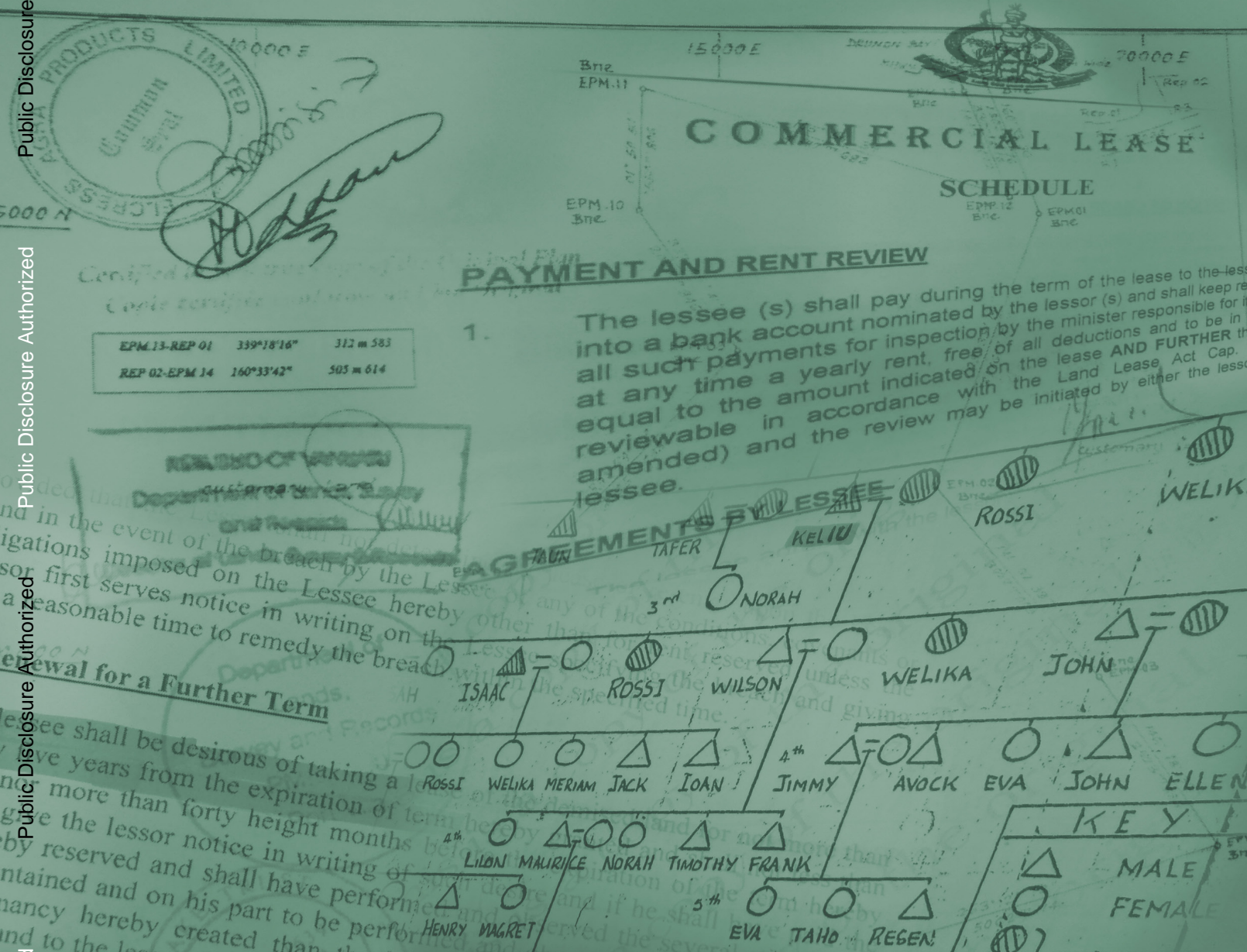


Public Disclosure Authorized

Public Disclosure Authorized

Public Disclosure Authorized

Public Disclosure Authorized



Towards More Equitable Land Governance in Vanuatu: Ensuring Fair Land Dealings for Customary Groups

Milena Stefanova, Raewyn Porter and Rod Nixon

About Justice for the Poor

Justice for the Poor (J4P) is a World Bank program that engages with justice reform as a cross-cutting issue in the practice of development. Grounded in evidence-based approaches focused on the perspective of the poor and marginalized, the program aims to improve the delivery of justice services and to support sustainable and equitable development processes which manage grievance and conflict stresses effectively.

Justice for the Poor Discussion Notes provide advice to partner governments, development practitioners and others interested in justice reform. Discussion Notes are reviewed by at least two external reviewers who are independent of the program.

Disclaimer

The findings, interpretations, and conclusions expressed herein are those of the authors and do not necessarily reflect the views of The World Bank, its Board of Executive Directors, or the governments they represent. The World Bank does not guarantee the accuracy of the data included in this work.

Rights and Permissions

The material in this work is subject to copyright. Because The World Bank encourages dissemination of its knowledge, this work may be reproduced, in whole or in part, for noncommercial purposes as long as full attribution to the work is given.

For permission to photocopy or reprint any part of this work, please send a request with complete information to the Copyright Clearance Center, Inc., 222 Rosewood Drive, Danvers, MA 01923, USA, telephone 978-750-8400, fax 978-750-4470, Internet: www.copyright.com.

All other queries on rights and licenses, including subsidiary rights, should be addressed to the Office of the Publisher, The World Bank, 1818 H Street NW, Washington, DC 20433, USA, fax 202-522-2422, Email: pubrights@worldbank.org.

Contact details

Justice for the Poor
Justice Reform Practice Group
Legal Vice Presidency
World Bank
1818 H Street, NW
Washington, DC 20433 USA
Email: j4p@worldbank.org

All Justice for the Poor publications are available at <http://www.worldbank.org/justiceforthe poor>

Photo courtesy of Milena Stefanova

Towards More Equitable Land Governance in Vanuatu: Ensuring Fair Land Dealings for Customary Groups

Milena Stefanova, Raewyn Porter, and Rod Nixon

May 2012

Justice for the Poor Discussion Note

Legal Vice Presidency
The World Bank

This note is a product of the collaboration between the Australian Agency for International Development (AusAID) and the World Bank on the East Asia and Pacific-Justice for the Poor (EAP-J4P) Initiative.

Acknowledgements

The authors are very appreciative of the participation of the respondents on Epi and Tanna islands, the support of the Shefa and Tafea Provincial Councils and the Epi and Tanna Island Councils of Chiefs with logistics and dissemination of information, the assistance of the Department of Lands staff in accessing land lease data and contributing to the development of this note, and the JBE Reference Group for discussion of the research design, findings, and suggested policy responses.

Other Justice for the Poor team members who have assisted in the production of this discussion note include Leisande Otto, Brigitte Olul, Sue Scott, Daniel Adler, and Shaun Williams. Peer reviewers were Anna Naupa (Senior Program Officer, AusAID Vanuatu), Don Paterson (Emeritus Professor of Law, University of South Pacific), Siobhan McDonnell (Legal Adviser, Vanuatu Cultural Center), Jon Lindsay (Senior Counsel, Environmentally and Socially Sustainable Development, World Bank), and Isabella Drossos (Senior Counsel, East Asia and Pacific Region). The authors thank them all for their efforts and commitment to the publication of this note.

Table of Contents

1. Introduction.....	1
2. Overview of Jastis Blong Evriwan Research.....	2
2.1 National Leasing Profile	2
2.2 Locality Leasing Studies.....	6
3. Policy Issues and Suggested Policy Responses	8
3.1. Issue: Environmental and Social Impacts of Leasing are Routinely Neglected	9
3.2. Issue: Custom Landholders Often Negotiate from a Position of Disempowerment.....	10
3.3. Issue: Group Rights are Disregarded and Custom Landholders Poorly Identified, Leading to Frequent Disputes	12
3.4. Issue: Ministerial Power over Disputed Land Used More Broadly than Intended.....	14
3.5. Issue: Determination of Land Values is Variable and Inconsistent.....	17
3.6. Issue: Lease Creation Process is Unregulated and Easily Abused	17
3.7. Issue: Lease Conditions are not Monitored and Enforced	19
3.8. Issue: Land Records are Often Missing, Incomplete, and in Poor Condition.....	20
4. Conclusion	20
Annex 1	22

1. Introduction

The regionally unique Constitution of the Republic of Vanuatu provides that “all land in Vanuatu belongs to custom owners and their descendants” and that the “rules of custom shall form the basis of ownership and use of land.”¹ Implementing this principle, however, after decades of land alienation by foreigners using alien laws has proven to be challenging. Concerns over actual and perceived problems of land alienation through leasing in Vanuatu triggered a National Land Summit in 2006,² followed by an Interim Transitional Implementation Strategy and a National Land Review, all of which set the stage for a legislative and administrative reform agenda and served as a guide to short- and long-term assistance to the land sector.³ This policy guidance formed the basis of the Australian Agency for International Development (AusAID)-funded “Vanuatu Short-term Land Reform Initiatives Project” (2007–10).

During this same time, the Vanuatu Ministry of Lands finalized a Land Sector Framework 2009–2018,⁴ focusing on five areas in need of reform. These were: (i) enhancing the governance of land; (ii) engaging customary groups; (iii) improving the delivery of land services; (iv) creating a productive and sustainable sector; and (v) ensuring the access and tenure security of all groups. To support the implementation of the Land Sector Framework, Australia and New Zealand are jointly funding a five-year land program, “Mama Graon,”⁵ which commenced in January 2011.

While valuable research had previously been carried out on leasing practices on the island of Efate,⁶ a lack of empirical data on leasing more generally in Vanuatu has hampered concrete, national policy dialogue. To address this gap and contribute to the 2006 National Land Summit objective of advancing *fair dealings with respect to land* and associated Land Sector Framework priority areas, the Justice for the Poor program (Jastis Blong Evriwan in Vanuatu)⁷ conducted a national lease profiling exercise and in-depth locality studies on Epi and Tanna islands to investigate the way different customary groups had engaged in specific instances of land leasing. The research documented evidence of continuing inequities in relation to past and subsisting land leasing practices, and provided testimony about ongoing challenges relating to group decision-making processes, local land use planning, and benefit sharing.

¹ Article 74 and 75, Constitution of the Republic of Vanuatu 1980. Further, Article 75 specifies that “only indigenous citizens of Vanuatu who have acquired their land in accordance with a recognized system of land tenure shall have perpetual ownership of their land.”

² See “Vanuatu National Land Summit Resolutions” (Port Vila: Government of the Republic of Vanuatu, 2006). The summit resolutions highlighted, among other items, the need to strengthen group customary ownership; to ensure the participation of all groups in decision making about land use; to review the custom owner identification process; to increase public awareness of land rights and laws; to remove the minister’s power to approve leases over disputed land; to ensure public access to the sea; to promote fair land dealings between parties; and to comply with environmental and social impact assessment requirements.

³ Chris Lunnay et al., “Vanuatu Review of National Land Legislation, Policy and Land Administration” (Canberra: AusAID, 2007).

⁴ Vanuatu, Ministry of Lands, “Land Sector Framework 2009–2018” (Port Vila: Ministry of Lands, 2009).

⁵ “Mama Graon” is the Bislama term for “motherland.”

⁶ Sue Farran, “Myth or Reality: Case Study of Land Tenure in Efate, Vanuatu” (paper presented to FAO/USP/RICS Foundation South Pacific Land Tenure Conflict Symposium, University of the South Pacific, Suva, Fiji, April 10–12, 2002).

⁷ Justice for the Poor is a World Bank research and development program that supports analytical and programmatic work in countries where legal pluralism presents a central development challenge.

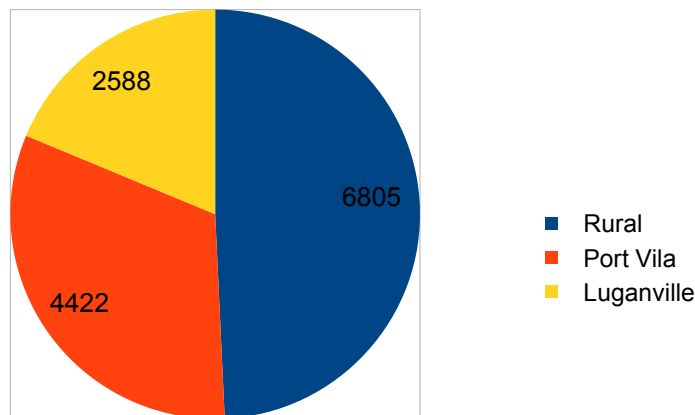
This note summarizes the research findings, prioritizes problematic issues for policy consideration, and offers practical proposals for addressing these issues to ensure more equitable and therefore durable future lease creation and lease administration procedures.

2. Overview of Jastis Blong Evriwan Research

2.1 National Leasing Profile

This study provides an estimate of how much of Vanuatu’s land is currently under lease, where land has been leased and how it is being used, the duration of leases, and the extent of lease subdivisions as of December 2010.⁸ However, these figures are **indicative only** and need to be treated with caution, as the quality of the data is questionable.⁹

Figure 1. Total Number of Leases in Rural and Urban Areas, December 2010



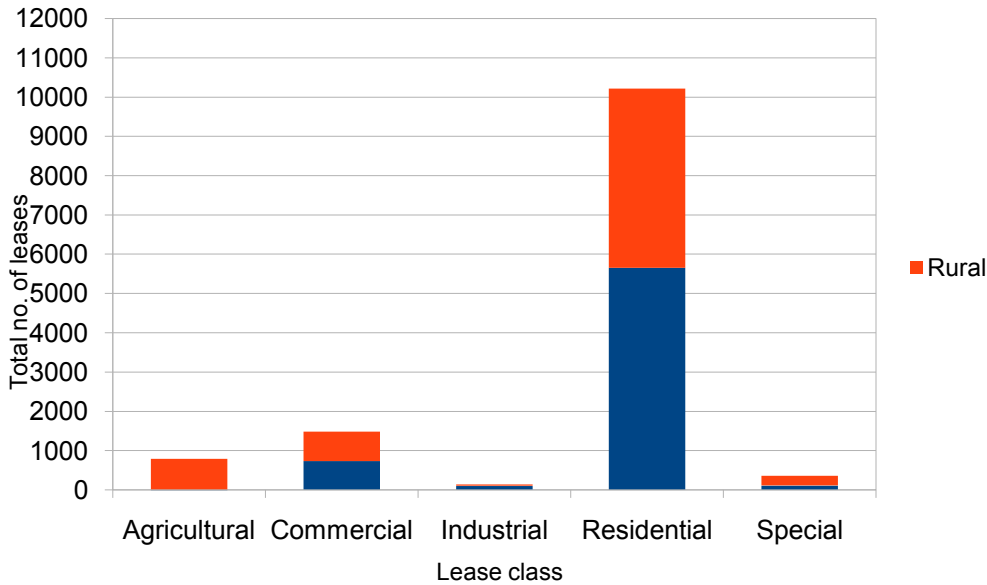
Notes: Area missing = 8 percent; includes subdivisions; 989 cancelled leases removed

According to the national leasing data, there were approximately 13,815 current leases, covering 9.3 percent of the total land area in Vanuatu. Out of that total, 7,010 are urban leases in Port Vila and Luganville (over government-owned land), comprising 1 percent of the land under lease in Vanuatu, and 6,803 are rural leases over customary land, comprising 99 percent of the land under lease.

⁸ A more detailed paper on the national leasing data has been prepared. See Sue Scott and others, “Vanuatu National Leasing Profile: A Preliminary Analysis,” Justice for the Poor Briefing Note (Washington, DC: World Bank, 2012).

⁹ The data was drawn from a number of government databases. These databases vary in quality and coverage, with missing data from the databases for many of the variables. For example, 24 percent of the records are missing data on lease term, 12 percent are missing data on year leased, 8 percent are missing data on area, and 6 percent are missing data on lease class. The number of cancelled leases has been excluded from the calculations. Additionally, as of September 2011, the estimated backlog was roughly 4,000 documents.

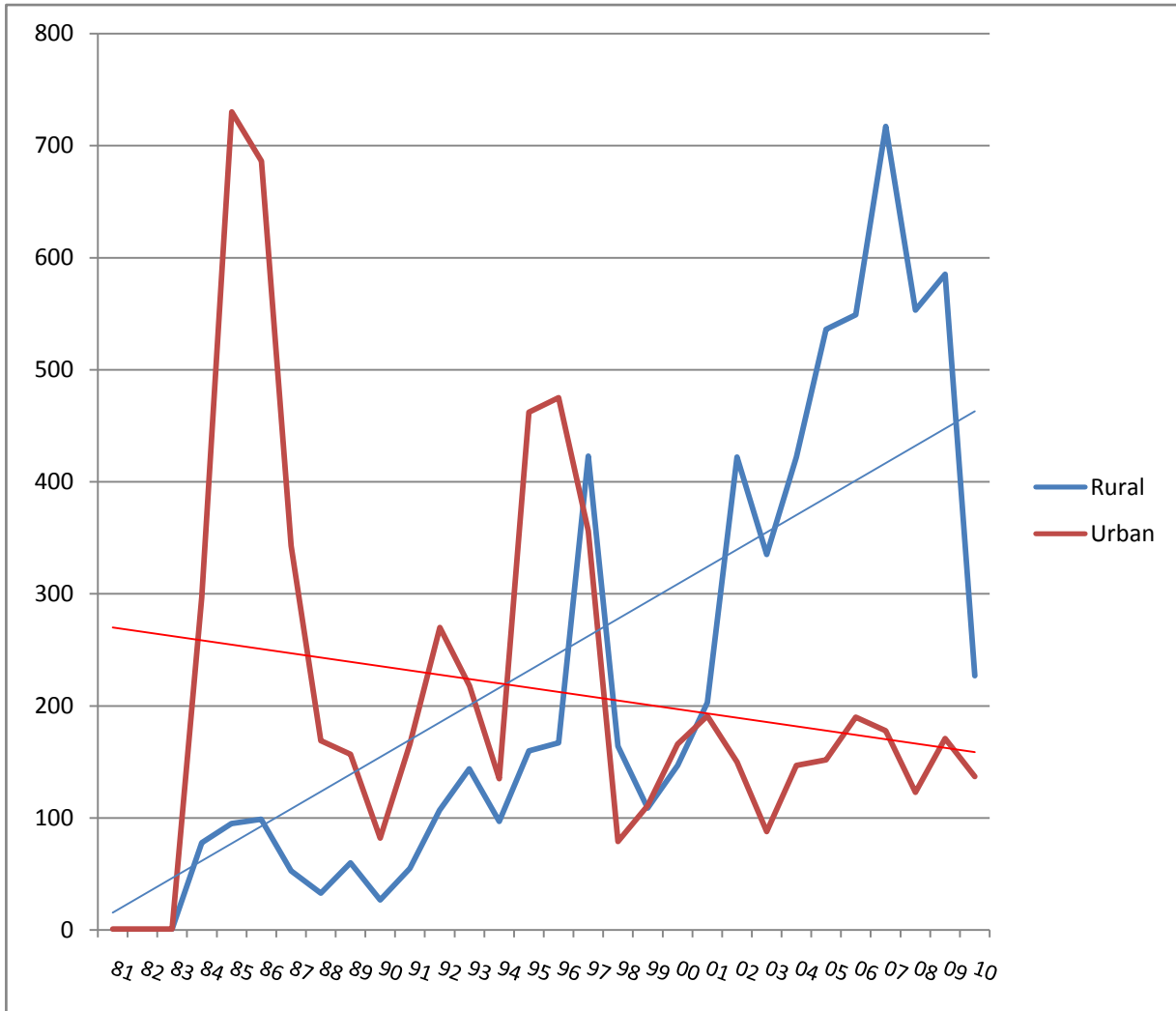
Figure 2. Lease Class by Number, Urban and Rural leases, December 2010



Notes: N = 12,980. Lease class missing = 6 percent; area missing = 8 percent; 989 cancelled leases removed

The majority of leases throughout the country are residential (79 percent), although the land area of these leases is only 4 percent of the total area under lease. The majority of residential leases are on the main islands of Efate and Santo. A further 11 percent are for commercial/tourism purposes, comprising 9 percent of land area under lease. Agricultural leases, while making up only 6 percent of the total number, account for 82 percent of the area under lease. The remaining 4 percent are industrial or special leases, consisting of 1 percent of the leased land area. The latter include schools, health centers, wharves, stadiums, and other public and private infrastructure.

Figure 3: Leasing Activity Trend, Rural and Urban Leases 1981–2010, December 2010



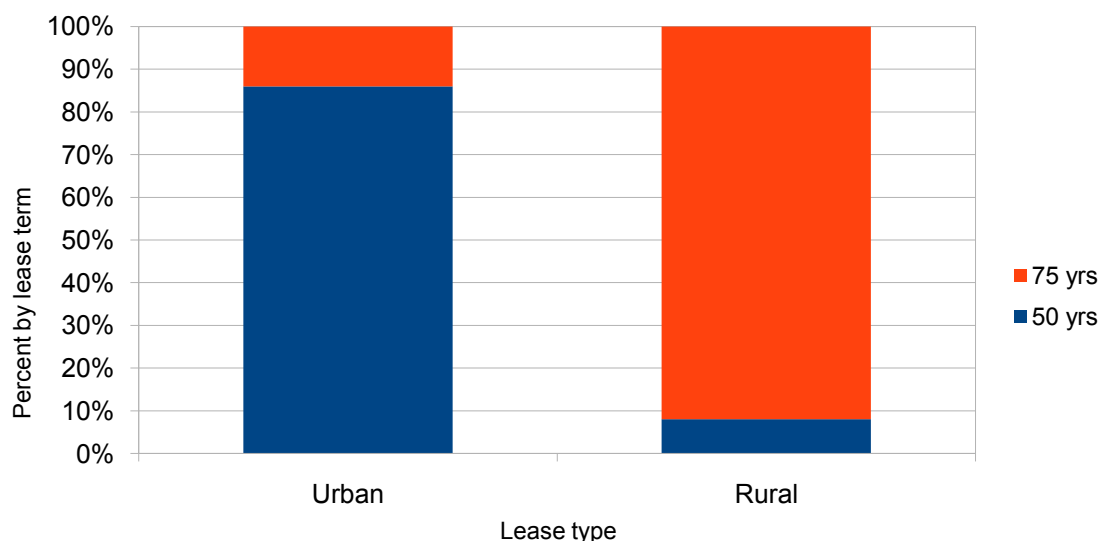
Notes: N = 13,000. Year missing = 12 percent; area missing = 8 percent; includes 989 cancelled leases

The pattern of leasing is very uneven across Vanuatu, with high percentages for Efate¹⁰ and the outer islands at 44 percent, followed by Santo at 10 percent,¹¹ and the remainder showing small percentages of land under lease. Over the last decade (2001–10), an average of 608 leases per year have been registered; 895 new leases were granted in 2007 and 1,800 between 2008 and 2010, despite the concerns about leasing expressed at the 2006 National Land Summit. Figure 3 shows that the proportion of rural leases granted in comparison to urban leases has been increasing since 2000.

¹⁰ Port Vila, the capital and main urban center, is located on Efate.

¹¹ Luganville, the second main urban center, is located on Santo.

Figure 4. Percent of Rural and Urban Leases for 50 and 75 years, December 2010



Notes: N = 10,277; Lease term missing = 24 percent; 989 cancelled leases and leases of fewer than 50 years removed

The maximum time for which a lease can be granted is 75 years.¹² Of the total number of 10,277 leases for which there is data, approximately 98 percent are for 50 years or more: 52 percent are for a term of 50 years and 46 percent for the maximum 75-year term. This figure is even higher for subdivision plots, of which 71 percent are for 75 years. The remaining 2 percent are for between 5 and 49 years.

Figure 4 shows that a much higher portion of these 75-year leases are rural leases, as fully 92 percent of rural leases are for 75 years, compared to only 14 percent of urban leases. Over 80 percent of urban leases are for a term of 50 years.

Table 1. Number and Area of Subdivision Plots per Island, December 2010

Island	Number of Subdivisions	Area of Subdivisions (km ²)	Area of Island (km ²)	% of Island under Lease	% of Island Subdivided
Efate/Outer Islands	3,993	53.4	970.4	44.0%	6%
<i>(Efate/Outer Islands - rural)</i>	<i>(3,220)</i>	<i>(52.3)</i>			
<i>(Efate/Outer Islands - urban)</i>	<i>(773)</i>	<i>(1.1)</i>			
Santo	1,141	40.5	3,958.9	10.0%	0%
<i>(Santo - rural)</i>	<i>(292)</i>	<i>(38.7)</i>			
<i>(Santo - urban)</i>	<i>(849)</i>	<i>(1.8)</i>			
Aore	243	11	58.1	65.3%	19%
Malekula	31	0.1	2,053.2	5.5%	0%

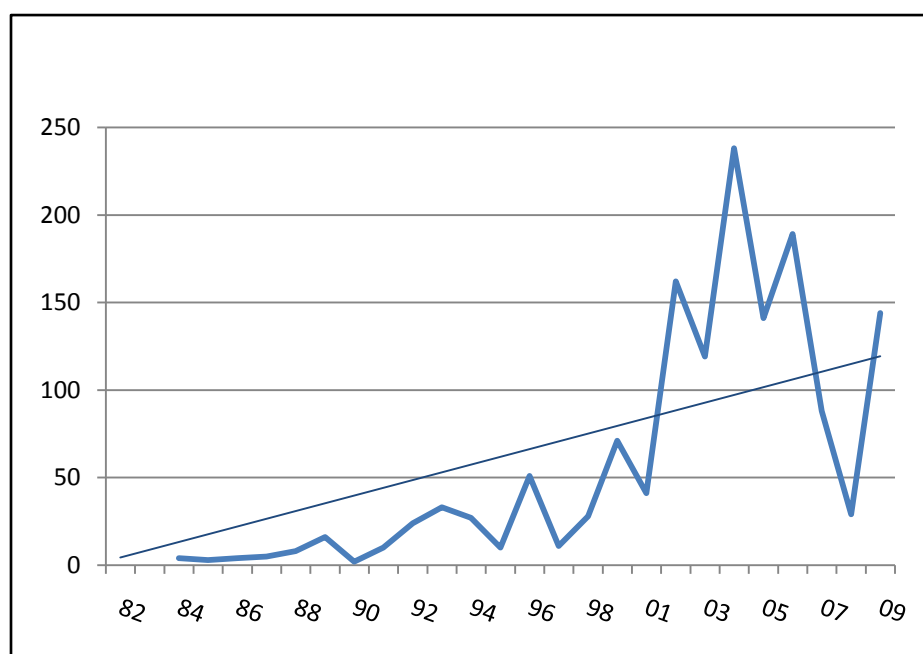
¹² Only leases for more than three years are required to be registered. The *Land Leases Act* (sec. 32) stipulates that a term of lease cannot be more than 75 years.

Epi	7	0	445.3	14.0%	0%
Bokissa	2	0.6	0.7	90.9%	86%
Tanna	2	0.2	561.6	2.0%	0%
Pentecost	1	N/A	490.9	0.1%	N/A
Total	5,420	105.9	11,994	10%	1%

Notes: Cadastre missing = 274; area missing = 8 percent; 171 cancelled leases removed

The practice in which investors lease large tracts of primary agricultural land and subsequently subdivide and sell it for residential purposes has been identified as an issue of concern by custom landholders. Out of the 13,813 active leases in Vanuatu, 5,420 are subdivisions, the majority of which are over peri-urban and rural land on the main island of Efate.

Figure 5. Number of Rural Leases Signed by the Minister, 1980–2009, December 2010



Notes: N = 1458; Lessor missing = 29 percent; year missing = 189

The 2006 National Land Summit raised concerns about the unrestricted use of the Minister of Lands' power to sign leases over disputed customary land. Numerous Vanuatu Ombudsman decisions have also critiqued the misuse of ministerial powers with respect to land. National leasing data shows that out of the 6,803 rural leases, 1,469 were signed by the minister as lessor.¹³

2.2 Locality Leasing Studies

The locality leasing studies combined desk reviews of individual lease files provided by the Department of Lands (DoL) with in-depth qualitative field work investigating the way customary groups engage in formal land leasing practices. The field work also recorded stories about how

¹³ See discussion below in section 3.4 on the application of ministerial power over disputed land.

these leases were made and what local impact they had generated.¹⁴ Epi was chosen for a locality study because of its history as a site of commercial agriculture and because Shefa province views Epi as a suitable site for agricultural development. Tanna was chosen because of its standing as a tourist destination and as the site of some primary industry investments, and because of its reputation as an island where customary systems of land management continue to be strongly asserted.

The total number of leases studied on Epi was 23, comprising six special, eight commercial/tourism, one rural residential, and eight agricultural. Seventeen of the 23 leases were created on land previously alienated by preindependence titles. Agricultural leases are the dominant lease category in terms of land area and are equal to commercial/tourism in number. The area of land under lease (6,317 hectares) on Epi is approximately 14.2 percent of its total land area (44,534 hectares); one agricultural lease of 5,343 hectares represents 12 percent of the island's land area.

The total number of leases studied on Tanna was 64, consisting of 35 special, 23 commercial/tourism, two rural residential, three agricultural, and one industrial. Special leases are the dominant lease category on Tanna, as this category covers a range of different lease purposes, such as schools, infrastructure, churches, and telecommunications facilities. Commercial/tourism is the second largest lease category and reflects the growing tourist interests as well as other commercial activities, such as the Lenakel wharf, the Vanuatu Post, and coffee processing. The area of land under lease (1,486.80 hectares) on Tanna is approximately 2.6 percent of its total land area (57,070 hectares¹⁵). In some cases, leases have been registered specifically for the purpose of consolidating claims over customary land.

The Epi and Tanna studies found that there is a critical need to improve the lease formation and lease administration processes to ensure that customary landholding groups enjoy more equitable engagement in formal land dealings. The current lease formation and administration procedures essentially promote negotiations between small numbers of men (acting as custom "owners") and investors making deals over land in which larger custom landholding groups (which include women) have legitimate interests. Little support or information is available to custom landholders to guide decisions on whether to lease or pursue alternative development paths, and when they do consider a formal dealing, there is little or no support for negotiating terms and conditions. Where advice is available, it often comes informally from brokers, government officials, or other parties with an interest in the deal. All of these deal-making processes are often highly opaque and the resulting agreements, though providing some short-term cash flows to the identified "owners," have a poor track record on matching anticipated benefits for broader landholding groups, through either job creation or the distribution of cash.

Moreover, the potential for individuals to obtain what are perceived to be substantial amounts of money from lease premium payments is fueling disputes over land and increasing social discord.

¹⁴ For the Epi island research report, see Raewyn Porter and Rod Nixon, "*Wan Lis, Fulap Stori: Leasing on Epi Island*," Justice for the Poor (Washington, DC: World Bank, 2010); for the Tanna island research report, see Rod Nixon, Leisande Otto, and Raewyn Porter, "*Wan Sip, Plante Kapten: Land Leasing on Tanna Island*," Justice for the Poor (Washington, DC: World Bank, 2011). Both are available at <http://www.worldbank.org/justiceforthepeer>.

¹⁵ Patricia Simeoni, *Atlas du Vanouatou* (Port Vila: Geo-consult, 2009).

While ongoing reform of land dispute-resolution mechanisms is essential to the timely resolution of existing disputes, it is also critical that future conflict be contained through the improvement of lease formation and lease administration processes. Further attention needs to be given to empowering members of landholding groups (including women) to make informed decisions about leasing land and to negotiate on more equitable terms.

While detailed studies were undertaken on only two islands, from feedback received during the dissemination of the findings, it appears that the issues identified in these two areas reflect the leasing situation across a range of contexts in rural Vanuatu. These findings also reaffirm the validity of key Land Summit recommendations.¹⁶

3. Policy Issues and Suggested Policy Responses

An overview of the current lease creation process is provided in the box below, followed by a discussion of the related problems. The various steps in this process were recorded from discussions with DoL officers and available DoL booklets,¹⁷ but no regulation specifying the different steps in the process currently exists. What is more, research on Epi and Tanna shows that leases are often created without reference to this formal (but not regulated) process described below.

Box 1. Overview of the Current Lease Creation Process

The lease creation process for rural land begins with an **Application for Negotiator Certificate**. This application is registered in the Planning Unit of DoL and then submitted to the Land Management and Planning Committee (LMPC) for consideration. The LMPC is comprised of the Physical Planning Unit, provincial government, Environment Unit, land tribunal office, and DoL. If the application is approved, a Negotiator Certificate (valid for 12 months) is issued and lease negotiations can proceed.

Signed by the Minister of Lands, the **Negotiator Certificate** names the registered negotiator (potential lessee), and identifies the general area of land of interest, the type of land (for example, preindependence title number or custom land), the approximate number of hectares (exact area subject to a later survey), the classification of lease requested, and custom landholders (named if already identified or yet to be identified).

When the custom landholders have not been identified on the Negotiator Certificate, a **Custom Ownership Identification Form (COIF)** (*kastom ona blong kraon*) is either provided to the negotiator or sent to a relevant chief in the nominated area via the area secretary (both options have been identified by DoL). A Public Notice is dispatched to the area by the secretary of the LMPC to notify people of the lease interest and ask the chiefs of the village council to hold a meeting to identify the correct custom holders of the land (sketch map provided). Minutes of the meeting are requested. The Notice recommends that any disputes should be referred to the village land tribunal or joint village land tribunal. The COIF should

¹⁶ For example: shared ownership of land among community members; the importance of inclusive decision making, including the participation of women; determination of customary boundaries; review of leases, including rent and lease conditions; approval of leases by the island council of chiefs; removal of the Minister of Lands' power to approve leases over disputed land; elimination of the need for disputes to be resolved before a lease can be registered; determination of fair land rents and premium payments; zoning of land prior to leasing; advancement of cultural, environmental, and access provisions; and printing of leases in Bislama.

¹⁷ "Land Talk," Booklet Series vol. 1 (Port Vila: Ministry of Lands and Natural Resources, 2010).

then be filled out and signed by the chiefs of the area, after which the COIF and minutes of the meeting should be placed on file at the DoL.

Lease negotiations then proceed, the land is surveyed and submitted to DoL for approval, the negotiator pays fees, the lease is prepared and signed by the lessor and lessee, the lessee pays the land premium and advanced annual rent, and the lease is submitted to the Registration Unit for a series of approvals and the minister's consideration. When the lease is approved, stamp duty and registration fees are paid by the lessee and the lease is registered.

The following list of issues and suggested policy responses emerge both from field research and subsequent consultations with stakeholders. The list is not exhaustive but represents a core set of issues and actions on which there is a reasonable level of agreement. With a realistic assessment of existing institutional constraints, all of these problems could be dealt with and potentially resolved.

3.1. Issue: Environmental and Social Impacts of Leasing are Routinely Neglected

An application for a Negotiator Certificate does not trigger the appropriate planning policy or the requisite social, environmental, and economic impact assessments. For example, the current lease creation process is not linked to the environmental impact assessment (EIA) requirements associated with development activities that are likely to cause “significant environmental, social and/or custom impacts.”¹⁸ This means that a lease could be issued for a development project with possibly serious environmental or other consequences but the developer would be required to comply with any requirements in this regard only once the lease has been registered and the activities are due to begin. Research findings show that even after the lease has been registered, the environmental and social impacts of development are not well mitigated and assessments are not systematically carried out, despite the legislative requirements—even in the case of large lease areas that affect such issues as subsistence living and food security. For example, development activities on a large agricultural lease on Epi (covering 12 percent of the island) allegedly proceeded without the required impact assessment, despite concerns that the arrangement could cause the displacement of people from the gardens they cultivate.

Response: link planning, social, and environmental assessment requirements with the lease creation process

The lease creation process should be strengthened so that the application for consent to lease triggers planning considerations and the Land Management Planning Committee's (LMPC) assessment of the need for a Preliminary Environmental Assessment (PEA). This could be done by:

- i. Amending the application form for a Negotiator Certificate to require more information about the nature of the project (location, purpose, land area, development plan, and capital investment).

¹⁸ *Environmental Protection and Conservation Act* [CAP 283] of 2002; *Environmental Impact Assessment Regulations* 2011.

- ii. Providing that an application for a Negotiator Certificate trigger a consideration of physical planning issues by LMPC and LMPC's assessment of the need for a Preliminary Impact Assessment (PIA).
- iii. Requiring a PIA in cases where a lease application might impact environmentally sensitive areas or exceed the identified thresholds (for example, land area or capital investment). If required, completion of an approved PIA should be a precondition for lease registration. In addition, the Negotiator Certificate should be amended to include reference to any special conditions (such as the need for a PIA) that must be complied with and then verified by the LMPC prior to lease registration.

The enforcement of social and environmental impact requirements needs to be strengthened. The adoption of Environmental Impact Regulations in August 2006 to buttress the *Environmental Protection and Conservation Act No. 12* of 2002 represent a step in the right direction. However, the limited resources and capacity of the Department of Environment present an ongoing challenge to the enforcement and implementation of any environmental and social safeguards.

3.2. Issue: Custom Landholders Often Negotiate from a Position of Disempowerment

On Epi and Tanna, lessors often did not have a copy of the lease they had executed, and in cases where they did, their understanding of the lease creation process, lease conditions, or benefit-sharing options was weak. For example, custom landholders on Tanna were surprised when clearance of a 35-hectare lease began; they had had a different conception of the size of the leased area and chased the lessee away when they realized the impact of the development on their environment.

In addition, little support or information is available to custom landholders to guide decisions on whether to lease or pursue alternative development paths. If they do decide to lease, there is little available assistance in negotiating the terms and conditions of the lease. The practice of writing leases in English and not the local Bislama further undermines the understanding of their rights and responsibilities in relation to leases. The result is often poor leasing outcomes, such as low rents (approximately US\$2–3 per hectare per annum for agricultural leases), lease clauses that require compensation for improvements on expiry of the lease (amounting to effective alienation of land with little prospect that the custom landholders will be able to pay back the cost of the development), and poor benefit distribution. As confirmed by the national leasing data above, the overwhelming majority of leases are for a term of 75 years, whereas at independence, a period of 75 years was intended to be granted only for major investments and joint ventures.¹⁹

Response: improve the lease creation process to trigger public communication and community-based consultation activities

To maximize the opportunities for customary groups to make informed decisions about land leasing, the application for a Negotiator Certificate should trigger the issuance of a public notice (through radio, newspaper, and/or direct correspondence) and other awareness-raising actions, such as the distribution of relevant information to custom landholding groups in the area. This

¹⁹ Ministerial Statement on Land Policy Implementation (Port Vila: Ministry of Lands and Natural Resources, 1980).

notice should include a description of the prospective lessee's offer, the nature of the proposed development, the suggested terms of the lease, the lease conditions, the location, and the projected parties to the lease agreement. Procedures should be elaborated that allow concerned parties to lodge an appeal to the DoL and a stay of the registration process if (i) their interest has not been acknowledged in the application; (ii) they do not agree with the proposed development as an interested party; or (iii) the process for consultation and providing adequate information has not been followed.

Response: provide access to affordable advisory services for landholding groups

Options should be explored to ensure that independent advisory services are available to landholding groups to help them make informed decisions about land transactions. Access to better advice is intended to mitigate potential conflict by preventing any real or perceived inequities due to poorly informed deal-making procedures, and by channeling grievances from existing land dealings into peaceful resolution.²⁰ Special consideration is needed to providing information and advice to women and youth, who are generally excluded from local-level decision making related to land. The development of this kind of service should be concerned with both (a) the actual supply of advisory services as required by landholders, and (b) issues of governance and institutional arrangements (that is, identifying and supporting legitimate, effective, and sustainable structures for providing advisory services to landholders). The scope of these services could cover various kinds of support for lease negotiations, advice on community governance and equitable benefit-distribution issues, and alternative options to leasing development.

To mitigate poor leasing outcomes for customary landholders, leasing procedures should be revised to require a certificate from a solicitor indicating that s/he has explained to the custom landholding representative the effect of the lease and is confident that the advice has been understood.

Response: review the standard lease agreement template to include clauses that offer greater protection to custom landholders

A review of the standard lease agreement template is needed with a view to including routine and special clauses that offer appropriate recognition of customary land rights (for example, group access to the sea, protection of cultural heritage, user rights, and so on) and regular rent adjustments. Clauses identified as problematic and thus requiring a special discussion include: (a) those setting the term of leases at the maximum length of 75 years by default; (b) those that require compensation for any improvements on expiry of a lease; and (c) those providing for covenants that are effectively unenforceable because they are poorly defined or not time bound.

²⁰ See "Access to Advisory Resources by Parties to Customary Land Dealings and Natural Resources Access Agreements in Solomon Islands - Research Report," Justice for the Poor (Washington, DC: World Bank, forthcoming).

3.3. Issue: Group Rights are Disregarded and Custom Landholders Poorly Identified, Leading to Frequent Disputes

There are foundational contradictions in the Constitution of Vanuatu and current land legislation regarding contemporary land law in Vanuatu on the nature of customary land “ownership” and dealings in land.²¹ The Vanuatu Constitution stipulates that only ni-Vanuatu people can own land in perpetuity and recognizes “customary” ownership of all land in Vanuatu.²² It remains unclear, however, whether the rights of custom landowners are communal,²³ individual,²⁴ or both individual and communal.²⁵ The matter is presumably to be determined by “the rules of custom.”²⁶

Importantly, a key recommendation of the National Land Summit (2006) was that the land law of Vanuatu be changed so as to unambiguously acknowledge the communal nature of customary land rights.²⁷ The notion of “ownership” has been criticized²⁸ as a product of contemporary land law in Vanuatu. Some commentators argue that the language in the more recent land legislation ignores the basis of customary management, which depends on holding—and not owning—land.²⁹ In this sense, customary land rights in Vanuatu are part of a complex web of interconnected relationships to place that include a wide variety of rights to the land, such as the right to garden on the land, or make collections of food and plants for other uses. Inherent in these bundles of rights is a description of the land as a “common basket” that sustains all the people.³⁰ Nowhere in contemporary legislation, however, is there meaningful recognition of this kind of customary group right to hold land and make decisions about its use. The failure to adequately recognize and enforce group landholding rights remains a critical factor in the number of disputes over land and the benefits (or lack thereof) derived from land leasing, thus presenting significant challenges to current leasing practices.

The ambiguity in legislation and practice is reinforced by the requirement that a form (COIF) be signed identifying the custom owner (*kastom ona*) of the land as a step in the lease formation process. Epi and Tanna research, however, identified a number of issues related to the transparency and validity of this custom owner identification process. The COIF is an important document, as it represents a quasi-official endorsement by the respected chiefs of a person or

²¹ Siobhan McDonnell, “Masters, not Mistresses of Modernity: Preliminary Thoughts on the ‘Cultural Power’ of Law in Vanuatu” (paper prepared for ANU Workshop, Australian National University, Canberra, March 9, 2010).

²² Article 73 of the Constitution states that “all land in Vanuatu belongs to custom owners and their descendents.” This is further articulated in Article 75, which states that “only indigenous citizens of Vanuatu who have acquired their land in accordance with a recognised system of land tenure shall have perpetual ownership of their land.”

²³ Constitution of Vanuatu, Article 73.

²⁴ *Ibid.*, Article 75.

²⁵ Article 79(2) mentions both “customary owner or owners of the land.”

²⁶ Article 74 stipulates that “rules of custom shall form the basis of ownership and use of land in Vanuatu.”

²⁷ Resolution Number 1 states that “Every land in Vanuatu is owned by a group (tribe, clan or family).”

²⁸ See J. Simo, “Report of the National Review of the Customary Land Tribunal Program in Vanuatu” (Port Vila: Vanuatu National Cultural Council, 2005).

²⁹ *Ibid.*

³⁰ A. Naupa and J. Simo, “‘*Hu i Kakaē Long Basket*’ Matrilineal Land Tenure in Vanuatu, Case Studies of Raga and Mele” (Suva, Fiji: Pacific Islands Forum Secretariat, 2008).

persons as legitimate representative(s) of the custom landholders for the purpose of negotiating a lease. The person(s) identified in the COIF will ultimately be named as the lessor(s) if a lease is registered, and subsequently have the right to transfer the lease without consent from the broader group. The COIF process thus encourages the notion of *individual* owners and, in that way, undermines the traditional notion of landholding by a customary group.

A significant number of leases appear to have been registered without a COIF (only 28 out of the 87 leases on Epi and Tanna contained a COIF on file). Even if the COIF is filed, the *process* of consulting the custom landholding group is often not recorded, making it impossible to determine whether consultations were conducted in an appropriate manner. COIFs are often signed by individual chiefs or people claiming to be chiefs, even though currently there is no process for confirming which chiefs have the necessary authority to sign what documents on behalf of whom. In the absence of minutes of a consultation with custom landholders, the COIF in and of itself cannot validate group consent to any agreement, and the result is serious discrepancies in the entire process. For example, monetary rewards are allegedly used to encourage chiefs to sign when there is uncertainty or competing claims over the land in question. In other cases, witnesses who sign a COIF may change their minds and sign another COIF certifying ownership for different groups of custom owners. Moreover, multiple names and spellings are often used, making it difficult to track people from one document to another or to identify relationships between them.

The poor custom “owner” identification procedures are clearly driving prolonged land disputes, mainly between custom claimants, over the ownership of the land. As noted above, the existence of a COIF does not ensure that such disputes will not emerge. Of the total number of leases on Epi and Tanna, nearly 50 percent had been subject to disputes between custom landholder claimants—for a variety of reasons. The whole process, for example, might have been completed with a COIF signed by a “chief” whose authority was contested and yet the lease was registered anyway. The dispute might have arisen after the lease registration was completed and the true customary landholders were made aware of the situation—indeed, the research recorded a number of such cases of the “secret” registration of leases that occurred without the knowledge of the broader group.

A case study³¹ of one large lease presents an example of how the present land leasing framework encourages this kind of autonomous behavior. In this case, the lease was created with five named lessors and minimal consultation with other members of landholding groups, yet the lease covers valuable agricultural lands and the development has apparently placed many families’ food production land (gardens) at risk. Furthermore, it is reported that a substantial premium paid to the five named lessors was spent on consumables within seven months. Similarly, a number of other leases studied as part of the research for this paper were formalized by named lessors who were at the time living independently in the capital, Port Villa, allegedly without knowledge or consultation with other members of the landholding group. Such cases often result in intra-group conflict.

One important factor in the number of disputes between custom land claimants after lease registration is that men, who have traditionally had more social and legal power than women in

³¹ Ibid.,15.

Vanuatu, feel entitled to claim the right to benefit from land on which entire groups are dependent. Women are generally excluded from decision making about land and they are not represented in any formal leasing arrangements. No named lessors were women. An example of women's involvement in decision making was found in only one case on Tanna, where rent is paid into an account whose signatories are two senior women. A family decision is needed before the money can be withdrawn. Respondents report that in some cases, women, as family members, do benefit from rent monies used for school fees, household items, and custom ceremonies; however, these cases were rare. More common was the situation where the named lessors were alleged to exercise high levels of personal discretion in how lease premiums and rents were spent, with the result that other members of the landholding group felt deprived.

Response: support policy debate on options for recognizing group rights within the legal context of Vanuatu

The rights of landholders as a group need to be recognized, on both a national policy level as well as through improved lease creation procedures. National policy debate should be informed by the experience of groups in Vanuatu and by experiences in other, similar contexts.

Response: develop consultative and transparent local COIF approval processes to ensure recognition of group rights

The recognition of group rights is critical to addressing improved lease creation procedures in the long term. However, as there will be a time lag before appropriate action can be agreed on and taken, some short-term procedural changes could help mitigate the known risks. These include:

- i. Revising the COIF to better reflect the group nature of landholding rights, for example, by indicating that the named custom owner is acting on behalf of a landholding group and his authority will be limited by custom under the laws of Vanuatu; and
- ii. Supporting the development of a systematic approach to defining the role of the island councils of chiefs and local government authorities (such as provincial or area councils) as part of the process of authorizing COIFs, an approach that should be prescribed by the leasing procedures. The COIF should be revised to require final approval by the customary land tribunal or the island council of chiefs (evidenced by signatures of a majority of members), certifying that the correct customary authorities have signed the form.

3.4. Issue: Ministerial Power over Disputed Land Used More Broadly than Intended

At independence in 1980, while the government carefully considered the return of land to customary landholders, it provided in section 78(1) of the Constitution that “where...there is a dispute concerning the ownership of *alienated* land, the Government should hold such land until the dispute is resolved.”³² To handle this transition, section 8(1) of the *Land Reform Act 1980* gave the Minister of Lands “general management and control over all land...where ownership is disputed.” This includes the power to “conduct transactions in respect of the land including the

³² See section 78(1) of the Constitution of Vanuatu.

granting of leases in the interest and on behalf of the custom owners” (section 8(2)(b)) and “take all necessary measures to conserve and protect the land on behalf of custom owners” (section 8(2)(c)).

Given the transitional nature of the legislation described above, it would have been expected that the number of leases signed by the Minister of Lands on behalf of customary landholders after independence would gradually decline, on the assumption that customary landholders had resolved disputes over ownership and were taking responsibility for their own lease negotiations.³³ National leasing data, however, indicate the contrary. The number of leases over customary land signed by the Minister of Lands as lessor has increased dramatically over time, totaling 1,469 as of the end of December 2010. Of the total seven cases on Epi and Tanna for which the Minister of Lands is a lessor, six are on unalienated customary land.

One of the reasons for the increase in the number of leases signed by the minister on behalf of custom landholders in dispute is that competing customary claims over alienated land are rarely resolved. This is in part because dispute resolution is often pursued through “forum shopping” over extended periods in order to gain the most advantageous outcome.³⁴ The expanding number of leases signed by the minister is also due to the Ministry of Lands’ broad interpretation of the ministerial power to sign leases over contested customary land. While section 78(1) of the Constitution cited above clearly restricts the minister’s power to *alienated* land, the relevant sections of the *Land Reform Act* are less clear and have given rise to much broader interpretation of ministerial authority, namely his right to grant leases over any customary land that is under dispute.³⁵ The lack of a definition of—and criteria to determine—what qualifies as a legitimate land dispute have further created space for the unrestricted use of ministerial power, which, if employed without consent of the affected parties, may run contrary to the requirement to act “in the interest of and on behalf of the custom owners.”

A growing body of literature³⁶ supports a more limited interpretation of the minister’s power to sign leases only over alienated land. A number of court decisions³⁷ and Ombudsman reports³⁸ have also critiqued the use of ministerial power to grant leases over land without the consent of

³³ J. Haccius, “The Interaction of Modern and Custom Land Tenure Systems in Vanuatu,” SSGM Discussion Paper 2011/1 (Canberra: Australian National University, 2011).

³⁴ The term “forum shopping” refers to the use of multiple forums of dispute resolution, from *nakamal* (customary forums) to area and island councils of chiefs, customary land tribunals, and civil courts. Outcomes of customary forums are often not recorded and are not required to be considered/recognized by customary land tribunals and civil courts, which encourages forum shopping.

³⁵ Section 8(1) states that the “Minister shall have general management and control over all land (a) occupied by alienators where either there is no approved agreement in accordance with sections 6 or 7 or the ownership is disputed; (b) **not occupied by an alienator, but where ownership is disputed**; or (c) not occupied by an alienator, and which in the opinion of the Minister is inadequately maintained. It could be argued that section 8(b) does not refer to customary land under dispute, but alienated land under dispute vacated by an alienator.”

³⁶ See Haccius, “The Interaction of Modern and Custom Land Tenure Systems in Vanuatu”; Lunnay et al., “Vanuatu Review of National Land Legislation”; and Ralph Regenvanu, “Issues with Land Reform in Vanuatu,” *Journal of South Pacific Law* 12, no. 1 (2008).

³⁷ See *Roqara v. Takau* (2005); *Ifira Trustees Ltd v. Family Kalsakau* (2006); *Solomon v. Turquoise* (2008); *Valele Family v. Touru* (2002).

³⁸ The reports are numbered 98–10; 099–09; 99–06, and copies can be found on the University of the South Pacific Law School website: <http://www.vanuatu.usp.ac.fj/ombudsman/Vanuatu>.

customary landholders. Rent moneys payable in relation to disputed land for which the minister is a lessor are deposited into a Custom Owner Trust Account (COTA) managed by the Ministry of Finance. Jastis Blong Evriwan research on Epi and Tanna suggests that while disputes between competing custom groups have occasionally been resolved, sometimes enabling identified custom landholders to claim money held in trust for them in the COTA, little has been done by the government to proactively resolve custom landholder disputes, identify correct custom landholders, and rectify the lease record.

Furthermore, Jastis Blong Evriwan research indicates that in cases where customary groups succeed in becoming listed lessors, it may be impossible for them to recover full rent payments from the COTA.³⁹ For example, according to custom landholders who eventually succeeded in becoming listed lessors for a long-disputed telecommunications site, most of the money they thought had been held for them in the COTA was not available when they attempted to collect it. Additionally, because telecom providers find that funds often go missing from the COTA, these companies now simply hold payments associated with disputed leases and then distribute the funds following the resolution of the dispute and the determination of the legitimate lessors.

Response: review ministerial power to sign leases over disputed customary land

The propensity of the Minister of Lands to sign leases over disputed customary land has become one of the most contentious issues for land reform over the last few years. To address this, Resolution 9 of the 2006 National Land Summit recommended the removing “of the power of the Minister to approve leases over disputed land” and also stated that “If land is disputed, the dispute must be resolved before the Minister can approve a lease in relation to the land.”⁴⁰ The National Land Summit Interim Transitional Strategy was later changed by the Council of Ministers to enable the minister to “sign a lease on behalf of the custom owners” in cases where “there is a dispute over land which is used for public interests.”⁴¹ In November 2008 a private Member’s bill sought to remove the ministerial power but the bill was rejected on the grounds that land disputes must not hinder development. In August 2010 the Council of Ministers (COM) issued a decision to stop the issuance of Negotiator Certificates and new leases over rural land that is under dispute, except with prior approval from the council.⁴² Recent media reports indicate that the COM decision continues to be routinely ignored.⁴³ This points to the urgent need for legislative or judicial review of the ministerial power to sign leases over disputed land to clarify whether the authority extends to new leases over unalienated land, and if so, what the limitations of this power are (for example, invoked in the interest of public services or filling the legal vacuum with regard to transacting existing leases for which the minister is a lessor).

³⁹ The COTA is understood to have been established as a “nominal” account containing little actual money. Whereas the government credits the account each year based on rent payments for all leases for which payment is due, no guarantees are in place to ensure that rents are actually paid. This means that in addition to other issues discussed in this paper, the nominal amount (liability) in the account is overstated.

⁴⁰ See Lunnay, “Vanuatu Review of National Land Legislation,” Attachment 1 (see n. 3).

⁴¹ *Ibid.*, Attachment 3.

⁴² COM Decision 62/2010.

⁴³ “State Land Sold Under Value and Without Tender,” *Daily Post*, April 3, 2012.

3.5. Issue: Determination of Land Values is Variable and Inconsistent

On Epi and Tanna, there were wide variations in premium and rent payments. This in part reflects the age of some leases and the absence of rent reviews that might have maintained some relationship between the annual rent received and the current land value. It also suggests that current valuation guidelines issued by the Valuer General rely on a thin land transaction market and are based on unimproved market values. These guidelines are also used by other agencies, such as the DoL and private licensed valuers, who vary them according to their own criteria to determine final valuation figures, with the result that despite the existence since 2007 of a specific formula, there continue to be significant inconsistencies in the determination of land values. Facilitation payments and high legal fees may further distort the data on land transactions, such that land values are inflated and the cost of infrastructure, whether through government land purchase or government land leasing, becomes increasingly expensive and limits already constrained capital and recurrent budgets.

The lack of regular rent reviews also results in diminishing real returns on land and creates disparities between old and new leases. Of the 87 leases on Epi and Tanna, only 12 (14 percent) have had an increase in rent, despite the provision in the standard lease format for a five-yearly rent review. And in most cases where rent reviews did occur, it was not as a result of a systematic rent review process, but for other reasons (for example, transfer of the lease).

Response: review current land valuation practices

In order to improve land leasing outcomes, support could be provided to the office of the Valuer General to improve the valuation services provided by the DoL and private valuers. This should include (i) the regular review/audit of valuations made by private valuers; (ii) a review of the basis for determining land values; (iii) the dissemination of simplified land valuation data throughout the country to better inform leasing negotiations between lessors and lessees;⁴⁴ and (iv) the development of a code of practice and valuation guidelines that all registered valuers in Vanuatu are required to observe as a condition of their registration.

3.6. Issue: Lease Creation Process is Unregulated and Easily Abused

As noted above, while various diagrams, descriptions, and checklists have been prepared by the DoL with regard to the lease registration process, there are no mandated checks and balances at each step of the process to ensure greater protection of the custom landholders. The research findings on the issuance of the Negotiator Certificate and custom owner identification, as well as the controversy over the scope of ministerial power, clearly illustrate the need for changes in the institutional and procedural aspects of the current lease creation process.

⁴⁴ The Valuation Roll (where the valuation of land is recorded) is a public document (*Land Leases Amendments Act* 2002, sec. 33).

Response: improve Land Management Planning Committee capacity and procedures

Given the important role the LMPC should play in lease creation, attention must be given to revising its composition⁴⁵ and adjusting its skill base and procedures. Changes to its composition could reflect the design of new procedures to prevent lease disputes and validate the agreement of the custom landholder group—as verified by the relevant island council of chiefs—to the proposed lease. A permanent representative of the *Malvatumauri* (the National Council of Chiefs) could be appointed to the LMPC to ensure that this verification process occurs. A representative from the Vanuatu Investment Promotion Authority (VIPA) could also be appointed to ensure consistency with investment promotion policy and to assist with the screening of potential investors. Moreover, a Vanuatu Cultural Center representative would ensure that cultural heritage protection issues are taken into account in the consideration of the Negotiator Certificate’s approval.

The Vanuatu Land Governance Committee (VLGC),⁴⁶ through its thematic working group on Land Use Planning, could be tasked with revising the membership, role, and procedures of the LMPC. Areas that should be considered by the thematic group include: (i) the purpose of the LMPC; (ii) the schedule, regularity, and rules of LMPC meetings; (iii) the appropriate membership and member appointment terms; (iv) the development of regulations for approving applications to lease; (v) the identification of issues that would trigger a PIA; (vi) the development of regulations for verifying that lease conditions have been fulfilled by the negotiator prior to lease registration; and (vii) the appropriate training of LMPC members on new regulations. The LMPC could be required to publicize its decisions and report annually to Parliament on its work for increased transparency and accountability. In addition, a random annual review of LMPC decisions could be conducted through an independent review process.

Response: develop regulations for the verification and review of the lease creation process

The proposed reforms to the lease application approval process should be matched with a robust verification process prior to the registration of the lease. Responsibility for verification should first rest with the LMPC, which would be tasked with ensuring that: (1) all conditions specified on the Negotiator Certificate (for example, PIA) are met; (2) notification has been issued and information has been made available to custom landholders and residents of the subject area of lease interest; (3) the relevant island council of chiefs has correctly certified that the custom group identification process has taken place and that the land was not under dispute (including confirmation from the customary land tribunal office, island court, and Supreme Court that there is no pending case in any venue on the subject land); and (4) a solicitor’s certificate has been obtained confirming that the parties have been informed and understand the lease conditions. The execution of this proposed reform of lease creation procedures must be adequately supported in a way that balances the two goals of creating an effective lease creation process and preventing unnecessary delays to investment in the national economy.

⁴⁵ See box 1 for the LMPC’s current composition.

⁴⁶ The Vanuatu Land Governance Committee oversees the implementation of the Vanuatu Land Sector Framework (2009–2018).

3.7. Issue: Lease Conditions are not Monitored and Enforced

Since independence and the passage of laws creating Vanuatu's system of land leasing, there have been minimal public resources available to maintain the Register of Land Leases to proactively and effectively administer leasing arrangements. This underinvestment of public resources has left the monitoring of compliance with standard lease conditions and any special provisions to the lessor(s) and lessee(s). On the one hand, evidence from Epi and Tanna reinforces general perceptions that lessors frequently have little understanding of the conditions of the lease or of where to go to inquire about leasing issues. On the other hand, some lessees have been denied access to the land for which they signed a lease and paid a premium, due to custom landholder claimant disputes. Clearly, there is room for lease administration improvements if both lessors and lessees are to achieve better land leasing outcomes.

Standard documents for agricultural, commercial, and special leases each contain a number of standard clauses, including a five-yearly rent review that can be initiated by either the lessor or lessee. This provision is not being observed because lessors are often not aware of its inclusion in the lease agreement and lessees have no incentive to activate a review that will result in an increased annual rent. For example, of the 87 leases on Epi and Tanna, only 14 percent had experienced an increase in annual rent. As noted above, the rent increases that had occurred had done so for a range of reasons but never as a result of a systematic rent review process. The Epi and Tanna research indicates that very low annual rents are paid on old leases and this in turn creates disparities and discord between old and new lessors. Additionally, some leases have special conditions, such as the employment of the lessor's family members or a percentage of business turnover granted from the lessee to the lessor. The special conditions, however, were invariably found not to be working and in some instances, where lessors were frustrated at their powerlessness to enforce the provision, had resulted in acts of property destruction. No leases with special conditions were being observed on Tanna. On Epi, conditions on agricultural leases were largely ignored, resulting in the neglect of employment conditions and the minimal development of the leases.

The lack of monitoring and enforcement of lease conditions has led to unresolved grievances over unrealized lease benefits (for example, unpaid annual rent or unfulfilled promises for tourism development or employment of local communities). Moreover, because they have little knowledge and/or access to affordable legal advice, lessors are usually prevented from taking forfeiture action.⁴⁷

Response: facilitate access to affordable legal advice for grievances associated with existing leases

To enable parties to access further information in the event of any breach of lease conditions, an information pamphlet entitled, for example, "Knowing your Lease" should be attached to the revised leasing template, explaining in simple language the conditions; their enforcement; the terms of forfeiture, cancellation, and/or changes to lease conditions; rent review procedures; and the rights associated with transfer, subdivision, or subleasing. This should be coupled with access

⁴⁷ *Land Leases Act* (Sec. 43) provides for the right of forfeiture for breach of express or implied terms of a lease.

to affordable legal advice on actions that can be taken to enforce the lease conditions in a particular case, along the lines of what is described in section 3.2.

Response: ensure regular rent review of existing leases

Procedures should be developed by the DoL for informing lessors and lessees about the review process, when a lease review is due (for example, a computer generated letter), and reporting requirements. Before the proposed valuation audit, the Valuer General should be provided with additional staffing and resources to review existing rent payments and facilitate the renegotiation of annual rents to reflect current land values. This could first be undertaken on a pilot basis and, if successful, expanded nationwide in the longer term.

3.8. Issue: Land Records are Often Missing, Incomplete, and in Poor Condition

Land lease records have not been well maintained since land leasing began after independence in 1980. Many files are incomplete, in poor condition, or out of date. The difficulties in accessing accurate information about leases are exacerbated by the separate filing of the lease creation documents (deliberations of the LMPC, the Negotiator Certificate, and the COIF) from the lease file established once the lease is registered. In many instances, it was not possible to locate Negotiator Certificates or COIFs for registered leases. For example, of the 87 leases on Epi and Tanna, Negotiator Certificate documents were on file in only 14 percent of cases and COIF documents in only 32 percent.

Response: improve the accuracy, integrity, and security of land lease records

This area is one of the primary focuses of the Vanuatu Land Reform Program “Mama Graon” supported by the governments of Australia and New Zealand. It is recommended, consistent with the improved lease creation process discussed above, that: (i) a records management system be developed and implemented to improve the accuracy, integrity, and security of land lease records; (ii) all documents required in the lease creation process be kept together with the registered lease; (iii) line agencies with responsibility for administering leases (for example, the education and provincial offices that pay annual rents to lessors) have access to copies of leases, either through e-governance systems or paper-based systems; and (iv) the land recording system clearly captures pending land tribunal cases, appeals, claims, and complaints.

4. Conclusion

Current land leasing practices in Vanuatu reveal a number of problems, such as the neglect of impact assessments, the overextension of ministerial power, inconsistencies in the determination of land values, and the poor enforcement of lease conditions. Of perhaps overarching importance is the leasing process’ failure to take into account the customary principles of group landholding in the country and to make available the advice and guidance most people require prior to lease negotiations. All of these factors contribute to inequitable outcomes for landholders.

Poor lease creation processes are likely to intensify social discord, as disenfranchised groups continue to be excluded from land use decision-making processes and benefit sharing. Improving

the transparency and accountability of the land leasing process and providing means for custom landholding groups to make informed decisions about their land are critical to the maintenance of sustainable development—and societal harmony—in Vanuatu.

Annex 1

Summary of Issues and Suggested Policy Responses

Policy Issue	Suggested Policy Response	Responsible Agency
<p>1. Environmental and social impacts of leasing are not well mitigated</p>	<ul style="list-style-type: none"> • Link planning and social and environmental assessment requirements to the lease creation process: <ol style="list-style-type: none"> a. Amend the application form for the Negotiator Certificate to require more information about the nature of the project (location, purpose, land area, development plan, and capital investment). b. Application for Negotiator Certificate should trigger consideration of physical planning issues by the Land Management Planning Committee (LMPC) and LMPC’s assessment of the need for a Preliminary Impact Assessment (PIA). c. Where an application to lease potentially impacts environmentally sensitive areas or exceeds identified thresholds (for example, land area or capital investment), a requirement for a PIA should be triggered. If required, completion of an approved PIA should be a precondition for lease registration. The Negotiator Certificate should be amended to include reference to any special conditions (e.g., the need for a PIA) that must be complied with and verified by the LMPC prior to lease registration. 	<p>Department of Lands</p> <p>Department of Environment</p> <p>Department of Local Authorities</p>
<p>2. Custom landholders generally negotiate from a position of disempowerment</p>	<ul style="list-style-type: none"> • Improve the lease application process to trigger public communication and community-based consultation activities: <ol style="list-style-type: none"> a. Issuance of Negotiator Certificates and LMPC decisions should be announced by public notification (on broadcast media, print, 	<p>Department of Lands in collaboration with local stakeholders</p>

	<p>radio, and TV, and notices posted around the site of the survey), and be followed up by the direct distribution of information to relevant landholding groups using similar communication channels.</p> <p>b. Extend the period allowed for lodgment of a caution/appeal and allow for stay of registration if interested parties disagree with the proposed lease.</p> <p>c. Provide access to affordable advisory services so that landholding groups can make informed decisions about land transactions. The development of such services should be concerned with both (a) the actual provision of advisory services as required by landholders; and (b) the issues of governance and institutional set up (i.e., identifying and supporting legitimate, effective, and sustainable structures for the provision of advisory services to landholders).</p> <p>d. Review standard lease agreement template to include clauses that offer greater protection to customary landholders (e.g., public access to the sea; protection of cultural heritage; user rights) and regular rent adjustments. Covenants in lease agreements should be time bound and enforceable.</p>	<p>Department of Lands</p> <p>Independent Agency supported by Government</p> <p>Department of Lands</p>
<p>3. Group rights not taken into account and poor process for identifying custom landholders during the lease creation process</p>	<ul style="list-style-type: none"> • Support policy debate on options for recognizing group rights in the legal context of Vanuatu • Develop consultative and transparent local custom owner identification processes to ensure recognition of group rights: <ul style="list-style-type: none"> a. Redraft the Custom Owner Identification Form (COIF) to better reflect the group nature of landholding rights (e.g., by clearly stating that the lessors' signatories are the agreed representatives of the group). b. Support the development of a systematic approach to defining 	<p>Vanuatu Cultural Center National Council of Chiefs Ministry of Justice</p> <p>Department of Lands National Council of Chiefs</p>

	<p>the role of the island councils of chiefs and local government authorities (e.g., provincial or area councils) in the process of authorizing COIFs and ensure that this approach is prescribed by leasing procedures. COIF to be revised to require final approval by customary land tribunal or island council of chiefs (evidenced by signatures of a majority of members) certifying that the correct customary authorities have signed the form.</p>	
<p>4. Ministerial power over disputed land used more broadly than intended</p>	<ul style="list-style-type: none"> • Review ministerial power to sign leases over disputed customary land 	<p>Ministry of Lands Ministry of Justice</p>
<p>5. There is great variation and inconsistencies in the determination of land values</p>	<ul style="list-style-type: none"> • Review current valuation practices: <ol style="list-style-type: none"> a. Conduct regular review/audit of valuations made by private valuers. b. Review the basis for determination of land values. c. Disseminate simplified land valuation data throughout the country to better inform lease negotiations. d. Develop a Code of Conduct and valuation guidelines that all registered valuers are required to observe as a condition of their registration. 	<p>Department of Lands and Valuer General</p>
<p>6. Current lease creation process is not regulated and provides space for abuse by interested parties</p>	<ul style="list-style-type: none"> • Improve LMPC capacity and procedures: <ol style="list-style-type: none"> a. Broaden the membership of LMPC to include other institutions (e.g., National Council of Chiefs, Vanuatu Cultural Center, and Vanuatu Investment Promotion Authority). b. Clarify the role and procedures of LMPC including (i) purpose of the LMPC; (ii) schedule, regularity, and rules for LMPC meetings; (iii) appropriate membership and member terms; (iv) development of regulations for approving applications to lease; 	<p>Department of Lands</p>

	<p>(v) identification of issues that would trigger a PIA; (vi) development of regulations to verify that conditions to lease have been fulfilled by the negotiator prior to lease registration; and (vii) appropriate training of LMPC members on new regulations.</p> <p>c. LMPC to publicize decisions in media, report annually to Parliament, and be subject to random review by independent body.</p> <ul style="list-style-type: none"> • Develop regulations for robust verification and review of lease creation process: <ul style="list-style-type: none"> a. Prior to registration, LMPC to verify that a proper lease creation process has been followed, including that (i) all conditions specified on the Negotiator Certificate (for example, PIA) are met; (ii) notification has been issued and information has been made available to custom landholders and residents of the subject area of lease interest; (iii) the relevant island council of chiefs has correctly certified that the custom group identification process has taken place and that the land was not under dispute (including confirmation from customary land tribunal office, island court, and Supreme Court that there is no pending case before them regarding the subject land); and (iv) a solicitor’s certificate has been obtained indicating that the parties have been informed and understand the lease conditions. 	
<p>7. Lease conditions, both standard and special, are not monitored and enforced (e.g., rent reviews, development and employment conditions)</p>	<ul style="list-style-type: none"> • Increase public awareness and enable access to affordable legal advice for grievances associated with existing leases. • Ensure regular rent reviews of existing leases: <ul style="list-style-type: none"> a. Procedures are to be developed by Department of Lands for informing lessor(s) and lessee when a lease review is due. b. The Office of the Valuer General to be provided with additional staff to support the Land Referee’s function within the Office and the facilitation of regular rent reviews. 	<p>Ministry of Justice</p> <p>Department of Lands</p> <p>Valuer-General</p>

<p>8. Land records often missing, incomplete, and in poor condition</p>	<ul style="list-style-type: none"> • Improve accuracy, integrity, and security of land lease records: <ol style="list-style-type: none"> a. A records management system be developed and implemented to improve the accuracy and integrity of land lease records. b. All documents required in the lease creation process are kept together with the registered lease. c. Line agencies with responsibility for administering leases have access to copies of lease files. d. The land recording system clearly captures pending land tribunal cases, appeals, claims, and complaints. 	<p>Department of Lands</p>
--	---	----------------------------

This discussion note summarizes findings from in-depth research into land leasing issues in Vanuatu and offers a number of suggestions for improving the lease creation and administration process. Current land leasing practices fail to take into account the customary principles of group landholding in Vanuatu and lack of proper advice prior to lease negotiation contributes to inequitable outcomes for landholders. Poor lease creation processes are likely to intensify social discord as disenfranchised groups continue to be excluded from land use decision-making processes and benefit-sharing. Improving the transparency and accountability of the land leasing process and supporting custom landholding groups to make informed decisions about their land remains critical for sustainable development in Vanuatu.

Justice for the Poor is a World Bank research and operational program aimed at informing, designing and supporting pro-poor approaches to justice reform.

www.worldbank.org/justiceforthe poor

