs) over the same land area, and major contention over misuse of the lease-leaseback provisions. There is a capacity challenge for the government to verify the genealogy of these groups. Changes to the legislation were made by the Land Groups Incorporation (Amendment) Act 2009, although there have subsequently been cases contesting the efficacy of the amendments.

In contrast, Fiji has recorded genealogies since the 1880s and is, as a result, potentially better placed than its Melanesian neighbors. Commercially, Fiji has benefited from the establishment of the Native Land Trust Board (NLTB) in the 1940s as a quasi-governmental body that has administered all customary land in Fiji on behalf of indigenous groups. In 2011 the NLTB changed its name to the iTaukei Land Trust Board (iTLTB) – and we use the names interchangeably in this paper. Whilst the NLTB / iTLTB has come under criticism over the years, it has some 60+ professional staff (comprising valuers, lawyers, lease managers, land surveyors, accountants, and negotiators) that have the requisite skills to manage customary land on behalf of the landowners.

The purpose of this paper is to critically examine the progressive approach towards the administration and control of customary land in Fiji since the inception of the NLTB / iTLTB, given the ‘all and inclusive’ *sui generis* nature of customary property. We identify some of the operational successes as well as shortfalls, to explain how the iTLTB is adapting to operational changes, given its onerous functions, in light of comparable developments in other common law jurisdictions. These operations are also discussed against the ever-increasing demands of its stakeholders in the new millennium, to contextualize

how effective it is as an institutional trust structure to act in the best interests of customary owners in the face of globalization and modernity.

Following the introduction, the paper is organized into 8 sections. We start by providing the historical context to land recording in Fiji after Cession to Queen Victoria in 1874, through to the establishment of the Native Land Trust Board in the 1940s. We then examine the efficiency and vulnerability of the Trust, and the challenges it has faced over the last fifteen years relating to agricultural leases, sugar production, agro-forestry and tourism, as well as what some see as the new opportunities associated with mineral extraction. We suggest that part of the challenge that a trust structure like the iTLTB faces is in dealing with the *plurality of registers* in navigating between high-context and low-context understanding of land, and how some customary landowners prefer to operate under informal extra-legal *vakavanua* arrangements.

Our analysis demonstrates that, in terms of land holding, leasehold structures are part of a solution that do not necessarily detract from customary ownership of land. However, one of the key roles of the iTLTB is in effective lease management and we have concerns that at an operational level, like other countries in Melanesia, the basis of rental, the terms of the lease, the handling of improvements, prevailing valuation approaches, and the protocols surrounding lease extension / renewal, are not serving the best interests of the customary landowners. We conclude by summarizing the lessons that come out of the iTLTB example, with our suggestions as to how current shortcomings may be addressed, so that other countries in the region can benefit from the iTLTB experiment.

Background

NLTB was created out of Ordinance 12 of 1940, enabling a statutory trust operating as the Native Land Trust Board, (CAP 134) today. The Act relates to the control and administration of native land prescribing the membership composition of the Board under s.3 and vesting control and administration of all native land to the Board per s.4. In essence, s.4 provides a bedrock undertaking by the NLTB in so far as leasing of native land, where legal ownership remains with the landowning units but control of it is transferred to and vested in the NLTB as decided by Cullian J in the matter of *Waisake Ratu (No.2)*, see *Waisake Ratu No.2 & Another v Native Land Development Corporation and Native Land Trust Board*, [1987] FJSC 9, [1991]35 FLR 116. In that matter, the plaintiff sought damages, and won, arising from their eviction from native land following a grant by the NLTB of a development lease over the land. In essence, the Court

affirmed the view that within the boundaries of un-leased native land, the *Mataqali*¹ in this instance retains residual customary control and is free to cultivate and deal with that land according to customs.

On the other hand, CAP 133 comparatively has earlier existence in its terms of provenance, resulting from the logical progression that the Act relates to native land tenure: a matter that preoccupied the colonial administration thinking since its early days in trying to understand customary land situation and in devising a hybrid system to provide some orderly facilitation of its interests in Fiji. From Ordinance 11 of 1905, the Act denotes that native land classification under s.3 as those that shall be held by native Fijians according to native customs as evidenced by usage and tradition. This Act also enunciated the creation of the Native Lands Commission that was sanctioned to ascertain what lands in each province in Fiji are rightful and hereditary property of native owners whether under the Mataqali or under other subdivisions that it may be held. It would follow that the book or register of landowning unit living members, known as the *iVola ni Kawa Bula* (VKB), was an offshoot from this exercise, which mandated the listing of all customary landowning units' membership that held land according to native custom.

In 1949, Fiji passed the *Native Lands Act*, [CAP 133] the culmination of a process set in motion between 1884 and 1926 when the Native Land Commission (NLC) had official sittings around the islands to determine native land titles, which constituted the recorded owners of Fijian land. Close to 88 per cent of the land had customary owners speaking on behalf of their respective *vanua*² through connection, adducing sworn verbal submissions to the Commission. With the assistance of cartographers who accompanied the Land Commissioner, the entire land holding structure of Fiji was spatially imaged.

Land that appeared to be 'ownerless' (because the owners were absent or deceased) was placed in Schedules A and B, and held in Trust by the then Crown on behalf of the Fijians (*iTaukei*) as *bona vacantia* holdings (i.e. unclaimed estates or ownerless land, a legal concept associated with property which does not have an owner). These formed the remainder of the landmass of Fiji, together with land that was alienated prior to the establishments of the Colony (pre 1874) and successfully claimed by owners (who were mostly foreigners) in the first land Commission (after 1874). This alienated land forms the basis of the land with freehold title that endures today.

¹ The *Mataqali* is a clan or sub tribe, and is the operational unit of a *vanua*.

² The Fijian word *vanua* has many meanings in the vernacular, but we use it here to describe the extent of the

² The Fijian word *vanua* has many meanings in the vernacular, but we use it here to describe the extent of the customary estate / land holding as recognized and recorded in the 'Book'. Vanua – the traditional homeland, comprising land and waters that form the socio-economic and political extent of a chiefly reign and control.

As part of the process of recording ownership of land, the Native Land Commissioner also noted the genealogies of the customary owners of the land. Today, the resultant record book, *iVola ni Kawa Bula* (known as the 'VKB' or the 'Book'), together with the evidence book, are source documents that assist the Native Lands Commission Chairman in resolving ownership claims, boundary determinations and chiefly title disputes.

Given the various classification and policy processes, the NLTB, as precursor to the iTLTB, was legislatively enacted in 1940 as trustee responsible for the administration and control of all native lands. The need for a trust structure was largely driven by the ever-growing pressure to access to land for government purposes, urban expansion and commerce during the colonial times. Embedded in this historic development was clause 4 of the Instrument of Cession to Britain of 1874 that necessitated the proper classification and protection of native land.

Native land held under custom as described under s.3 of Native Lands Act CAP 133, confirms a status that affords some degree of certainty but still very much in the customary register, one that can be granted in accordance with the provisions of the Act as prescribed under the NLTA CAP 134 s.7. Any lease granted under this provision is an instrument of tenancy under an agreement to lease between the lessor and lessee, sanctioned by the Board and such a grant operates exclusively outside the ambit of common law leases until it is registered. Depending on the type of land use and the future needs of the tenant, an instrument of tenancy created under CAP 134 may suffice in terms of giving a green light to dealing with native land, but still falls short of the comfort proffered by a registered title, such as certainty for commercial purposes and a registrable title that can be transferred or mortgaged to raise capital on behalf of the title holder. This is the preferred practice by banks and lending institutions in Fiji when vetting refinancing applications against leases on native land as collateral.

Section 4(1) of the NLTA vests the control of all native lands in Fiji (88 per cent by area) to the iTaukei Land Trust Board under a trust arrangement. As trustee, the iTLTB administers and controls all native lands for the benefit of all registered land owning units in Fiji. Other aspects of leases are treated specifically in sections 10 through 18 of the NLTA. Most major developments are accommodated through this system, whereby the grant of a lease creates an instrument of tenancy that could be further formalized into a registered lease upon registration with the Registrar of Titles.

There have been a number of decrees promulgated since 2006 by the current Government that have affected native lands in general and also how native land is administered through the Board. Understandably, most of these saw facilitative amendments that would demand consistency of application in relation to other laws and government policies. Notably the Land Use Decree (2010) saw the

introduction of a whole new leasing regime affecting native land, through the facilitation of a Land Bank. The intent of the Land Bank has come into question, given the presence and ongoing role of the iTLTB in the administration of customary land. Most poignantly, this raises issues of replication and whether the perceived inherent deficiencies within the current system can be improved. As it stands, the selling point of the Land Bank leasing regime seems predicated on the slim procedural approach of its processes, activated through landowning units recommending parcels of land for designation into the regime. *Prima facie*, it is investor friendly in that there is minimal direct contact between investors and the landowning unit, as the Land Bank manifestly becomes a proxy (in a more pro-active and commercial sense than demonstrated by the iTLTB in its role as trustee). Salient features of the Land Use Decree (2010), which served to amend both the Native Land Act (CAP 133) and the Native Land Trust Act (CAP 134), are briefly discussed below.

Decree 7 of 2011 (Native Lands [Amendment]) and Decree 8 of 2011 (Native Land Trust [Amendment]) as gazetted (Vol.12, Nos.18 and 19 respectively), both saw the same manner of amendments in procedural application by deleting the word ‘native’ wherever it appears and replacing it with the word ‘iTaukei’. This amendment applies to all uses of the word ‘native’ wherever it appears in other legislation.

A restructure to the composition of the Board was enacted by Decree 32 of 2010 (Native Land Trust (Amendment) Act, CAP 134), whereby section 3 was amended to make the Minister of iTaukei Affairs Chairman of the iTaukei Board instead of the President. Likewise, amendments to section 18, deleted the word ‘President’ wherever it appeared and replaced it with the word ‘Minister’. A new section 37 completes the formality deeming it that any mention of the word ‘President’ on Board documents will be replaced by the word ‘Minister’.

The most significant impact on customary owners came in Decree 61 of 2010 (Native Land Trust (Leases and Licenses) Amendment Regulation 2010), which amended section 33 of CAP 134 and substituted a new provision in relation to the allocation of rental monies received on customary land paid by the iTLTB to the members of the landowning units and how henceforth it is to be divided equally amongst the members. This amendment turned on its head the payment methodology of NLTB lease monies (after management costs) that reflected the chiefly social hierarchy of the leadership as prescribed by s.11(1) of NLTA to the *Vanua* (most senior chief - 5% of rental income), *Yavusa* (chiefs of confederations, or larger tribal groupings – 10% of rental income), *Mataqali* (chiefs – 15%, and members of a clan or village) and *iTokatoka* (heads of sub-clans or familial groups, and their members), with the remaining 70% of rental income going to registered members of the proprietary landowning group. Since the amendment, those members of the proprietary group registered in the VKB now receive an equal share of 100% of the rental

income after management fees and a 5% levy into a collective trust. Moreover, the amendment demanded clarity and transparency premised on the fact that there are instances where the leadership of the Vanua, Yavusa and Mataqali is often vested in the same person, whereby the remaining and broader Mataqali population were historically forced to share the residual income received. The iTLTB through this amendment has done away with cash payment distribution as in the past but has required that money will only be paid into a Mataqali Trust account that is properly vetted and established specifically for the purposes of receiving and distributing rental income.

Whilst the object of the Land Use Decree is to utilize iTaukei land ‘in the best interest of native land owners’ per section 3(1), a close scrutiny of the procedural process of the Land Use Decree reveals that designating native land and head leasing it to the State Land Bank severs the connection between *Mataqali* members and the *vanua* to an even greater degree than currently experienced under the leasing regimes of iTLTB. This is due to the absence of residual customary control of the land by the landowning unit once placed under the Land Bank Regime but not yet leased. This has the potential to create inordinate uncertainty depending on the market forces of supply and demand whilst designated land is waiting to be leased to a commercial user. Further, extensive privacy clauses render it impossible for landowners to enforce their rights against the State per section 15. This includes, under s.15(1), a limiting provision that precludes any Court, Tribunal, Commission or any other adjudicating body to accept, hear or determine or in any other way entertain any proceedings, claim, challenge or dispute by any person or body which seeks of purports to challenge or question the validity of the Decree, or the decision of the Minister for that matter. The risk of venturing into a commercially binding contract with potentially unenforceable property rights is daunting for prospective developers. It is our observation that the promises of increased economic activity through making land readily available for commercial use under the one-stop-shop Land Bank Regime may prove harder than originally intentioned under the clauses highlighted.

Efficiency

The surge in global demand for resources and services expansion development is impacting on Melanesia, which is largely welcomed by the population. Associated with this development is introduction of new ideas (or rather ideas that are new to the region), and demand for land and resource access that differs from customary subsistence land usage. This includes large scale harvesting of forestry resources (and replanting), extractive industries and tourism development opportunities, all of which make the professional services of specialized institutions like the iTLTB both more prominent politically and more essential for the protection of customary landowners interests.

The iTLTB advisory process associated with the provision of development leases on customary lands, depending on the complexity of a proposed development, may often consist of no more than two meetings attended by its various professional experts and members of the *Mataqali*. The policies guiding these meetings are sanctioned under the *Leases and Licences Regulations*, and are more to do with obtaining the consent of the landowning unit as final administrative act in allowing proposals to proceed. Contract conditions are discussed as well, but these are usually generic unless subject to special conditions peculiar to the proponent industry. Lease covenants drafted by the iTLTB see little input from the landowning unit, with only a brief opportunity for consultation with the owners regarding the final form and/or tenor of the lease. Historically, NLTB leases commonly lack specificity and are imprecise on such vital matters as dispute resolution, process and procedures dealing with default, cultural heritage, nature and extent of customary rights and interests, and lack consideration of its likely impairment, extinguishment or damages. It is therefore perfunctory that leasehold contracts for multi-million dollar land developments may consist of a simple document of no more than fifteen pages, often based on a simple Unimproved Capital Value (UCV) rental basis that neither adequately reflects the loss of access to the land for the rental period, nor the ownership of improvements at lease expiration.

As the case in any emerging (post colonial) economy, the pursuit of developmental goals at improving GDP, facilitating revenue, and reducing poverty are a high priority. Therefore, the presence of a centralized institution, such as the iTLTB, tasked with all matters pertaining to customary land stewardship, is potentially a huge benefit for customary landowners. Whilst the positives are acknowledged, national interest pressure to pursue economic policies for the greater societal good may risk being at the expense of the property rights and interests of customary owners. This facilitation is often at the behest of governments striving to provide rapid land access for would be investors. Manifested as development policies, such intensity has the potential (and legislatively the ability) of restructuring customary tenure systems in an attempt to make them more consistent with development goal. Examples include land access programs consistent with the advent of sugar industry, pine plantation and recent tourism development surge in Fiji. The collective impact of restructured tenure arrangements over customary land is yet to be fully appreciated.

Fiji has a rich history in its sugar industry. It created a special type of landholding in the *Agricultural Landlord and Tenants Act (ALTA)* [CAP 270] to enable land to be leased for sugar cane production whilst protecting the industry and providing both security and certainty to farmers. This legislation allowed for a rent passing of ‘up to’ to 6 percent of the Unimproved Capital Value (UCV) of the land (as determined by a group of valuers advising the Minister, given the incorrect assumption that there is no open ‘market’ for such land). Under ALTA, UCV is defined as the value of an agricultural holding held

as if it were fee simple, unencumbered by any mortgage minus any improvements. It is noted that this compensation is supposed to reflect the agricultural productivity of the land and the purpose for which the land is issued and not the actual use of the land or for any purpose for which the land could be used (per ALTA, s.21(3)). Whilst all native land is prohibited from sale, with exception to the Crown for limited State infrastructure use, native leases are transferable and the lease interest can be sold in an open market. Such regulated rents cloud the issue of equitable return, especially where comparison is made to a rental based on, say, 6% of the hypothetical unimproved capital value (UCV) of the land rather than its equitable productive capacity.

The ALTA administrative mechanism also enables the Sugar Tribunal to grant a new lease per s.4 of CAP 270. This arises where an illegal tenant in adverse possession can petition for legal recognition and formalization of lease title as if they had been occupying the land for three years or more without the lessee's notice of eviction or reasonable measures taken for his eviction. Whilst the total impact of the ruling would be deleterious to the original leased estate, it has, through the process also bypassed customary owners consent in the creation of new leasehold interests.

Fiji Pine Industry and its plantations are also a special case. The special treatment provided for plantation forest leases was heavily skewed in the planters' favor in that the usual process of leasing was truncated to ensure expedited proceedings in the leasing of large tracts of native land. iTLTB for its part in the coalition of the willing sanctioned the issuance of single leases for vast tracts of native land and over multiple landholding units. This avoided the need for duplication of process such as surveying, lodging of multiple documents and payment of fees over every single lease area. iTLTB by law collects rental and divides it amongst the various landowning units per its records and payment policy. In 2010, the value of Fiji Pine Limited's 47,933 hectares of plantation estates was estimated at \$48.3 million compared to \$54.3 million the previous year. One of the attributed drivers to the reduction of value was the increase in customary owners contribution, with the increase in annual land rental rates from \$11 per hectare to \$15 per hectare (Fiji Pine Ltd, 2010).

The involvement of iTLTB departments in such a leasing process gives rise to an internal blame game over the failings of the trust system, which is normally to the detriment of customary owners. Today, questions of over-planting of forest beyond the boundaries of the leased area and encroachment into native reserve land, is a recurring issue with no easy solution given the age and market value of the standing forest, and the capital investment. This leads to questions and conflict over the legality of such encroachments, the ownership of the standing timber and standardizing of acceptable approaches to equitable compensation.

Clearly, despite providing security and certainty to the industry and farmers, lease returns from these plantations and agricultural holdings are unreasonably low. Likewise, spin-offs from the pine industry through harvesting contracts, equity participation in processing and other value adding opportunities are minimal, often through the lack of startup capital available to the landowners. As a result, the equity participation of landowners in the commercial forest timber sector is just 1 percent, with the rest held by the industry partner.

In attempting to entice tourism investors, there are many notable examples where iTLTB saw fit to impose ceiling rent (fixed revenue) with no regard to the business potential, rising costs, risks and other economic indices, which would point to such lease covenants being unconscionable. In other cases, in an attempt to develop a 'partnership' between landowners and tourism developers, base rent and turnover income approach have been adopted as the basis of equitable return to the *Mataqali*. The difficulty in policing such provisions is in proving the real turnover figures of a resort that may be owned by a French or US consortium with holiday bookings marketed and paid for internationally, with no clear record of revenue within Fiji. That aside, it is noteworthy that in nearly all waterside developments, little is formalized regarding the possible environmental impact of such development on customary fishing grounds and/or the contributory value of the surrounding water(s) per se towards the development. The right to customary fishing rights (*iQoliqoli*) in proximity to waterside developments are, in most cases, formally registered as customary held and owned (which may not necessarily be held by the adjoining landowners) with the Native Fisheries Commission. In cases of exclusive use of customary fishing grounds by developers or the inability of the customary fishing rights owners to access their seasonal fishing grounds due to tourist activities, compensation for the adverse effects and impairment to the continuing exercise of customary rights and interests of the customary owners is in most cases neither realized nor a matter for negotiation.

The difficulty for iTLTB in managing and enabling commercial development on surplus customary land seems to be in anticipating and clearly demarcating the extent of overlapping rights and interests over any given parcel of land. The situation is compounded in waterside development for tourism and resource processes that impact on both customary land and adjoining customary fishing grounds. Proactively, and to avoid future conflict and uncertainty for all parties, it is essential that the extent of such rights and interests must be first established. It would be futile to argue at some future date that such rights and interest may be extinguished without clearly establishing and determining the quantum of what was there in the first place (see for example - *NF, J, RE, & DL Armstrong v Savage Togara Coal Pty Ltd. [1999] QLC 3*).

Plurality

From the statutory powers vested to iTLTB, it seems that the recognition of customary title (afforded through the full acknowledgement of customary owners at Cession) obviates the need to itemize what constitutes customary rights and interests, together with the facilitation of a competent land management and administration system that provides an equitable compensation regime where surplus land is used for commercial purposes. In this regard it is important that the understanding of customary title must be informed by, and based on, the relationship of customary owners to their traditional lands. This understanding is similar elsewhere in Melanesia, and the wider South Pacific.

So far in Fiji, all compensation has focused on the economics of using iTaukei (native) land with little or no consideration of what constitutes customary title, with its integral rights, obligations and restrictions. Fiji has focused on recognition and developing systems to balance the expectations of the plural registers that inevitably confront administrator(s) of customary held land. Critically, customary relationships with land do not readily translate (or adapt) to Western/European concepts of real estate and economics. Whilst ‘ownership of land title’ is a Western/European convention, ‘ownership of land’ has a much broader meaning in the traditional *vanua* context. The Western/European interpretation is in individualized possession where land and property is commoditized, whereas the traditional *vanua* understanding is intergenerational, spiritual, and grounded in notions of guardianship, stewardship and sustainability by the family, tribe or clan as a collective.

The 2010 Annual Report of the Fiji Independent Commission Against Corruption cites 323 registered complaints against the iTLTB. Much of the distrust towards the iTLTB administration of all native land stems from the interplay between the plural registers; this interplay requires transparency and full disclosure. Given the lack of consultation and understanding of this interplay, landowners are pessimistic not only about the powers of the iTLTB but the also the manner in which it reaches decisions. Given that clauses against ‘deprivation of property’ are entrenched in Fiji’s Constitution and in the operation of the common law in Fiji, the Courts over the years have interpreted the powers vested in the iTLTB literally, regarding matters of informed prior consent of landowners before renewing or issuing of leases. Further, the Courts have tended to favor a literal interpretation of section 4(1) of the NLTA in terms of administration and control of customary land, opining that individual landowners have no legal standing or capacity to be involved in the leasing of their land (see, for example, of *Meli Kaliavu and others v NLTB* (1956) 5 FLR 17; *Timoci Bavadra v NLTB* (Unreported) 11/07/1986; and by *Namisio Dikau v NLTB* (1986) 32 FLR 179).

Vakavanua (Customary Arrangements)

Given the growing unease by customary owners towards iTLTB for lack of comprehensive transparent dealings, capacity, and entrenched grievances relating to equitable compensation, some landowners have taken the law into their own hands. *Vakavanua* dealings (customary lease arrangements), whilst informal, are sometimes preferable to both the landowners and their tenants, given their mutual mistrust (and lack of confidence) in the iTLTB. In some cases *vakavanua* arrangements are more profitable between the proponents and customary owners, with customary owners feeling assured that they remain in more control of their land. In 1996 there were 1,480 customary owners (comprising 4,292 of total hectares cultivated by cane growers) who opted for *vakavanua* arrangement for cane farming on their land (FSC Grower Census, 1999).

Similarly, in cases of tourism developments, both landowners and registered customary fishing rights owners have found it financially appealing to enter into contractual *vakavanua* dealings with developers. In some cases income to the landowning unit from the *vakavanua* arrangements are more consistent and contemporary in terms equitable economic return to the ad hoc needs of the communal landowning groups. Whilst these deals, as observed, ensure a close working relation between the parties, they do lack commercial certainty and engagement rules, and as lending institutions do not recognize such transactions they can be to the disadvantage of the developer. As a result, *vakavanua* arrangements tend to work best in small scale farming ventures, or for informal leases to members of the landowning unit who want to develop a commercial enterprise. To ensure they do not out of proportion if abused through unrealistic demands of the parties, they work most effectively when moderated through chiefly involvement and closely observed traditional protocols.

From tenant's perspective, it is reported that there are also some advantages to be gained from *vakavanua* dealings, despite inherent risks of security of tenure for the lease term. Such arrangements are much quicker to process and enable early access to the land, and often enable negotiation to use the best quality land. For example, this may mean land that has been put in Reserve and otherwise would not be available to leasing to non-Fijians is made available under a *vakavanua* arrangement. For the customary landowners, there is no management and administrative fees payable to iTLTB and (prior to the changes that occurred under the amending Decrees) were also free from the policy of structured payments as per its leases and licenses regulations.

Ideally, it is preferable not to have a plural leasing system in place as we see now with iTLTB leases, Land Bank leases and *vakavanua* arrangements. In this paper we do not elaborate on the leasing arrangements over State land, which from an agricultural perspective have historically competed with the

iTLTB (via differing percentages of UCV collection). Generally speaking, tenants and investors want security of tenure, with clarity of lease term, and are happy to pay equitable market rents that are regularly reviewed. The challenge for the iTLTB is to deliver a land management service that is appropriate to the needs of both the landowners it serves and the tenants that wish to productively use customary land. This would limit the need for *vakavanua* arrangements and avoid political interference through Government initiatives like the Land Bank.

Capacity

The key question that emerged throughout the years of iTLTB's operation is how to define its future form and role. Should it concentrate on iTaukei people making decisions over native lands in consultation with the registered customary owners? Likewise, should the iTLTB be given a new mandate to first review its lease management provisions and formalize all its dealings in customary lands by engaging professionals, technology and data that comply with international best practice? Obviously the answer to both rhetorical questions is a resounding 'yes'. However, there is no illusion that this task will be simple. Making the iTLTB fit for purpose needs to be driven by the locals who understand the rigors of customary land economics, valuation, development, lease management, finance and taxation in the context of the socio-political / socio-cultural structures that support them whilst at the same time being attuned to the Anglo/Western fundamental concepts of property – in other words, all iTLTB staff need to be able to navigate and mediate the plurality of registers.

Perhaps one of the best lessons of the iTLTB for wider Melanesia where there is growing suspicion about the use of leases, is that it has showcased that leasing is an instrument that can render the freedom of doing business on customary owned land in Fiji. In this regard, the iTLTB model is a template that can be encouraged but its policies and operating protocols need constant review in order to nurture aspects that assuage fear of loss of control from a landowners' perspective whilst assuring stability and certainty to would be investors. The goal for any Land Trust or Incorporated Land Group is to provide customary owners with models of land tenure that effectively integrates both economic and cultural aspirations. Economic aspiration should not be at the expense of cultural maintenance (Report of the Review of the Aboriginal Land Trust: [1997] 2 Australian Indigenous Law Reporter 110). Below, we set out a number of recommendations that can help achieve this goal.

Operational Matters

Lease terms

For long term security and certainty, iTLTB routinely grant 50-year and 99-year leases to meet industry needs. However, there is a level of contention over the appropriateness of lease terms beyond 50 years. For example, a resort development or material infrastructure may have a return on investment that is based on a significantly shorter period. The situation was tested (in the context of mahogany plantations) in *Tiva v Director of Lands [2005] FJCA 1; ABU0015.2004S*, and *Tiva v Native Land Trust Board [2007] FJHC 117; HBC 81 of 2006*. The point at issue was that the iTLTB could not issue leases in excess of 50 years for isolated unplanned areas outside the margins of settled areas and properly designed areas. It transpired that the iTLTB had, inappropriately, issued a number of leases over unsurveyed areas for a term of 99-years. As the decision rendered those leases illegal, iTLTB was faced with the colossal problem of having to recompense developers and plantation owners for the grant of leases were void from the initial date of grant. To redress the problem, on 8 November 2007 Cabinet gazetted an amendment to CAP 134 by the *Native Land Trust (Leases and Licences) (Amendment) Regulations 2007*, which provided retrospective approval for 99-year leases by including leases for development or those in the public interest such as tourism ventures and infrastructure.

There is a need to engage a flexible approach to lease terms, ensuring that whatever term is adopted is in the best interests of the custom landowners, whilst ensuring that the term is appropriate for an investor to recoup a return on their investment. Provided that there is clarity in development leases that at lease expiration the improvements vest in the landowners, as part of the return to the landowners on forsaking their land for the duration of the lease, a number of opportunities occur during the first and subsequent lease terms to surrender and renew the lease. Such a surrender and renewal recognizes that both the land and improvements vest in the landowners. The valuation of the improved land (with the benefit of the approved improvements) is relatively straightforward and the present value of the future reversionary interest is easy to calculate.

Any such lease covenants should also consider the frequency and quantum of rent review options.

Management and ownership of improvements on Native Land

Fiji is currently in a position where many residential and commercial (with a few tourism) leases managed by the iTLTB are approaching expiry. Many of the leases are silent on the ownership of improvements, and as with the high profile situation of Government Facilities on native land around Suva, many cases are likely to end in expensive and lengthy litigation if the ownership of improvements is not clarified once

and for all. As in the cases of past British colonies, all of Fiji's doctrinal applicability on tenure and property matters has jurisdictional underpinnings inherited from its former colonial masters. Fiji's antecedence as a colony of New South Wales (Australia's first State) from where it was once administered, burdens its tenure system today. As a result Fiji has inherited an adapted NSW version of the Torrens system, where improvements are often owned separately to the underlying interest in the land. This is in stark contrast with the 99-year development leases that were used in Victorian England, where under the Westminster system the approved improvements on the land had to be given over to the landlord in good and tenable repair at lease expiry.

The burden of this interpretation afflicts the current administration and control powers of the iTLTB whereby long-term native leases for government utilities and related purposes run to lease expiry without ownership provisions relating to improvements in agreement clauses. Essentially, the underlying tenure in the land then returns to the *Mataqali* but the issue that is often contested long after the term expires is about the ownership of improvements on the land. Moreover, the UCV based rentals do not generate sufficient revenue to create a sinking fund for the landowners to buy out any tenants improvements. As a result, what transpires is a conflict situation whereby the landowners are pressured to create a lease extension at a rental of 6 percent of UCV, a rental that does not reflect that the land is now actually 'improved'. Moreover, this lack of beneficial lease management for the landowners creates the potential for what are in effect perpetual leasehold interests over the land (which is akin to alienation, albeit that alienation is precluded by the legislation).

An example is the long running case relating to the Government station / office lease in the township of Nausori. The Attorney General, in a High Court Action, *HBC No.54 AG v NLTB & MATAQALI Nakuita* instituted the matter in 2000. Premised on the basis of wrongful eviction by the NLTB as *Mataqali* trustee, the above action seeks *inter alia* a determination on the ownership of improvements on the subject land. In a more recent development, *Mataqali Nakuita* were advised that they have neither interest in the land lease nor the improvements, resulting in the *Mataqali* filing civil action 330/2011 hoping that justice will look kindly on them. The *Mataqali*, according to iTLTB sources³, sought the assistance of the Prime Minister (who, as Minister for iTaukei Affairs, is also the current Chairman of iTLTB) to resolve this long outstanding matter in 2012. The matter remains unresolved at the time of writing this paper. It is of concern that the Government is contesting the ownership of the improvements in this lease expiration, as the Government approach is most certainly to the long-term disadvantage of the *Vanua*. If the Government were to win the case, and prove that the Government as tenant owns improvements on

³ Source: Personal Correspondence with Mr Save Ralagi, iTLTB Landowners Affairs, Suva (10 February 2014).

customary land, this would set a very unfortunate precedent for all customary land in the country and dissuade landowners from committing their land for development.

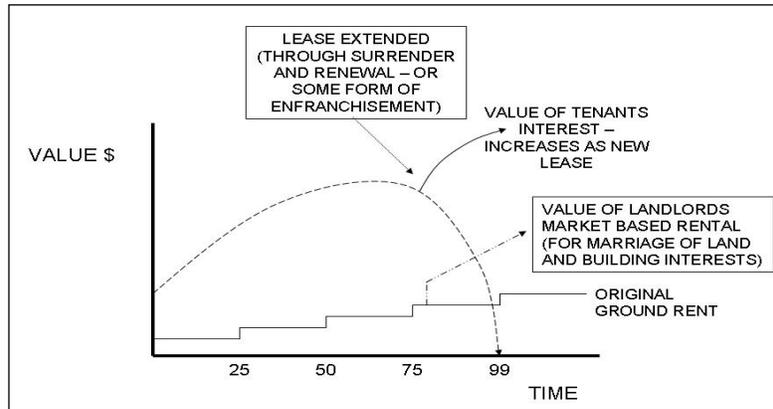


Figure 1: Marriage value of landlord and tenants interest on lease expiry (assuming continued tenant occupation and no compensation)

Source: Boydell 2008, p.61.

Conversely, if the Government were to accept that the improvements do indeed belong to the landowners, then they could merely request to be granted a new lease at a commercial rent for the premises (land and buildings) rather than relying on the hypothetical and now inappropriate (for the land is improved) unimproved capital value basis. Such an agreement would set a clear precedent for the nature of improvements on customary land and (as demonstrated in Figure 1) allow negotiations to occur during the last twenty years of a lease for extensions that reflect the ownership of the improvements with the customary landowners on reversion.

Henceforth, all new development leases granted by the iTLTB on behalf of customary owners need to be very clear in stating that the improvements will belong to the landowners and form part of the reversionary interest. Moreover, covenants need to be carefully drafted within the leases to ensure that any improvements on the land are formally approved by the iTLTB on behalf of the landowners, and clearly recorded on the lease document. The lease document also needs to make it clear that the approved improvements are to be provided to the landowners in good and tenantable repair at lease expiration (or surrender if an earlier renewal is sought).

To assist in this crucial financial remuneration for the landowners, the iTLTB needs to ensure that it has capacity to complete the schedule of condition / schedule of dilapidations in the latter years of the lease. This will be achieved by ensuring that the iTLTB trains and retains suitably qualified building surveyors who can undertake detailed property condition inspections and cost any repairs that the tenant needs to make to the property prior to expiration of the lease, or surrender/renewal arrangements are put in place.

Likewise, it is important to ensure that the iTLTB has sufficient qualified valuers who can analyze lease contracts and negotiate terms for the grant of a new lease, rent review provisions and surrender / renewal arrangements.

Reliance on a percentage of the hypothetical unimproved capital value UCV as the basis of rental determination

Much of the land that is held under a lease from the iTLTB (and for that matter the Government) is already improved and thus there is a market (or potential development) basis on which to determine the value of the land. Reliance on UCV creates a plural market, where the return to the landowners (if based on a percentage of a hypothetical UCV) bears no relationship to the economic value of the improvements that a developer or other tenant is benefiting from.

As the Pacific Islands Forum Secretariat recommends, “Administratively determined Unimproved Capital Value based returns to customary land must be avoided. Although these may seem uncomplicated, they do not facilitate a fair return to landowners” (PIFS, 2008. p.17).

Rather than rely on the outdated and hypothetical construct of unimproved capital value as a basis for rental agreements, the iTLTB must research a more equitable market based arrangement that will secure the optimal return to the *Vanua*, whilst ensuring that a lease on native land remains attractive to current and prospective tenants.

Appropriate valuation approaches

As highlighted above, there is a need to improve the capacity of iTLTB staff involved in the valuation of lease interests and also in understanding the valuation and forecasting approaches used by developers and prospective tenants on native land to ensure that the best and most equitable returns are achieved for the customary landowners. The iTLTB staff dealing with these matters need to be conversant with international best practice, as articulated in the International Valuation Standards (IVSC, 2013).

In addition to training in development feasibility and analysis, valuation capacity needs to be developed in understanding the marriage value (or synergistic value) associated with development on customary land and potential use of adjacent *iQoliqoli*. Likewise, capacity needs to be developed to deal with compensation issues where there is a taking, damage, or associated loss of Special Indigenous Value (see our prior papers for the World Bank: Boydell & Baya 2012 and Boydell & Baya 2013, that explore these issues in detail).

The Way Forward

We find that there is a need to review the lease management functions of the iTLTB to align it to contemporary land based development in Fiji. There is a need to balance the land based economic drivers of the national economy such as agriculture, tourism and resource development (amongst others) on one hand and the needs and aspirations of registered landowning units on the other. Currently, the complexity of lease management is confounded as the NLTA takes effect subject to a minimum of 22 other Acts and Decrees, ranging from Agricultural Landlord and Tenant Act to the Surfing Decree. Any review of the iTLTB lease and licensing regulations needs to have regard to international best practice, but must be undertaken in such a way as to ensure respect and sensitivity in dealing with indigenous land.

Below, we outline the range of issues that need to be considered in undertaking a review of the iTLTB leasing and licensing regulations, and also offer lessons for the lease management needs of other countries in Melanesia:

- i. Consider the range of lease terms and their appropriateness to purpose (e.g. a resort development or material infrastructure may have a return on investment that is based on a significantly shorter period than 50 years). There is a need to engage a flexible approach to lease terms. This will provide that whatever term of lease is adopted it will be in the best interests of the custom landowners, whilst ensuring that the term is appropriate for an investor to recoup a return on their investment.
- ii. Associated with the lease terms is the need to consider the frequency and quantum of rent review options (learning from the Vanuatu example, where there is a five-yearly review pattern... but to an unrealistic rental basis and no capacity to actually undertake the review process).
- iii. Fiji is currently in a position where many residential and commercial (and a few tourism) leases managed by the iTLTB are approaching expiry. The responsibility on tenants to return the improvements in good and tenantable repair on lease expiration is not clearly articulated in the wording of the leases. A clear policy that remedies this deficiency is required, together with recommended drafting protocols and wording for all new leases recognizing that the improvements will belong to the landowners and form part of the reversionary interest in the land.
- iv. There is a need to evaluate how the current arrangements address (and can be revised to incorporate) contemporary issues such as cultural heritage, carbon sequestration, environmental management, prospecting and extractive mining etc. Consider the extent to which the iTLTB has been progressive in this regard, pursuant to s.33 of the NLTA (i.e. leases for special purposes).

- v. There is a need to critically assess and (where appropriate) consider alternatives to the template terms and conditions of leases and licensing agreements currently in use, to ensure that they are consistent and compatible to the generic and specific clauses that underpin international best practice. It is important that any such terms and conditions are relevant to, and if appropriate unique, to the context of the land use and industry concerned.
- vi. Such a review needs to recognize the transdisciplinary nature of the management of customary land. An appreciation of this transdisciplinarity is essential to both the current and future capacity requirements and training needs of the iTLTB to ensure suitably qualified staff can be trained and recruited to deal with building, valuation, development feasibility, resource / agricultural / ecological economics, legal, management, planning, GIS, negotiation and client relation matters.
- vii. It is important to remember that much of the land that is held under a lease from the iTLTB is already improved and thus there is a market (or potential development) basis on which to determine the value of the land. Rather than rely on the outdated and hypothetical construct of unimproved capital value as a basis for rental agreements, equitable market based arrangements should be applied that secure the optimal return to the *Vanua*, whilst ensuring that a lease on iTaukei (Native) Land remains attractive to current and prospective tenants.
- viii. There is a need for iTLTB staff engaged in lease management to understand the valuation and forecasting approaches used by developers and prospective tenants on iTaukei (Native) Land. These officers need to understand how valuation practice on native land can meet contemporary International Valuation Standards (IVSC) and best practice. This includes building capacity to deal with compensation issues where there is a taking, damage, or associated loss of Special Indigenous Value as well as marriage value (or synergistic value) associated with development on customary land and related aspects (for example: prospecting agreements, exploration licenses, mineral extraction, cultural heritage issues, environmental impact issues, carbon sequestration, climate change, use of adjacent *iQoliqoli* areas).

Concluding Remarks

Our analysis of the iTLTB highlights that the recording of landowner groups in Fiji over the last 120 years, whilst not without some problems, has made it easier to set up a land trust administration to make surplus customary land available for economic development by using lease structures. The iTLTB has now been running (in its earlier guise as the NLTB) for almost 70 years. In this paper we have provided a

comprehensive analysis of the iTLTB and made a number of recommendations as to how it may further enhance the professional services that it offers to the customary landowners that it serves.

So what real lessons does this analysis offer for Papua New Guinea, Vanuatu and the Solomon Islands? Clearly having a formal record of all indigenous groups through the VKB has made it easier for the iTLTB to know upon whose behalf they are ultimately dealing, with associated benefits in terms of lease management and disbursement of rental income to the beneficiaries. Recent regulatory changes by the current government have changed some of the historic arrangements relating to heads of confederations and major clans in an attempt to make those rental disbursements more equitable to all registered members of a particular landowning group.

Where the iTLTB differs from the Incorporated Land Group arrangements in Papua New Guinea, the three peri-urban trusts in Vanuatu and the charitable trusts in the Solomon Islands is in terms of economies of scale. Because the iTLTB has been administering all customary land in Fiji for around 70 years it has sufficient rental income to cover its administrative costs and is able to employ a large professional team. This skill set is not matched in Papua New Guinea, for example, when a landowning group incorporates in order to negotiate with a resource company for access to their land. The negotiation power of the Incorporated Land Group is compromised by their inability, in most cases, to pay for appropriate professional services to advise and negotiate on their behalf.

The other Melanesian countries have regularly sent some of their land management staff (from government departments predominantly) to observe the workings of the then NLTB and see what lessons can be learnt in applying such land management and administration skills back in their respective countries. A question that arises is one of the scales. Like its Melanesian neighbors Fiji is spread over an archipelago of some 330 islands. This has resulted in a level of decentralization from the capital with satellite offices being established in Lautoka and Labasa to service those regional areas. There is a strong rationale for the diverse cultural groups in different islands of Vanuatu, the Solomon Islands, or Papua New Guinea to have their own regional representative trust boards with a collection of professional services.

We see such an initiative as a prudent way forward but it would be subject to significant investment by the respective governments in establishing these professional services. What is evident however is that unless governments take action to ensure that they do have professional service services available in representative customary land trust bodies that can negotiate effectively on behalf of customary landowning interests, landowning groups will remain poorly or underrepresented and land conflict will be enduring at the nexus of the plurality of registers.

There is certainly evidence of reaction to the intervention by external donors to land related matters (see for example, Elahi & Stillwell 2014, Simo 2013, and www.mildamelanesia.org). Examples of inappropriate lease-leaseback arrangements in Papua New Guinea and questionable urban leases in Vanuatu have created a level of distrust in direct government administration of customary land (which is why a Land Trust Board can be a useful intermediary) as well as a lack of faith in leasehold structures per se. Whilst this is understandable, and we have highlighted similar failings in Fiji, our view is that leases remain part of the solution rather than being part of the problem of administering customary land. The lessons in this paper serve to clarify a number of those issues. If leases are to be part of the solution it is essential that customary landowners are supported in their drafting and the covenants contained therein. This is precisely how a Land Trust structure with suitably trained professional staff can protect the landowners interests. However, as we have seen, landowners and the government feel that they are not being properly served by the existing land trust structure. As is evident in Fiji, we see customary owners moving towards vakavanua arrangements and the government trying to take control of customary land under a Land Bank regime.

Overall, we find that customary land may best be administered by a land trust that leaves the customary structure intact, and takes innovative approaches to represent best practice, to enable the plural registers to evolve and overlap in a way that satisfies a predevelopment and economic growth agenda.

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