

The background features a stylized landscape with a dark blue mountain range, a teal body of water with white wave lines, and a light blue foreground. A white rectangular box with a black border is tilted and contains the title text.

**MAKING
LAND
WORK**

Volume one
Reconciling
customary land
and development
in the Pacific

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Preface

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

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

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

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

At a glance

Reconciling customary land and development in the Pacific

Chapter 1 introduces the core ideas and concepts canvassed in other chapters.

Chapter 2 describes the basic features of the tenure systems for customary, freehold and public land in the Pacific region, focusing on customary systems, while acknowledging the great diversity among these systems.

Chapter 3 considers why some countries in the Pacific have started the process of reforming land policies and institutions. Many people in the region do not have secure rights to land. Improving tenure security can provide people with greater access to land and to finance, which can stimulate economic growth and social development.

Chapter 4 describes mechanisms to give formal legal status to customary groups and to customary decision-making authority. These allow customary owners, as a group, to enter into legally enforceable agreements with outsiders. They can also assist individual group members to invest in their own land.

Chapter 5 provides an overview of different ways to record or register customary landholdings and the issues to consider with each option. Accurately identifying boundaries and recording rights or agreements is important to avoid disputes between group members and with other groups or outsiders.

Chapter 6 considers how the land dealings of customary groups can be facilitated, particularly through leasing. Leases are an effective and flexible way for customary groups to make their land available for development without giving up ownership.

Chapter 7 discusses the importance of assisting customary groups during land dealings. There is a risk that they may not fully understand all of the terms and conditions before they sign agreements. Governments can assist and protect customary groups in a range of ways by, for example, regulating lease agreements, providing expert assistance or providing oversight mechanisms.

Chapter 8 describes the different types of disputes over customary land and various ways to resolve them. Both customary approaches and formal legal mechanisms for resolving disputes should be supported.

Chapter 9 considers why many governments in the region find it hard to gain and maintain secure access to land for public services and infrastructure. It also considers the challenges for governments accessing customary land and negotiating fair compensation for landowners.

Chapter 10 describes the challenges posed by urbanisation and the recent and rapid growth in informal settlements in or near Pacific urban centres. Providing more secure tenure for settlers should be a priority for many governments in the region if they want to reduce overcrowding, unemployment and crime, and promote economic growth.

Chapter 11 discusses the risks to women of changes in customary land management, and the opportunities for women to strengthen their rights when developments are occurring on customary land. Women play a critical role in the social, cultural and economic life of communities, yet their contribution could be further enhanced if they had more secure access to land.

Chapter 12 is about land administration. In many ways this chapter is one of the most important. Unless there is an effective and efficient system of land administration, the potential of policy improvements can be lost or not fully realised.

Chapter 13 describes the essential elements for reforming land policies, laws and institutions within the context of the Pacific region—strong leadership, broad political support and financial commitment.

Chapter 14 presents some principles that can guide land policy reform in Pacific countries.

Summary

Pacific land systems

Customary ownership is the dominant form of land tenure in the Pacific region. In most countries it accounts for more than 80 per cent of the total land area. The characteristics of customary tenure systems are significantly different from those of public or freehold forms of tenure. Land rights are managed by customary groups according to their own unique processes, which are linked to underlying social and spiritual belief systems. For countless generations, customary tenure has successfully met the basic needs of people in the Pacific region by effectively adapting to changing social and environmental conditions. Land has come to represent an important safety net in terms of the subsistence lifestyle of many people in the region.

Why is land policy reform in the Pacific necessary?

Some customary systems of tenure are being subjected to a range of new and rapidly changing forces that are testing their ability to adapt, as well undermining their ability to provide adequate tenure security for both members of customary groups and people outside the groups. These forces include technological change, new income opportunities, rapid population growth, mobile populations, burgeoning aspirations and rapid social change. Many people no longer enjoy secure land tenure. They no longer have certainty that their rights (or their group's rights) to land will be recognised by others and protected in cases of challenge. Land policy reform can help to address these tenure issues by recognising and supporting customary systems and by linking them to formal legal and economic systems.

Improvements in tenure security can deliver important benefits to customary landowners and investors—men and women—and to government and society as a whole. These include fewer disputes over land, access to finance for new businesses or housing, and greater investment by government in public services and infrastructure, such as roads, schools, hospitals, water and sanitation.

How can customary and formal land institutions be linked?

Countries in the Pacific region have two different systems of governance. It is important to recognise both the customary (largely oral) institutions that have served communities for thousands of years and the formal (written) institutions of the modern nation state. These systems can coexist harmoniously for the benefit of Pacific peoples. The challenge is to establish links between the customary and formal institutions. There are five ways this has already been done, both within and outside the region:

- » by creating legal mechanisms to recognise customary groups
- » by formally recognising the landownership of customary groups through a process of recording or registration
- » by facilitating the leasing of customary land in a way that fairly distributes benefits between landowners and leaseholders
- » by establishing regulations and institutions that support, assist and protect customary landowners during negotiations with governments and investors
- » by supporting both customary and formal institutions in resolving different kinds of land disputes.

By formally recognising customary groups

Legal mechanisms to formally recognise customary groups are required in some parts of the Pacific. These mechanisms could include landowner trusts, incorporated landowning groups and registration of individual customary landowners. Their purpose is to give customary groups a presence in the formal legal system. The most suitable model will depend on a variety of factors and circumstances, including the strength of supporting state institutions. Landowner trusts and incorporated landowning groups can be particularly effective and efficient options for this task.

By formally protecting customary landownership through recording or registration

Some customary groups want to gain formal recognition of the land over which they have authority. The best way to formally connect a particular customary group to a particular parcel of land is to record important information about the land in a format that can be used for future reference. Often, tenure security can be provided for landowners and other land users by recording or registering only information about land dealings rather than information about land rights. Moreover, there are often advantages in recording or registering ownership at only the group level rather than the individual level. This can avoid the records or the register becoming out of date.

By facilitating dealings in customary land

There is a strong desire by many Pacific people to maintain customary authority over land. But some also want to use their land to generate income and gain access to social services and business opportunities. Leasing their customary land enables them to do both. Leases are a flexible mechanism for doing business. They have the potential to satisfy the requirements of investors for secure tenure, yet enable customary landholders to retain ownership. In some cases leases can be used to gain access to credit.

By protecting and assisting customary groups in land dealings

Many customary groups are often ill-equipped to deal with the complex legal arrangements involved in negotiating leases or other land use agreements with investors, developers and governments. To ensure negotiations are fair, there needs to be assistance and protection available for customary groups. Ideally, they should be in a position to provide 'free, prior and informed consent' before any development occurs. There is a range of ways to do this—for example, establish an intermediary organisation that is specially equipped to provide expert advice and assistance to customary groups; regulate lease agreements to ensure that important conditions, such as regular rental reviews, are inserted into all agreements; or require government approval and oversight of land use agreements.

By supporting customary and formal institutions for resolving land disputes

For disputes related to customary land to be resolved effectively, formal legal institutions need to work with customary authority. Pacific countries have a relatively high number of disputes involving customary land that can be difficult to resolve. Usually local institutions are best placed to manage the complexity of customary land disputes; they are more accessible, resolve issues faster and are less expensive than government institutions. However, for disputes that cannot be resolved by customary institutions or that involve outsiders, formal legal institutions such as courts are also needed. Ideally, a system that combines customary and formal institutions should be established to allow final and enforceable determinations and minimise opportunities for claims to be pursued in multiple forums.

What are some other benefits of land policy reform?

As well as contributing to tenure security for customary landowners, investors and developers and increasing the availability of customary land for social and economic development, land policy reform can benefit government, urban settlers and women.

More land for public purposes

Governments need to have access to customary land to provide the infrastructure and public services necessary for a prosperous and well-functioning state. But obtaining this access can be contentious. Although governments can compulsorily acquire customary land, negotiating access through leases—and establishing partnerships between landowners and the government to share the benefits of developing the land—can usually deliver more sustainable outcomes. Government acquisitions of land during the colonial era sometimes caused grievances that are still being pursued through the courts.

Greater tenure security for urban settlers

Major towns and cities in the Pacific region are growing rapidly, especially as people leave rural areas in search of new opportunities and services. Many people face no alternative but to live in informal or squatter settlements without secure land tenure. In many areas, such settlements are at crisis point with an ever-growing number of people living in conditions of poverty and deprivation. The first step in dealing with this crisis is for governments to acknowledge the reality of urban growth and both the problems and the opportunities it brings. Efforts are then needed to formally plan and release sufficient urban land to accommodate the population growth. This requires a well-functioning urban planning system and a willingness to convert state land into residential land and to work with customary landowners to convert informal arrangements into formal legal arrangements.

More secure access to land for women

Migration, urbanisation, population growth and commercial developments on customary land present risks for women in customary groups. Such developments lead to changes in land use, which can leave women with fewer rights and less access to land than they previously had. The control men have over customary land can be increased during negotiations with outsiders because of the greater role men generally have in customary decision making. These risks to women can be addressed in part by ensuring that the rights of women are formally acknowledged in any dealings involving land tenure and use.

Why is effective land administration important?

Effective land administration is crucial for land tenure security, as it implements land policy and the rules of tenure. Yet establishing formal land administration institutions can be expensive and must compete with the many other demands made on the limited resources of the state. Strengthening formal land administration means tailoring the scope and depth of functions to the available resources, minimising opportunities for corrupt land dealings, and building and maintaining the technical and managerial skills of staff in land departments and related agencies. Acknowledging and working with customary institutions that are effectively providing tenure security can help to minimise costs and prevent duplication of effort.

What are the essential ingredients of policy reform?

Reforming land policy is a complex process in any country. The deep relationship between land and culture in Pacific societies adds extra dimensions. Although land tenure is a technical issue, in customary systems it is foremost a social issue. It affects men and women and their identities as members of families, customary groups and broader national communities. Governments and communities seeking to improve their land policies should recognise that it is a process that may take decades rather than years. It must be approached in small, structured steps built on robust and open community consultation and participation.

Are there ‘Pacific principles’ for land policy reform?

Because of the great diversity among customary land systems in the Pacific region, it is not possible to present specific land policies that are relevant to or ‘fit’ all Pacific countries. But it is possible to identify some broad principles to guide policy reformers and implementers in Pacific countries:

- » make tenure security the priority
- » work with and not against customary tenure
- » intervene only if it is necessary
- » ensure land policies reflect local needs and circumstances
- » be prepared for long timeframes to achieve lasting reform
- » actively involve stakeholders rather than only informing them
- » adopt simple and sustainable reforms
- » balance the interests of landowners and land users
- » provide safeguards for vulnerable groups.

1 Introduction

‘Land reform can no longer be ignored.’

Hon. Dr David Derek Sikua, Prime Minister of Solomon Islands, in a major policy speech to Parliament, 18 January 2008

‘We cannot remain complacent. The costs of ignoring land issues are too high.’

Rt Hon. Sir Michael Somare, Prime Minister of Papua New Guinea, at the launch of the National Land Development Taskforce, 4 May 2006

The move to land policy reform

In the Pacific region, land policy reform¹ is on the agenda. Papua New Guinea is implementing an innovative program to strengthen its land administration systems, make more customary land available for development and reduce the number of disputes over land. Since 2005 Vanuatu has also been developing a substantial land policy reform program that focuses on protecting customary ownership and ensuring fair dealings in land and sustainable development. There is also activity in other parts of the region. East Timor, Solomon Islands, Samoa, Tonga and Kiribati are either considering or undertaking land policy reform.

The growing push to reform the policies, laws and institutions governing land is not coming from governments alone. People in many countries recognise that their livelihoods and those of their children and grandchildren depend on sensible and sustainable development of their traditional lands. Land is crucial for food production, shelter, community development and economic wealth. For customary landowners and for countries as a whole, the potential social and economic benefits of making more land available for development are enormous.

¹ ‘Land policy reform’ involves changing the policies and institutions associated with land. It is usually restricted to changing the land administration system, rather than redistributing land rights to different segments of the population, which is often referred to as ‘land reform’ (Burns 2007).

As well as the potential benefits, there are great challenges. Land policy reform requires broad community consensus. Large-scale reform programs also require wide-ranging technical and managerial skills, long timeframes and adequate funding. In custom-based societies where land is such an important part of culture, identity and community, the task is more complex and sensitive. The impact of globalisation means that in many parts of the region traditional authority is not as strong as it once was and customary groups are themselves often divided over the need for and the direction of land policy reform.

Reconciling customary land and development

The premise underlying this report is that, despite the challenges, land policy reform can be undertaken successfully and sustainably if it is approached in a structured and consultative way. *Making land work* is based on the view that reform efforts are much more likely to be successful if they acknowledge the continuing relevance of customary land tenure systems. The central thesis of this report is that making land work means developing mechanisms to link customary land systems to the formal legal and economic systems of the modern nation state.

Making land work strives to take into account the diversity of countries in the region and the broad spectrum of individuals, communities, organisations and institutions that use and manage land. This report provides an overview of the main issues that Pacific countries need to consider if they choose to reform land policy. It will be a useful reference for governments and communities wishing to undertake policy reform to:

- » increase the amount of customary land that can be used for social and economic development
- » create social and economic benefits for customary landowners and the wider public
- » strengthen the legal rights and tenure security of landowners and land users
- » reduce the number of land disputes and the time taken to resolve them.

2 Land tenure systems in the Pacific

‘Land is our life. Land is our physical life—food and sustenance. Land is our social life; it is marriage; it is status; it is security; it is politics, in fact it is our only world ... We have little or no experience of social survival detached from the land.’

Residents of Bougainville, quoted by Dove, Miriung, Togolo (1974)

In the Pacific region there are basically three systems of land tenure—customary, public and freehold. Most land in the region is under customary authority and in most countries it represents more than 80 per cent of the total land area (Table 2.1). While public and freehold land represents only a small proportion of a country’s land area, it is often located in the most productive and accessible places, and is usually supplied with the infrastructure for economic and social development.

Customary land

Distinct customary systems of tenure have evolved on thousands of different islands and areas within the Pacific region. In any country there may be dozens of different types of customary tenure but in some of the Melanesian countries the number is higher. Despite their complexity and diversity customary tenure systems do share some common characteristics (Box 2.1), which differ significantly from those of public or freehold systems.

The various aspects of customary tenure—inheritance, allocation of usage rights, dispute settlement and recordkeeping, for example—are managed by customary groups according to their own unique processes, which are often linked to underlying social and spiritual beliefs (see Annex B). Most governments in the Pacific region have tended to avoid interfering with customary tenure systems, in terms of how they allocate rights, manage the land and keep records.

TABLE 2.1 » DISTRIBUTION OF LAND BY SYSTEM OF TENURE IN THE PACIFIC REGION

	Public ^a	Freehold ^b	Customary
Cook Islands	Some	Little	95%
East Timor ^c	Some	Some	Most
Fiji	4%	8%	88%
Federated States of Micronesia	35%	<1%	65%
Kiribati	50%	<5%	>45%
Marshall Islands	<1%	0%	>99%
Nauru	<10%	0%	>90%
Niue	1.5%	0%	98.5%
Palau	Most	Some	Some
Papua New Guinea	2.5%	0.5%	97%
Samoa	15%	4%	81%
Solomon Islands	8%	5%	87%
Tokelau	1%	1%	98%
Tonga	100%	0%	0%
Tuvalu	5%	<0.1%	95%
Vanuatu	2%	0%	98%

^a Includes Crown land and land owned by provincial and local governments.

^b Includes land that is not strictly freehold, but similar in characteristics, such as the 'perpetual estates' found in Solomon Islands.

^c East Timor does not as yet have a separate legal category of 'customary land', even though most of its rural land remains under customary forms of authority.

Source: Compiled and calculated from various sources, including interviews on field trips and published information.

BOX 2.1 » CHARACTERISTICS OF CUSTOMARY TENURE SYSTEMS

Although customary land tenure systems vary greatly across the Pacific region and it is risky to generalise, they do share some common features. For present purposes, some of the main characteristics of customary tenure systems follow.

- » Access to land primarily stems from birth into a kinship group.
- » Groups based on kinship or other forms of relationship are the main landholding (or 'owning') units.
- » The main land-using units are individuals or small household units.
- » Men, particularly chiefs, elders or senior men within the customary group, have the main say in decisions over the group's land matters.
- » As well as being a source of power, land is a focus for many social, cultural and spiritual activities.
- » There are usually ways to accommodate the land needs of anyone accepted into the group. Outsiders—for example, refugees from tribal fights—are sometimes adopted by a group and gain the privileges of group membership.
- » Land can be transferred only within existing social and political relationships.
- » Rights to access land are constantly adjusted to take account of changes in group membership—some groups increasing and some dying out—and the need to redistribute land.

Source: AusAID (2006).

Although customary land is often described as being 'owned' by a group, this does not necessarily mean that all members of the group have equal access to the land. Each individual within a customary group has distinct and often different interests and rights to use, control and transfer land and land-based resources (Box 2.2). Some rights are vested exclusively with a particular individual (for example, rights to harvest a particular tree); some are vested in families or households (for example, rights to grow a crop); and some may be shared equally between all or a large number of the group's members (for example, the right to decide, or to veto a decision, to swap land with another customary group).

Customary groups often allocate land rights to members on the basis of function rather than demarcated area. This can result in several members having different functional rights to the same land. For example, an individual may have the right to hunt on the same land as someone else has the right to collect timber. Reciprocal obligations often underpin the allocation of land rights. For example, a family or an individual may be granted rights to harvest timber for subsistence use on the condition that they help the group to defend the forest (Vegter 2005).

BOX 2.2 » EXAMPLES OF CUSTOMARY LAND RIGHTS**Usage rights**

Rights to use land for traditional purposes, including:

- » hunting, fishing, growing crops, grazing animals or collecting food
- » manufacturing materials, artefacts or other natural products from the resources of the area
- » erecting a residence and other infrastructure
- » learning and communicating cultural, natural and spiritual knowledge, traditions and practices of the area.

Control rights

Rights to make decisions about the land, including:

- » how land should be used and who should use it for traditional purposes
- » how to sell or dispose of products from the land by trade, exchange or gift
- » who should benefit from the income derived from the land.

Transfer rights

Rights to transfer land, or specific rights to use land, to other people, including:

- » through inheritance or membership of the customary group
- » through negotiation and agreement with another customary group or an outsider.

Source: Adapted from FAO (2002) and Sutton (2001).

Across the Pacific the distribution of rights to customary land depends largely on local social norms and kinship systems. Considerable care therefore needs to be taken in generalising regional or country patterns from the diverse local systems. Even in local systems, the structure of inheritance and group organisation can be based on complex and fluid principles rather than rigid rules. For example, on Gaua in Vanuatu, inheritance patterns have oscillated between patrilineal and matrilineal elements, leading to conflict among men and women over the nature of 'custom' itself. Similarly, on parts of Espiritu Santo in Vanuatu, lines of descent and marriage are determined by reference to the mother, but land is inherited through the father and residence is determined by the location of the father. Hence the local system has matrilineal, patrilineal and patrilocal elements—which means that rights to land are negotiated by reference to gender as well as kinship, marriage and locality.

The social hierarchies that define social status within a customary group also determine the distribution and exercise of land rights. Relationships within a landowning group may be determined by age, social rank and gender. For example, in Fiji, women have fewer rights to land than do men, but women of high social status have more extensive rights than women of low status.

A woman's land rights often vary over time. For example, in some parts of Papua New Guinea, even though a woman may move after marriage to her husband's land, she could retain the right to access her customary group's land. That right depends on a variety of factors, such as her physical proximity to the land, the availability and productive capacity of the land, the rules of her husband's group, and the cooperation of her husband (Sack 1973). Historically, in parts of Fiji, if a woman's husband died the male members of her clan invited the widow to return to her village and live there with rights to use the land to support herself and her children. This custom protected women from the risk of landlessness and poverty. The topic of women, customary land and development is discussed in more detail in Chapter 11.

Public and freehold land

Public land is owned by the state whereas freehold land is owned and controlled by individuals or corporate bodies. Most public and freehold land in the Pacific region was alienated from customary authority during the colonial era (see Annex B). Public and freehold land can generally be sold or transferred to someone else, and is referred to as 'alienated' land (Box 2.3). This is in contrast to customary land, which in most countries in the region cannot be sold except to other customary groups or the state. Recordkeeping and dispute settlement for public and freehold land is managed by the state.

BOX 2.3 » TYPICAL CHARACTERISTICS OF ALIENATED LAND—PUBLIC AND FREEHOLD LAND

- » Rights to the land are set out in legislation or other written documents (such as lease agreements).
- » The land boundaries are clearly identified, usually by surveys.
- » The holders of all rights to a parcel of land are clearly identified or identifiable.
- » Usually the tenure to a parcel of land is protected by a registered title.
- » The law provides the titleholder with powers to sell, lease, mortgage or enter into other dealings with the land.

Source: AusAID (2006).

3 Why reform land policy

‘One of the most important factors of production in Papua New Guinea is land, which is locked up because of outdated and inefficient land administration and legal frameworks, and divergent customary land tenure systems.’

Thomas Webster, Chairman, Papua New Guinea’s National Land Development Taskforce (2007, p. vii)

‘What [is needed] at this time, is to find a middle ground as to how [our country] can continue to enjoy its custom and culture, but at the same time allow a cash economy to develop in a fair way.’

Russell Nari, Director General, Ministry of Lands, Vanuatu, in his address to the Vanuatu National Land Summit, September 2006

For countless generations, customary land has successfully met the basic needs of Pacific people. Customary groups have adapted their land tenure systems to deal with, among other things, fluctuations in population, conflict and environmental stress. Land has come to represent an important safety net for many people in terms of a subsistence lifestyle. Unfortunately, customary tenure systems can sometimes fail to provide tenure security for members of customary groups and others. This is already happening in the Pacific. In some places they are failing to adapt at a sufficient pace to cope with the range of new demands on them. This chapter considers the reasons why tenure security is so important for all people within a society before examining why some people in the Pacific region do not have secure land tenure and how to respond to this problem.

The benefits of secure land tenure

Secure land tenure is important for social and economic prosperity and stability in all societies. Land tenure is the relationship, whether defined legally or customarily, among people with respect to land. Land tenure provides rules about who has access to use, control and transfer land and under what conditions.

Secure land tenure is defined as the certainty that a person's or a group's rights to land will be recognised by others and protected in cases of challenge. Secure tenure can exist or cease to exist with respect to any landownership structure—freehold, state or customary. The level of security does not depend on who the owner is; it depends on the cumulative recognition by others of a person's or a group's rights to the land.

Secure land tenure provides important benefits for landowners, communities and society as a whole. It encourages people to invest in land and develop businesses, homes and communities. Few people will develop land and property they might lose rights to.

Within a customary group, secure tenure enables an individual or family with an allocation of land to use that land for a particular purpose, such as agriculture or hunting. For a customary group, secure tenure enables it to lease some of its land to a group member, an urban settler or an outside developer in return for income.

For an investor, secure land tenure is important for gaining access to credit. Landownership or the right to use land (for example, through a lease) can be used to borrow money from a financial institution for investment, provided that the property rights are accepted by the financial institution as a valid form of security or guarantee (that is, collateral) for the loan. Financial institutions are reluctant to lend to people who cannot offer clear and transferable property rights as collateral. Access to credit creates opportunities for an individual, corporation or a group to buy new equipment, develop the land, start a business or extract natural resources.

Secure tenure is also important for a government as it enables it to confidently build infrastructure such as roads, and deliver public services such as education and health care. Such investments can ultimately increase the social welfare and prosperity of an entire country.

The problems of insecure land tenure in the Pacific

In many parts of the Pacific, people's access to customary land is sufficiently secure for their basic needs; their primary source of tenure security comes from their membership of a customary group.

However, in some parts of the Pacific, customary systems are failing to provide adequate tenure security for group members and/or outsiders, especially women, local and foreign investors, governments and urban settlers. Some of the underlying reasons for this include:

- » increased interaction with outsiders and the introduction of new ideas, which have sometimes undermined customary authority
- » rapid population growth and migration
- » ineffective state institutions and poor perceptions of the legitimacy of some institutions
- » social and political instability.

THE WEAKENING CUSTOMARY AUTHORITY

In some areas of the Pacific, increased interaction with outsiders such as central governments, democratic institutions, and Christian missions has weakened customary forms of authority. And investors using new technologies and engaging in globalised trade have had an impact on authority. They have introduced new ways of using land, including large-scale harvesting of timber and minerals, agribusiness, roads and other infrastructure, and tourism. New ideas and opportunities for customary groups to benefit from their land can mean that customary authority is less effective in regulating the behaviour of group members or the leaders of the group.

Changes in customary authority can reduce land tenure security for some members of customary groups and strengthen it for others—for example, when land deals take place without the consent of all landowning members of the group. Historically in the Pacific region, such changes have tended to reduce women's access to land.

Loss of authority can also weaken processes for resolving disputes involving customary land, so that disputes remain unresolved for a long time. Because customary tenure systems are often not recorded in writing and many different people or groups may claim to have rights to the same piece of land, neither customary landowners nor investors are able to protect their rights.

POPULATION GROWTH AND MIGRATION

In many rural areas, population growth and limited employment and business opportunities have led to significant migration from these areas. In Melanesian countries such as Papua New Guinea, Solomon Islands, Fiji and Vanuatu, large numbers of rural people have moved to urban centres. In Polynesian countries, such as Samoa, Tonga and the Cook Islands, many have moved to other countries, particularly New Zealand, because of favourable entry conditions.

Large-scale migration from rural to urban areas has undermined tenure security in a number of ways. A lack of affordable freehold land for rural migrants to use for housing and businesses in urban areas has forced them to informally settle on public land and the customary land of other groups. The new settlers often try to strengthen their tenure security through, for example, physical force, political patronage and rental agents. Because the first wave of settlers are usually men and they make the initial informal arrangements, the women who follow them usually have neither informal nor formal tenure agreements in which they have participated or to which they have consented. Some informal settlements have existed for decades, creating great uncertainty over land rights and boundaries. The resulting tenure insecurity is a key driver of other problems in the settlements, such as conflict, crime, poor health and inadequate sanitation.

Despite these challenges, urbanisation offers many Pacific countries opportunities for future development. The highest levels of economic activity usually occur in urban areas. For example, around 60 per cent of Fiji's gross domestic product is produced in those areas (Storey 2006). Some governments are responding to this by trying to make more affordable freehold land available, establishing temporary leases for blocks of public land, or working closely with customary landowners to formalise existing settler arrangements. How to manage urban growth and improve tenure security is discussed in more detail in Chapter 10.

The people who left Polynesian countries for other countries have provided an important economic benefit as a result of the money they send home to their families (so-called remittances). Remittances are a major source of income for many people in the Pacific region. However, a problem is that many migrants retain rights to their customary land despite living overseas. They are able to influence decisions about land use and potentially undermine the tenure security of the owners who still reside on their customary land.

OUTDATED INSTITUTIONS FOR ADMINISTERING LAND AND RESOLVING DISPUTES

Tenure security for owners of public and freehold land and for lessees of customary land depends on government institutions maintaining accurate records and enforcing agreements. Many Pacific countries have land administration institutions inherited from their colonial eras, which are becoming less and less workable, relevant or sustainable. Delays in processing transactions and records are common problems. Some court systems are also struggling to enforce agreements or resolve large numbers of land disputes. The costs and delays in getting an agreement enforced or a dispute resolved can reduce the value of the agreement or the value of the land itself.

SOCIAL AND POLITICAL INSTABILITY

While insecure land tenure can create disputes and conflict, the relationship also works in reverse—conflict and instability can undermine tenure security. Places such as East Timor and Bougainville in Papua New Guinea have suffered instability that at times has escalated into violent conflict. The cause of conflict is often a dispute over rights and access to economic benefits, including rights to land or housing. The conflict can be between different customary or ethnic groups or between landholders and the government.

Conflict can force people to leave their land, enabling other people to encroach on it. Resolving disputes about land rights lost as a result of conflict can be a complex and sensitive process, especially if land records have been destroyed or did not exist in the first place.

Options for improving land tenure security

Broadly speaking there are three different ways that countries in the region could improve the security of land tenure: the minimalist approach, the privatisation approach and the middle way.

THE MINIMALIST APPROACH—MAINTAINING EXISTING INSTITUTIONS

Basically maintaining the status quo—that is, countries keep their present land policies, laws and administrative systems—is the minimalist approach. In most places customary land tenure systems still meet the needs and aspirations of many people. Even though landlessness is emerging as a problem and women are often excluded from formal landownership decisions, a significant proportion of Pacific populations can access land to meet their basic survival and livelihood needs.

This option has a number of significant risks and is not a viable long-term policy approach. Without strengthening the land rights of people who live in informal urban settlements, the levels of poverty and conflict in those settlements will increase. Without processes that provide for landowners to share fairly in the benefits generated from their customary lands, the potential for civil unrest increases. Without adequate safeguards in place to regulate transactions involving customary land, so-called ‘leaders’ can deceive and exploit their fellow landowners by making deals behind their backs and ‘running off with their timber or mining royalties’. Without more robust tenure arrangements for public land, governments may not be able to provide hospitals, schools, roads or other important public infrastructure and services. Without greater recognition, women may miss out on important benefits associated with using and developing land.

THE PRIVATISATION APPROACH—REMOVING CUSTOMARY INSTITUTIONS

The privatisation approach involves subdividing customary land into ‘private’ parcels that individuals can freely sell, lease or mortgage. Under this option, customary tenure would be radically changed. Advocates of this option argue that customary landownership is an impediment to economic growth.

In most Pacific countries large-scale privatisation of customary land is not a viable policy option. Apart from the practical, political and legal impediments, there are serious risks associated with forcibly converting customary land into individualised titles. According to a number of comparative studies (see Fitzpatrick 2005) the risks associated with privatisation include:

» Inequality and social conflict

Privatising customary land opens opportunities for wealthy and well-connected landholders to claim disproportionately large amounts of newly registered land, at the expense of the poor and those who are less able to access formal institutions and advice. Registering rights to customary land in terms of ‘owner’ or ‘user’ can oversimplify aspects of land tenure that allow some types of access—at different times and in different ways—to all members of a customary group. Women who have only usage rights are often particularly disadvantaged. Because of its ‘once and for all time’ nature, registration of individual rights can also activate a large number of dormant customary land disputes.

» **Landlessness and loss of social insurance**

Privatising land rights grants individual owners in-principle rights to exclude others and to mortgage or sell their land to others. The result can be an increase in landlessness. This can occur if the landowners transfer their land to people outside their customary groups through voluntary sale or are forced to sell their land because they have defaulted on mortgage arrangements. Another result can be a loss of cohesion within customary groups. In either case, group members lose the social insurance against landlessness, poverty and environmental stresses that is provided by customary systems of land tenure. The financial burden of supporting these group members then falls on the state and society as a whole.

» **Informality and inaccuracy of records**

Privatising customary land involves registering the rights and boundaries to individual land parcels. The value of land registration lies in its accuracy. Buyers, investors and credit providers can enter into transactions with confidence that the land register accurately reflects the land rights or land agreements over the land. But a common experience of land registration programs is that the land registers are not kept up to date because it is too expensive, inconvenient or unfamiliar for local landowners to record new transfers and transactions. As a result, land registers lose their accuracy (and value) over time.

Even if the risks associated with land privatisation can be avoided, individual land titles are not necessary for tenure security and are not a precondition for economic development on customary land. Tenure security and economic growth can be achieved with group ownership. Indeed, individualising customary land can sometimes be counterproductive to the economic development of the land (Altman, Linkhorn & Clarke 2005).

THE MIDDLE WAY—LINKING CUSTOMARY AND FORMAL INSTITUTIONS

Instead of the two extremes—do nothing or make radical changes—there is a ‘middle way’ to increase tenure security. Land policy reform need not abolish customary systems of tenure. Instead it can build on them by adapting the formal land administration system so that it recognises and supports customary institutions. This can be achieved by linking customary tenure systems to the formal economic and legal systems. Such links involve recognising the rights and authority of customary groups in relation to land, and allowing leases or other agreements for customary land to be used by individuals, organisations or corporations. It also involves allowing certain types of disputes that cannot be resolved by customary authority to be referred to mediation or arbitration by state-supported institutions. In short, at the same time as customary rights and authority are recognised, insiders and outsiders are given the security they need for investment, and mechanisms are provided for managing and resolving intractable disputes.

Evidence from the Pacific region is that stronger land rights will contribute substantially to long-term economic development if they are supported by an environment that encourages general economic growth—roads, market access and effective governance, for example.

Some countries in the Pacific region have already begun to reform their land policies. Some governments have helped customary landowners to take advantage of new ways of using land, by recording land boundaries and land use agreements and creating ways for the group to gain recognition in the formal legal system. Some have strengthened customary authority in relation to natural resource management and dispute resolution. And some governments have acted to prevent conflict by entering into agreements with occupiers and users of land to share the benefits derived, even where the government has formal legal ownership of the resource.

These countries have broadly adopted the ‘middle way’ to improve tenure security. They are pursuing a variety of ways to link customary systems to their formal legal and economic systems.

4 Recognising customary groups

‘... there is no “best practice” model for recognizing customary tenure.’

Daniel Fitzpatrick (2005, p. 471)

One way to link customary institutions to formal institutions is to enable customary owners to create a legal identity for themselves as a landowning group, or as individual members of a landowning group.

Most countries in the Pacific recognise in their Constitutions or legislation the authority of customary groups to manage their ancestral land in accordance with their traditions and customary law (see Annex B). This prevents the removal of land from customary groups, except in specific circumstances such as when the government needs land for a public purpose.

However, if a customary group wishes to enter into an agreement with an outsider to develop some of their land the group will normally need to deal with the outsider in a formal legal way. Many outsiders will insist on entering into an agreement with a legal entity so that they can seek the assistance of the state to enforce it if a dispute arises later.

If customary groups are unable to create a formal identity for themselves, most legal systems will recognise all members of the group, or a specified number of people within the group (for example, adult males), as owners of an undivided share of group land. Unfortunately, this shared ownership, known as ‘co-ownership’, rarely facilitates dealings with outsiders for several reasons.

- » All the landowning members of the group must be identified and have their names recorded on any land dealing.
- » All landowning members of the group (including absentee owners) must consent to the dealing, otherwise any member may subsequently challenge the dealing on the basis that their consent was not obtained.
- » The identity of the landowning members of the group must be updated for each new agreement.

Long-term land developments involving large numbers of co-owners are unlikely to proceed, particularly if the landowners are dispersed, if they are difficult to identify or if not all landowners are happy about the proposed development. The costs and risks associated with this scenario are too high for many outside investors and developers.

A number of countries in the Pacific have attempted to overcome the costs and risks associated with doing business with customary landowning groups. The mechanisms used include landowner trusts, incorporation of landowning groups and registration of individual customary landowners. The characteristics, benefits and disadvantages associated with each mechanism are now described.

Landowner trusts

In some countries a customary landowning group is able to create a legal device known as a 'trust' to gain formal legal recognition for the group as a whole (see Volume two, Case Study 2). The key actors in a trust are the trustee(s), who are usually the leader(s) of the group, and the beneficiaries, who are the customary landowners. Every trust is unique and will reflect the terms of the agreement between the trustee(s) and the beneficiaries, as well as the common law or relevant legislation (if any exists). Many trusts have the following broad characteristics.

- » The trustee(s) holds legal title to assets (the land).
- » The trustee(s) may enter into land deals with other parties (for example, through a lease).
- » The trustee(s) must act in the interests of the beneficiaries.
- » Land dealings by the trustee(s) must comply with the terms of the trust.
- » All net revenues and benefits from management of the trust (that is, profit from land dealings) must be passed on to the beneficiaries or used as otherwise provided for by the terms of the trust and other applicable legal provisions.
- » The trustee(s) may not obtain any personal benefit from dealings in the trust, other than those agreed by the beneficiaries or allowed by the trust agreement.

A trust has certain advantages as a mechanism for facilitating dealings in customary land. It provides a degree of legal certainty for people dealing with the trust. Outside investors can transact with the trustee(s), with full confidence that they are dealing with the legal owner(s) of the land. Complaints by beneficiaries lie against only the trustee(s)—they are internal to the trust and do not affect the legal validity of a land transaction.

Trustees are subject to strict duties that have been developed by the common law courts. These duties do not need to be specifically incorporated into trust agreements. There are a number of wide-ranging remedies associated with trusts that allow, for example, benefits appropriated by trustees to be returned to the beneficiaries.

A trust is flexible because it is created by agreement among beneficiaries—the customary landowners. Trust agreements do not have to include any particular terms or take any particular form. Their flexibility is useful in relation to:

» **Recording and registration**

Trust agreements must be recorded in writing. Trusts do not need to be registered or require approval and monitoring through bureaucratic mechanisms (as with an incorporated customary landowning group). Some countries regulate trusts over customary land through legislation, which may include a requirement for them to be registered.

» **Nature of the trustee(s)**

A trustee can be an individual, a group of individuals or a legal entity such as a statutory body. Candidates include traditional leaders, elected representatives or an incorporated land council that may include expert administrators and advisers. For example, the Native Land Trust Board in Fiji is a trustee of customary land as well as a statutory body (see Chapter 7, particularly Box 7.4).

» **Authority of the trustee(s)**

Being able to limit and define a trustee's authority provides considerable opportunity to design trusts in ways most suited to the cultural, social and economic circumstances of the landowning group. The authority of the trustee(s) could be linked to the traditional decision-making processes of the landowning group by, for example, using an advisory body or appointing a customary leader as the trustee.

» **Beneficiary consent**

Landowning groups may design a trust to ensure all decisions reflect the informed consent of beneficiaries (see Box 4.1). For example, the trustee(s) could be required to inform beneficiaries prior to making major decisions, and obtain the consent of beneficiaries for those decisions. The criteria for establishing consent could be unanimity, two-thirds approval, or some other formula. Alternatively, consent could be granted through an advisory body.

» Distribution of benefits

The trust may require all trust income to be distributed at regular intervals to beneficiaries, or some of that income to be distributed and the rest invested. Alternatively, the trust may leave the timing and extent of distribution to the discretion of the trustee(s). The trust may include a requirement that all beneficiaries receive equal distributions of benefits, or that some receive more than others. Alternatively, the trustee(s) could be limited to specifying the total amount of benefits for distribution, leaving the proceeds to be distributed by a customary decision-making authority or a formal administrative body (see Box 4.1).

The benefits may be distributed to the beneficiary group as a whole, rather than directly to individuals. Group benefits could be used for improving the social and economic conditions of the community through community groups and women's groups, or for building infrastructure or providing social services such as education.

» Range of application

Trusts can be set up for small groups of families with modest assets, or for community groups consisting of thousands of people with significant assets. Their responsibility can be limited to land, or include other investments.

In Solomon Islands the 1968 Land and Titles Ordinance allows up to five named trustees to hold legal title to land on behalf of a customary group. The trustees have power to deal in that land if those entitled to a major portion of the beneficial interest in the land consent to the deal by signing a statutory declaration. Similar laws were proposed in 1971 in Papua New Guinea, but were withdrawn after criticism of, among other things, their potential for abuse by traditional leaders.

The potential for trustees to abuse their power remains the major disadvantage of the trust mechanism. If the trustees are customary leaders, experience suggests that traditional obligation may not be sufficient to prevent fraud or misappropriation of money and other benefits generated. Some customary landowners may find it difficult to access the formal court system if they have been the victims of fraud. Moreover, while trustees may be held accountable through requirements of disclosure and consent in the trust agreement, the drafting and insertion of these requirements involve costly legal advice and a degree of knowledge of and familiarity with legal institutions among customary landowners themselves.

Whether a trust is the best vehicle for formalising landownership depends on the circumstances of the landowners, the legislative and regulatory framework and the effectiveness of the formal institutions of the state.

BOX 4.1 » LAND TRUSTS IN VANUATU

Vanuatu has experienced considerable and growing demand from investors for access to customary land. Some customary groups have taken advantage of this and entered into leases for parts of their land. This created a need to identify and recognise group ownership of their land. Vanuatu does not have a system of customary land registration and there is no formal way to record landowning groups as a single entity for entering into agreements. As a result, some communities in Vanuatu took the initiative to formalise their group ownership of land by creating and registering land trusts.

The villages of Ifira and Mele are adjacent to Port Vila, making village land valuable and attractive to outsiders. Both the Ifira land trust and the Mele land trust were established in 1980—when Vanuatu gained independence—to facilitate leasing land to investors for the benefit of their respective communities.

The two trusts were set up in similar ways and have the following key characteristics.

- » They bring together landowning groups within each village under single trusts.
- » Beneficiaries are defined as clan members according to custom—leaving the specification of beneficiaries subject to customary decision making.
- » The emphasis in the distribution of benefits is on the community rather than individuals, and includes support for schools and infrastructure.
- » The trustee of each trust is a company, and its board of directors consists of community members.
- » The power of each trustee is limited by the requirement that consent be obtained from an advisory body before key decisions are made.
- » The trusts invest some of their earnings in other ventures.

The success of the trusts has been mixed. The Ifira land trust has been more successful financially and has provided substantial benefits to the community. The trust is much admired in the community and is regarded as having played a key cohesive role. The Mele land trust has been less successful financially. It has a broad mandate to invest in projects that go beyond its core responsibilities of managing community land. It has participated in a range of poorly performing business ventures. The response of the Mele land trust to its financial difficulties has been to accelerate the release of land to the formal economy—perhaps more than was considered desirable by the community.

Source: Volume two, Case Study 2, 'Village land trusts in Vanuatu: 'one common basket'.

Incorporation of customary landowning groups

Some countries in the Pacific region have special legislation that allows a customary landowning group to ‘incorporate’. Incorporation involves the formation of a new corporation, which is a legal entity under the law. To some extent, the core characteristics of an incorporated landowning group are similar to those of a trust. Such an entity holds legal title to the land and can deal in the land on behalf of the group. As the titleholder, the entity can enter into a legally secure agreement with an outside investor. Because the agreement is between two legal entities, any subsequent complaints by group members remain internal to the group, and do not affect the formal validity of the agreement (see Volume 2, Case Study 1).

An incorporated landowning group usually enjoys the legal status of a corporation with perpetual succession² and the capacity to sue and be sued, and to do other things a corporation can do (Fingleton 2007). However, in some countries the rules that apply to a company do not necessarily apply to an ‘incorporated customary landowning group’. For example, in Papua New Guinea there is no requirement for such groups to have a board of directors.

The process of incorporating a customary landowning group is defined by special legislation—unlike a trust, which does not require special legislation—and may differ from country to country in the Pacific. The process can involve some public expense as a result of bureaucratic approval and oversight mechanisms. Depending on the legislation, there are sometimes establishment and operational costs including legal assistance, accountancy services and anthropological advice on genealogies and group membership.

Ideally, the legislation dealing with the incorporation of customary landowning groups should allow groups to define their own rules for decision making without imposing foreign concepts and ideas. Without this freedom, members of a customary group may struggle to understand their rights and responsibilities, especially if they have poor levels of education.

Customary landowning groups have been incorporated in various parts of the Pacific, including Papua New Guinea (Box 4.2) and the Cook Islands. It also occurs in Australia and New Zealand.

² Perpetual succession is the continuation of a corporation’s or other organisation’s existence despite the death or an exit from the business of any owner or member, or any transfer of stock.

In New Zealand, there is a single Act that governs both incorporated customary landowning groups and landowner trusts for Maori land (see Volume two, Case Study 7). The Act specifies basic requirements for setting up an incorporated landowning group, including how shareholdings are determined, the nature of a management committee, and the maintenance of a share register. Mainly as a result of the greater legal complexities associated with incorporation than with a trust, Maori landowners rarely choose to incorporate. Importantly, trusts set up under the Act have the same capabilities as incorporated landowning groups.

In the Cook Islands customary landowners can incorporate under the 1970 Land (Facilitation of Dealings) Act. They must apply to the High Court and establish a management committee with authority to make decisions on behalf of the group. As in New Zealand, landowners rarely incorporate, reflecting both the administrative and regulatory complexities, but also the logistical difficulty resulting from nearly 90 per cent of Cook Island landowners living in other countries.

BOX 4.2 » LAND GROUP INCORPORATION IN PAPUA NEW GUINEA

In Papua New Guinea, incorporated land groups are the usual mechanism for representing landowners, and they are often used to capture the economic benefits of resource developments. The process of incorporation is set out in special legislation known as the Land Groups Incorporation Act 1974. In contrast, there is no specific legislation governing landowner trusts, nor an administrative framework to support them.

The process for incorporating a land group in Papua New Guinea begins with preparing a constitution, which is simply the rules that govern the incorporated land group. The constitution must include such details as the name of the group and the name of its custom, the qualifications for membership of the group, the nature of the controlling body of the group, and the procedures for settling disputes. After a process for hearing comments or objections, the group can be registered with the Registrar of Incorporated Land Groups and legally incorporated.

Incorporation has proved to be an effective mechanism for customary landowning groups to participate in Papua New Guinea's formal economy. As legal entities incorporated groups can make commercial deals with investors or developers involving the use of the groups' land and manage the income generated. For example, an incorporated land group is free to invest the income from a mining or forestry project in a new business, to use the income to fund a community project, or to distribute the income among the members of the group. The most important feature of incorporation in Papua New Guinea is that decisions can be made within a customary framework.

Source: Volume two, Case Study 1, 'Incorporated land groups in Papua New Guinea'.

Registration of individual customary landowners

Another mechanism used in the Pacific to recognise a customary landowning group is registration of individual members of the group. While it sounds good in theory, this approach can result in inaccurate details on landowners and fragmented landownership. These problems can be avoided by registering ownership at the group level rather than at the level of individuals (discussed further in Chapter 5).

Identifying the members of a customary group and understanding how the rights of ownership or land use are allocated is not straightforward. The allocation of individual land rights can change as a result of, for example, inheritance, residence, marriage and family size. Also, there are significant differences in how the various customary groups determine membership and allocate land rights (see Annex B).

In an attempt to capture information about land rights within a customary group, a number of countries have applied a particular inheritance rule to all customary groups. However, this approach usually fails to capture the full picture of ownership patterns practised by customary groups. As a result, the register of landowners often ends up being incorrect from the perspective of the customary groups.

PROBLEM OF LAND FRAGMENTATION AND CROSS-OWNERSHIP

The Cook Islands and New Zealand have attempted to create a register of individual customary landowners (Box 4.3). Both countries use an equal inheritance rule, whereby children inherit equally the registered lands of their parents. This system has created the problems of fragmentation and cross-ownership. Small plots of land now have hundreds or thousands of owners, and any one person may have ownership rights in a large number of small plots of land. The equal inheritance system has corrupted the traditional practice of rights to land being contingent on residence and participation in the community and so has changed the land systems from being flexible and effective in allocating rights and managing land, to being unworkable.

Highly fragmented landownership can create a vicious cycle. This is because the greater the dilution of ownership, the lower the incentive for people to dispose of land to enable consolidation of ownership. This is the case for two reasons. As fragmentation increases:

- » the value of each shareholding shrinks and so do the benefits of disposing of the land
- » the scope and complexity of the ownership structure increases and so do the costs and effort required to bring the owners together to consolidate ownership.

BOX 4.3 » REGISTRATION OF CUSTOMARY LANDOWNERS IN NEW ZEALAND AND THE COOK ISLANDS

In New Zealand, systematic registration of the customary lands of the Maori people began in the late 1800s. The objective was to bring the land tenure systems closer to the English system, so the emphasis was on individualisation of titles rather than registration of group ownership. Measures were taken to reinforce the process of individualisation, including a requirement that each title have a maximum of 10 registered owners. This forced the landowning groups to divide their lands into small parcels for registration.

The Cook Islands followed a similar path and the ownership of most customary lands in the Cook Islands was registered during colonial times under a 'native freehold title' system. A crucial court decision in New Zealand, which was adopted in the Cook Islands, was that all children should inherit equally the registered lands of their parents. This decision has led to considerable difficulties in managing land and defining ownership. In New Zealand, in 2007 there were 2 million owner interests recorded on just 26 000 land titles, and this is growing by about 185 000 a year. The difficulties relate not only to fragmented ownership but also to increasing cross-ownership. People now have ownership rights in many parcels of land, with the portfolio of each person's land interests increasing rapidly.

With the ever-increasing dilution of ownership, people in both countries are failing to update their registration records, which now contain obsolete information. In the Cook Islands in particular, the registration system cannot cope, and registered titles are not accepted as collateral by lenders.

Sources: Volume two, Case Study 7, 'Maori landownership and management in New Zealand', and Case Study 8, 'Absentee landowners in the Cook Islands: consequences of change to tradition'.

PROBLEM OF ABSENTEE OWNERS

Another potential problem associated with registering individual members of customary landowning groups and the equal inheritance rule is absentee members. Under traditional practice in parts of Polynesia, people who moved elsewhere usually relinquished their rights to the land. But under the formal land register in the Cook Islands all children inherit the registered land of their parents. This has meant that decisions about land management are sometimes influenced more by absentee owners than by resident owners. This is a particular concern for the Cook Islands because, as already noted, most citizens live in other countries. As a result of the equal inheritance rule, the rights of Cook Islanders living on their customary land are dominated by the rights of people living elsewhere, who are in the majority. Land rights even extend to people born in other countries who have never been to the Cook Islands but are considered Cook Islanders.

The problem of conflicting claims

Irrespective of the legal mechanisms that are made available to customary groups to gain formal recognition, unless there is also a mechanism for groups to clearly identify their land—to formally differentiate their land from land held by other customary groups—an opportunity exists for rival ownership claims. Establishing a trust or an incorporated landowning group does not necessarily prevent the problem of conflicting claims. Without a formal way to connect a particular customary group to a particular parcel of land, other people or other customary groups can claim rights to the same parcel of land.

Conflicting land claims documented in Papua New Guinea are often a response to disputes over financial benefits associated with mining or timber royalties (see Volume two, Case Study 1). The only way to avoid this problem is to enable customary groups to clearly identify and formally protect their rights to land. The different ways to make this connection between a group and their land are discussed in Chapter 5.

5 Recording and registering customary land

‘... land registration is only a means to an end. It is not an end to itself. Much time, money and effort can be wasted if that elementary truth is forgotten.’

S Rowton Simpson, quoted in FAO (2003, p. 89)

Without certain and accurate land boundaries, it is difficult for landowners to reach or enforce agreements with potential investors or developers. Members of landowning groups may also be deterred from investing more intensively in their own family land.

In many parts of the Pacific region, information about the boundaries of land under customary tenure is recorded orally by local groups. These boundaries tend to be described in terms of natural features such as rocks, trees or rivers. Uncertainty or disputes among customary groups over boundaries are common.

Boundaries to customary land often shift in response to political, economic or demographic changes. While the boundaries of garden land are likely to be well defined and widely accepted, those of more remote upland or bushland areas for hunting or gathering may not have been determined specifically in the past, often because there was no good reason to do so. Modern conflicting claims may have emerged only in response to increases in land value, perhaps due to development, or competing claims by the state or other customary groups. The process of creating formal documented boundaries can also bring to the surface historical disputes.

Moving towards a land administration system in which important information about customary land, such as the identity of the landowning group, boundaries and transactions, is identified and accurately and safely stored is a way to provide better tenure security for landowners and investors. It can provide proof of ownership, reduce the potential for land disputes and facilitate land dealings. The information can be acquired through recording or registration. These processes have particular meanings in relation to land.

Recording

Recording is a process of capturing boundary, ownership and/or transaction information about land and storing it for future reference on paper or electronically. There are different types of land records. At one level, the records can be the result of social and physical mapping—identifying customary groups and recording their details, local institutions, procedures and land boundaries. It is usually done after landowners who share boundaries meet and agree to the boundary locations. Social and physical mapping records this information without trying to fit any of it into formal legal categories or attributing legal status to the records. It is also possible to record other information about land, such as lease agreements.

Land records may be stored by customary owners and local government or local traditional land arbiters, as a statement that all parties accept the process and the boundaries. Access to some land records may be restricted to certain people. Different recording systems operate in the Pacific region.

Registration

Registration is a process of collecting and consolidating recorded information in a centralised and accessible system. There are two basic types of registration that relate to land.

- » **Deeds registration** involves collecting historical legal instruments (deeds) for different parcels of land. Deeds are a record of transactions, not legal rights; they are *evidence* in a court of law of legal rights in the land. The person who can demonstrate an ‘unbroken chain’ of title has the superior legal right. In some jurisdictions, the information in a deeds registry is supplemented by titles insurance in order to provide full certainty of ownership.
- » **Torrens registration** involves consolidating the current facts about a parcel of land, including its boundaries, the names of the registered proprietors, and any other interests that affect title to the land. The land register for a parcel of land acts as *conclusive proof* of both the rights of registered parties and the boundaries of the land parcel. The state backs the status of registered rights and boundaries so that they cannot be challenged successfully in court, except in a limited set of circumstances such as fraud. The state may provide compensation for loss if there are any errors in the registry. A few countries in the Pacific use modified versions of this system, particularly in relation to their freehold lands.

As in the case of recording, it is possible to register other information about land, including restrictions on land use or lease agreements. Vanuatu has a system to register lease agreements over customary land in a 'deeds registration' system that, by default, also records land ownership. Fiji collects a significant amount of information about customary land, including lease agreements and customary owners, in a system that is a slightly simplified Torrens system of registration.

Most countries in the Pacific have legislation that permits registration of customary land, but very little of this land has been registered (Table 5.1). Generally speaking, most registration of customary land in the region occurred during colonial times. While the purpose of registration is to help the state to define and protect property rights through enforceable rules, in places where the government is perceived to be weak, customary landowners may not be keen to register their land. Some landowners remain suspicious of any process that involves the government gathering information about their land.

TABLE 5.1 » CUSTOMARY LAND REGISTRATION IN THE PACIFIC REGION

	Legislative provision	Customary land that is registered
Cook Islands	Yes	65%
East Timor	No	–
Fiji	Yes	Almost all
Federated States of Micronesia	Yes	Most
Kiribati	Yes	Most
Marshall Islands	Yes	Very little
Nauru	Yes	Most
Niue	Yes	10%
Palau	Yes	Most
Papua New Guinea	Yes	Very little
Samoa	Yes	Some
Solomon Islands	Yes	0.2%
Tokelau	No	–
Tuvalu	Yes	100%
Vanuatu	No	–

Source: Based on information provided by Donald Paterson, Emeritus Professor of Law, University of the South Pacific, 2007

Designing and improving a recording or registration system

There is no ‘one size fits all’ approach to accurately capture information about customary land. One approach may suit one country or location, but not another. Local factors such as the capacity and efficiency of the land administration institution, the status of customary authority, the level of land disputation or the number of land dealings need to be considered. Selecting the best approach involves a number of different considerations.

TO RECORD OR REGISTER?

Registration of information about land involves greater risks and costs but can sometimes produce greater tenure security (indefeasibility of title) than recording does. A flexible cost–benefit approach may lead to decisions to combine registration and recording methods. For example, group ownership may be registered but information on membership and individual interests may be only recorded.

A land recording process has been undertaken in Auluta Basin, Solomon Islands (Box 5.1). An important lesson from the Auluta Basin experience is that the success of a recording process depends on adequate consultation, full information and an explicit process to deal with disputes.

BOX 5.1 » THE RECORDING PROCESS IN AULUTA BASIN, SOLOMON ISLANDS

The people of Auluta Basin on the island of Malaita have begun to make their land available through leases for an oil palm plantation. This required, as a first step, a process of recording customary tenure, including defining genealogies and land boundaries, and resolving any disputes. In support, a pilot recording project was launched in Auluta Basin in 2005.

The recording method used proved successful. The pilot project facilitated a process for landowners to actively participate in the recording procedures and to resolve their own differences. Village meetings were held with an emphasis on goodwill, reconciliation and cooperation. Negotiated and mediated outcomes were achieved for almost all disputed land boundaries, with landowners preferring to compromise for the sake of agreement and security. Important to its acceptability was the recording methodology, which was culturally appropriate, taking into account local practices and language.

Source: Volume two, Case Study 3, ‘Recording land rights and boundaries in Auluta Basin, Solomon Islands’.

GROUP AND/OR INDIVIDUAL INTERESTS IN LAND?

Often the simplest and least problematic approach to recording or registering customary land is to collect information on only the name of the group who owns the land (which may be a tribe, clan, family or a trust or incorporated landowning group). There may be no need to record further information about individual rights within the group, or even the nature of group membership. This approach is particularly effective if:

- » obtaining information internal to the landowning group would cause more conflict and expense than justified by the potential benefits
- » customary processes provide sufficient tenure security for group members, including in land dealings (if any) with outsiders.

If membership details of the group are required, all landowners would have to be identified through genealogies and the like. This information requires a degree of institutional and financial support if it is to be comprehensive and its accuracy is to be maintained.

As discussed in Chapter 4, creating a register of each individual landowning member of a customary group (and their land rights) has a number of potential problems, including fragmented ownership and absentee owners. There are also other problems and risks associated with recording or registering the land rights held by individual group members or families.

- » It is expensive to create and maintain accurate records.
- » It can create conflict by activating dormant disputes over rights to particular areas of land.
- » It can oversimplify customary arrangements that protect the access rights of poor and vulnerable members of the group such as women.
- » It can create opportunities for knowledgeable or well-connected group members to manipulate written records.

In certain circumstances, recording or registering individual customary interests in land can produce benefits that outweigh the disadvantages. These benefits arise when the documentation resolves tenure insecurity within a landowning group, encourages investment by group members, or facilitates dealings with outside investors.

REGISTERING TRANSACTIONS RATHER THAN REGISTERING RIGHTS?

To achieve effective tenure security for customary land it may not be necessary to go as far as recording or registering all the details about land rights. Registering agreements is an alternative and can be effective when the registration of rights is too expensive or produces too much disagreement. The registration of agreements can provide sufficient tenure security for customary group members and outside investors. For example, leases of customary land in Vanuatu are highly sought after by investors and are accepted as collateral by banks and financial institutions, but only the leases are registered, not land rights. However, registration of land use agreements can create a register of customary land ownership by default (Box 5.2).

BOX 5.2 » REGISTRATION OF OWNERSHIP BY DEFAULT THROUGH LAND USE AGREEMENTS

Registration of customary land has occurred ‘by default’ in the Pacific. In some countries the registration of land use agreements for customary land has resulted in information about land boundaries and owners being recorded.

- » Forestry or logging agreements include records of land boundaries and landowners, but those records are not always available on the public land register.
- » Leases of customary land for mining purposes specify land boundaries and landowners. The agreements are generally public documents held by the government department that handles petroleum and/or mineral activity.
- » Agreements to conserve cultural and natural sites require the land boundaries and landowners to be recorded. These records are held by the government conservation authority and, in the case of World Heritage agreements, by an international body.

RECORDING OR REGISTERING TRANSACTIONS AFTER RIGHTS HAVE BEEN REGISTERED?

After details on the rights and boundaries of customary land have been recorded or registered, is it necessary to record or register subsequent transactions affecting that land? There are three main ways to answer this question (Fitzpatrick 2005, p. 468).

Compulsory registration of transactions affecting registered customary land is ideal as it maintains the accuracy of the register. But it assumes that the government provides sufficient funding and has the capacity to undertake the work, and that the landholders are sufficiently confident in government institutions to register the transactions.

Optional documentation of transactions may be the best option if compulsory recording or registration is impractical due to institutional or funding constraints, and if the parties to the agreement are satisfied with their own methods for maintaining records.

No formal mechanisms for documenting transactions may be the best option where there are few transactions, customary authority is strong, and local recordkeeping consistently provides tenure security to all parties.

SYSTEMATIC OR SPORADIC REGISTRATION OF LAND RIGHTS, OR BOTH?

Assuming that registration of land rights is justified, they can be registered sporadically or systematically.

Sporadic registration is when individual or group landholders apply to register their rights to land. The land registry acts in a passive manner. It simply accepts and considers applications from the public.

Systematic registration is usually undertaken by the land registry office or its delegates, who actively adjudicate and register rights and boundaries to a particular area of land. It affects adjoining parcels of land, not single parcels that are the subject of individual (sporadic) applications.

Sporadic registration of customary land is usually slow because landholders are cautious about costs, convenience or the relative unfamiliarity of the process. If registration is justified, the advantages of systematic over sporadic registration are that it covers a large area of contiguous land relatively quickly and is often free of charge to landholders.

Systematic registration that is free of charge to landholders is expensive for governments and usually requires a significant component of donor funding. The cost can be reduced if registration is of group rights and boundaries only.

Generally speaking, if rights and boundaries to land are to be registered, the costs of systematic registration are justified only in priority areas for development or in areas of endemic tenure insecurity that can be resolved by systematically adjudicating on rights. Depending on the circumstances, other areas can be left to sporadic registration, to recording or not be subject to documentation efforts at all. This is particularly so if the process of documentation may trigger unresolved land issues.

LEGAL STATUS OF LAND RECORDS OR REGISTERED INFORMATION

Systematic registration allows for quality control in adjudicating and deciding on boundaries. As such it may be possible for the land register to provide *conclusive proof* of the rights and boundaries of systematically registered land parcels. For sporadically registered land, the land register may provide only *evidence* of rights and boundaries, which may be outweighed by a valid counterclaim based on custom.

DIFFERENT WAYS TO IDENTIFY LAND BOUNDARIES

If landowners have not previously needed to identify boundaries with any precision, agreeing to boundaries—before surveying and creating records—can be difficult. But usually neighbouring groups or subgroups can agree to boundaries for substantial parts of their lands as a result of negotiations among neighbours and community leaders.

After boundaries are agreed, the next challenge is to mark them out. Land surveyors with professional training, legal authority and accurate instruments produce the best results. Where surveyors are not available or are too expensive it may be possible to rely on agreed sketches or maps, written descriptions based on visible landmarks, outlines on photographs or satellite images, or boundary markers placed using a global positioning system. Such diagrams, notes or images should be attached or incorporated into land agreements so as to avoid future doubt or conflict.

There are often inexpensive ways for communities to identify and record land boundaries for themselves. Whatever approach is taken, if there is a need for clearly defined land boundaries it should be met.

Implementing a registration system

NATIONAL POLICIES AND INSTITUTIONS

Before putting in place a system to register details of customary land and associated transactions there needs to be legislative, regulatory and administrative mechanisms to support the registration process. In most countries in the Pacific region this needs to occur at the national level, as the costs are often too high for a local or regional government to sustain. Even if lower levels of government are willing to register customary land, without national policies and institutions to support the process it is unlikely to be successful. This was the case in Papua New Guinea where the provincial government of East New Britain has been unable to achieve its registration objectives despite attempting to do so since the 1950s (Box 5.3).

THE COSTS OF A REGISTRATION SYSTEM

The small amount of customary land that has been registered in a number of Pacific countries, despite the existence of enabling legislation, reflects the significant effort and costs associated with establishing and maintaining a registration system. The protracted nature of surveying land and registering details can act as a deterrent to registration.

The cost of establishing the legal and administrative framework usually requires a large and upfront investment, followed by smaller recurrent costs. Countries may be able to obtain donor or lender support for the initial investment, but the ongoing costs of maintaining the registration system usually needs to be met by the national government, which means these costs must be considered when establishing the system and must be affordable in the long term.

BOX 5.3 » UNSUCCESSFUL REGISTRATION EFFORTS IN PAPUA NEW GUINEA

In the 1950s the Australian administration in Papua New Guinea started work to register customary land. Work was done to record genealogies and land boundaries in preparation for registration. The size of the task was underestimated and by the end of the 1960s not a single parcel of customary land was registered. The situation has not changed since independence in 1975.

In more recent times the provincial governments of East Sepik and East New Britain have shown an interest in customary land registration. The Tolai people—located in the north-east of East New Britain Province—have been particularly interested in registering their customary lands. They valued the recording of their genealogies and land boundaries in the 1950s and 1960s, believing it helped to reduce disputes involving land. Despite some assistance from the provincial government in the 1990s the Tolai people are still a long way from registering any land. The resources and technical support needed to make progress are in high demand by a range of competing development priorities, leaving only modest funding from the provincial government for this program.

Source: Volume two, Case Study 4, 'Land registration among the Tolai people: waiting 50 years for titles'.

MANAGEMENT OF THE REGISTER

The benefits a registration system can offer a country depend on its supporting administration. If land records are misplaced or not kept up to date, or if corrupt practices begin to occur, the records will become inaccurate and the register will become useless and of no value. The value of a land register can also be undermined if records are not stored safely and duplicates are not stored in different sites. There are examples throughout the Pacific region where entire sets of land records have either disappeared or been destroyed. This has occurred in provincial areas of Papua New Guinea and in Kiribati, the Cook Islands and the Marshall Islands. Reasons include volcanoes, fire, World War II bombings, and theft. Duplicate, computerised records held at different locations would guarantee the value of a land register, but establishing and updating a computerised land register involves costs that may be unaffordable for many Pacific countries.

6 Facilitating dealings in customary land

‘Indigenous land for good reason is inalienable. It must remain so. However, inalienability represents a huge difficulty for our economic development. It is a difficulty we must overcome.’

Richie Ahmat, Executive Director, Cape York Land Council, quoted in Botsman (2003, p. 11)

For the majority of customary groups in the Pacific, land and land-based resources are the most important economic assets they have. Customary landowners seeking greater economic benefit from their land require not only effective mechanisms to gain formal recognition for the group (Chapter 4) and effective ways to identify their landholdings (Chapter 5), but also mechanisms to facilitate land dealings. But land is not just an economic asset for customary groups; it also has social, environmental and sometimes spiritual importance. Land dealings therefore need to balance economic benefits with the other interests that customary people have in their land. Reconciling these objectives is the subject of this chapter and the next.

Broadly speaking, mechanisms that facilitate dealings in customary land while protecting and assisting the owners will:

- » *prohibit* a customary group from selling its land except to another customary group or the state
- » *allow* a customary group to enter into long-term leases with outsiders or individual members of the customary group
- » *prevent* customary groups from subdividing their land into individual parcels that can be sold, except in a few circumstances.

How customary groups can be protected and assisted in their land dealings is discussed in detail in Chapter 7.

Prohibit sales of customary land

Most countries in the region prohibit the alienation of customary land by sale or transfer, except to the state (Table 6.1). In Samoa and Vanuatu the inalienability of customary land is enshrined in their Constitutions. Only in the Federated States of Micronesia, Palau, the Marshall Islands and Nauru is the sale of customary land allowed. Even in these countries, there are restrictions on the type and eligibility of purchasers of customary land.

The prohibition of customary land sales in most countries is a policy position that reflects the continuing relevance and strength of customary authority in the Pacific. Prohibition protects customary authority over land and sustains the closeness of landowning groups (Ellickson 1993). There does not seem to be a need to remove this prohibition, given that long-term leases can, if properly supported by the state, provide sufficient tenure security for people to borrow money, invest and develop customary land. Also, to date customary groups have shown very little interest in permanently cutting ties to their land by selling it.

Allow lease agreements for customary land

In the Pacific, if customary groups decide to derive an income from their land by making it available to particular members or outsiders to use, most groups do so through leases. A lease is a contractual agreement—which may be formal or informal—for the temporary use of land. It enables a customary group to make income from their land, while retaining ownership but providing tenure security to the land user.

Most countries in the Pacific region permit formal leasing of customary land (see Table 6.1). In Solomon Islands and Papua New Guinea, customary groups are prevented from leasing directly to outsiders, which has resulted in complicated processes to ‘work around’ this impediment (Box 6.1).

Leases can include terms and conditions to allow customary landowners to retain certain controls over the land for the term of the lease. This flexibility is a major benefit of lease agreements. For example, a lease agreement could allow landowners to continue cultural or spiritual activities on their land. Or it could include environmental protections or land use restrictions and periodic reviews. The scope for customary landowners to retain some control contrasts with their total loss of control when land is sold.

Leases can also be drawn up to provide in-kind benefits. These benefits may include infrastructure, education and training, or employment for customary landowners in the land’s development. Such inclusions in leases can work well to maintain good relations between the landowners and lessees.

TABLE 6.1 » CUSTOMARY LAND DEALINGS IN THE PACIFIC REGION

	Is the sale or transfer of customary land prohibited? ^a	If prohibited, how?	If allowed, do people choose to alienate their land?	Is leasing permitted? ^b
Cook Islands	Yes, except to the state	Legislation		Yes, after registration as native freehold
Fiji	Yes, except to the state	Legislation		Yes, but only through the Native Land Trust Board
Federated States of Micronesia	No		Sometimes	Yes
Kiribati	Yes, except to the state and community organisations	Legislation		Yes, with court and ministerial approval
Marshall Islands	No		No	Yes
Nauru	No		No	Yes, with approval from the President
Niue	Yes, except to the state	Legislation		Yes
Palau	No		Sometimes	Yes
Papua New Guinea	Yes, except to the state	Legislation		No ^c
Samoa	Yes, except to the state	Constitution		Yes, with ministerial approval
Solomon Islands	Yes, except to the state	Legislation		No ^d
Tokelau	Yes, except to the state	Legislation		Yes, with government approval
Tuvalu	Yes, except to the state, local government council or a cooperative	Legislation		Yes, with ministerial approval
Vanuatu	Yes, except to the state	Constitution		Yes ^e

^a Refers to the sale or transfer of customary land to people outside of the customary landowning group.

^b Refers to the ability of customary groups to enter into a direct lease agreement with someone outside of the customary landowning group.

^c In Papua New Guinea it is possible for customary landowners to indirectly lease their land to outsiders through the 'lease – lease back' system (see Box 6.1).

^d In the Solomon Islands it is possible for customary landowners to lease their land if they first convert it into a registrable 'perpetual estate' (see Box 6.1).

^e Government approval is required for leases involving a non ni-Vanuatu.

Note: East Timor is not included in this table as customary land is not formally recognised and Tonga is not included as there is no customary land there.

Source: Based on information provided by Donald Paterson, Emeritus Professor of Law, University of the South Pacific, 2007.

BOX 6.1 » RESTRICTIONS ON LEASING CUSTOMARY LAND IN SOLOMON ISLANDS AND PAPUA NEW GUINEA

Solomon Islands does not allow customary land to be leased. For the customary landowners to lease their lands, legislation requires the land to be converted to registered 'perpetual estates'. Perpetual estates are similar in nature to freehold land and can be leased. But converting land to perpetual estates first requires customary tenure to be recorded, which involves defining genealogies and land boundaries, and resolving any disputes. The land is then acquired by the government, converted to perpetual estates, and then handed back to the traditional owners.

Customary landowners in Papua New Guinea are prevented from leasing land directly to outsiders by the Land Act, which prohibits the selling, leasing or disposal of customary land, except to the state. But they can lease it to the state and then lease it back. In this way, the landowners acquire a leasehold interest in their land from the government, which may then be mortgaged or subleased to investors. The Government of Papua New Guinea is currently reviewing the lease – lease back system with a view to enabling landowners to directly lease out their land.

Leases can also provide flexibility in the way landowning groups are paid. Broadly speaking, there are three possible ways for money to be paid under a lease:

- 1 a one-off sale payment at the start of a lease (no rental payments during the term of the lease)
- 2 regular rental payments (no upfront sale payment)
- 3 a combination of options 1 and 2—an upfront sale payment and regular rental payments.

As a general rule the longer the term of a lease the higher the tenure security and the more desirable the lease is to outsiders who are interested in raising finance and making investments in the land. However, tenure security depends not only on the term of the lease, but also on the level of recognition the lease gets from landowners, the government and others.

Many long-term leases allow the leaseholders to sell the leases at a later date. Because lease values are increasing in many parts of the Pacific, when leaseholders sell them they can realise a capital gain (profit). Unless the lease agreements include a provision for such a gain to be shared with the landowners, it goes directly to the leaseholders. Such gains can be a major source of tension and discontent. Recently, the practices of leaseholders have been an issue in Vanuatu, which has a strong market in leases of customary land. The next chapter considers ways to protect and assist customary groups in such circumstances.

Prevent subdivision of customary land

The subdivision of customary land into private parcels of land remains very rare in the Pacific region. Papua New Guinea is the only country that allows customary land to be converted to freehold tenure.³ Once land is subdivided and converted to freehold tenure, customary authority is essentially extinguished and individual landowners are able to deal in the land in accordance with the laws governing freehold land. People would be free to sell or transfer their land as they wished.

Given the current strength and relevance of customary authority for most people in the Pacific, it is unlikely that any state would impose mandatory subdivision of customary land for developmental purposes (see ‘The privatisation approach—removing customary institutions’ in Chapter 3). It is also not needed in most cases to achieve tenure security. As already noted, long-term leases of customary land can achieve sufficient security of tenure for both customary groups and individual investors to enable social and economic development.

However, subdivision may be viable in rare circumstances—if all members of a customary group voluntarily agree and it is carefully managed by the state. In some circumstances, the evolution of land rights under customary tenure systems can lead to a consensus by members of a group that customary land should be partitioned into privately owned parcels. As group members put more money and labour into land, customary systems can adapt and recognise individual rights that have more exclusive characteristics (Deiningger 2003). For example, in many customary systems, residential and cultivated land is not accessible by all group members at all times. A voluntary decision by a customary group to subdivide their land into private parcels is more likely to occur in urban and peri-urban areas or where land use is much more intensive than in traditional or shifting patterns of subsistence agriculture.

A real risk associated with voluntary subdivision is that it can be abused by some members of the customary group and so undermine the group’s social welfare functions. It is critical that a decision to formally subdivide customary land reflects free, prior and informed consent by all male and female members of the landowning group (see Chapter 7). Ideally a customary group should be fully aware of the benefits of leasing their land before they decide to subdivide it. Pacific governments wanting to allow customary groups to voluntarily subdivide their land will need to regulate the process carefully, because it is difficult to reverse, could leave some people landless, and could create serious tensions if it is not done properly or fairly. Papua New Guinea has a number of legal safeguards relating to voluntary subdivision in the Land (Tenure Conversion) Act. Even so, Papua New Guinea’s National Land Development Taskforce has recommended that the Act be repealed in favour of steps to facilitate development through registration of group ownership titles in the national Land Titles Register.

³ In the Cook Islands customary land can be converted into ‘native freehold’ land. However, native freehold land does not have the same characteristics as private freehold land, because it cannot be alienated other than to the state, and it cannot be mortgaged.

7 Protecting and assisting customary groups in land dealings

‘The central element underpinning the success of the CLC [Central Land Council] is that it is an intermediary *advisory* body between investors and landowners, with traditional landowners retaining the power to make decisions about their land.’

Mick Dodson, David Allen & Tim Goodwin, Making land work, Volume two, Case Study 6, p. 125

To leave dealings in customary land in the hands of an unregulated market would be a mistake. Customary landowners are often not equipped to engage in such dealings in the same way as outside investors, especially foreign investors. They can lack knowledge and information as a result of limited educational opportunities, inexperience in doing business in the formal economy, and poor access to business support services. Outside investors tend to be better informed about business opportunities and market conditions, and generally have experience and skills in negotiating and doing business.

These likely serious imbalances in knowledge and information create the potential for customary groups to enter into agreements such as leases that they do not understand and that deprive them of significant benefits or opportunities associated with their land. This may become a source of conflict or tension if members of the group later realise that they have entered into a bad agreement. If developments on customary land create social conflict, environmental damage or disproportionate impacts on vulnerable members of the landowning group, they threaten the social welfare that underpins customary land systems.

Land-related conflict has the potential to undermine the attraction of a country as a place to invest as well as lead to violence. It is in the interests of long-term investors, the government and ultimately all of society to ensure that members of customary groups do not enter into land deals that could cause tension or conflict—that they understand the terms of agreements, are not manipulated or coerced and have the right to reject the proposal.

The principle of ‘free, prior and informed consent’

The principle of ‘free, prior and informed consent’ has been developed as a benchmark in international and domestic law to protect customary groups in dealings with outsiders, including governments. In international law the principle is used in relation to the relocation of customary groups, the use of cultural and traditional knowledge, projects on customary land or the introduction of new legislation concerning a customary group (International Labour Organization 1989; United Nations 2007). Some of the elements of free, prior and informed consent are described in Box 7.1.

Australia, the Philippines, Malaysia, Venezuela and Peru have national legislation that adopts some or all aspects of free, prior and informed consent of customary groups. Adopting this principle in legislation has the potential to make it easier and faster for outside investors to negotiate agreements involving customary land because it introduces a predictable process (see volume two, Case Study 6).

Free, prior and informed consent should be obtained from women as well as men. Ideally the interests and rights of women as members of a customary group would be acknowledged and incorporated during the negotiation and formulation of any dealings in land. This approach is consistent with international law and the international convention dealing with the elimination of discrimination against women (United Nations 1979). Most Pacific countries are signatories to this convention.

Unfortunately the consent of women in Pacific customary groups is often not sought for decisions about changes in land use and the distribution of benefits from leasing land. This can be a problem, because women play a critical role in the social, cultural and economic life of communities, and excluding them from decision making involving land can sometimes result in poor outcomes for the group (see Chapter 11).

BOX 7.1 » FREE, PRIOR AND INFORMED CONSENT**Free**

There is no coercion, intimidation or manipulation.

Prior

Consent is sought sufficiently in advance of any authorisation or commencement of activities and allows time for customary consultation/consensus processes.

Informed

Sufficient information is provided to the customary group to allow members to make a meaningful decision on, for example:

- » the nature, size, pace, reversibility and scope of a proposed project or activity
- » the reason(s) or purpose of the project or activity
- » the duration of the above
- » the location of areas that will be affected
- » a preliminary assessment of the likely economic, social, cultural and environmental impacts, including potential risks and benefit sharing
- » personnel likely to be involved in the proposed project (including members of the customary group, private sector staff, research institutions and government employees)
- » procedures that the project may entail.

Consent

Consultation and participation are crucial components of a consent process. Consultation requires time and an effective system for communicating among interested parties. Customary groups should be able to participate through their own freely chosen representatives and customary or other institutions. Ideally there should be both male and female representatives. This process may include the option of withholding consent. Consent to any agreement should be interpreted as indigenous peoples having reasonably understood it.

Source: Based on Permanent Forum on Indigenous Issues (2005).

There are practical ways for Pacific governments to assist customary groups who wish to engage in land dealings with individual members or outsiders to ensure free, prior and informed consent applies to any deal. They include:

- » providing customary groups with access to expert advice and assistance through an intermediary institution
- » regulating the terms and conditions in leases and other land use agreements
- » requiring government approval of land use agreements
- » establishing an organisation to negotiate land use agreements on behalf of customary groups (such as the Native Land Trust Board in Fiji).

Each of these suggestions is now considered in more detail.

Provide expert advice and assistance

An important way to support landowners in land dealings is to assist them to make their own informed decisions. Such decisions require access to information and may involve advisory services, which can be provided by an intermediary organisation with expertise in land business. Ideally, an intermediary institution that is able to assist and protect customary groups would have the following characteristics:

- » be specifically designed to enable customary groups to release land for commercial development if they choose to do so
- » provide only advice and assistance, leaving decision-making authority with the customary groups in accordance with the principle of free, prior and informed consent
- » not depend on the development of customary land for its funding—that is, not have an incentive to advise in favour of profit-making activities.

There are no examples of intermediary institutions in the Pacific with these characteristics. Fiji's Native Land Trust Board was specifically designed to help customary groups release their land for development, but it represents customary owners during lease negotiations rather than assisting them to do it themselves. Also, it depends on revenue derived from leasing land for its funding, which means it has an incentive to release land for development. (The Native Land Trust Board is discussed further at the end of this chapter.)

An example of an intermediary institution with the ideal characteristics described above is the Central Land Council in Australia (Box 7.2). The council is designed to support customary groups considering making land available to outside investors, mostly for mining and tourist projects. It provides only advice and assistance; customary owners retain the right to decide on how best to use their land, including not developing their land at all. As a result of recent legislative amendments, the Central Land Council no longer depends on the release of land for development for its funding.

BOX 7.2 » THE CENTRAL LAND COUNCIL IN AUSTRALIA

The Central Land Council is an intermediary institution for Indigenous Australians in central Australia. Its area of responsibility is larger than Papua New Guinea, but with a population of only 18 000. The Central Land Council is one of four Aboriginal land councils in the Northern Territory established under the *Aboriginal Land Rights (NT) Act 1976*. Some states in Australia have also established land councils.

The mandate of the Central Land Council is to provide advisory and support services; it does not have the authority to do business on behalf of landowners. Instead, the decision-making authority lies with land trusts, which act independently of the Central Land Council. These trusts are managed by the landowners and decisions on land dealings are made on the principle of informed consent among the owners. It is the role of the Central Land Council to ensure that landowners are fully aware of the consequences of any land use agreement and of the options available to them.

The Central Land Council has experts that landowners can call on, including legal, business, environmental and cultural advisers. The responsibilities of the land council include:

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

Thirty per cent of the revenue generated by agreements that allow mining goes directly to traditional owners and other Aboriginal people living in areas affected by the mining. Until 2006, 40 per cent went to the Central Land Council and 30 per cent to community grants. Land council funding is now determined by the responsible national government minister on a performance basis. This change has reduced the incentive for land councils to advocate for mining or other high-profit activities by removing the direct link between council funding and royalty payments.

Source: Volume two, Case Study 6, 'The role of the Central Land Council in Aboriginal land dealings'.

PUBLIC AWARENESS OF INTERMEDIARY INSTITUTIONS

Many customary groups may not be aware of their need for advice or assistance. While a limited number of groups would voluntarily seek advice from an intermediary institution if one existed, there is the risk that some groups would not. To ensure advice and assistance is provided to customary groups that actually need it, it may be necessary for government to make it compulsory for all groups to receive advice before they enter into land use agreements. In addition to this, or alternatively, all customary landowners should be made aware of the benefits of getting advice from an intermediary institution. Without an understanding of their need for advice, customary groups may oppose or resent the need to consult an intermediary.

REGULATION OF INTERMEDIARIES

In situations where there is, or is likely to be, an active market in customary land leases, some individuals or organisations, such as real estate agents, may seek to provide advice to customary groups about land deals. Many of these advisers would have vested interests or a 'conflict of interest', and provide advice that is not balanced and impartial. This is currently the situation in Vanuatu (Box 7.3). To avoid this situation, Pacific governments may need to regulate who is able to give advice and how the advice is given and paid for.

BOX 7.3 » THE NEED TO REGULATE INTERMEDIARIES IN VANUATU

Customary land in Vanuatu can be leased for periods of up to 75 years and there is an active market in customary land leases. Mostly these leases are negotiated directly between landowners and investors. It is usual for private real estate agents to act as intermediaries in the negotiations, but they do not normally act on behalf of the customary landowners. They also play an active role in soliciting land from customary owners for release to the land market. Demand is creating a market for intermediary advisory services, but it is in its infancy and limited in its effectiveness.

The lack of legislation to regulate dealings in customary land has created problems in Vanuatu. Foreign investors are making deals with landowners that are very much in the investors' favour. Landowners are discovering that the terms and conditions they agreed to are inadequate, or that they were not fully informed about the implications of these terms and conditions.

There are two basic options for regulating advisory services to customary groups.

» **Sole provider**

The government, through legislation, creates an institution to be the sole source of assistance to customary groups within a defined geographical area. Its operation is regulated through enabling legislation. Other advisers (individuals and institutions) would be prohibited from giving professional advice. An example of this approach is the Aboriginal land councils that operate in a number of places in Australia.

» **Regulated market**

The government, through legislation, establishes and maintains a system whereby advisers (individuals or institutions) can be registered and regulated according to defined industry or professional standards of conduct. Non-registered individuals or institutions would be prohibited from providing advice.

There are advantages and disadvantages associated with each option. The main benefit of a sole provider is that the institution could be the source of a wide range of specialist expertise and generate economies of scale. The main risk associated with this option is that it could be costly to operate and lack an incentive to provide a good quality service. To overcome this risk the funding of the institution could be structured to create an incentive for quality service. One way of doing this is to link funding to performance, measured against clear and measurable indicators associated with assisting customary groups. It would also be necessary to put in place systems to avoid corruption and ensure adequate funding. Various sole provider institutions of this nature in Australia are successful in assisting customary groups, but they are expensive to operate. They could be used as models but would need to be adapted to suit the different conditions found in Pacific countries.

The main benefit of establishing a market in advisory services for customary groups is that competition between providers can promote efficiency. But for the market to operate successfully the government would need to be an effective regulator. It would have to establish a system to register service providers and ensure that those not registered are not allowed to operate and that registered advisers maintain certain standards of service. In many Pacific countries, particularly smaller island countries, there is no guarantee that the market would be big enough to support even one service provider, let alone competitors.

For smaller countries, or countries with a limited market in leases of customary land, there may be no other choice than to have a sole provider. There may also be some scope for one or more intermediaries to operate at a regional level in the Pacific, to help spread the establishment and operating costs among smaller countries.

Regulate lease agreements

Another way to protect customary landowners in land dealings is to require that certain conditions are included in lease agreements. This may be done directly through legislation or indirectly as a result of advice from an intermediary institution. These conditions may cover the term of the lease, rental rates, fees on capital gains, access conditions, environmental impacts and land uses. Mandatory conditions can be a good way to protect landowner interests. They could specify:

- » as well as revenue, the in-kind benefits such as social, educational and health services to be provided by the lessee
- » the transparent procedures to be followed for distributing benefits, renegotiating the lease or providing information on costs and revenues
- » the specific standards to be met when roads and other infrastructure are constructed
- » the requirements to be followed for avoiding and repairing environmental damage
- » if the lease can be sold, the formula or ratio to be used to share any capital gain between the leaseholder and the landowners
- » the arrangements for reviewing and adjusting rental payments according to current market values of the land or some other agreed formula
- » the proportion of revenue generated by the lease to be held in trust for future landowner generations
- » the arbitration procedures to be used to settle disputes over leases.

The extent to which mandatory terms and conditions should be included in leases would depend on a number of factors, including the nature and scale of the proposed development and what other protections exist for customary groups. It is important to strike the right balance. A highly regulated system could make land dealings costly and difficult. However, if no other support is provided to customary groups dealing in land, mandatory lease terms would provide some protection.

Require government approval of lease agreements

Another way to protect customary groups is to require government or ministerial approval of lease agreements to ensure that customary groups are making good decisions. The usefulness of this approach depends on the government or minister being in a position to make an informed decision.

Some Pacific island countries have adopted this regulatory approach in some form, including the Cook Islands, Kiribati, Nauru and Samoa (see Table 6.1). For some small island countries it may be the most cost-effective form of government regulation. The main problem with this approach is that land bureaucracies in the region are not always equipped to make well-informed assessments, particularly when they are not normally experienced in business matters. This type of model may also provide an incentive for corruption.

Negotiate lease agreements on behalf of customary groups

Another way to protect customary groups involves the government, or an organisation created and regulated by the government, negotiating lease agreements on behalf of customary groups. The rationale behind this model is that the government, or a government-regulated body, is in a better position to negotiate land agreements that are in the best interests of customary landowners than are the customary landowners themselves. The problem with this rationale is that it is now perceived by many to be paternalistic.

THE FIJI MODEL

Fiji has adopted this approach using the Native Land Trust Board (Box 7.4). The government has given the board full authority to conduct business in customary land on behalf of the landowners. Its role is to make decisions with respect to customary land that are in the best interest of landowners. It leases customary land for terms up to 99 years, except in the case of land for agricultural purposes, for which the maximum term is 30 years.

The strength of this model is that investors face a relatively streamlined process for deals involving customary land. The Native Land Trust Board markets available land and clearly sets out the terms of the leases. Leases of customary land can be transferred, subleased or mortgaged. The main problem with the model is that customary landowners have limited control over the leases of their own land. The board can enter into leases without the endorsement of the landowners; however, the board sometimes does seek the approval of landowners.

BOX 7.4 » THE NATIVE LAND TRUST BOARD OF FIJI

The Government in Fiji established the Native Land Trust Board by statute to manage all customary land, including land not intended to be released to the formal economy. This is the statutory body that negotiates leases on behalf of customary groups. Its main characteristics follow.

- » The members of the board are principally appointees by the Great Council of Chiefs, which is the highest assembly of traditional chiefs.
- » Substantial authority over customary land is vested in the board, and there is no requirement to gain informed consent from landowners for major decisions.
- » There is no advisory body or any other institution to advise or oversee the board (apart from the government itself).
- » The board is granted exclusive rights to deal in customary land.
- » Dealings are restricted to leasing; land cannot be bought or sold.
- » Rental incomes are subject to management fees of 15 per cent or more.
- » Incomes tend to be distributed to individual beneficiaries rather than communities as in the village land trusts of Vanuatu.
- » The board plays a broader role in land management.

There are currently about 33 000 active leases generating rental income of F\$22 million a year (US\$14 million). The contribution of leases to Fiji's economic development has been substantial, particularly in view of the active role the board has played in promoting investment in tourism, by far Fiji's most important industry.

One point of contention is the substantial authority that the Native Land Trust Board has over customary land with no legal requirement to consult with landowners before entering into a deal. The initial design of the board omitted consultation requirements to ensure sufficient tenure security for investors. Recently, consultation has become more common in response to landowner pressure and the benefits of inclusive decision making.

PROBLEMS WITH REPLICATING THE FIJI MODEL

Other countries in the Pacific region are unlikely to create an institution like the Native Land Trust Board to negotiate lease agreements on behalf of customary owners. Such a move would now possibly be unconstitutional or inconsistent with legislation in many Pacific countries (Paterson 2001). More importantly, customary landowners are unlikely to voluntarily surrender their powers of management the way Fijian landowners did in the late 1930s. It is unlikely that any Pacific government would contemplate imposing this approach.

8 Resolving customary land disputes

‘Disputes over land are tearing apart our families, our villages and our communities.’

Village chief from Nggela (Florida) Islands, Central Province, Solomon Islands, in a community consultation with an AusAID land mission, June 2006

Most countries in the Pacific region experience disputes involving customary land. Because customary land is an integral source of social identity, culture and livelihoods, disputes over the land can involve questions of law, social authority, economic opportunity and historical grievance.

There is no ‘one size fits all’ solution to disputes involving customary land. The systems used for resolving disputes vary across the Pacific region. Local customary institutions must be involved because they have the knowledge of both custom and the causes and effects of the disputes. They are also more accessible, resolve issues faster and are less expensive than government institutions. State institutions must become involved in handling disputes that cannot be resolved by local customary institutions, especially disputes involving outsiders.

Ideally, customary institutions and state institutions should combine to form a coherent system that allows final and enforceable determinations, and minimises opportunities for claims to be pursued in multiple forums. The ideal system for resolving customary land disputes should also be transparent and accountable, and accessible to women, children and low-income groups.

The main types of disputes involving customary land

INTERNAL DISPUTES

Some landowning groups have complex relationships among families, extended families, clans, tribes and villages, and groups may expand or divide in response to different economic and political incentives. Despite their complexities it is still possible to classify certain disputes as internal to a customary group. These disputes may stem from membership, particularly when membership determines entitlements to land or its revenues. Alternatively, they may stem from questions of status and authority and be between leaders of different components of the group or arise from decisions made by group leaders.

Internal disputes may also involve:

- » claims of exclusive rights by individuals or families—for example, by fencing off some group land or attempting to sell or lease land
- » different versions of undocumented historical events—for example, when land was occupied or how land use was agreed
- » inheritance entitlements—for example, where land has been shared rather than subdivided among members of successive generations
- » boundaries—where boundary markers have disappeared or no precise boundary had been agreed previously.

OUTSIDER DISPUTES

Disputes over customary land also arise between landowners and outsiders, particularly the state. Those involving the state encompass claims that:

- » customary land was improperly acquired (or alienated) or owners were inadequately compensated for land acquired during colonial times
- » the boundaries between customary land and alienated land were incorrectly surveyed
- » government acquisition of customary land after independence did not follow due process or provide adequate compensation.

In the Pacific region governments and their agencies have limited capacity. This means that disputes involving the state are often connected to problems within the administration of land itself because of poor recordkeeping, conflicting advice from state institutions, or insufficient coordination among government departments.

Disputes between landowning groups and outside investors commonly arise from differences between expected and delivered benefits, damage to the local environment, the employment of outsiders, and the expiry and renewal of leases.

Sometimes land disputes develop between different customary groups. This type of dispute is increasing in the Pacific because of increased migration, population pressures and economic activity (see Chapters 3 and 10). But these disputes may also involve boundaries and undocumented events, as in the case of internal disputes.

Procedures used to resolve disputes

Disputes may be settled using adjudication, arbitration and mediation.

- » **Adjudication** involves the determination of legal rights by a third party (usually a court or tribunal). Unlike arbitration, the parties to a dispute do not choose the adjudicator. A claim by one party is sufficient to commence adjudication proceedings, in which case the other parties must defend the matter to avoid a default judgement. Adjudicated decisions are enforced through state institutions, including the police and the courts.
- » **Arbitration** is a process in which disputing parties agree to accept the decision of a third party. The third party is appointed by the disputing parties, or chosen in accordance with a process agreed by the parties. Unlike court proceedings, arbitration proceedings are not normally subject to formal rules of evidence or procedure. Although there are no formal mechanisms in the Pacific for resolving customary land disputes using arbitration, it can occur if a lease or an agreement with an incorporated land or business group stipulates that the parties must appoint an arbitrator.
- » **Mediation** is a process that assists disputants to reach agreement themselves. All 'alternative dispute resolution systems' (see 'Alternative systems' in the next section) involve a mediator to facilitate communication between the disputants. The mediator can help to identify the underlying issues to be addressed, and suggest options for agreement, but cannot impose a decision.

Institutional options for resolving customary land disputes

CUSTOMARY INSTITUTIONS

Customary institutions, which play an essential role in managing and resolving customary land disputes, take various forms across the Pacific region. They include hereditary chiefs, designated land chiefs, village councils, aristocratic lineages, respected elders, local 'big men', and ritual or spiritual authorities. In all countries, customary institutions play an initial role in resolving customary land disputes. No country prohibits resolution of land disputes by customary institutions, but few countries have developed systems for resolving land disputes that combine those institutions and their formal institutions. Those that have include:

- » Samoa, where the Village Fono Act 1990 grants the village council (*fono*) jurisdiction over village land disputes (see Volume two, Case Study 10)
- » Tokelau, where disputes over Tokelauan land (not Crown or freehold land) are determined by atoll leaders (*faipule*) and the village council of elders (*taupulega*)
- » Vanuatu, where the Customary Land Tribunal Act 2001 stipulates that its formal system of dispute resolution complements customary mechanisms
- » Solomon Islands, where all disputes involving customary land must be submitted to custom chiefs or land arbiters before the matter can be referred to the courts, and parties must file a certificate showing that this has occurred before seeking the judgement of a local court.

Strengthening customary mechanisms through legal recognition and support helps to harness their benefits in terms of ready access, low cost and knowledge of customs. However, it is important to note that most customary forms of dispute resolution are dominated by male leaders. This may mean that the important role women play in using and managing land, including resolving land disputes, is not always fully recognised.

STATE INSTITUTIONS

There are three basic types of state institutions that govern customary land disputes in the Pacific: courts, tribunals and commissions. A **court of law** adjudicates disputes by exercising its judicial power under the Constitution. A **tribunal** is a court of law with a specific jurisdiction. Courts are presided over by judges with formal legal training and experience. In some cases, the judge(s) may be assisted by an assessor, who does not have legal qualifications but has experience in the subject matter under dispute. Courts usually apply strict rules of evidence that prevent certain types of evidence (such as hearsay) being presented.

A **commission** can adjudicate legal claims to land, if allowed to do so by the national Constitution. Unlike a court, a commission can undertake research, investigations and policy development that are not limited by the facts or claims of a particular dispute. A commission may also engage in information and publicity campaigns in order to prevent the emergence of disputes. Commissioners do not have to be legally trained judges, and are often not bound by strict rules of evidence. As with courts, commissions may undertake or order the mediation of disputes.

Almost all countries in the Pacific region adjudicate customary land disputes through the court system. The following countries have specialist land courts:

- » Papua New Guinea (Local and Provincial Land Courts)
- » Vanuatu (Customary Land Tribunal)
- » Samoa (Land and Titles Court)
- » Solomon Islands (Customary Land Appeal Courts)
- » Tonga (Land Court)
- » Tuvalu (Land Court)
- » Palau (Land Court).

Some countries have special land divisions within their general courts, including:

- » the Cook Islands (High Court land division)
- » Niue (High Court land division)
- » Kiribati (Magistrates Court land division).

In the Marshall Islands, the High Court has jurisdiction over customary land disputes, and may refer certain land-related questions to the Traditional Rights Court for its opinion. Depending on the type of dispute, the Federated States of Micronesia uses a land commission (Chuuk), a land court (Kosrae and Pohnpei) and the land registration section of the department for resources and development (Yap). In Fiji, disputes over ownership (not leases) of customary land are determined by the Native Lands Commission. In Nauru, customary land disputes are taken to the Nauru Land Committee.

ALTERNATIVE SYSTEMS

In many countries around the world, what are termed 'alternative dispute resolution systems' have been established to deal with local or family-based disputes. The systems encourage mediated settlements rather than immediate recourse to a court.

Traditional systems for resolving land disputes in the Pacific region share some of the characteristics of these alternative systems. They include an appointed or acknowledged independent mediator like a 'big man' or land chief, the use of reconciliation workshops or discussions, choice of an informal and familiar setting for discussions, the avoidance of lawyers or court paraphernalia, and an informal and responsive agenda for the proceedings so the disputants can feel comfortable and confident.

In situations where neither a customary institution nor a formal legal institution is available or appropriate for resolving a dispute, an alternative system could be useful. However, such dispute resolution systems are not widely used or recognised in the Pacific. Yet there could be important benefits from providing greater support for and recognition of alternative systems, given the weakened state of customary and formal land dispute institutions in some parts of the Pacific, particularly in some urban and peri-urban areas.

Mediation potentially has an important role in resolving customary land disputes in the region because it avoids the ‘winner–loser’ model of formal legal adjudication (see Volume two, Case Studies 9 and 11). In Papua New Guinea, customary land disputes cannot proceed to the Local Land Court until mediation has been attempted by a mediator appointed by the Provincial Land Disputes Committee. In East Timor, disputes over customary land are mediated by officers of the Land and Property Directorate, which is part of the Ministry of Justice (Box 8.1).

BOX 8.1 » LAND DISPUTE MEDIATION IN EAST TIMOR

In East Timor mediation of land disputes is undertaken by trained officials from the national Land and Property Directorate and so is embedded in land administration rather than judicial administration. This allows remedies unavailable in the courts, such as selling, leasing, dividing or swapping land and interim agreements to allow use of the land until the dispute is resolved. It also alleviates problems associated with a lack of capacity in the court system, including minimal facilities in rural areas. Land administration generally has greater access to self-funding opportunities than the courts. In East Timor the Land and Property Directorate generates substantial revenues from leases over public land.

Source: Volume two, Case Study 9, ‘Mediating land conflict in East Timor’.

Designing or improving a dispute resolution system

The effectiveness of formal systems for resolving customary land disputes depends on their accessibility, sustainability, expertise, jurisdiction, procedures, mechanisms for enforcing decisions, and accountability.

ACCESSIBILITY

Formal systems for resolving customary land disputes must be accessible otherwise disputants will resort to informal alternatives. These alternatives may involve customary institutions, but normally involve direct approaches to politicians, local and provincial officials, and police or military personnel. Barriers to accessing formal systems such as high costs and very long waiting times increase the likelihood of disputants pursuing their claims through several institutions. This phenomenon of ‘legal forum shopping’ can be a problem with customary land management systems.

Costs such as court (or commission) fees and legal fees (if lawyers are involved) can be a major barrier. Although court fees are an important source of funding and sustainability (see below) for formal systems, they do deter low-income groups with otherwise legitimate claims to disputed customary land. Some customary land claimants will select informal arbitration options with lower fees and charges. As would be expected, the price of access affects women and lower income groups disproportionately.

Lawyers can be important in facilitating court proceedings, identifying the relevant issues and evidence, and advising claimants on their options for a negotiated settlement. But involving lawyers in customary land disputes substantially increases costs for the parties. While legal aid programs can help lower income groups, the cost of legal aid would increase the total budgetary cost of the dispute resolution system itself.

Long distances and costly forms of transport deter disputants from pursuing their claims in formal institutions. The mountainous and archipelagic countries in the Pacific face particular challenges in improving access to formal justice systems. Decentralisation—establishing courts or commissions in regional and district centres and providing transport for court or commission members to meet the parties—can greatly improve accessibility. Responsibility for administering the system may also be vested in provincial agencies (Box 8.2).

BOX 8.2 » SETTLING CUSTOMARY LAND DISPUTES IN PAPUA NEW GUINEA

Papua New Guinea's Land Disputes Settlement Act was designed by Melanesians for a Melanesian society. Its structure of mediation, arbitration and appeal is based on a combination of Melanesian customs, principles and practice, and formal law of British origin. The mandatory involvement of the disputing parties in mediation is based on the principle that a resolution by consensus is more permanent than one imposed by authority. The system is decentralised to the district level to bring it closer to the community it is designed to serve.

But the system is now struggling to operate effectively. The major problems reflect a lack of adequate resources, legislative design flaws, a lack of bureaucratic leadership and failure to maintain a pool of adequately trained people to administer it.

A land dispute resolution system that makes extensive use of local custom still requires ongoing training and support for administrators (mediators and arbitrators), cost-effective procedures for disputants, clear leadership from bureaucracy, and an ongoing financial commitment from government. The system also needs regular reviews that are supported by a government commitment to implement any major recommendations.

Source: Volume two, Case Study 11, 'Settling customary land disputes in Papua New Guinea'.

SUSTAINABILITY

Accessibility must be balanced against the need for a formal system to be sustainable. Even well-designed dispute resolution systems will fail if they lack sufficient recurrent funding. Court or commission fees and charges are usually not enough to maintain an effective system for resolving disputes, making funding from general revenue necessary. However, courts or commissions may lack sufficient political support to gain that funding when competing with other areas of demand. User-pays arbitration may be an option only if an outside investor agrees to bear the arbitration costs.

Dispute resolution is an integral component of an effective land administration system, which can be an important source of government revenue. Even customary land can be a source of revenue if it is leased by outsiders and developed. For example, under the Alienation of Customary Land Act 1965 the Samoa Government is entitled to a 5 per cent commission on rent or other payments of an annual or periodical nature (see Volume two, Case Study 10). In Fiji, the Native Land Trust Board can retain a percentage of rents received for customary land leases. In East Timor, mediation of land disputes is funded by the Land and Property Directorate, which earns substantial revenue from leases granted over state land (see Case Study 9). Funding the system for resolving customary land disputes from land administration revenue may be one way to ensure the system is sustainable.

The sustainability of a dispute resolution system also depends on adequate staff and training and effective systems of communication. One lesson from land mediation in East Timor is that regular training programs are required to address the problem of staff turnover. Effective communication systems also provide a means to enhance knowledge and skills. Publishing judgements is an important part of sustaining and improving the quality of a dispute resolution system (see Case Study 11).

EXPERTISE

An effective system for resolving customary land disputes requires a range of expertise. At its heart there must be knowledge of custom and local issues and expertise in law and legal procedure. In developing effective systems it is desirable to draw on the customary knowledge of both men and women. Many mature women have a deep knowledge of their custom, but they are often excluded from participating in the formal institutions. Bringing local customary knowledge into formal institutions, with judges holding the legal expertise, is a major challenge when designing or improving a dispute resolution system.

Some Pacific jurisdictions illustrate possible policy options.

- » In Papua New Guinea, the Local Land Court appoints mediators local to the area in which the dispute emerged.

- » In Vanuatu, village land disputes are heard first by the members of the Village Land Tribunal, who are chiefs and elders of that village (elders being any person with important communal responsibilities, regardless of age). Chiefs and elders also act as members of the appellate land tribunals.
- » In the Marshall Islands, the High Court may request the opinion of the Traditional Rights Courts in relation to customary land disputes.
- » In Tonga the Land Court consists of a judge and an assessor. The assessor is selected by the judge from a panel of assessors, and his or her duty is to advise the judge on Tongan custom.
- » In Samoa, the Land and Titles Court is comprised of a President, who is a judge of the Supreme Court and must have legal qualifications, as well as Samoan judges and assessors, who must be matais (titleholders with authority over customary land). Appeals may be made to the Lands and Titles Appellate Court, which is presided over by the President and two Samoan judges of the Lands and Titles Court who have not had any previous involvement in the case.

In these and other Pacific countries, expert witnesses may also give evidence on local custom before a court of law. The exceptions include Papua New Guinea, Kiribati and Tuvalu, where expert witnesses are not used because custom is proved as a question of law only. This means that custom is proved by simply producing documents (see 'Procedures' later in this chapter).

JURISDICTION

As already noted, most Pacific countries have specialist land courts or commissions for customary land. In some cases, these courts cannot make an initial determination on whether the disputed land is customary land. For example, in Papua New Guinea the Land Titles Commission (and not the Land Court) determines whether land has the status of customary land. In Samoa the Land Investigation Commission determines whether an area of land is customary in nature, not the Land and Titles Court. In other systems, the general courts usually have jurisdiction to determine whether land is customary or alienated.

Disputes over leases on customary land may be outside the jurisdiction of specialist land courts or commissions. The parties may agree in the lease to arbitrate disputes, which means that only appeals on questions of law are directed to the general courts. Where arbitration is not included in the lease or agreed by the parties, disputes are often heard in the general courts rather than the specialist land courts. For example:

- » In Fiji, where leases of customary land are granted by the Native Land Trust Board, disputes are determined by the Agricultural Tribunal or the general courts (High Court and Court of Appeal). Until recently, the courts have not allowed landowners to challenge the granting of a lease by the Native Land Trust Board.

- » In Solomon Islands, disputes over leases are determined by the High Court and Court of Appeal.
- » In Vanuatu, disputes over non-customary dealings in customary land are determined by the Supreme Court, with appeal to the Court of Appeal.
- » In Papua New Guinea, incorporated land or business groups must establish a dispute resolution body in their constitutions to determine disputes among their members.

The use of multiple institutions to handle different disputes over customary land can create uncertainty for investors and land claimants. But this uncertainty is often outweighed by the benefits of different institutions having specific functions and expertise. In many cases it may make sense to concentrate expertise relating to customary land rights in a specialist institution, leaving disputes involving outsiders and legal determinations to arbitrators or general courts of law (Box 8.3).

BOX 8.3 » THE LAND AND TITLES COURT IN SAMOA

In Samoa the principal forum for resolving customary land disputes is the Land and Titles Court. This court has an advantage over 'customary' courts established elsewhere in the Pacific in that it has been accorded superior status and the only appeal is to its own Appellate Division. The court can undertake its own investigations. The court's investigative approach is suited to dealing with customary land disputes as it avoids a competitive battle between parties and unfair litigation tactics. Further, the court is not bound by technical rules of evidence, which make it very difficult for parties to prove their case in customary matters. One way of improving the resolution of customary land disputes is to create a specialist institution that is able to develop expertise in customary land matters and is not restricted by the normal rules of evidence.

Source: Volume two, Case Study 10, 'Resolving land disputes in Samoa'.

PROCEDURES

The legislation establishing a dispute resolution system should clarify the respective status of customary law, common law and the national Constitution. In most Pacific jurisdictions, the courts apply custom or customary law to determine disputes over customary land. At times further clarification is required about the relationship between custom and customary law (see Volume two, Case Study 10). Sometimes clarification is needed about the relationship between constitutional human rights principles, particularly relating to gender equality, and the application of custom to disputes over customary land. In Solomon Islands, for example, customary law is exempt from the general prohibition of discriminatory laws. In Vanuatu the courts have determined that constitutional antidiscrimination provisions do prevent customary law being applied in a discriminatory manner. In Fiji, customary law is subject to antidiscrimination provisions under the 1997 Constitution, but some areas of customary law are not open to challenge on the ground of discrimination.

Since custom or customary law is rarely written, institutions that use it as a basis for determining claims must consider how it is to be proved. There are two general options.

In some jurisdictions, custom or customary law must be proved as a 'question of fact'. This usually involves the oral testimony of expert witnesses. Using such witnesses does provide access to local knowledge and expertise, but can increase the costs of court proceedings. Expert testimony can also be complicated by the application of formal rules of evidence, because some customary principles are contained within hearsay stories and historical accounts.

In other jurisdictions, custom must be proved as a 'question of law'. This does not require evidence, but can be proved simply by producing documents. Proving custom as a question of law is cheaper, but it is complicated by the fact that most customary law is unwritten. It can be difficult for a court to decide whether a particular custom is 'customary law', especially when applicable legislation or common law fails to provide a definition of 'customary law'.

ENFORCEABILITY

To be effective, dispute resolution systems need to include mechanisms for enforcing decisions. Enforceability can be difficult in the context of disputes over customary land, which not only has economic value, but political, social and spiritual significance. The decisions of dispute resolution institutions may be enforced by customary mechanisms such as traditional compensation or customary work, or by state institutions such as police and the courts, or bankruptcy procedures against people who fail to pay fines.

Enforcing court decisions is difficult if the courts are seen as 'foreign' or 'colonial' entities, and if the state and its enforcement mechanisms are weak or perceived to be illegitimate. There may be scope for state institutions to adopt customary mechanisms such as compensation, but the legislation enabling decisions to be enforced needs to clarify the acceptable mechanisms.

An enforceability issue that needs to be considered is whether a court decision is binding on the parties only (in personam) or enforceable against the land (in rem⁴). It appears that the in rem nature of decisions in Samoa has caused problems, because some affected people have been unaware of the dispute in the first place (see Case Study 10). This communication problem highlights the importance of ensuring that all interested people have notice of claims and adequate access to justice, including the date of hearings and dispute resolution. Decisions are unlikely to be accepted if they are made in the absence of the parties with a stake in the outcome.

4 Latin for power about or against 'the thing'.

ACCOUNTABILITY

Decisions regarding customary land disputes will not be effective unless the parties to the dispute accept that the decision maker has legitimate authority to determine the dispute. It is therefore important that decision makers are perceived to be independent of government (especially in places where governments are not trusted by large segments of the population), impartial and without any conflict of interest. Decision makers must also have knowledge of relevant local customs or be advised by people who have that knowledge. There can be tension between the need for impartiality and independence on the one hand, and knowledge of customs on the other. Some Pacific jurisdictions have resolved this dilemma by stipulating that dispute resolution mechanisms include both impartial decision makers (judges) and advisers (or assessors) with knowledge of custom, and that different sets of criteria and appointment procedures apply to these different positions.

An effective system for resolving disputes provides an opportunity to appeal decisions—to determine whether an error has been made in the reasoning. Dispute resolution systems may consist of various levels of decision making, each with a different function. The primary role of customary institutions, and sometimes the lower courts, is to mediate and attempt to establish consensus. If this is unsuccessful, the dispute may be referred to courts of appeal, which usually consider questions of law and not custom. Limiting the jurisdiction of appeal courts to questions of law saves time and money, and leaves questions of custom to local courts that are generally better placed to determine such questions. For example:

- » In Solomon Islands, customary systems can entail a process of conciliation and compromise, or a decision by a chief or chiefly council after consultation with the community. If this fails, disputes may be heard by a local court and, on appeal, by a customary land appeal court. Appeal is allowed to the High Court on matters of law, but not custom.
- » In Vanuatu, disputes regarding customary land are referred to a Village Customary Land Tribunal, and may be appealed to an Area Customary Land Tribunal, with a right of further appeal to an Island Land Tribunal.
- » In Samoa, disputes are dealt with by the village council and, if this fails, by the Land and Titles Court. Appeals may be made to the appellate division of that court.

Throughout the region the pre-emptive referral of customary land disputes to the mainstream court systems is becoming more common. By changing the forum to the general court system, local or customary processes and specialist land courts are not being used and the proceedings are more legal in nature. Administrative law remedies are being sought but at considerable expense. One result is that the general court lists are becoming clogged with land disputes that could be settled more efficiently through traditional or specialist jurisdictions.

9 Land for public services and infrastructure

‘... a human group invariably opens a significant proportion of its territory to public use.’

Robert Ellickson (1993, p. 1381)

In most countries, including countries in the Pacific region, governments have an important role in providing social services and infrastructure. This may include roads, bridges, water storage and supply infrastructure, waste management, electricity, hospitals, educational institutions, airports, shipping ports and recreational facilities. To provide these things, a government needs to be able to access land, protect its legal interests, effectively manage the land for a public purpose and, if necessary, dispose of the land in a way that makes responsible and equitable use of public money. Many Pacific governments are struggling to gain and maintain access to land for public purposes.

Although most Pacific countries prohibit the transfer or sale of customary land, this prohibition does not apply to government. Not only are governments allowed to buy customary land, all governments, except in Nauru, have legislation that allows them to force a landowner, including customary landowners, to transfer ownership to the government (Table 9.1). This legislation empowers governments to get land for important investments that benefit the public, even if there is opposition from landowners. Accessing land in this way is justified on the assumption that the public interest outweighs the interest of landowners. Most Pacific countries require the government to pay fair (just) compensation to landowners who lose their land to the government.

A common practice in the region now is for governments to access customary land for public purposes by negotiating leases.

TABLE 9.1 » COMPULSORY ACQUISITION OF CUSTOMARY LAND IN THE PACIFIC REGION

	Is compulsory acquisition allowed?	Compensation requirements	Is compulsory acquisition applied?	How is land normally accessed?	Usual way that landowners are paid
Cook Islands	Yes	na	Rarely	Lease	na
Fiji	Yes	Just and equitable compensation	Rarely	Lease	By negotiation with the Native Land Trust Board
Federated States of Micronesia	Yes	Fair compensation	Rarely	Negotiated purchase	By negotiated agreement
Kiribati	Yes	na	Rarely	Lease	At a set rate per hectare leased
Marshall Islands	Yes	Just compensation	No	Lease	na
Nauru	No			Lease	By negotiation and landowner consent
Niue	Yes	na	na	na	na
Palau	Yes	na	Rarely	na	na
Papua New Guinea	Yes	Just compensation paid on just terms	Yes	Mostly compulsory acquisition	Just compensation paid on just terms
Samoa	Yes	Full and just compensation	Often	Mostly compulsory acquisition	Market value of land
Solomon Islands	Yes	Reasonable compensation	Not normally	Negotiated purchase or lease	By negotiated agreement
Tokelau	Yes	na	na	na	na
Tuvalu	Yes	na	Sometimes	Negotiation or compulsory acquisition	na
Vanuatu	Yes	Reasonable compensation	No	Mostly lease; sometimes negotiated purchase	By negotiated agreement

na Information is not available.

Source: Based on information provided by Donald Paterson, Emeritus Professor of Law, University of the South Pacific, 2007.

Government access to customary land in the Pacific

Some landowners in the Pacific are keen to sell or lease their land to the government. They welcome the income from the transaction as well as the benefits from having a road or hospital or other public service close by. However, in other parts of the Pacific, governments are finding it almost impossible to acquire land from customary groups—even for public purposes that clearly would benefit the landowners. Some of the reasons for this are now considered.

CHALLENGES TO GOVERNMENT OWNERSHIP

Government ownership of some land, especially land acquired by colonial administrations, is currently being challenged by customary groups. In Papua New Guinea and Vanuatu, for example, there is a large backlog of compensation claims relating to public land. Micronesian countries are also disputing the ownership of land acquired by government during the colonial era (Box 9.1).

UNCERTAINTY IN VALUATIONS OF CUSTOMARY LAND

Another reason why governments in the Pacific have difficulty acquiring more land is the uncertainty and disputes over the valuations of land, especially customary land.

Because customary land has significant cultural, spiritual and environmental value as well as economic value, its owners cannot be easily compensated for what they lose. A customary group may not wish to relinquish ownership or grant a lease at any valuation. In these situations a government is in the difficult position of weighing its public interest objective against the desire of a customary group to maintain uninterrupted ownership and use of its land.

Even if a customary group is open to selling its land to the government, the government needs to deal with the difficulty of putting an economic value on the land and calculating the amount of compensation. Because customary land in Pacific countries cannot be freely sold or transferred, there is no readily available 'market' value. This problem is exacerbated by the serious shortage of independent land valuers with professional qualifications in many Pacific countries.

BOX 9.1 » CHALLENGING GOVERNMENT OWNERSHIP—PAPUA NEW GUINEA, VANUATU AND MICRONESIA

Papua New Guinea has received a lot of publicity about compensation claims for land acquired by the colonial and Australian administrations. According to the Constitution, as well as the Land Act 1996, land acquired for a public purpose is subject to just-terms compensation. The government is now faced with a large backlog of compensation claims over land acquired prior to independence or before the 1962 Land Act, which tightened procedures for acquiring land. The protracted land compensation claims relate largely to the government claiming ownership of unoccupied land without paying compensation to adjoining landholders. These landholders have often sought compensation on the basis that the land was 'owned' under customary practices, even though it was not occupied at the time it was claimed by the state.

In **Vanuatu** there is also a substantial backlog of compensation claims over land acquired by the state before independence and retained by the state after independence (see Volume two, Case Study 12). Although most of this land reverted to customary landowners at independence, 2 per cent remained under government control and much of this is high-value urban land. While the government acknowledges that there are outstanding compensation issues to resolve, it faces the dilemma of raising the finance to do this when there are so many other pressing development needs.

In the **Federated States of Micronesia**, the **Marshall Islands** and **Palau**, substantial tracts of land were acquired by colonial governments without compensation or landowner consent, particularly by Japan during World War II (see Annex B). The Marshall Islands has since resolved its compensation issue by returning all such land to the customary landowners. There have been efforts in the Federated States of Micronesia to return land originally acquired without payment of compensation, but the process has been protracted and is unlikely to be completed for some time. In Palau there are provisions for returning to the original owners land acquired in an inappropriate way, but these provisions have not been widely applied and most land continues to remain under public ownership and under dispute.

RECORDKEEPING

Poor administration and recordkeeping are also reasons why governments in the Pacific region have difficulty maintaining access to land for public purposes. Effective recordkeeping depends on adequately defined and demarcated land. Without accurate maps of state land, customary groups can contest ownership of that land, however it was acquired. Boundaries of the acquired land can fall into dispute over time if accurate surveys and records were not made at the time of the acquisition or, if made, not stored appropriately or safely (Box 9.2).

BOX 9.2 » LAND ACQUISITION RECORDS IN PAPUA NEW GUINEA

When governments acquire customary land for public purposes in Papua New Guinea they do so by way of a native land dealing. This process investigates the relevant landowning groups, a valuation is made of the land and improvements, and the boundaries are surveyed and marked. Documents are then submitted to the Department of Lands for registration of the native land dealing. A draughtsman checks the survey data and plots the area acquired onto a master transparency copy of the relevant 1:50 000 map. In 2000 there was a backlog of two–three years in registering native land dealings.

For much of the land thought of as public land, there is uncertainty about its true ownership because of the poor state of the land registration records in the Department of Lands in Port Moresby and the provincial capitals. This uncertainty particularly relates to roads, as many roads have been built on customary land through informal arrangements—without governments formally acquiring the land. With the poor state of records and such informal agreements, there are numerous places throughout the country where the government believes it legitimately owns the land that contains public infrastructure, and customary owners equally believe they are the legitimate owners. Without good records, resolving ownership status presents considerable challenges for all involved.

Source: Volume two, Case Study 12, 'Acquiring land for public purposes in Papua New Guinea and Vanuatu'.

Improving government access to customary land

Most land that Pacific governments need to acquire for public purposes is customary land. Improving access and tenure security means improving relationships and dealings with customary groups. Even though governments in the Pacific region have legislative power to force landowners to transfer the required land to the state, using this approach has a significant risk of undermining the relationship between government and landowners. A less risky approach is to negotiate a voluntary sale or lease of the land. This is the approach used in most places.

Vanuatu has taken the policy approach of buying land if permanent access is needed for such infrastructure as roads and airports. But generally, customary land is accessed by negotiating leases with the customary landowners (see Volume two, Case Study 12).

PROVIDE EXPERT ADVICE AND ASSISTANCE

As mentioned in Chapter 7, customary groups are often in a poor position to deal with outsiders, including the government. This means they may enter into an agreement over their land with the government that they do not properly understand and that deprives them of significant benefits. There is a risk that they may later seek to legally challenge the acquisition or the level of compensation.

For governments to avoid this uncertainty and risk, they need to ensure that customary groups have access to expert advice and assistance, ideally supplied by an independent institution established to help them negotiate with investors or government (see Chapter 7).

CONSULT CUSTOMARY GROUPS AND ENTER INTO PARTNERSHIPS

When a government negotiates access to customary land it needs to ensure that the agreement will be upheld. To achieve this it is important that all interested parties are effectively engaged in the negotiations and decision-making process. All members of the customary group should give their free, prior and informed consent to the agreement (see Chapter 7). Papua New Guinea has found that, wherever significant effort was put into consulting with landowners about acquiring land for roads, better and more timely agreements were achieved and disputes were minimised (see Case Study 12).

Governments can improve relationships with customary groups by entering into partnership arrangements with them so that they can continue to benefit from the land acquired for public purposes. Such arrangements could mean that group members are employed to maintain buildings or other infrastructure built on the land. This could occur irrespective of the method used to access the land, but would be easier for landowners to arrange if the land were leased.

GAIN ACCESS BY LEASING LAND

A number of governments in the region now gain access to customary land by entering into lease arrangements with the landowners, rather than through voluntary sales or compulsory acquisition (see Table 9.1). It is also possible for a government to force customary landowners to lease their land.

There are advantages and disadvantages to leasing land for public purposes. One advantage is that, if the government no longer needs the land, the land can simply revert to customary tenure. Leasing avoids some of the sensitive issues associated with disposing of public land previously acquired from customary owners—for example, whether it should be sold as freehold and, if it is sold back to the customary owners, how much they should pay (market value or a reduced rate), or whether it should be converted back to customary tenure and returned to the customary group (as expected by some customary landowners).

Leasing generally avoids the large upfront payments incurred when buying land, and allows the government to make other investments that require such payments. Lease agreements can include conditions to ensure that any increase in the value of the land can be enjoyed by the customary group rather than the government.

A disadvantage of leasing is the opportunity it gives to customary landowners to make unreasonable rental requests during the lease term or during the renegotiation of a lease. This can occur if the land is needed on a permanent basis, such as for an airport or highway. The customary owners are in a powerful position. To avoid such requests, the government could include options for renewal in the lease agreement and fix rental payments according to market value or some other formula, or impose a land use restriction or covenant over the land, so that it must be used for a specified public purpose, and determine rental payments according to market value or some other formula.

PROVIDE LAND VALUATIONS AND COMPENSATION

Irrespective of how a government acquires land, an accurate valuation of the land is important for both the government and the landowners. Land valuations provide a benchmark for both parties when negotiating a voluntary purchase or lease agreement. For example, a valuation can help a government to demonstrate it negotiated a lower rate than the market rate for land to be used for a purpose such as a school or police station that would directly benefit the customary group.

The terms and conditions of a negotiated agreement need not always include a monetary payment. Land swaps and in-kind arrangements may be possible, but need to be considered carefully. For example, in Samoa an in-kind deal was made with landowners—a hydroelectric facility was built on their land in return for free electricity. A disadvantage of this arrangement is that the landowners have no incentive to use electricity prudently. As part of the agreement landowners have retained right of access to the water resources (see Volume two, Case Study 13).

Although customary land is sometimes perceived to have no ‘market’ value, once land is transferred to the state for a public purpose, its origins are irrelevant. So, to avoid legal challenge governments should assume that it has inherent economic value irrespective of its original tenure status (Box 9.3).

BOX 9.3 » LAND VALUATION IN SAVAII, SAMOA

When the government acquired a large tract of land on Savaii, Samoa’s second largest island, it used the lack of a market in customary land to justify its compensation of US\$1.6 million—significantly less than the market value of freehold land. Unconvinced, the landowners commissioned independent valuations and these found the land to be worth US\$16 million. This higher valuation was justified on the basis that once land is alienated from its customary owners it has the same value, regardless of its origins. The Supreme Court of Samoa upheld this post-alienation view of land valuation.

Source: Volume two, Case Study 13, ‘Accessing land for public purposes in Samoa’.

REGULATE LAND VALUERS AND PROVIDE ACCESS TO MEDIATION

In most countries in the Pacific the market in land is not large and the number of land valuers is small, which results in considerable differences in the valuations of customary land. To increase the objectivity of land valuations used to determine compensation, it is important for governments to regulate and license professional land valuers and to support professional training and education.

Landowners need user-friendly ways to challenge the determinations of land values made by governments, as it may be quite a daunting prospect to take a dispute directly to an appeals court. Governments could consider providing access to mediation for landowners who wish to challenge such determinations.

10 Informal settlements and urban land

‘Development is a process of change. Central to this is ... people shifting from the countryside to towns and cities. Secure land tenure ... is a key precondition for this ...’

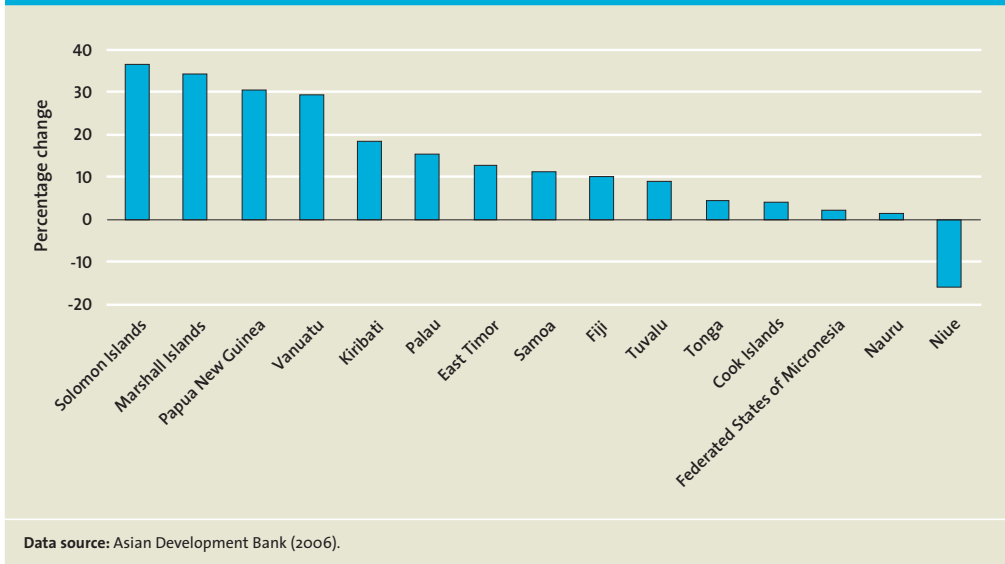
Nicholas Stern, Senior Vice President and Chief Economist, World Bank (2003)

Population growth and large-scale migration from rural to urban areas in Pacific countries were identified in Chapter 3 as reasons for reforming land policies. This is largely because of the resulting growth in informal urban settlements, which are a source of tenure insecurity in the region. The issues related to urbanisation, particularly informal settlements, are now considered before examining how to manage the growth of these settlements.

Population growth, migration and urbanisation

The land areas of most countries in the Pacific region are small, and population growth rates are high. This has resulted in increased pressure on land tenure systems. These pressures will continue to intensify, but not to the same extent for all countries. Some gain relief from people migrating to take advantage of the international labour market. The countries with the lowest population growth rates are easy to identify in Figure 10.1. The countries on the left of the figure have virtually no external relief from population pressures. In some countries, populations are increasing by more than 30 per cent every 10 years.

FIGURE 10.1 » ESTIMATED CHANGE EVERY 10 YEARS IN THE TOTAL POPULATIONS OF COUNTRIES IN THE PACIFIC REGION

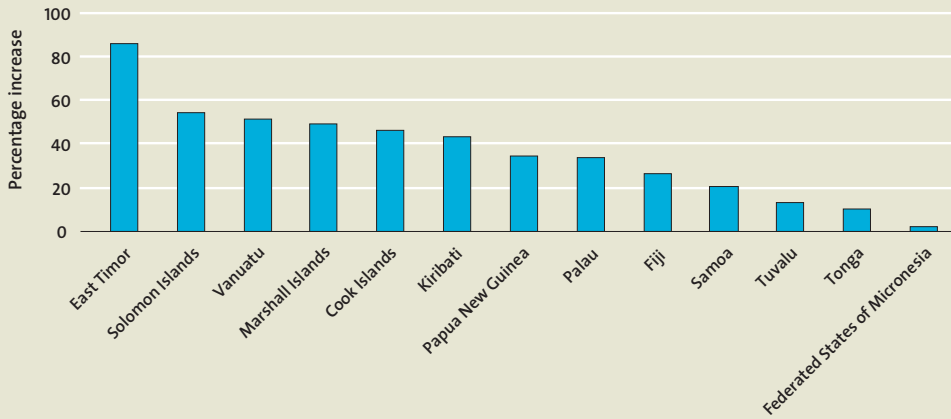


Urban centres in the Pacific are experiencing considerable population growth. For many countries, 10-year growth rates are close to 50 per cent (Figure 10.2). A common pattern across countries in the region is for urban population growth rates to far outstrip total population growth rates. At current rates East Timor's urban population is increasing by more than 80 per cent every 10 years.

Rapid urban population growth in the Pacific reflects a natural increase in the populations of towns as well as significant rural–urban migration. There are a number of interconnected 'push and pull' factors responsible for this migration: the negative effects of weakening customary authority in some rural areas, an increasing desire for a lifestyle that can be found only in urban areas, and the greater opportunities for employment and access to public services, such as education and health care, in urban areas.

In the Pacific region in 2007, an estimated 2.3 million people lived in urban areas or rural towns, out of a total population of 9.3 million. While this accounts for just one in every four Pacific people, 12 out of 22 countries and territories in the region have higher urban than rural populations (Secretariat of the Pacific Community 2007). If Papua New Guinea is excluded, approximately half of all Pacific people live in urban areas or rural towns.

FIGURE 10.2 » ESTIMATED INCREASE EVERY 10 YEARS IN URBAN POPULATIONS OF COUNTRIES IN THE PACIFIC REGION



Data source: Asian Development Bank (2006).

Urbanisation brings with it potential advantages and disadvantages. The advantages stem from the high diversity of activity and the economies of scale and scope, which act as a catalyst for innovation and growth, and can drive development in both the urban areas and the surrounding rural areas. However, increased urbanisation also comes at a cost, particularly if urban infrastructure and services do not keep up with increased demand. Problems related to Pacific urbanisation include limited access to land, poor housing, inadequate basic infrastructure, increasing hardship for vulnerable groups such as youth, women and people with disabilities, and increasing numbers of informal settlements (Storey 2006).

The rapid growth of informal settlements

As noted, urban growth in the Pacific is associated with the rapid emergence of informal settlements, where people lack formal rights to occupy the land they settle on. Sometimes the occupancy is illegal—in direct violation of the law. In other cases, the settlers may have rights that are ‘extra-legal’—not against the law, but not recognised by the law. The key characteristic of informal settlements is tenure insecurity. This reflects the chronic shortage of affordable and formal land (with legal title) for settlers to buy or lease for housing and commerce.

Most population growth in urban centres can be traced to informal settlements. For example, in Port Moresby the settler population is growing at 112 per cent every 10 years (7.8 per cent a year), which is more than double the rate for the city as a whole (see Volume two, Case Study 5). On average, a new informal settlement is established every year. In 1980, 10 per cent of the population of Port Moresby resided in such settlements. In 2000 the proportion was 21 per cent and, at current rates of growth, it will reach 29 per cent in 2008.

In Honiara, 34 per cent of the population is believed to reside in informal settlements and recently the number of settlers has been growing by 26 per cent a year, although this growth rate is likely to subside in the future. In Suva, 45 per cent of the population resides in informal settlements, and there too the settlements are growing rapidly. Urban centres elsewhere in the region are facing similar situations.

Unfortunately, some governments in the region have been slow to acknowledge the reality of rural–urban migration and the growth of informal settlements. A common view is that informal settlements are temporary and that residents in these settlements will eventually return to their customary lands and, if not, they should be sent home.

Failure to acknowledge or accept informal settlements is both a cause and consequence of poor urban planning. Only a small amount of formal land has been released, along with associated infrastructure such as water and electricity, for residential and commercial development. Because of this, the cost of formal land is relatively high, which reflects the strong relationship between availability and affordability.

Some governments in the region still hold tracts of land in urban and peri-urban areas that could be formally released for residential use. In many cases, migrants from rural areas have not waited for state land to be released, instead building informal settlements on this land. Because of the large numbers of people moving into settlements, many governments have struggled to prevent this happening. In some places politicians or government officials have taken advantage of the situation by offering state land to settlers or by offering services such as electricity or water in return for political patronage (see Case Study 5).

A key factor in the lack of affordable land is the high costs associated with releasing formal land for residential and commercial purposes. Complex statutory regulations for residential land developments and for housing construction are a concern in many places. When regulations make construction too difficult and expensive, building informally becomes much more attractive. Many of the statutory requirements are carried over from colonial periods when standards were set at levels appropriate for developed countries rather than developing countries. The standards need to be modified, while continuing to take into account the prevalence of natural disasters in the region, such as volcanic eruptions, earthquakes and cyclones.

The rapid growth of informal settlements has considerable consequences for urban planning and development. Infrastructure and services are generally not provided to informal settlements. Roads are not built, electricity is not connected legally and, in most settlements, there is no reticulated water or sewerage and no neighbourhood schools. This has led to social poverty, with some people in informal settlements living in squalor. These situations contribute to law and order problems, disputes, and higher levels of conflict.

The role of customary land

In some Pacific countries, customary landowners are already making land deals with migrant settlers seeking places to build homes and live. As a result, informal settlements have emerged not just on state land, but also on customary land. The customary landowners who are making their land available to migrant settlers have recognised the potential to earn income from their land and are taking advantage of it—filling a gap in the market.

In Port Moresby these land dealings normally include a large upfront payment and ongoing rental payments (see Volume two, Case Study 5). The parties to these informal dealings often attempt to legitimise their deals by producing receipts and, in some cases, preparing statutory declarations. The Oro community in Port Moresby has even set up an intermediary responsible for storing records, collecting rents and resolving disputes. Apparently there is an active market for buying and selling residences in informal settlements.

Land disputes in informal settlements are sometimes resolved through mediation and negotiation. But at times disputes are resolved by force. There are instances in Port Moresby of settlers from the same customary group living close to each other as a means of securing their interests and enforcing their deals (see Case Study 5). There are also instances of outright land invasion by settlers, with landowners powerless to either remove them or to negotiate deals with them to stay. In some cases, landowners have taken steps to limit the tenure security of residents in unwanted informal settlements by, for example, restricting infrastructure services, and even refusing to accept rents for risk of legitimising their presence.

Slowing the growth of informal settlements

International evidence indicates that attempts by governments around the world to prevent or reverse rural–urban migration have been relatively unsuccessful (United Nations Population Fund 2007). Such migration is an international trend and the reality is an increasing number of people in the Pacific want to move away from their traditional lands to live in urban areas. There is also international consensus on the need for governments around the world to recognise the right of people to choose where they want to live. Article 13 of the Universal Declaration of Human Rights (1948) states that: ‘Everyone has the right to freedom of movement and residence within the borders of each State.’⁵ Pacific governments and urban landowners need to accept the right of people to move to urban areas to live. The real issue is how to manage urban growth to improve tenure security and development opportunities.

MAKE MORE FORMAL LAND AVAILABLE

Slowing the growth of informal settlements requires the release of more formal land (supported with appropriate infrastructure) that is affordable. This means that both the state and customary landowners need to make more of their land available for new urban settlements.

For customary groups to make more of their land available they are likely to need assistance to:

- » gain formal (legal) recognition as landowning entities (Chapter 4)
- » record or register their land rights and/or agreements over their land (Chapter 5)
- » lease their land to urban settlers (Chapters 6 and 7)
- » gain access to institutions that can effectively resolve disputes with urban settlers or the government (Chapter 8).

This implies cooperation between customary landowners and the state. In addition, there needs to be coordination between customary landowners and state land administration agencies responsible for urban planning and infrastructure (see Chapter 12) to ensure that new developments are appropriately located and supplied with basic infrastructure.

The release of customary land for urban development through formal land systems is a key component of the current land policy reform program in Papua New Guinea. During 2008 the government plans to introduce a pilot program in which customary landowners on the outskirts of Port Moresby will partner the state in releasing their land for urban development. The partnership will include revenue-sharing arrangements between landowners, the local government, the provincial government and the national government. As part of the pilot program the government will also seek to work closely with investors and financial institutions.

5 See also Article 12(2) of the International Covenant on Civil and Political Rights (United Nations 1966).

At the same time as making more land available for urban settlements, governments need to find ways to improve conditions in existing informal settlements. The numbers and extent of these settlements make the process of formalisation—converting informal property rights into formal property rights—a medium-term to long-term project.

FORMALISE SETTLEMENTS ON STATE LAND

Formalising informal, illegal and irregular settlements on state land requires innovative adaptations to land administration and legal systems to improve tenure security, as well as improvements to infrastructure (Burns 2007). An important step is for governments to concede that the land will not be returned to the state. However, rather than hand over full ownership rights to settlers the state can grant settlers temporary occupation rights to small parcels of land or protection from eviction. This can enable the state to collect revenue from the land and provide settlers greater tenure security. Such approaches have been used all over the world, including in Kenya, the Philippines and Brazil (Payne 2002).

In Solomon Islands, efforts have been made to legitimise settlements on state land by providing temporary occupation licences to the settlers, who are required to make annual rental payments to the government. This is a precursor to converting the tenure of this state land into fixed-term estates, initially with 50-year leases. To date, 350 plots in informal settlements have been converted. As part of the process, the government has begun improving infrastructure by building roads and footpaths. But it is important to note that formalisation can exacerbate underlying tensions. Most of the Honiara settlers are from the island of Malaita, and many members of the local Guadalcanal population resent that formalised land rights are going to outsiders, even though the land was transferred to the state decades ago.

FORMALISE SETTLEMENTS ON CUSTOMARY LAND

Regardless of any efforts to formalise settlements on state land, it is probably as important, if not more important, for governments in the Pacific region to find ways to formalise the settlements on customary land. Governments need to acknowledge the informal dealings involving customary land and do something to help formalise these. Customary landowners would need similar assistance to that required to release customary land for new urban developments (see the discussion above on making more formal land available).

Formalising settlements on customary land has the potential to benefit the landowners in several ways. In addition to increasing their tenure security, customary landowners could become partners with the state to incorporate their land within the urban planning system. This would ensure that residential land developments were properly designed and serviced. A partnership arrangement would also enable landowners to approve plans before residential development proceeded. Obtaining community approval for urban development planning is common practice in well-planned urban systems.

By working in partnership with governments using formal systems, arrangements for both customary landowners and tenants can be more secure. With recourse to the law and formal protections for both landowners and tenants, people would not be forced to resolve disputes themselves. Informal arrangements have often been the foundation for community tensions, particularly in East Timor, where there is a history of displacement, and in Solomon Islands.

Yet many customary landowners may be reluctant to formalise dealings in their land. Some may fear that by formalising arrangements they will lose the freedom to claim back land from migrant settlers at a time of their choosing.

Due to the nature of informal settlements, formalising settlements on customary land will require negotiations that involve customary owners, settlers, land planners, urban authorities, service providers and legal advisers. Mediated open discussions as well as reconciliation workshops are likely to be necessary, and governments will need to encourage, facilitate and support all communication.

FORMALISE SETTLEMENTS ON LAND WITH DISPUTED OWNERSHIP

East Timor does not have large informal urban settlements like those in Melanesia. But it does have a high degree of ad hoc occupation of urban housing, largely as a result of huge numbers of people being displaced during Indonesian rule and returning in late 1999 following the successful vote for independence. In July 2004 the Land and Property Directorate established a special procedure to regularise the ad hoc occupation of houses until accurate ownership can be determined. Around 3000 special leases have been issued at nominal rents to ad hoc occupiers, who acknowledge in the lease agreements that they are not the rightful owners of the houses and land they occupy.

This interim mechanism for formalising informal occupation after populations are displaced provides some tenure security to the occupiers and allows the extent of informal occupation to be calculated, without prejudicing the rights of owners whose claims will be upheld by East Timor's future land restitution mechanisms.

11 Women, customary land and development

‘There is a strong positive association between women’s land rights and poverty reduction; this is because women’s control over land assets enhances household welfare, women’s cash incomes and spending on food, children’s health and education.’

United Nations Human Settlements Programme (2008, p. 15)

Land systems in the Pacific region are changing, particularly as a result of population growth, migration and the development of markets in land and other natural resources. These changes often affect women differently from how they affect men. Some women now have fewer rights and less access to land than they previously had under customary arrangements. However, changes to land systems in the region have the potential to provide opportunities for women to improve their rights and access to land. Understanding the range of risks and opportunities for women in relation to land can help a country to develop better land policies. This in turn can provide important social and economic benefits for women, their families, the government and society as a whole.

Women, land and custom: a brief overview

Despite the complexity and diversity of customary tenure systems in the Pacific (see Chapter 2 and Annex B), which are constantly evolving in response to contemporary pressures, it is possible to make two general statements about women’s rights to customary land in the region.

- » Women usually lack independent rights to land.
- » Women usually have less input than men into decisions about land.

Most women in the Pacific region access customary land as daughters, nieces or wives—rarely in their own right. This means women’s rights to land depend on them maintaining good marital, family and social relations, and on continuing their relationship with men (Box 11.1).

BOX 11.1 » WOMEN, LAND AND ENTREPRENEURSHIP IN TONGA

The International Finance Corporation has provided the following example of the effects of tenure uncertainty on women’s entrepreneurship in Tonga.

When Esteta, a 40 year old woman in Tonga, and a group of her friends in the same village decided to grow vegetables to sell, they had to ‘borrow’ land from a male relative to do so. But this land is far away from their village and since it is not theirs, they are not sure how much time and effort to invest into the land. For example, they would also like to grow fruit to sell, but fruit trees take some years to grow and they do not know if they will still have the land when the trees begin to bear fruit. Uncertainty over land ownership and less access to resources creates suboptimal economic outcomes.

Source: International Finance Corporation (2004, pp. 1–2).

While women may contribute to decisions at the family level about land use, they are under-represented in public and ‘official’ customary forums for making decisions relating to land. This is significant, as outsiders, including state institutions, work with ‘official’ decision-making authorities in customary groups.

In areas where customary authority is largely unaffected by external changes, women have adequate access to land in terms of providing for themselves and their families. They are key contributors in many subsistence or agriculture-based systems. As well as doing most of the household and child-rearing work, they contribute substantial time and labour to working fields and collecting produce from forest and marine areas. They are also responsible for food and livelihoods when husbands or male relatives move away in search of cash employment.

Customary systems usually include mechanisms to provide some form of land access to all group members, and to protect vulnerable members (for example, widows and unmarried women) from severe poverty. Where strong gender discrimination exists in relation to customary land, it often arises from the interaction of custom with social and economic pressures, including increases in economic activity and making customary land available for development.

Risks to women from developments on customary land

Because relatively few women in the Pacific hold rights to customary land that are independent of their husbands or a male relative, and few are allowed to contribute directly to decisions affecting their customary group's land, women's rights and access to land can be lost or modified in a range of ways outside of their control. For example, the benefits of land agreements with outsiders can favour men, women's rights can be oversimplified when land rights are recorded, and gender biases can arise when laws and policies are implemented. These situations reflect the fact that women across the region tend to have less education than men and tend to participate less in public life.

The risk of women, particularly widows and unmarried women, losing access to land is heightened when there is increased competition for land as a result of population growth and economic activity (new developments on land), when disproportionate numbers of men migrate in search of employment, or when disproportionate numbers of men die as a result of armed conflict or HIV/AIDS.

People who lose access to land lose access to livelihoods and customary forms of social insurance. They are more likely to migrate to informal urban settlements, or rely on other kinds of assistance. In short, it is society as a whole that will bear the costs of women's dispossession caused by changes in customary land use and management.

INTERACTION WITH OUTSIDERS

Because in most parts of the Pacific region men have a greater role in making decisions relating to customary land, their control over the land is reinforced in any land negotiations with outsiders. This can undermine the rights of women and result in changes in customary systems themselves. Naupa & Simo (2007, p. 38) concluded from their field research into the matrilineal system of Mele on the island of South Efate, Vanuatu:

The pressure of an expanding urban population and the growing demand for peri-urban land are driving the change from matrilineal respect to a male focus. Men's traditional role as administrators of the land, while rights are passed through the women, mean they are best placed for engaging in the formal land tenure system which currently recognizes land administrators as key decision-makers. Time-efficiency of dealing with an individual and the visible traditional land administrator meant that many Mele land deals have happened without women's prior consent or knowledge—a dangerous situation for other matrilineal societies ...

Outsiders who negotiate with men tend to direct financial benefits such as royalties and compensation payments to men rather than women. Yet women are more likely than men to use these funds to benefit their families (providing better nutrition, clothing, education and health care) and community (paying school fees and investing in more productive long-term uses of their land). Women also tend, more so than men, to reinvest cash income in productive long-term uses of their land, which can generate economic growth. Women who have little or no control over development or the benefits of development can become more dependent on men and at greater risk of poverty if there is social disruption or conflict.

In Papua New Guinea when mining leases were negotiated in Bougainville, women's rights in land were diminished during negotiations and in formal agreements. Men were over-represented as landowners in spite of these societies being matrilineal and rights to land being transferred through women. Men were signatories to agreements and gained control over compensation payments and royalties, often to the exclusion of their mothers, sisters and sister's children.

Men and women can have different views of the costs and benefits associated with development on their land. The potential negative impacts of development by outsiders, such as social disruption and environmental degradation, can be suffered disproportionately by women and children. In combination with other adverse conditions—including opportunistic acts by local politicians—grievances and social divisions arising from land dealings in customary areas can lead to serious conflict (Box 11.2).

BOX 11.2 » TRANSACTIONS INVOLVING MATRILINEAL LAND IN SOLOMON ISLANDS, AND THEIR ROLE IN ARMED CONFLICT

From 1998 to 2003, Solomon Islands suffered from a conflict now known as 'the tensions'. The underlying causes of the conflict included controversy regarding the occupation of customary land around Honiara by settlers from other islands.

Settlement often occurred after informal arrangements were struck between migrants and landowning communities. While some of these transactions were legitimate, the 'customary' nature of other transactions was questionable. Some land transactions were called into question because deals were struck by men without consulting women, even though Guadalcanal land tenure systems are matrilineal in nature.

Source: Kabutaulaka (2001).

DOCUMENTATION RELATING TO LAND

To accommodate changes in land use and management or as a result of such changes, more and more documents are being produced to record land rights, boundaries and agreements in Pacific countries. These documents cover genealogies, leases, informal sales, land group or land trust records, statements of customary law, and records for government departments. Such documents can have discriminatory effects if women are not given the opportunity to be involved in their preparation or are not included in lists of landowners, or if customary systems are oversimplified at the expense of vulnerable members of the group.

Three examples from Solomon Islands illustrate the risks to women's rights of oversimplifying and reinventing custom. In the Marovo area of New Georgia, descent lines were simplified in response to a private developer's demands for custom to be represented in a clear and concise way. Similarly, on Choiseul, people with customary rights to use land have reworked their genealogical charter so as to present themselves as patrilineal descendants of the first occupants of the area, thereby granting themselves rights to control the land. On Malaita, genealogies have been reworked to exclude group members who have become residents of other areas.

INTERACTION WITH LAW AND LEGAL INSTITUTIONS

Customary law can be recorded or recognised by legislation in a manner that reinforces male control over land. In Vanuatu, for example, the Custom Policy provides that the 'true custom owners' of land are men whose lineage is directly connected to the community located within the boundaries of the land. If these people are dead, male guest residents may assume ownership rights, provided they have lived there for at least four generations. If the long-term guests have also died out, adopted sons and their descendants may assume rights. Control over land may pass to a woman only if all these men are dead, and none of her uncles are alive. This means that women in Vanuatu 'own' land only as a last resort under the Custom Policy.

Gender biases can also arise when laws and policies that appear to be gender neutral are implemented. These biases largely arise when state institutions do not provide women the information they need on laws and policies and do not advise them of their rights to be consulted and to participate in decisions on land (Naupa & Simo 2007).

In many countries in the Pacific, there have been efforts to create dispute resolution mechanisms that blend customary processes with more formal and court-like processes, as noted in Chapter 8. There is a risk that these hybrid mechanisms to resolve disputes will produce decisions and interpretations of custom that undermine the land rights of women. Yet, women are also hesitant to assert their rights in formal court systems. The reluctance of women to use the formal court system is probably due to the system being culturally alien, based on colonial adversarial or inquisitorial methods and in conflict with cultural values of consensus. There is also a lack of women in the judiciary.

Other obstacles to women accessing formal institutions of justice include limited access to transport, inadequate support from court staff, the technical nature of procedures, a lack of time, and poverty.

Developments on customary land and opportunities for women

The changes affecting customary land systems in the region are unlikely to stop in the foreseeable future. As well as carrying risks for women in customary groups, they provide opportunities to strengthen and expand women's rights to access, use, manage and benefit from land.

Things that can be done to boost women's rights in the context of modern land development include (World Bank 2006):

- » recording or registering the land interests of women as well as men through joint titling and leasing arrangements
- » reforming laws that restrict women's rights to land
- » improving women's access to credit and training
- » integrating gender equality into any changes to land tenure and security
- » seeking women's input to legislative changes involving land
- » ensuring women's full participation in land registration and mediation processes
- » involving women and women's groups in the management of natural resources.

These actions are consistent with the United Nations (1979) Convention for the Elimination of Discrimination Against Women, which most Pacific island nations are party to. Article 2(f) encourages governments '... to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women'. These actions should be undertaken not only by government but by civil society, investors and customary landowners themselves because women who have secure land rights have more incentive to put time, money and labour into making land more productive.

Countries undertaking land policy reform should be sensitive to the cultural traditions that may inhibit women's access and rights to land and avoid assuming that cultural values are relatively uniform in all regions. Women's organisations can be key partners for governments undertaking land policy reform, particularly in identifying entry points for effectively engaging with communities and building support for change.

LAND ADMINISTRATION

Ensuring that women are represented in recordings or registrations of land rights, in land dealings and in lists of landowners is an important step in supporting women's rights to customary land that is being made available for development. But it cannot be assumed that administrative processes will translate into effective access to land or control of land. A World Bank review (2005, p. 35) of land administration projects states that:

There has been a lack of understanding of the complexity and diversity of land tenure patterns, including women's rights, by most land administrators, by project managers, and by those providing technical assistance ... There is a belief that addressing gender issues only means issuing titles or co-titles to women, with little appreciation, for instance, for what happens (a) in subsequent transactions, (b) in enforcement and actualization of those rights, (c) in realizing the benefits that may stem from formalizing women's rights ... and (d) in altering decision-making powers within households.

Women's participation in all stages and levels of land administration is important to ensure that gender inequalities are not exacerbated by customary land development. For example, in Fiji the Native Land Trust Board has sometimes intervened to ensure that women's land rights are acknowledged even though such intervention is not required by legislation. In Vanuatu, some government departments now appear to be aware of the need to obtain women's views by, for example, consulting men and women separately when gathering information on usufruct rights to forests.

LAND LAW

While laws and regulations can be discriminatory in nature, particularly in relation to inheritance and access to credit, they can also establish mechanisms to ensure women can contribute to decisions about the use of their customary land. For example, in 2006 the Vanuatu National Land Summit recommended that the Land Lease Prescribed Forms be amended to ensure that the consent of all customary landowners is obtained before land is leased.

To maximise the contributions women can make to legislative changes involving land they need to be literate, understand their legal rights as citizens and in custom, and be able to represent their own interests in formal venues. Legal reforms should therefore be coordinated with other support services to, for example, improve women's general education and training, their knowledge of development issues, and their social and economic status.

Civil society, particularly non-government organisations, can play a significant role in ensuring that women have rights to land by advocating and supporting gender inclusiveness in national law and policies, and in the development of land. They can also monitor, document and publicise gender issues arising from land development. This should include raising awareness of the benefits of ensuring women have input in managing and developing land, and publicising violations of rights to land where this is appropriate.

THE INTERPRETATION AND EVOLUTION OF CUSTOM

Individuals and institutions involved in land law and administration can ensure that women have adequate input into decision making and that interpretations of custom that give greater recognition to women's rights are favoured over interpretations that give less recognition to them.

Civil society can also play a role by increasing women's awareness of their rights and improving their access to justice. They should also pay attention to how custom can be mobilised and reinterpreted by men in 'new' or crisis situations, including conflict, natural disasters, or when land is opened for development.

12 The role of land administration

‘Effective, accessible, transparent and accountable land administration agencies are crucial to any effective governance framework ...’

United Nations Human Settlements Programme (2008, p. 38)

‘... corruption in land dealings has been an ingredient in the mix for social instability and a contributory cause of urban poverty.’

Hon. Dr David Derek Sikua, Prime Minister of Solomon Islands, in a major policy speech to Parliament, 18 January 2008

Land administration supports land tenure security by implementing land policy and the rules of tenure. Because land is the most important resource in most countries, effective land administration underpins an efficient economy and a stable social environment. This means that there is little point in reforming land policies unless the change can be effectively supported by an efficient system of land administration.

The functions and objectives of land administration

In the Pacific, land administration is carried out formally by state agencies and informally through customary leaders. Core functions associated with a modern formal land administration system include recording land rights, valuing and taxing land, regulating land use and managing land information (Box 12.1). These functions are performed by a range of institutions—sometimes only once but sometimes daily (Table 12.1).

The objective of land administration is to provide tenure security by accurately defining and protecting people’s rights in land. Tenure security enables people to use land confidently, without fear of interference or disruption from others. An effective land administration system is therefore able to contribute to social and economic stability and wellbeing.

Ideally, formal land administration should cover all types of land tenure—freehold, public and customary. In many parts of the world and most of the Pacific, customary land is not covered by formal land systems. However, it is possible to link certain aspects of customary land tenure to a formal land administration system. Some of the ways this has been done are discussed in other parts of this report. If it is done sensitively and carefully it has the potential to improve tenure security for a vast number of people.

BOX 12.1 » CORE FUNCTIONS OF A MODERN LAND ADMINISTRATION SYSTEM

Implementing land policy and legislation

This includes establishing the strategic direction and operational framework for the land system as a whole. It is often done at a national level.

Registering land information

This normally requires a registry of land transactions, landownership or other rights in land such as leases, mortgages and rights of way.

Valuing land, and setting and collecting land taxes and rates

These functions are often linked as land taxes and rates are generally applied according to land values. Land valuations are often done by the private sector but regulated by the state. Some land administration organisations are responsible for collecting fees or duties relating to the sale of land or the transfer of leases.

Planning land use and managing state land

These functions may include:

- » providing well-organised transport infrastructure, including roads and airports
- » planning for the delivery of services—electricity, telecommunications, water and sewerage infrastructure
- » planning commercial centres, industrial areas and residential areas
- » planning the locations for social services, including schools, universities and hospitals
- » allocating land for public purposes (roads, public parks and recreational areas)
- » managing the process of acquiring land through lease or purchase
- » managing the leasing of public land to businesses and individuals
- » managing the sale of public land to investors, developers, or individuals.

Surveying and mapping land

This includes establishing the boundaries of land, and generating a paper or digital record of the land area of the country. The output can include geographic and cadastral information.

Managing land information

This includes undertaking a stocktake of the nation's land and making available geographic information to the general public. The more sophisticated administrations use computerised geographic information systems as tools.

TABLE 12.1 » INSTITUTIONAL ARRANGEMENTS AND TIMING OF CORE LAND ADMINISTRATION FUNCTIONS

Administrative function	Timing	Institutional arrangements
Registering land and approving land dealings	Daily	Land administration agency
Valuing land	Periodically (every 5–10 years)	Private sector; controls set by government
Setting and collecting land rents and land rates ^a	Daily	Land administration agency, or rates set and collected at the municipal level
Planning land use	Periodically (every 5–7 years)	Land administration agency, town authority or local government
Issuing permits associated with land use and development applications	Daily	Land administration agency, town authority or local government
Surveying land	Once for registration of a new land parcel	Private sector; controls set by government
Mapping land	Updated periodically (every 10 years)	Private sector or land administration agency
Managing land information	Daily	Land administration agency in cooperation with other government agencies and occasionally the private sector
Licensing/certifying/accrediting land professionals (e.g. surveyors, valuers, cartographers) in the private sector	Periodically—as demanded	Land administration agency (training may involve other government agencies)

^a Rates are used to finance municipal services (water, roads, waste). Many countries have a low annual collection rate (about 30 per cent) for land rent, taxes and rates.

Source: Based on information provided by Dr Ken Lyons, land administration consultant, 2008.

Overview of land administration arrangements in the Pacific

In most Pacific countries formal land administration covers only state and private land; the administration of most customary land is handled by the customary leaders. The current formal systems are largely a legacy of colonial administrations and in some cases have become outdated and ineffective. In the smaller countries, it is usual for only some of the typical functions of land administration to be undertaken. Responsibility for land administration lies at the ministerial level in most countries in the region, while the administrative functions are undertaken at a departmental level or by a division within a department.

Land use planning is weak in most Pacific countries. Responsibility for planning in the urban centres of Melanesia is decentralised to provincial governments or local authorities, and resources are often limited. In East Timor and the countries of Polynesia and Micronesia, land use planning is normally undertaken by a national authority. Samoa and the Cook Islands have the best capacity to plan land use in the region. Some smaller states, including Tuvalu, Niue, Tokelau, the Marshall Islands, Palau and Nauru, have either very limited land planning functions within government or none at all.

Throughout the region the role of the private sector in land administration is growing, with private businesses commonly surveying and valuing land, planning urban land use and providing cartographic services. These professionals still need to operate within the guidelines set by governments or under licences issued by the land administration authority.

In Fiji customary land is formally managed and administered on behalf of its owners by the Native Land Trust Board (see Chapter 7). The Fiji Department of Lands and Surveys has little role in administering customary land, except leasing customary land for public purposes. The Native Land and Fisheries Commission is the administrative authority responsible for recording and registering customary land.

It is common in the Pacific region for government acquisitions or dealings in customary land to be formally registered. In some places, this is done within the land administration agency, but in others, including Tuvalu, Niue, Kiribati and some provinces of the Federated States of Micronesia, dealings in customary land are recorded through the court system. In Vanuatu and Samoa, the land departments play significant roles in customary land dealings.

The need for effective land administration institutions

Dealings in land can involve substantial sums of money. The land administration system therefore presents considerable opportunities and incentives for ineffective administration or corrupt practices, both in developed and developing countries. While there is a continuum between effective and ineffective institutions, some of the symptoms of an ineffective institution include theft, bribery, fraud, misconduct in public office, nepotism and extortion (FAO 2007). There is a potential for land administration officials to collude with outside parties to, for example:

- » tamper with or destroy registration records
- » raise valuation determinations for land being purchased by the state for public purposes
- » lower land valuation determinations so as to reduce land tax rates
- » lower land prices or provide preferential access to state land that is released for developers
- » circumvent planning provisions.

These problems tend to occur more where land laws are complex, inconsistent or obsolete. Fragmented institutional arrangements, weak institutions, ambiguous laws and a weak judiciary aggravate the situation. Sometimes a lack of capacity, in terms of poor motivation, low pay and poor training of staff, are at the heart of the problem (Box 12.2). Staff appointments based on favouritism may be another factor. Jobs may be reserved for a particular ethnic or religious group or those who support a political party or a favoured gender. Sometimes low pay means that officials give priority to other sources of income (FAO 2007).

To increase effectiveness, staff should have an organisational manual that sets out their roles, procedures and expectations about their behaviour. There should be programs to make staff aware of what is and is not acceptable in terms of their duties and behaviour. Staff rotations can sometimes expose wrongdoing or poor practices. Having more than one person responsible for each decision may help to prevent problems. Effective internal auditing and sanctions are needed to avoid corrupt dealings, although the cost of such measures, if not carefully designed, can exceed the savings made by avoiding corruption.

BOX 12.2 » SYMPTOMS OF POOR CAPACITY IN LAND ADMINISTRATION

Lack of resources

Land administration institutions may lack offices and technical resources for fieldwork.

Lack of qualified or competent staff

Staff may lack qualifications, skills or experience. Insufficient qualified staff may be available. Regulations may not be translated into local languages or those responsible for land administration may have a poor command of the local languages.

Lack of institutional capacity

In post-conflict settings in particular, land administration institutions may have been totally destroyed. The institutional memory and the capacity and culture for work may have been lost, creating a perfect environment for weak governance.

Negligence

A lack of care rather than capability can result in core functions being neglected. This can lead to, for example, land rights not being supported and greater tenure insecurity, particularly for highly vulnerable groups. If negligence is routine, officials are not being made accountable for their actions.

Mismanagement

Failings in administration are not acknowledged or rectified and often undermine the reputation of the organisation and its staff.

Source: FAO (2007).

Particular care is needed to establish administrative processes that provide checks and balances. Transparency is particularly important. By redesigning ways of doing things, opportunities for corruption may be prevented. Outsourcing and tendering should be carefully supervised. For example, when releasing state land for development, use an open and transparent auction system instead of the cheaper but secretive systems of tender, select tender, or application.

Balancing land administration functions with budgets

To increase the effectiveness and efficiency of land administration requires a long-term plan that encompasses the full spectrum of administrative functions. Before undertaking such a large task the appropriate scope of the land administration system needs to be determined. The scope depends on the budget allocated to land administration, which makes understanding the budget and the likely size of future budgets crucial.

There is no point in embarking on programs to build the capacity of the land administration agency and to expand the scope of its activities if there are insufficient funds to support it. However, the budget allocated to land administration must be balanced against the multitude of other development needs that a nation faces in education, health, police, legal institutions and infrastructure, for example.

Most countries in the Pacific do not have sufficient resources available to develop land administration systems with all the functions of those in developed countries. The focus should be on meeting priorities rather than on trying to be comprehensive. The focus should also be on functions that can be sustained with local people and resources. For example, land use planning can be allowed to evolve and adapt in response to requirements rather than be comprehensive from the outset. The volume of land information and its management can reflect a balance between cost and comprehensiveness. And rather than relying on expensive valuation systems that are vulnerable to corruption, land tax and rates systems can use simple formulas for calculating dues—or not collect them at all if the cost of collection exceeds the income stream.

Recording and registration programs require careful designing and planning—particularly systematic registration of customary land, because it requires considerable long-term investment and is beyond the financial capacity of most countries. Sometimes donor support may be available for implementing such programs, but there are still the substantial ongoing costs associated with keeping records and registers up to date. As discussed in Chapter 5, land registration is of little value unless there is a well-functioning administration agency to support it, and this requires sufficient funding over a time horizon of many generations. To date, most efforts in the region to register customary land have consumed considerable resources with little or no return.

Poor and ad hoc attempts by donors to improve land administration in developing countries around the world and in the Pacific are not uncommon. Some support programs were implemented without adequate consideration of ongoing budgetary needs and without being integrated into the government's agenda. Ad hoc programs to improve land administration can result in unbalanced, poorly prioritised or unneeded functions that require more resources than are budgeted for or are available. Better outcomes can be achieved if donors liaise closely with the recipient country's land administration institution at all stages of the program. This helps the donor to understand the context and to support technical solutions that are appropriate for the particular needs of the country (Box 12.3).

BOX 12.3 » AUSAID SUPPORT TO LAND ADMINISTRATION IN SOLOMON ISLANDS

AusAID provided assistance for land administration in Solomon Islands over the period 2000–07 and there were many positive outcomes, including improvements in skills, confidence and morale within the land administration agency, and a new well-organised records system. The designers had noted the lessons from previous projects to improve land administration in Papua New Guinea and China, particularly that for a new system to be sustainable the technology adopted had to be maintained using local people. Simple, affordable and easily maintained computer technology was used to establish an efficient land records system, with safe storage in mind, and duplicated using a manual system.

There were also lessons to be drawn from things not done so well. The key shortcoming was that the project was not integrated into the land administration ministry and the overall plan and strategy for strengthening the ministry. The project was less effective than it might have been largely because of poor communication between the ministry and the project managers.

Source: Volume two, Case Study 15, 'Strengthening land administration in Solomon Islands'.

The role of education and training

How well a country's land administration performs is more than just about the design and budget of the system, it is also about the people operating the system. Given the range of functions usually involved, a system needs people who can perform simple tasks as well as people with technical and university qualifications, including surveyors, cartographers, land use planners, and valuers. Often these highly skilled people are not available in the Pacific. Land administration systems need to be designed to reflect the available workforce, in so far as is possible, but also include strategies to increase the levels of skill within the land administration agency. The strategies should include at least an ongoing program of short courses and training, but also tertiary education for land professionals.

Courses for land professionals are available at the University of Technology in Lae and at the University of the South Pacific in Suva. The University of Papua New Guinea in Port Moresby has courses in land law and policy, and in regional and physical planning. The University of the South Pacific services the widely dispersed island countries of the Pacific, which means students face the difficulties of distance and often have to rely on government support. To try to bridge this problem of access, the university has put in place a program for distance and flexible learning, which allows students to remain in their home country when undertaking courses. But this approach does not suit some land courses, especially surveying, which requires practical training and access to equipment.

With limited resources, these institutions do a good job of providing a range of land courses. However, there are important shortcomings, such as access to equipment, computers and software, and library resources. Academics who teach the courses also have difficulty finding the money and time to interact with other academics and to keep abreast of developments in technology and the literature.

A donor program in Laos illustrates how some of the shortcomings and constraints in educating and training land professionals can be overcome in the Pacific (see Volume two, Case Study 16). The program oversaw the development of a partnership between the Polytechnic School in Laos and a tertiary institution in Australia. The Australian institution helped to develop a new curriculum based on current knowledge and methods, but tailored to the circumstances of Laos. Through the partnership, the quality of the land courses on offer were raised to the standard of the Australian institution, academic links were formed to help to sustain course quality, and access to resources and facilities were improved.

13 The essentials of policy reform

‘Land reform is easier said than done ...’

Papua New Guinea’s National Land Development Taskforce (2007, p. 1)

Policy reform, and especially land policy reform, is not an easy undertaking for any country. In predominantly custom-based societies policy reform that affects traditional institutions can arouse greater passion, fear, uncertainty, anger and potentially conflict. Even where a broad consensus for change exists, successfully managing it is a challenge. Policy reform calls for sensitive, calm and rational debate; it requires the participation of all segments of society, whose views must be respectfully heard and incorporated; it demands strong leaders for tough decisions, balanced compromises and clear direction; and it consumes large amounts of labour, knowledge, technical and managerial skills, finance, capital and time.

Having the essential ingredients for undertaking policy reform—strong leadership, a clear, well-planned process, and adequate resources—will mean the difference between success and failure.

Leadership

Addressing issues that affect the broad community requires strong leaders with energy and vision. Because land policy reform is such an important issue in the Pacific, strong and visionary leaders are required at all levels—from the highest councils of national government to community leaders at the village level. Such leaders, often called ‘reform champions’, are people known and respected by the broader community. The most effective leaders do not claim to have all the answers; what they do have is a vision of a better future and can inspire others to help them get there.

Anyone who has spent more than a short time in Fiji will have heard of Ratu Sukuna. He is a respected customary chief who played an important role in creating Fiji's current land system in the 1930s. Ratu Sukuna became convinced that for Fiji to prosper a way had to be found to reconcile customary land tenure with development. In a now famous speech to Fiji's Great Council of Chiefs Ratu Sukuna argued that landowners with more land than they could use were bound by duty to their fellow Fijians and the state to put it to better use.

An idle land-owner neglects his duty to the state. Should this holding be more than he can utilize, he should lease the surplus to those who can make use of it. (Kamikamica 1987, p. 229)

After convincing the Great Council of Chiefs, Ratu Sukuna spent four years going from village to village, explaining his vision and consulting with customary landowners. This marathon effort, combined with his traditional status and personal prestige, persuaded Fijians to establish a land system that mobilised underused land for development within a framework of customary ownership.

Papua New Guinea's current land policy reform has also benefited from strong leadership. The Minister for Lands and Physical Planning, Dr Puka Temu, started the reform process in 2004. Like Ratu Sukuna, Dr Temu did not claim to have the answers, but argued that many of the problems besetting Papua New Guinea related to the need to make land work more effectively. In 2005 he appointed a taskforce of diverse community representatives and government agencies to take the policy development process forward, while continuing to provide strong leadership at the political level.

The policy process

Leadership alone will not ensure success. Land policy reform often requires a commitment beyond the life and influence of particular leaders. Success also requires an ordered, transparent process. Although the land policy reform being undertaken in Papua New Guinea and Vanuatu differs in character and goals (see Boxes 13.1 and 13.2), both countries have a commitment to process that helps to ensure reform continues if leaders move on.

A planned approach to reform is generally referred to as a policy development process or policy cycle, reflecting that policy development never stops. The policy cycle depicted in Figure 13.1 has eight components, which are discussed briefly below. These components are not fixed or immutable because policy processes differ depending on the circumstances. Similarly, there is no correct sequence or timing. Some components, such as consultation and monitoring and evaluation, once begun, should not stop.

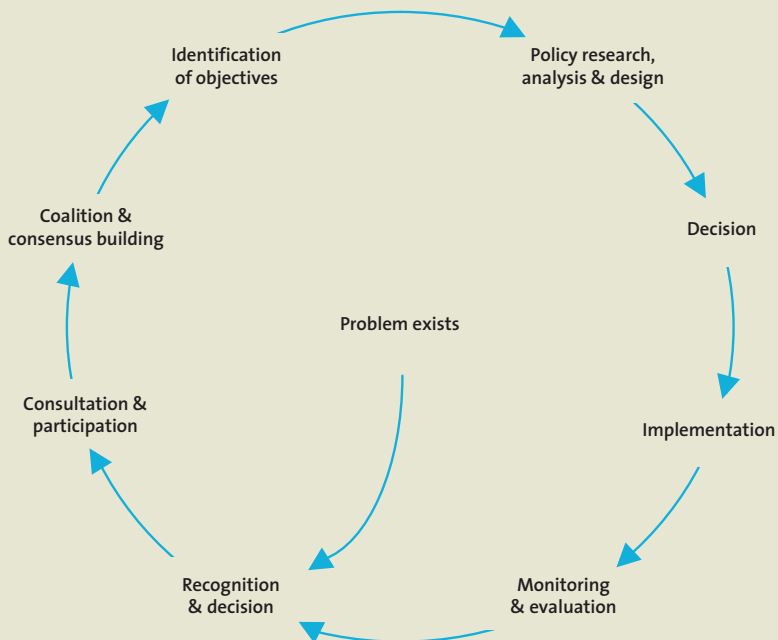
BOX 13.1 » LAND POLICY REFORM IN PAPUA NEW GUINEA

In Papua New Guinea the process of land policy reform has been driven by a need for land for economic development. In August 2005 the Minister for Lands and Physical Planning, Dr Puka Temu, convened the National Land Summit with the theme 'Land, economic growth and development'. It attracted strong support and participation from a broad sweep of PNG society. Papua New Guinea's Cabinet considered the outcomes and appointed the National Land Development Taskforce to continue the policy development process. The taskforce was led by the National Research Institute, a policy think tank, with a range of representatives from government agencies, the private sector and academia.

The taskforce followed a strategy of consultation, public information, consensus and coalition building. It put together a team of experts to develop the technical aspects of the reform while consulting broadly using public meetings throughout the country and private meetings with government and non-government stakeholders. The taskforce devoted a lot of time to forging broad political support to minimise the risks from a change of government.

Early in 2008 Papua New Guinea began implementing the reform. How successful it will be is yet to be seen. Implementation is being led by a non-government agency that will need to work closely with the Department of Lands and Physical Planning.

Source: Volume two, Case Study 14, 'The paths to land policy reform in Papua New Guinea and Vanuatu'.

FIGURE 13.1 » THE POLICY CYCLE

BOX 13.2 » LAND POLICY REFORM IN VANUATU

In Vanuatu, unlike in Papua New Guinea, it was too much development that led to the recent land policy reform. The rapid growth in land development and the emergence of a lively real estate market during the late 1990s generated big profits for local and foreign investors but customary owners were seeing little of the benefit. This resulted in disenchantment and frustration among customary landowners and civil society groups.

The champions for reform in Vanuatu emerged from the National Cultural Centre and the Council of Chiefs (*Malvatamauri*). At the National Summit for Self Reliance and Sustainability held in 2005, these groups pushed for a national land summit and built a coalition that included powerful elements of the bureaucracy, in particular the lands department.

During 2006 a series of provincial summits were held throughout the country as forerunners to the National Land Summit in September 2006. These provincial summits provided excellent forums for consultation and built a groundswell for reform. While Papua New Guinea's summit was themed around economic development, the Vanuatu summit's theme was 'Sustainable land management and fair dealings to ensure progress with equity and stability'.

Twenty resolutions emerged from the summit based on landownership, fair dealings in land, and sustainable development of land. Vanuatu's Cabinet endorsed the resolutions in November 2007 and appointed a steering committee to guide the policy development process. The committee, chaired by the Director General of the lands department, includes representatives from relevant government agencies, the Council of Chiefs, the private sector and civil society groups. Early in 2008 it was moving towards the implementation stage. Vanuatu has followed a broad consultative process, has the participation of the main stakeholders and has strong leaders from civil society and the bureaucracy. It also needs strong political leadership, and greater agreement on key issues relating to land policy reform. These appear to be the main risks for Vanuatu's land policy reform process.

Source: Volume two, Case Study 14, 'The paths to land policy reform in Papua New Guinea and Vanuatu'.

RECOGNITION AND DECISION TO ACT

Even though people may be aware of a problem and the need for change, acting on it can be difficult, to some extent because wealthy or influential people may benefit from the current situation. This is another reason why leadership is important. But the initial impetus for change need not come from political leaders. In Vanuatu early momentum for the current land reform process (see Volume two, Case Study 14) came from civil society and customary chiefs, who worked together to put the issue onto the national agenda.

CONSULTATION AND PARTICIPATION

Land policies will be sustainable only if developed with input from the community. It needs to be consulted and involved throughout any reform process, with men and women participating equally. Such a consultative and inclusive approach involves disseminating information, encouraging debate in the media, holding public meetings and holding regular discussions between interested groups, experts and government ministries. Consultation and participation should be part of all components of the policy cycle. As detailed options emerge, policymakers should test them by continuing to consult and involve all sections of the community, particularly vulnerable groups such as women, the landless and the poor.

COALITION AND CONSENSUS BUILDING

Reform champions need to identify groups with a substantial stake in the reform issue and seek their support and participation in the reform process (Box 13.3). Holding together broad alliances so that fair and effective compromises are made is when leadership is important. The Vanuatu Government understood this when in 2006 it appointed a steering committee representing all major interest groups to take forward the outcomes of the National Land Summit.

IDENTIFICATION OF OBJECTIVES

When developing or changing policy, a prerequisite is clear and agreed objectives because they determine priorities—where resources are assigned and the focus of research, consultation and debate. Initial objectives can be broad to allow for public discussion and consultation.

POLICY RESEARCH, ANALYSIS AND DESIGN

Policymaking is about seeking answers, solutions and alternatives to address an issue. A common and easy way to change policies is to incrementally change existing policies. Other ways are to search for inspiration and for ideas that have been successfully applied abroad, to review international research and best practice findings, to discuss options with experts and to consult people with an interest in the outcomes of the policy process. In practice, major public policy reforms include all these approaches. Good policies are based on evidence, not just the claims of interested parties. Policy alternatives should be rigorously tested against data, facts, international experience, logical analysis and the views of all people with different interests and perspectives. When designing the policy, policymakers should determine concrete and measurable objectives and develop realistic indicators to measure their achievement.

BOX 13.3 » CONSENSUS BUILDING IN POLICY DEVELOPMENT—THE CONTRASTING EXPERIENCES OF MOZAMBIQUE AND COLOMBIA

During the 1990s Colombia and Mozambique, countries plagued by land-related conflict, recognised the need to reform their land policies.

Colombian policymakers developed their reform program inside government agencies with little community consultation. The law aimed to set up institutional structures to implement a well-intentioned reform program based on decentralised decision making by local councils. The lack of consultation, however, meant policymakers did not understand there were no incentives for local leaders to support these institutions. As a result, resources were poured into a program that was hard to implement and ill-suited to social and economic realities.

In 1992, after almost 20 years of conflict, the Mozambique Government recognised that land policy reform was needed to support the resettlement of 5 million refugees, to encourage investment and to contribute to economic development.

In contrast to Colombia, Mozambique recognised the need for a policy process based on consultation and community participation. The government established the Land Commission with representatives from nine separate ministries. This broad-based institution helped to build wide political support for the land policy. Representatives from non-government organisations participated in Land Commission meetings, and academic groups were encouraged to submit reports on different versions of the draft new law. Seminars and conferences were organised with civil society, public servants working on land issues and international experts to encourage policy debate. These gatherings were openly covered by the media.

This process contributed to a strong sense of national ownership and to the implementation of a law that was well suited to Mozambique's situation. The law's success has been attributed largely to the new land policy being based on consultation and research before the legislation was drafted.

Sources: Grusczyński & Jaramillo (2002); Tanner (2002); Deiningger (2003).

DECISIONS

Land policy reform involves decisions that can have huge social, cultural, economic and political consequences. Political leaders need to be sure they are making the correct decisions and understand the implications of their decisions. Before agreeing to reforms politicians, especially those in government, will want answers to the following questions:

- » What are the objectives to be achieved?
- » How will the objectives be achieved?
- » What is the evidence that the objectives will be achieved?
- » How long will the reform process take?
- » How much will the reform cost?
- » Who will be affected by the new policy?
- » Who has been consulted throughout the reform process?

A well-planned, evidence-based policy process will provide the answers so that political leaders will have the confidence to make decisions.

IMPLEMENTATION

Reform processes often fail at the implementation phase. Common reasons are waning political or bureaucratic support, competition for funding from other policy and program areas, and slow progress or setbacks that undermine the confidence or influence of reform supporters. For significant areas of reform that involve land tenure and administration, implementation of a new or changed policy may be facilitated by a high-level body appointed to oversee this stage of the reform process. Broad representation on such a body helps to ensure that implementation is transparent, balanced and well informed. During implementation it is important that the government and the oversight body continue to consult widely and keep the public up to date on progress.

MONITORING AND EVALUATION

Monitoring and evaluating the effects and outcomes of a new or changed policy is essential; policymakers need to know whether their work is achieving its objectives. Although these tasks come at the end of the policy cycle, they must be built into the reform process at the design stage. Monitoring and evaluation holds officials and ministers accountable for their policies and provides feedback on how they can be improved. And so, the cycle starts again.

Resources

Land policy reform often requires large amounts of resources—people and money. A common weakness of programs designed to strengthen land administration systems is that they underestimate the resources required. Many Pacific countries planning substantial land policy reform require more human and financial resources than they currently have. Even well-established land administration agencies look abroad when planning major reform, to ensure they have access to and can draw from the most up-to-date expertise and policy models. International expertise, however, is expensive. The budget for land policy reform must be balanced against the multitude of development needs that a nation faces. Developing countries may be able to fund small incremental changes to land policies, but substantial changes may require donor support.

Donor involvement in land policy reform can be controversial. A perception that change is being driven by other countries—whether based on fact or not—may undermine community and political support. Over the past decade there has been a growing realisation among donors that successful development programs are those that are owned and driven by the country receiving the support, particularly if they involve something as important, complex and sensitive as land.

This approach is reflected in the Paris Declaration on Aid Effectiveness, a statement of principles developed at an international meeting of aid donors and recipient countries in Paris in 2005. The Paris Declaration looks at the responsibility of developed and developing countries for delivering and managing aid in terms of five principles:

1 Ownership

Aid recipient countries exercise effective leadership over their development policies and strategies and coordinate development actions.

2 Alignment

Donors base their overall support on partner countries' national development strategies, institutions and procedures.

3 Harmonisation

Donors' actions are more harmonised, transparent and collectively effective.

4 Managing for results

Donors and recipient countries manage resources and improve decision making for results.

5 Mutual accountability

Donors and partners are accountable for development results.

In July 2007 Pacific island countries and their donor partners broadly agreed to these principles and adapted them to suit the circumstances in the Pacific.

What is most important for land policy reform is that national policymakers retain control over the decision-making processes while taking advantage of the resources donors can make available and the international expertise these resources can procure. This may not always be easy in small countries that need more technical and managerial expertise. However, this is where leadership and process are important. If local policymakers have put in place a rigorous reform process, this will help them to deal confidently with international experts and donors and maintain control over the directions of the reform.

Donors will be concerned that their own taxpayers' funds are spent in a responsible and effective manner. They will want to ensure that objectives are being met and that rigorous processes are in place to provide for quality assurance, monitoring, evaluation and accountability.

14 Some 'Pacific principles' for land policy reform

'The land policy agenda must be driven and owned at the country level and, whilst lessons of good practice can be shared across countries, simple one-size-fits-all solutions are unlikely to help.'

Lorenzo Cotula, Camilla Toulmin & Julian Quan (2006, p. 2)

Land policy reform involves changing the policies and institutions associated with land. In the Pacific this reform basically requires the institutions of the two different systems of governance—customary and formal—to be recognised and linked. But because of the region's diversity not only in language, culture, geography, politics and government but also in customary systems of land tenure, there are no specific policies to create these links that are relevant to or 'fit' all countries. However, it is possible to identify some broad principles that can guide the leaders, debaters, communicators, decision makers and implementers of land policy reform. These principles have practical, cultural, social and institutional dimensions.

Make tenure security a priority

Clear and secure rights over land are essential for social development, economic growth and reducing disputes and conflict. But unfortunately, land tenure insecurity is an issue for an increasing number of people in the Pacific region. Its impact on customary groups, individual members and outsiders means few will take the risk of investing in land or improving land and property that they might 'lose'. And if people are not able to maintain access to land to supply their basic needs, conflict is a likely result. This makes tenure security a high priority for people. Policy reform to meet other objectives for landowners, such as greater access to credit, may not succeed until people have secure tenure.

Work with and not against customary tenure

Given the continuing dominance of customary systems of tenure within the Pacific region, policy proposals that seek to radically alter existing tenure rules are likely to encounter strong practical, cultural, political and legal impediments and generate widespread distrust and opposition. Governments and others should seek to work with the existing customary institutions, rather than against them. This means keeping the fundamental features of customary ownership intact while allowing some new types of land use to occur.

Intervene only if it is necessary

The capacity of government institutions in many Pacific countries to coordinate and implement policy reforms often falls short of their ambitions. Therefore, governments should intervene in customary land systems only if it is absolutely necessary—for example, to improve tenure security, to resolve conflict or to develop public infrastructure.

Unnecessary interventions can create new problems. For example, drawing lines on a map to delineate ownership can lead to disputes over land when there was no previous disagreement about ‘unwritten’ boundaries. Because recording such information can be expensive and take a very long time, governments should consider limiting this sort of work to urban areas, or where disputes have arisen between customary groups, or where customary owners are seeking to develop some of their land.

Governments should also be wary of trying to change aspects of customary land systems that are working effectively or if there is no demand for change from the community. The tenure systems of most customary groups continue to insure members against the risks of landlessness, crop failure, environment stress, income loss and illness or disability. Close-knit groups often create, through custom and law, land regimes that are highly efficient and that adapt to changes in the requirements of their members (Ellickson 1993). These systems may be providing sufficient tenure security at little cost to encourage all of the available forms of investment.

Ensure land policies reflect local needs and circumstances

Land policies, particularly those relating to the recording or registration of land, should be designed to suit local needs and circumstances rather than follow a predetermined formula (Fitzpatrick 2005). Land tenure systems and the way people relate to land vary significantly between Pacific countries and even within a country. For example, in Vanuatu some customary groups want assistance to protect their long-term interests during the negotiation of lease agreements with investors. They may require different land policies from customary groups in another country who are seeking to attract more commercial development on their land, such as in parts of Solomon Islands and Papua New Guinea. Also urban areas often require different land policies from rural areas, due to the higher levels of investment and intensity of land use. It is important to identify local needs and circumstances when developing land policies rather than assume that the needs of all people in relation to land are common across a country.

Be prepared for long timeframes to achieve lasting reform

Some types of land policy reform cannot be done quickly. Policy reform, even a small change, is likely to require new laws or institutions or existing ones to be redesigned. Many people, groups and organisations should be consulted and be invited to contribute to the development of any new policy. Governments need to understand, cost and justify the reforms being proposed. None of these tasks is necessarily simple, cheap or quick. Slow and steady incremental reform provides the community with a chance to consider and adapt to change.

Actively involve stakeholders rather than only informing them

Pacific governments should not expect to simply inform people and organisations about land policy reform without allowing them to have the chance to shape it. In parts of the Pacific where the authority of the state is limited, land policy reform will need to be driven by a wide and representative group of people interested in and directly affected by the outcome—with the support of the government and the bureaucracy. These representatives are likely to include customary leaders and advisory groups, non-government organisations, the private sector and academia. Only by working constructively together will they develop innovative land policies.

Adopt simple and sustainable reforms

To develop robust links between customary and formal institutions that will stand the test of time, the links need to be sustainable from a technical, financial and participatory perspective. In many cases, simple and low-cost approaches can prove to be superior to more sophisticated ones because they can be understood, used and maintained by local people with minimal outside assistance. Pilot activities can be an effective way of testing and demonstrating the benefits and costs of policy options. This is especially important to do before rolling out expensive, complicated or risky reforms over an entire country.

Balance the interests of landowners and land users

Governments should try to ensure that rights and protections are balanced for all groups with an interest in land, both owners and users. It is important not to undermine the tenure security of one segment of the population in order to increase it for another, unless there are mechanisms to adequately compensate people who have suffered loss as a result of new land policies. For example, it is important to avoid land policy reform that benefits only investors, or that is perceived to do so, at the expense of landowners. This will cause discontent among landowners that can ultimately undermine tenure security for everyone. Conversely, if the rights of land users are not protected, investors—particularly those from overseas—are more likely to look elsewhere for investment opportunities.

Provide safeguards for vulnerable groups

While making more customary land available for use in the formal economy can generate important social and economic benefits overall, some people—for example, members of customary groups, informal settlers and women—can miss out on those benefits or be adversely affected by market forces. When designing policy reforms, special safeguards are needed for these people to ensure their social and economic security and prevent negative spillover effects, such as poverty or violence, which can affect society more widely.

There are a number of ways to create these safeguards. For members of a customary group, it may mean making sure that they have access to an intermediary institution that can provide expert advice about how to negotiate a lease over their land (see Chapter 7). Informal settlers may need to be provided with formal recognition of their rights to occupy the land they have settled (see Chapter 10). For women to share fairly in the benefits, special legislation may be required to ensure, for example, that they are listed as landowners on lease agreements or as beneficiaries of a land trust (see Chapters 5, 6 and 11). There are also other people who may miss out on the benefits of customary land entering the formal economy—the youth, elderly and disabled. Effective safeguards for these people have the potential to be good not only for them but for society more generally.

Annex A: Contributors to volume one

Development process

Volume one of *Making land work* was developed by an editorial team made up of AusAID officers and advisers and an external consultant. Contributions and comments were received from internal and external experts. The first draft was formally appraised by the Pacific Land Program's steering group in addition to a panel of external land experts and Australian government staff. Following these appraisals the report was amended to reflect the comments and suggestions received. Comments were also sought from external advisers when the final draft was being prepared.

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Annex B: Landownership in the Pacific

Customary land practices

The systems of customary landownership and land use in the Pacific region have evolved over thousands of years. Being remote from the trading corridors and the hubs of economic activity, livelihoods in the region have been built on subsistence activity. Not surprisingly, the customary land systems evolved in a way best suited to subsistence. A common characteristic of these systems is that all people have access to land for subsistence production. In most places, the allocation of land changes over time so that the distribution of land remains equitable as family sizes change. This ensures that adequate land is available for all families, whether expanding or contracting. Such flexibility has underpinned the enduring success of the subsistence economies of the region.

But these systems are now under increasing pressure as a result of societies evolving rapidly in recent decades in response to, for example, population growth, migration, and the emergence of new income-earning and consumption opportunities.

MELANESIA AND EAST TIMOR

At the core of the flexible land allocation in Melanesia and East Timor is collective ownership—the tribe, clan and extended family being the most common landowning units. Traditional agriculture continues to be the main form of livelihood for most people in Melanesia and East Timor. This has kept traditional land practices in rural areas strong, with land continuing to be managed and allocated in accordance with customary principles and processes. Land management and allocation are a central focus for customary groups in these countries—intrinsic to their culture, their social and economic wellbeing, and their community harmony. In recognition of this, decisions about these practices can be ritualistic in process. In East Timor, for example, they are often made in areas surrounding a sacred *lulik* house.

In most places, landownership and inheritance rights are patrilineal—assumed by only the male members of the landowning group. However, there are some areas (except in Fiji) where these rights are matrilineal—assumed by only the female members of the landowning group. Traditional marriage practices in such areas commonly involve cousin or in-clan arrangements, to ensure the land remains within the customary group. Occasionally, pieces of land or islands are owned by only one person, but this is very much the exception. Regardless of whether a society is patrilineal or matrilineal, land management and allocation decisions are normally made by the senior male members of the landowning group.

Rights to land often change according to marital status. For example, unmarried females in a patrilineal society have the right to use the land of their father's landowning group. However, if they marry outside the unit, they forgo those rights, but will normally acquire usage rights in the landowning unit they marry into. These rights do not always continue when their spouse dies, and sometimes they are reassimilated into their original communities.

POLYNESIA

As in Melanesia, traditional landownership among the countries of Polynesia is mostly communal. Tonga is a notable exception; land there had traditionally been held by chiefs. However, Tonga's traditional systems of land use and allocation are no longer seen today. Through conquest, a single chief acquired rule over all of Tonga in 1831 and established a Constitution in 1875 that formalised monarchic rule and transferred ownership of all land to the king, King Tupou I.

Elsewhere in Polynesia, traditional landowning units are typically extended families or groups of extended families. Ownership and hereditary rights are neither patrilineal nor matrilineal, but are vested in the people that reside with the landowning group, whether male or female, and whether they came to be members by birth, marriage or adoption. Rights are diminished when people leave the group to live elsewhere as a result of, for example, marriage. Rights of ownership may be taken away from a member of a family, or from a whole family, for conduct deemed by the village council to be a serious breach of the village's custom.

Authority to make decisions about how customary land is managed is normally vested in a chief, known in Samoa and Tuvalu as the *matai*. The *matai* is not normally an inherited position; the titleholder is chosen by the members of the landowning group. Ownership remains with the people.

Villages in Samoa, the Cook Islands, Tuvalu, Niue and Tokelau are normally inhabited by a collection of landowning clans and governed by village councils, known as *fono* in Samoa. These councils are comprised of the *matai* of each landowning group and they play a critical role in land use decisions, particularly in relation to village land. It is often the case that village land is regarded as communally owned land rather than land belonging to any particular landowning group.

Districts form a higher level of land demarcations, comprising groups of villages. These districts may be defined according to common lineages, as is the case in the Cook Islands. In the Cook Islands and Samoa, the traditional districts are tracts of land running from the mountains to the sea. In Samoa, there are 11 traditional districts and 330 villages.

The traditional systems of landownership and management in these countries are coming under increasing pressure from emigration, with large proportions of the populations of these countries now living abroad. Absentee landowners have brought a new complexity to the landownership and management systems, and much change has resulted. This is particularly the case for the Cook Islands because 90 per cent of its citizens now live abroad.

But traditional land practices continue to be strong in Samoa and Niue. Legislation has helped to reinforce the traditional systems, with official authority given to the heads of landowning groups and to village councils. In Tuvalu, 70 per cent of the land remains under traditional systems, but this is declining. Much of the land area has become *vaevae*, land that has been separated and divided among the members of landowning groups.

MICRONESIA

Traditional land practices in Micronesia are more diverse, with some locations having collective ownership and others an absolute ruler (owner). What is common across most places in Micronesia is that traditional landownership and land use practices have changed considerably since the onset of colonial rule.

In the provinces of Kosrae and Pohnpei in the Federated States of Micronesia, land was traditionally regarded as owned by the kings or paramount chiefs but, following a period of German and then Japanese rule, this tradition was replaced by a system of allocated parcels of land owned by individual males or male heads of families, and usually inheritable by the eldest son. In the provinces of Chuuk and Yap, customary land is owned by family lineages, matrilineal in the case of Chuuk and patrilineal in the case of Yap. Despite patrilineal lineage, senior females in Yap have considerable authority over land management. Also, a social hierarchy exists where paramount chiefs of higher castes have land management authority over lower castes. In these provinces too there has been some individualisation of land. In Chuuk and Pohnpei, about half of the customary lands registered are in the names of individuals; in Kosrae and in Yap about 15 per cent.

There are some islands in Kiribati where land is owned by an absolute ruler. But in most places, landownership practices resemble those seen in Polynesia, with ownership by extended family groups, and inheritance neither patrilineal nor matrilineal, but flexible according to need and place of residence. In most areas, custom favours giving a larger share of land to the males, but does not exclude females. On each atoll-based island, the land tends to be divided into sections that give each landowning group access to both the lagoon and the open sea. Rights to land can be exchanged, and in recent times there has been an increase in individual ownership of customary land for the purpose of sale, lease or mortgage. Where lands are still held in customary fashion, senior males are regarded as the people who control and supervise the use of the land.

Marshall Islands society is divided into a chiefly class (*irojj*) and a commoner class (*kajur*). All land is traditionally regarded as owned by the paramount chiefs who allocate allotments (*wato*) to their supporters and followers, both noble and commoner. In earlier times, the paramount chiefs and their assistants exercised very strict control over the use of land by the commoners, but this control is not as strongly exercised today. In most other respects, traditional ownership and management practices continue. The Marshallese have a matrilineal custom of hereditary ownership and occupation rights, but the head of each lineage group is normally the eldest male.

Traditionally, most of the land in Palau was owned collectively by clans, and controlled by the councils of chiefs or elders of the villages. Ownership rights were normally inheritable through the females of the clan. During the German and Japanese colonial periods, the traditional systems of landownership and land management were largely dismantled and replaced by individual ownership. While there continues to be some tracts of land under traditional communal ownership, this is declining as a result of a continuing trend to convert these lands into individual title.

Before the arrival of Europeans, land in Nauru was divided into 12 regions and, within each region, land was owned collectively by clans. The hereditary system of ownership rights was matrilineal. During the German administration, landownership was recorded—not according to the members of the landowning group, but by the senior male member of the clan in an official register, known as the German Ground Book. This contributed to the subsequent disappearance of clan ownership and its replacement by individual or family ownership. Other early contributing factors were intense tribal wars and epidemics that ravaged the population.

Alienation of land from customary ownership

With the onset of colonial rule in the Pacific region came radical change in customary practices. New ideas, new cultures and new religions were imported from the west and new ways were introduced for using, owning and dealing in land. The colonialists needed land for production, residential and administrative purposes, so ways had to be found to access customary land. Sometimes land was accessed using force or coercion and at other times by adapting the western systems to the traditional practices. Where people practised shifting cultivation, tracts of fallow land were commonly regarded by colonists as unoccupied, not owned or 'waste' land, and were simply assumed by them. The current state of landownership and use throughout the region was mostly defined during the periods of colonial rule. In most countries, little has changed since independence.

MELANESIA AND EAST TIMOR

Papua New Guinea

Prior 1888, customary landowners of British New Guinea, the southern part of present-day Papua New Guinea, often sold land to traders and missionaries. These were recognised and confirmed by grants of freehold. However, in 1888 all sales of customary land except in accordance with custom and other than those to the Crown were prohibited. A similar policy was applied to German New Guinea, the northern part of present-day Papua New Guinea, after it was acquired by Australia in 1919. This policy continued until independence in 1975, and remains in force today.

However, the Crown is relatively unrestricted in transferring state land to private interests under freehold conditions. This history has resulted in three main categories of landownership in Papua New Guinea: customary, freehold and state. The ownership and use of freehold and state land are in accordance with common law (laws defined by the courts) and written law (legislation and regulations enacted by parliament). This is in contrast to customary land where ownership and use are governed by customary practices and principles. Customary land comprises about 97 per cent of the total land area of Papua New Guinea, freehold land 0.5 per cent, and state land 2.5 per cent.

Although freehold land is only 0.5 per cent of the land area of Papua New Guinea, this represents about 2000 square kilometres, which is about the same land area under freehold as in Fiji. But unlike Fiji, the market in freehold land is relatively thin, with less activity than in Fiji and fewer active real estate agents. This may be explained by restrictions on foreign ownership. Since 1975, freehold land in Papua New Guinea may be owned only by citizens. However, owners of freehold land may apply to have its status converted to leasehold for 99 years, thereby allowing access to foreign investors.

Fiji

When the islands of Fiji were ceded to Britain in 1874, they became a Crown colony, and the Crown acquired all land not occupied by Fijian tribes. Land sold by Fijians prior to this time was, after approval by land commissions, granted freehold title. Since 1874, Fijians have been prohibited from selling their land other than to the Crown. However, there was a period, 1905–12, when land sales were allowed and the Crown granted freehold titles to the purchasers. Today, customary land comprises about 88 per cent of the land area of Fiji, freehold land 8 per cent, and state land 4 per cent. About two-thirds of customary land has been converted to leasehold, mostly to Indo-Fijian cane farmers.

Today there is a particularly active and competitive market in freehold land in Fiji. Real estate agents play the key marketing role, with many agents focusing on international marketing. The market in Fiji functions as in other countries that have freehold land, including Australia and New Zealand. Freehold land may be freely sold and leased, but sales to non-citizens require the written prior approval of the Minister of Lands.

Solomon Islands

Solomon Islands was acquired by Britain in 1893 as a protectorate, not a colony, so there was no acquisition of land by the Crown. Solomon Islanders were regarded as owning all the land except land that was considered to be unoccupied and designated as waste land. From 1896 to 1914 Solomon Islanders were allowed to sell their land to foreigners, and grants of freehold were issued in respect of that land. Land sales to the protectorate government were also permitted. After 1914, sales of customary land were prohibited, except to the protectorate government, and some alienated land was returned to the customary owners.

In 1969 legislation provided for the granting of state land to private interests through a system of perpetual estates and fixed-term estates. These have many of the rights of usage, access and transferability available to freehold land, but are subject to payment of rent and compliance with certain conditions. Perpetual estates provide rights into perpetuity and are available only to Solomon Islanders, while fixed-term estates are for a period up to 99 years, or 75 years in the case of foreign interests. In 1977 freehold title was abolished and the land converted to the estate system. State land now comprises 8 per cent of the land area, and perpetual estates and fixed-term estates 5 per cent.

Vanuatu

Prior to independence in 1980, the Anglo–French Condominium administration of Vanuatu permitted the sale of customary land. Registration was undertaken by the Joint Court, often despite customary claims of ownership. As a result, there was considerable alienation of customary land and conversion to freehold land, mainly under foreign ownership. By 1980, 20 per cent of the land area was owned by foreign interests, and the desire to recover these lands was one of the strongest catalysts for New Hebrideans to seek independence.

At independence, Vanuatu adopted in its Constitution the principle that all land is owned by the indigenous custom owners and their descendants, although the government is also recognised as entitled to own land. This meant that, at independence, all freehold land reverted to customary ownership, except for land owned by the government, which comprises only 2 per cent of the land mass. To gain access to land, the former owners of freehold title were limited to negotiating lease arrangements, and much of the land has since reverted to leasehold conditions, particularly on the island of Efate, where Port Vila is located.

East Timor

The nature of landownership in East Timor remains unsettled. The Portuguese colonial administration issued approximately 2800 land titles between 1701 and 1975 and the Indonesian administration a further 47 000 land titles between 1975 and 1999. Some Portuguese and Indonesian titles overlap and a number are subject to customary claim. Many areas are occupied by people displaced during and after the Indonesian period. Political instability has delayed passage of a draft restitution law designed to resolve this patchwork of competing land claims.

East Timor has passed basic laws on landownership (2003), the allocation and lease of state land (2004), and leases of private land (2005). In combination with the constitutional right to private property, these laws establish three categories of land: state, abandoned and private. While the Constitution recognises the customs of East Timor, there is no separate legal recognition of 'customary land', although in practice most land is managed and used by customary owners according to customary principles. State land includes abandoned land that has not been restored to its rightful owners. The displaced owners were required to register their claims by 24 December 2003 and 11 000 claims were lodged with East Timor's Land and Property Directorate. Of these, about 90 per cent came from Indonesian citizens. Resolution of these claims awaits passage of the land restitution law.

POLYNESIA

Samoa

During the nineteenth century the Samoan islands attracted missionaries, traders and settlers, especially from Britain, Germany and the United States. Present-day Samoa was created in 1900 when the islands were divided between Germany (Samoa) and the United States (American Samoa). Upon assuming control, Germany recognised the claims of many Europeans to the perpetual ownership of land acquired from the indigenous inhabitants. Following the defeat of Germany in World War I, Samoa became a mandate of New Zealand in 1919. Land owned by Germans was confiscated by the government, and freehold estates were able to be granted out of public land.

By the time Samoa achieved independence in 1962, 19 per cent of land was alienated from customary ownership. Freehold land, owned mainly by individuals, accounted for 4 per cent of this land and public land the balance. The three categories of land ownership—freehold, public and customary—were confirmed in 1962 by the Constitution, and this mix of landownership continues. The Constitution prohibits further alienation of customary land except for public purposes. Freehold land cannot be sold to non-residents of Samoa.

Tonga

Tonga has a modern history that is unique in the region and this has resulted in a unique land system. Like elsewhere in the Pacific, European missionaries and traders started settling in Tonga during the nineteenth century. But Tonga did not become a colony and instead remained an independent country, albeit a British protectorate after 1900. Through conquest, all of Tonga came under the rule of King Tupou I in 1831, and his dynasty continues to rule. Full autonomy from Britain was achieved in 1970.

As mentioned earlier, King Tupou I established the Constitution in 1875 and in it transferred the ownership of all the land in the country to the king. This marked the end of traditional systems of landownership and land use. Since the Constitution, the king has allocated land on the principle of universal access, albeit on generous terms to the nobility. However, the principle of universal access extends only as far as the male members of the community.

Certain parts of Tonga were designated by the Land Act of 1903 as royal estates for the personal benefit of the monarch, and other parts were designated as royal family estates for members of the royal family. Grants of estates have also been provided under the Land Act to nobles and chiefs (*matupule*). These estates are held for life and cannot be transferred, but are inheritable and are not subject to forfeiture. The Land Act specifies that all land that is not royal land, or land held as hereditary estates, is Crown land.

Male Tongans aged 16 years are entitled to apply to the Minister of Lands for the grant of one town allotment, comprising 700 square metres, and one rural allotment comprising 3.3 hectares. These grants are made out of hereditary estates, royal estates or Crown land, if possible near where the applicant normally resides, and must be registered by the minister. Holders of these allotments do not have rights normally associated with ownership, but do have strong usage rights. Allotments are inheritable but, like hereditary estates, cannot be transferred by the allotment holder. Unlike hereditary estates, allotments are subject to forfeiture for failing to comply with court judgements to pay rent, or failing to keep a rural allotment in an adequate state of cultivation.

The Cook Islands

The Cook Islands was declared a British protectorate in 1888 and incorporated in 1901 into the then British colony of New Zealand. Traditional practices in landownership and land use were profoundly affected by the 1915 Cook Islands Act enacted by the New Zealand Parliament. This Act authorised a Native Land Court to investigate and determine title to customary land in accordance with native custom and usage, and to make orders converting such land into native freehold land. Native freehold land remained under traditional ownership, but authority over the land was removed from the customary owners to the Native Land Court. Two-thirds of customary land has been converted to native freehold. The chiefs of the islands of Mangaia, Mitiaro and Pukapuka have refused to allow the Native Land Court to undertake any such conversions.

Although the Cook Islands acquired independence in 1965, the sections of the Cook Islands Act relating to land have remained in force. The result is that there are now four forms of landownership in the Cook Islands: customary land held in accordance with tradition, native freehold land created by order of the Native Land Court, Crown land, and land held under freehold title. Freehold land was either acquired from the traditional owners before the Cook Islands Act or granted subsequently by the Crown. Only comparatively small amounts of land have been granted as freehold, mainly to religious bodies. Alienation of customary land or of native freehold land, whether to Cook Islanders or others, is prohibited by the Cook Islands Act.

Tuvalu

The nine atolls in the central Pacific known as Ellice Islands were brought under British protection in 1892 and became a British colony in 1916 in conjunction with their northern neighbours, the Gilbert Islands. In 1917 the Native Lands Ordinance was enacted, which prohibited the sale or gift of customary land to interests outside of customary landowning groups, except to the colonial government. The passing of the Crown Acquisition of Land Ordinance in 1954 provided authorisation for the government to compulsorily acquire land for public purposes. The amended Native Lands Ordinance in 1957 permitted customary land to be alienated to an agricultural marketing cooperative or to a local government council. The Ellice Islands separated from the Gilbert Islands and acquired independence in 1978 as Tuvalu. Little has changed in landownership patterns since independence, with about 95 per cent of the land area continuing to be held by customary landowners according to traditional practices. Most of the balance is Crown land; very little land has been alienated to cooperatives or local government councils.

Niue

In 1901 Niue was annexed to the British colony of New Zealand and remained under New Zealand control until obtaining self-governing status in 1974. The provisions of the 1915 Cook Islands Act outlined earlier also applied to Niue. Unlike the situation in the Cook Islands, no grants of freehold were made despite the presence of European missionaries and traders. The Native Land Court established by the Cook Islands Act failed to exercise its powers in Niue, so that no native freehold orders were made by it either. In 1966 the Niue Act established a land court specifically for Niue, with powers similar to the Native Land Court of the Cook Islands. However, the power to make native freehold orders was removed within two years by the Niue Amendment Act. The Village Councils Ordinance of 1967 gave village councils the power to own land, but this has not been exercised. With this history, by far the majority (98.5 per cent) of the land area continues to be owned by Niueans in accordance with customary practices, with Crown land comprising the balance.

Tokelau

Tokelau was taken under British protection in 1889 before being annexed to the British colony of Gilbert and Ellice Islands in 1916. In 1925 they were placed under New Zealand administration, and then made part of New Zealand in 1948 by the Tokelau Islands Act. Today, the islands continue to be administered by the New Zealand Government. During the course of this history, some Europeans landed and stayed on the atoll islands, and acquired land from the inhabitants. The Crown, which after 1916 claimed ultimate ownership of the land, recognised the title of customary owners and of the people who had acquired land from them. In 1967 the Tokelau Amendment Act provided that Tokelauans cannot alienate or dispose of their land, except to the Crown or among themselves in accordance with custom. Accordingly, there are today three forms of landownership in Tokelau: customary, Crown and freehold, which applies to land originally acquired by Europeans from the inhabitants and recognised as freehold by the Crown.

MICRONESIA

Federated States of Micronesia

The late nineteenth century Spanish administration of the four island groups that make up the present-day Federated States of Micronesia—Chuuk, Kosrae, Pohnpei and Yap—had very little impact on the systems of landownership. In 1899 colonial power was transferred to Germany whose main interest was in copra production; after World War I Japan took over control. The sale and leasing of land was permitted under the German and Japanese administrations. In addition, the Japanese administration asserted ownership of all unoccupied land in the island groups, and by the late 1930s the Japanese administration owned a considerable share of the land area of the Federated States of Micronesia, including more than half in Kosrae and Pohnpei. More land was purchased or seized during World War II in support of Japan's war effort. Following World War II and the defeat of Japan, the United States assumed responsibility for the Federated States of Micronesia. The US administration claimed as public land all land previously owned or occupied by the Japanese government or Japanese individuals.

As the Federated States of Micronesia geared up for independence, which it gained in 1986, these public lands were transferred to the respective state governments of the new nation. Some has since been transferred to private individuals as freehold. Today, public land represents about 35 per cent of the land area—60 per cent in Kosrae, 50 per cent in Pohnpei, and 2 per cent in Chuuk and Yap. The extent of freehold land remains small. Most of the balance of the land area is held by traditional landowners. However, much of this land is registered, with rights of title similar to freehold. The Constitution of the Federated States of Micronesia contains a provision that only citizens or corporations wholly owned by citizens may own land, but otherwise land is left to be regulated by the individual states.

Kiribati

Kiribati comprises three island groups—Gilbert Islands, Phoenix Islands and Line Islands. The Gilbert Islands, in conjunction with the Ellice Islands of present-day Tuvalu, became a British protectorate in the late nineteenth century and a colony in 1915. The Phoenix Islands were added in 1937 and the Line Islands in 1972. Some land had been sold or given by islanders to European missions and traders in pre-colonial times, but in 1917 the Native Lands Ordinance prohibited further land transfers, except to the colonial government. However, customary land was able to be converted to freehold land, but with sales restricted to the indigenous inhabitants of Kiribati. In 1957 restrictions under the Native Lands Ordinance were eased to allow the sale of customary land to local government councils, registered agricultural marketing cooperatives, the National Housing Corporation and the Development Bank of Kiribati. In 1954 the Crown Acquisition of Land Ordinance authorised the colonial government to acquire land for public purposes. The Neglected Lands Ordinance of 1959 further authorised the government to acquire land for local council purposes or for redistribution to the impoverished.

Since acquiring independence in 1979, there has been little change in landownership structures. The main exception is on the previously uninhabited Christmas Island in the Line Islands group where the land was owned by the Crown. There, a new town is being built and some land has been transferred to private interests with freehold title. Elsewhere in Kiribati, about 95 per cent of the land area continues under indigenous ownership, some with freehold title. Public land comprises most of the balance. Across all of Kiribati, about 50 per cent of the land area is public land, as Christmas Island accounts for nearly half the land area of Kiribati.

Marshall Islands

In 1886 Germany annexed the Marshall Islands from Spain and retained control until its defeat in World War I. Like the Federated States of Micronesia, the Marshall Islands were then placed under the administration of Japan. Japanese administration remained until the end of World War II, when the United States took over. During the period of German control, land was acquired by German traders, but almost all of them departed when the islands came under Japan's rule. Japan acquired significant tracts of land during its tenure, but this was converted to public land following World War II and confirmed as Crown land upon independence in 1986. Since independence, all land formerly owned by Japan has been returned to the original customary owners.

During the US administration, legislation was enacted to provide that title to land could be held only by citizens of the territory or corporations wholly owned by citizens of the territory, or by the government. This legislation was confirmed following the independence of the Marshall Islands. The government of the Marshall Islands is authorised by the 1986 Land Acquisition Act to acquire land for public use but this power has never been used. Accordingly, it is likely that there is no state-owned land and that all land in the Marshall Islands is indigenously owned, with ownership usually governed by customary practices. A possible exception is the atoll of Likiep, for which title is claimed

by the descendants of a German trader; its acquisition was made within customary systems, and the descendants are mostly of Marshallese lineage. Kwajalein atoll is home to an US military base, but the land is rented from the traditional owners.

Palau

Palau shares its modern colonial history with the Federated States of Micronesia. The two nations formed the Caroline Islands, which were first controlled by Spain before being transferred to Germany in 1899. Japan took over control during World War I until the end of World War II, after which the United States assumed control. In the late 1970s Palau separated from the Federated States of Micronesia and in 1986 became an independent country.

During German rule, individual occupation and ownership of land, especially uncultivated land, was encouraged to expand the production of copra. This set in motion a trend toward individual ownership that continues today. It is estimated that there are currently 20 000 land titles, some of which are clan or community titles to land, but many others are individual titles. Only citizens, businesses and other entities of Palau are able to own land.

The German and the Japanese administrations claimed as public lands all land that was not occupied and cultivated by Paluans and, when war broke out in the early 1940s, the Japanese administration purchased or seized whatever land it needed for its war effort. As was the case in the Federated States of Micronesia and the Marshall Islands, the post-war US administration confiscated all Japanese land and converted it to public land. When the Republic of Palau was created, these lands were vested in it as public lands, but ownership of much of this land is now being disputed by the traditional owners.

Nauru

In the early 1900s Nauru was discovered by a British company to have enormous reserves of phosphate, and that company, which became the Pacific Phosphate Company, negotiated with the German Government to extract phosphate upon payment of royalties to the then German administration. After the defeat of Germany in World War I, Nauru was placed under the responsibility of Britain and administered by Australia. Nauru gained independence in 1968, and ownership of the Pacific Phosphate Company was transferred to Nauru in 1970. Unlike most Pacific island countries, there is no history of land alienation to foreigners in Nauru as the sale of land to foreigners was prohibited during colonial times. This was reinforced in 1976 by the Lands Act. Only a small amount of land has been alienated as government land. Some missions occupy alienated land. The state did not assume ownership of the land for the phosphate mine.

Recognition of customary authority

Customary tenure is formally recognised and protected in all of the Melanesian countries, but not in East Timor. In Papua New Guinea, recognition and protection of customary land tenure are provided indirectly by the Land Act, which outlines that all land in the country other than customary land is the property of the state. The current Constitution of Fiji makes no express mention of rights to customary land, but the rights of Fijians to hold their land in accordance with traditional practices and uses has been recognised by legislation since 1880, and is preserved in the current Native Lands Act. The exclusive rights of Solomon Islanders to hold perpetual interests in land is recognised by the Constitution, and the rights of Solomon Islanders to hold customary land in accordance with traditional uses and practices is recognised by the Land and Titles Act. In Vanuatu, customary tenure is recognised and protected by chapter 12 of the Constitution.

Among Polynesian countries, only Samoa includes formal recognition and protection of customary land tenure in its Constitution. In the Cook Islands, Tuvalu, Niue and Tokelau, the Crown formally recognises the rights of traditional landowners through legislative means and protections.

Of the Micronesian countries, constitutional recognition and protection of customary authority over customary land are provided only in the Marshall Islands. The Federated States of Micronesia and Palau have some limited recognition and protections in their Constitutions by recognising and providing status to traditional law. The Constitutions of the four provinces in the Federated States of Micronesia go further and formally recognise and protect customary land. Recognition and protection of customary land tenure in Kiribati and Nauru are provided through legislation.

Land use

URBAN

In the urban centres of the Pacific countries, land is used predominantly for government and commercial offices, shops, stores, restaurants, hotels, light industry, public infrastructure, public services, and residential purposes. Most state land can be found in urban centres. Freehold land too is most often found in urban centres in those countries that have freehold title.

Within and around most urban centres, significant areas of both customary land and public land are occupied by informal settlements. These have emerged as people have moved from rural to urban areas and found that such settlements represent their best options for accessing land for residential purposes. Most informal settlements can be found in the urban areas of Melanesia. But settlements are also found in Samoa (Apia), Tonga (Nuku’Alofa), the Federated States of Micronesia (Pohnpei), Kiribati (South Tarawa) and the Marshall Islands (Majuro). East Timor does not have the large informal urban settlements of the kind seen elsewhere in the region, but it does have a high degree of ad hoc occupation of urban housing, largely as a result of widespread displacement and return in late 1999.

RURAL

The bulk of the populations of the Pacific countries live in rural areas and engage in traditional agriculture, either for subsistence or for sale in local marketplaces. Traditional agriculture managed within customary systems therefore dominates land use, particularly in the more remote regions. In Melanesia, East Timor, Samoa, Tonga, the Cook Islands, Niue, the Federated States of Micronesia and Palau root crops and small-scale animal husbandry are the main traditional agricultural activities, but the scope of production is becoming increasingly diverse. The other countries mostly comprise island atolls with very little fertile soil. Fishing is the most important food source in these locations, with traditional agriculture limited mainly to coconut, pandanus and banana trees, and taro. Coconut trees dominate land use in these countries, and in most places copra represents the only significant export cash crop.

Copra plantations that target the export market are also important forms of land use in Papua New Guinea, Solomon Islands, Vanuatu and Samoa. In Papua New Guinea there are also extensive large-scale plantations and smallholder estates of oil palm, coffee, cocoa and vanilla. Oil palms are also grown in Solomon Islands. In Tonga, squash production for the Japanese market is an important use of land, and in Vanuatu extensive areas of land are used for grazing beef cattle, also destined for the Japanese market. In Fiji traditional agriculture is less important. The most extensive form of land use is sugarcane farming under lease arrangements, particularly in the western and northern areas of the main islands, Viti Levu and Vanua Levu.

In Papua New Guinea, Solomon Islands and, to a lesser extent, Vanuatu and Fiji there are extensive areas of timber logging and localised mining. Mining dominates the landscape of Nauru. Resorts and hotels are significant land users along key coastal areas in Fiji, Vanuatu, Samoa, the Cook Islands and Palau. Due mainly to the rugged terrain, extensive areas of Melanesia and East Timor are not cultivated. In East Timor, 44 per cent of the land mass is at an incline of greater than 40 per cent. In the Marshall Islands three atolls amounting to 11 per cent of the land area were laid to waste as a result of nuclear testing in the 1950s, but some of this land has been rehabilitated and reinhabited in recent years. A small central area of Christmas Island in Kiribati has similarly been rehabilitated following nuclear testing at that time. As already noted, the Kwajalein atoll, comprising 9 per cent of the land area of the Marshall Islands, is used as a US defence force base.

Glossary of terms relating to land

Access most commonly means being able to use land and other natural resources (for example, to graze animals, grow subsistence crops, or gather minor forestry products). In some cases access can also refer to control of land resources (for example, rights to make decisions on how the resources should be used, and to benefit financially from the sale of crops, etc.) and transfer rights over the land (for example, rights to sell the land or use it as collateral for loans, convey the land through intra-communal reallocations, and transmit the land to heirs through inheritance).

Adjudication is the process of authoritatively determining the existing rights and claims of people to land. Adjudication should not alter existing rights or create new ones but should establish what rights exist, by whom they are exercised, and to what limitation.

Alienation occurs when the rights to land are transferred to another person. Alienation can be full (the sale of ownership of the land) or partial (the transfer of usage rights through a lease). The term 'alienated land' most commonly refers to land, the rights to which have been fully transferred or the ownership of which has been converted from customary tenure to freehold or public tenure. It is not commonly used to refer to customary land that has been leased.

Allocation is the process of assigning rights to land to a person (individual or corporate) within the rules defined by the land tenure system. Rights can be assigned by the sovereign power (nation state or indigenous) through original grants or through reallocations following expropriation, purchase or reversion. Rights can also be allocated by private individuals to others through sales, leases, inheritance, etc.

Cadastral information is parcel-based land information that includes a geometric description of land parcels, usually represented on a cadastral map. In some jurisdictions it is considered separate from, but linked to, the information on land rights and holders of those rights (land register), while in other jurisdictions cadastral information and land register are fully integrated.

Compulsory acquisition is the expression used in some jurisdictions to describe the power held by the state to acquire land by expropriation or eminent domain.

Co-ownership is where land is owned by more than one person at a given time. If more than one person owns the same land, they can be referred to as co-owners, co-tenants or joint tenants.

Control rights apply to the management of land. They may be rights to make decisions about how the land is used, including what crops are planted, and rights to benefit financially from the sale of crops, etc.

Customary tenure is the tenure usually associated with indigenous communities and administered in accordance with their customs, as opposed to statutory tenure usually introduced during the colonial periods.

Formal property has rights attached that are explicitly acknowledged by the state and may be protected using legal means.

Formal system is the collection of institutions and rules that are acknowledged or regulated by the state. In the context of land this system usually includes official rules or legislation, legal institutions and other institutions that deal with formal property.

Formalisation (also referred to as ‘regularisation’) is the process of bringing informal property rights into a formal, legal system of land administration.

Freehold is the everyday expression for tenure that provides what is usually regarded as ‘ownership’ rights, the holder having the rights to use, control, transfer and otherwise enjoy the land parcel to the extent permitted by law. The term derives from a particular type of tenure found under English common law (that is, the landholder was free from the obligation of providing feudal services).

Indigenous tenure system See ‘Customary tenure’.

Informal property has rights attached that lack formal, official recognition and protection. In some cases, informal property rights are illegal—held in direct violation of the law. In other cases, informal property may be ‘extra-legal’—not against the law, but not recognised by the law.

Informal settlement is where the people living in an urban or peri-urban area lack formal land rights to occupy the land. See ‘Informal property’.

Inheritance is the right to property transferred at the owner’s death to heirs or those entitled to succeed. In many traditional societies, property descends to males, and females have no or little right to inherit. In some societies, tenure rules may provide for females to inherit but, in practice, daughters are expected to give up this right on the basis that, upon marriage, they will gain access to the lands of their husbands. In matrilineal societies, upon the death of a woman, property descends through the line of the matrilineal uncle, and a surviving husband may lose rights previously enjoyed. In patrilineal societies, a widow may lose rights and be evicted.

Land administration is the system and processes for making land tenure rules operational. It includes the administration of land rights, land use regulations, and land valuation and taxation. Land administration may be carried out by agencies of the formal state, or informally through customary leaders.

Land dispute is a disagreement over land rights, boundaries or uses. A land dispute occurs when specific individual or collective interests relating to land are in conflict.

Land information system is a system for acquiring, managing, processing, storing and distributing information about land. It is usually based on parcels of land.

Land policy reform requires changes to the policies and institutions associated with land. It usually includes ways to improve tenure security. The term ‘land reform’ used in the international land literature often has a different meaning—implying a more radical process of redistributing land ownership to the poor for equity and agricultural efficiency purposes.

Land recording is a process of capturing boundary, ownership and/or transaction information about land and storing it for future reference on paper or electronically. Access to some land records may be restricted to certain people.

Land registration occurs when the recorded information about land is included in some form of public register. Registration can be of a parcel of land (sometimes referred to as title registration) or be based on the transfer documents associated with the land (sometimes referred to as deed registration). In title registration, ownership is transferred upon registration rather than on execution of the contract; the state may also provide a guarantee on the validity of the title.

Land rights are held to land and other natural resources. More than one person may hold rights to a parcel of land, which gives rise to the concept of a 'bundle of rights'.

Land tenure is the relationship, whether legally or customarily defined, among people, as individuals or groups, with respect to land and associated natural resources (water, trees, minerals, wildlife, etc.). Rules of tenure define how property rights in land are allocated within societies. Land tenure systems determine who can use what resources for how long and under what conditions.

Lease is the contractual agreement (which may be formal or informal) for the temporary use of land.

Ownership is the right to land that is, in everyday language, associated with being able to use, control, transfer, or otherwise enjoy a land parcel as long as those activities are allowed by law. Land law does not tend to define explicitly what is meant by 'ownership'.

Parcel is a portion of land for which distinct rights exist.

Private property is held by right by a private party who may be an individual person, a married couple, a group of people, or a corporate body such as a commercial entity or non-profit organisation.

Public property, also referred to as public land or state property, is held by the state, often by assignment to a public agency.

Regularisation See 'Formalisation'.

Tenure security is the certainty that a person's rights to land will be protected. People with insecure tenure face the risk that their rights to land will be reduced by competing claims, and even lost as a result of eviction. The attributes of security of tenure can change from context to context. Investments that require a long time before benefits are realised require secure tenure for a commensurately long time.

Title is the evidence of a person's right to land, or 'entitlement'.

Usage right (usufruct) is the right to use something (such as land) that belongs to another without destroying or damaging it. A holder of such a right may or may not have the right to sell the property.

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Land policy reform is on the agenda in the Pacific region. Papua New Guinea, Vanuatu, Solomon Islands, Samoa and East Timor, for example, are either undertaking or considering land policy reforms to ensure that land contributes to national social and economic development.

The growing push for reform is not coming from governments alone. Customary landowners in many countries recognise that their present and future livelihoods depend on sensible and sustainable development of traditional lands. But there are challenges. Reconciling customary land and development requires:

- » linking customary land into formal economic and legal systems
- » broad community consensus
- » extensive technical and managerial skills
- » long timeframes and adequate funding

Making land work is a resource for Pacific countries grappling with these challenges. Both volumes seek to provide ideas and inspiration for Pacific governments, officials, landholders and the private sector on how to increase the contribution of land to communities and economies while protecting traditional tenure systems.



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