

Legal Mechanisms for the Establishment and Management of Terrestrial Protected Areas in Fiji

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IUCN – The World Conservation Union

This briefing paper provides an overview of the existing legal mechanisms for establishment and management of terrestrial protected areas in Fiji, with an emphasis on community-based approaches to conservation. The paper was prepared by the IUCN Regional Office for Oceania on behalf of Birdlife International.

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The IUCN Regional Environmental Law Program for Oceania was established in 2007 to provide technical assistance and capacity building support to governments and non-government organisations in the Pacific islands. This program is currently in the early stages of its development, following extensive consultation with IUCN members, partners and other stakeholders. Further input on the development of the program is welcome, and may be directed to:

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LEGAL MECHANISMS FOR THE ESTABLISHMENT AND MANAGEMENT OF TERRESTRIAL PROTECTED AREAS IN FIJI

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INTRODUCTION

Involvement of local communities in the planning, establishment and management of protected areas is an indispensable aspect of conservation practice in Fiji. The overwhelming majority of land in Fiji is held under customary title by indigenous Fijians.¹ This land is held on a communal basis by landowning clans known as *mataqali*. Use of land and resources by members of the *mataqali* are determined, or strongly influenced, by the authority of traditional leaders. Local decision-making processes, governed by customary law and informed by traditional ecological knowledge, have played a central role in resource management in Fiji for centuries.

In recent years, local communities have emerged as leaders in the establishment of protected areas, with the number of community conserved areas (including locally managed marine areas) growing each year. Community conserved areas present significant practical benefits, including: community ownership of conservation initiatives; integration of traditional ecological knowledge into decision-making; and, direct community involvement in management activities (including surveillance and enforcement). These benefits are particularly significant in a context of limited government capacity for protected area management.

However, protected areas established purely on the basis of customary law are subject to certain limitations. Most importantly, there are limits on the extent to which resource owners can lawfully control the activities of individuals or entities that do not belong to the resource owning group. In order to effectively manage protected areas in the long term, it may be necessary for resource owners – with the assistance of conservation partners – to identify appropriate legal mechanisms to support and strengthen their local conservation initiatives.

This briefing paper provides an overview of the existing legal mechanisms for establishment and management of terrestrial protected areas in Fiji, with an emphasis on community-based approaches to conservation. The paper was prepared by the IUCN Regional Office for Oceania on behalf of Birdlife International. The paper is intended to inform the work of non-government organisations and government agencies working with local communities to establish and effectively manage protected areas in Fiji.

In particular, the paper reviews the following legislation:

- *Native Lands Act*
- *Native Land Trust Act*
- *National Trust of Fiji Act*
- *Forestry Decree*
- *Land Conservation and Improvement Act*
- *Water Supply Act*
- *Bird and Game Protection Act*
- *Endangered and Protected Species Act*
- *Environmental Management Act*.

The existing legal framework in Fiji offers a range of mechanisms with the potential to support the establishment and management of terrestrial protected areas. This paper presents case studies of existing conservation initiatives and provides practical guidance for utilising legal mechanisms to conserve biological diversity and natural resources. In conclusion, the authors call for the development of national protected areas legislation, in order to support the establishment of an integrated and effectively managed protected area network in Fiji.

¹ According to the Native Lands Trust Board, 'Native land ... comprises 87% of all the land in Fiji': www.nltb.com.fj.

INTERNATIONAL POLICY CONTEXT

The Government of Fiji has signed and ratified a number of multilateral environmental agreements relevant to the establishment and management of protected areas, including:

- 1971 *Convention on Wetlands of International Importance*
- 1972 *Convention Concerning the Protection of the World Cultural and Natural Heritage*
- 1986 *Convention on the Protection of Natural Resources and the Environment of the South Pacific*
- 1992 *Convention on Biological Diversity*.

By ratifying these treaties, the Government of Fiji has made an undertaking to the international community to protect its natural and cultural heritage and to conserve and sustainably manage its biological diversity using appropriate means, including the establishment and management of protected areas.

RAMSAR CONVENTION

The 1971 *Convention on Wetlands of International Importance* ('Ramsar Convention') aims 'to stop the loss of wetlands and to promote their conservation and wise use'. Parties to the Convention are required to identify wetlands of international importance within their territory and designate such wetlands for inclusion on a list established under the Convention. Parties are required to maintain the ecological character of listed wetlands, and to report on the status of listed wetlands within their territory. Furthermore, each party undertakes to promote the conservation of wetlands – both listed and unlisted – by establishing and managing wetland reserves. Fiji currently has one Ramsar listed wetland, located in the upper catchment of the Navua River.

WORLD HERITAGE CONVENTION

The 1972 *Convention Concerning the Protection of the World Cultural and Natural Heritage* ('World Heritage Convention') is concerned with identifying cultural and natural heritage sites of 'outstanding universal value', and with promoting cooperation amongst nations to contribute effectively to the protection of these areas. Parties to the Convention are required, inter alia, 'to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage'. Fiji does not currently have any listed World Heritage sites, although it is currently preparing a World Heritage nomination for Levuka township, the former colonial capital of Fiji.

NOUMEA CONVENTION

The 1986 *Convention on the Protection of Natural Resources and the Environment of the South Pacific* ('Noumea Convention') requires parties to prevent, reduce and control pollution, and to ensure sound environmental management and development of natural resources. The Convention requires parties to 'take all appropriate measures to protect and preserve rare or fragile ecosystems and depleted, threatened or endangered flora and fauna as well as their habitat'. To this end, parties are required, as appropriate, to establish protected areas, and prohibit or regulate any activity likely to have adverse effects on the species, ecosystems or biological processes that such areas are designed to protect. Parties are further obliged to develop and maintain technical guidelines and legislation for environmental impact assessment.

CONVENTION ON BIOLOGICAL DIVERSITY

The objectives of the 1992 *Convention on Biological Diversity* ('CBD') are 'the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources'. Parties to the Convention are required to develop national strategies, plans or programs for the conservation and sustainable use of biodiversity, or to adapt existing plans or programs for this purpose. In relation to protected areas, parties are required, as far as possible and as appropriate, to: establish a system of protected areas; develop guidelines for the selection, establishment and management of protected areas; regulate or manage biological resources important for the conservation of biological diversity; and, promote environmentally sound and sustainable development in areas adjacent to protected areas.

IUCN PROTECTED AREA CATEGORIES

The IUCN World Commission on Protected Areas (WCPA) has defined a 'protected area' as:

An area of land and/or sea especially dedicated to the maintenance and protection of biological diversity, and of natural and associated cultural resources, and managed through legal or other effective means.

The WCPA has established seven categories of protected areas, which have been widely applied by protected area managers around the world. The seven categories are:

CATEGORY Ia

Strict Nature Reserve: protected area managed mainly for science

Area of land and/or sea possessing some outstanding or representative ecosystems, geological or physiological features and/or species, available primarily for scientific research and/or environmental monitoring.

CATEGORY Ib

Wilderness Area: protected area managed mainly for wilderness protection

Large area of unmodified or slightly modified land, and/or sea, retaining its natural character and influence, without permanent or significant habitation, which is protected and managed so as to preserve its natural condition.

CATEGORY II

National Park: protected area managed mainly for ecosystem protection and recreation

Natural area of land and/or sea, designated to (a) protect the ecological integrity of one or more ecosystems for present and future generations, (b) exclude exploitation or occupation inimical to the purposes of designation of the area and (c) provide a foundation for spiritual, scientific, educational, recreational and visitor opportunities, all of which must be environmentally and culturally compatible.

CATEGORY III

Natural Monument: protected area managed mainly for conservation of specific natural features

Area containing one, or more, specific natural or natural/cultural features which is of outstanding or unique value because of its inherent rarity, representative or aesthetic qualities or cultural significance.

CATEGORY IV

Habitat/Species Management Area: protected area managed mainly for conservation through management intervention

Area of land and/or sea subject to active intervention for management purposes so as to ensure the maintenance of habitats and/or to meet the requirements of specific species.

CATEGORY V

Protected Landscape/Seascape: protected area managed mainly for landscape/seascape conservation and recreation

Area of land, with coast and sea as appropriate, where the interaction of people and nature over time has produced an area of distinct character with significant aesthetic, ecological and/or cultural value, and often with high biological diversity. Safeguarding the integrity of this traditional interaction is vital to the protection, maintenance and evolution of such an area.

CATEGORY VI

Managed Resource Protected Area: protected area managed mainly for the sustainable use of natural ecosystems

Area containing predominantly unmodified natural systems, managed to ensure long term protection and maintenance of biodiversity, while providing at the same time a sustainable flow of natural products and services to meet community needs.

COMMUNITY CONSERVED AREAS

The IUCN WCPA has defined community-conserved areas as follows:

...natural and modified ecosystems with significant biodiversity, ecological and related cultural values, voluntarily conserved by indigenous and local communities through customary laws or other effective means.

In recent years, there has been increasing interest in community conservation areas, and an awakening to their importance in fulfilling global biodiversity conservation objectives. Community conserved areas may fall into different WCPA protected area categories, depending on their management objectives.

NATIONAL POLICY CONTEXT

NATIONAL BIODIVERSITY STRATEGY AND ACTION PLAN

Consistent with its obligations under the CBD, the government of Fiji has developed a national biodiversity strategy and action plan (NBSAP). The strategy was drafted in 1999, reviewed in 2003 and 2006, and published in 2007. The goal of the *Fiji Biodiversity Strategy and Action Plan* is:

*To conserve and sustainably use Fiji's terrestrial, freshwater and marine biodiversity, and to maintain the ecological processes and systems which are the foundation of national and local development.*²

In relation to protected areas, the strategy states that: '[t]he establishment of a comprehensive and representative system of reserves and conservation areas at the national and local levels is critical to successful biodiversity conservation'.³ The strategy describes Fiji's existing system of protected areas as 'rudimentary' and calls for action to achieve the following objectives:

- establishment of a comprehensive and representative core protected area system;
- establishment of protected or conservation areas in addition to the core protected area system;
- effective management of existing protected areas; and
- adequate funding for protected area management.⁴

The strategy recognises that '[c]ontrol of local resources by traditional resource owners and users is critical to the success of biodiversity conservation'⁵ and calls for action to: (a) secure nationally significant sites through appropriate arrangements with resource owners; (b) encourage and assist resource owners to establish their own protected areas; (c) encourage resource owner participation in management of protected areas; and (d) provide equitable remuneration to resource owners for establishing and managing protected areas.⁶

The strategy highlights the importance of terrestrial conservation, stating that '[t]he conservation and sustainable management of Fiji's natural forests is the single most important means of conserving the vast majority of Fiji's endemic fauna and flora'.⁷

NATIONAL FOREST POLICY STATEMENT

In November 2007, the government of Fiji released the *Fiji Forest Policy Statement*. This statement establishes a new policy framework for the management of Fiji's forests. It envisions 'a permanent forest cover, including a protected forest area network'.⁸ It highlights the serious threats to forest biodiversity in Fiji, and states that 'the system of protected forest areas needs review, being insufficient in size and too scattered to provide for effective conservation'.⁹ The statement proposes the establishment and management of a 'protected area system for the conservation of representative sites of Fiji's indigenous forest types with their typical flora and fauna'.¹⁰

The policy statement recognises the need to encourage the direct involvement of resource owners and communities in sustainable forest management. In the policy statement, the Forestry Department undertakes:

- to work with resource owners and other stakeholders to establish a system of conservation areas;
- to assist resource owners to manage these conservation areas consistent with local needs;
- to work with the Department of Environment and non-government organisations to deliver environmental awareness programmes for resource owners and resource users; and
- to assist interested resource owners to protect forests with significant conservation values.¹¹

² Ministry of Tourism and Environment (2007) *Fiji Biodiversity Strategy and Action Plan*, p.23.

³ *Ibid.*, Guiding Principle IX. p.23.

⁴ *Ibid.*, p.30-2.

⁵ *Ibid.*, Guiding Principle V. p.23.

⁶ *Ibid.*, p.30-2.

⁷ *Ibid.*, Guiding Principle IX. p.23.

⁸ Ministry of Fisheries and Forests (2007) *Fiji Forest Policy Statement*. p.19.

⁹ *Ibid.*, p.15.

¹⁰ *Ibid.*, p.15, 26.

¹¹ *Ibid.*, pp.15, 29-30.

EXISTING CONSERVATION AREAS

There are currently a number of established conservation areas in Fiji. These conservation areas vary in their size and ecological value, and do not yet form an adequate or representative protected area system. The legal status of these areas varies, including: strict nature reserves declared under national forestry legislation; heritage sites owned or leased by the National Trust; conservation leases held by individuals and businesses; and, increasingly, community-declared conservation areas. These areas are not generally covered by management plans and are rarely subject to active management. Nonetheless, these existing conservation areas present important lessons for future conservation activities. Selected examples are profiled as case studies throughout this paper.

CASE STUDY – KOROYANITU NATIONAL HERITAGE PARK

Koroyanitu Range, near the west coast of Viti Levu, is the site of one of Fiji's most successful community conservation initiatives – the Koroyanitu National Heritage Park. The highest point is Mount Koroyanitu which, at 1,195 metres, is one of the ten highest peaks in Fiji. The range comprises old lava flows with highly weathered cliffs, eroded pinnacles and spectacular ephemeral waterfalls. Ecologically, the range is unique in being the only significant highland area on the drier western side of Viti Levu. This microclimate and its isolation from other forest areas has resulted in at least eleven plants endemic to the range.

The designation 'National Heritage Park' has no legal status in Fiji, but has been used at Koroyanitu – and at Bouma, on the island of Taveuni – to denote areas where landowners, the Native Land Trust Board and the government have agreed to protect nationally important natural and cultural heritage values and to assist their protection by the development of ecotourism. There has been an ongoing initiative at Koroyanitu since 1989. The main sustainable income generating activity for the six main land-owning villages is ecotourism. The site's proximity to the tourist centre of Nadi provides it with a major advantage for ecotourism development.

Whilst the sustainability of the project remains somewhat uncertain, and requires ongoing development, there is no doubt of the conservation significance of the site, or of the commitment of the villagers concerned.¹²

PROPOSED CONSERVATION AREAS

In recent decades, numerous protected areas have been proposed for Fiji. In 1980, the National Trust of Fiji – in collaboration with IUCN – produced a report that proposed a system of 88 national parks and reserves, set out guidelines for establishment and management of these sites, and included draft national parks legislation. The 1992 *National Environment Strategy* identified 140 sites of national significance, and recommended a formal legislative process to enhance protection of these sites. In recent years, a number of proposals for protected areas have also been made by non-government organisations, including WWF, Birdlife International, the Wildlife Conservation Society and Conservation International.

CASE STUDY – SOVI BASIN

Sovi Basin is the largest proposed protected area in Fiji. Sovi Basin is a large basin or amphitheatre of low rolling hills ringed by steep volcanic peaks rising to 1,185 metres. It is unique in the Pacific islands in being a large uninhabited basin with a pristine watershed of lowland rainforest. Sovi Basin is owned by thirteen *matagali*, or traditional landowning clans, with eight small areas of Crown land and two freehold parcels. In 2005, landowners agreed to cancel the logging concession which covered the basin, in exchange for the establishment of a compensatory conservation trust fund. In late 2007, Conservation International secured a major donation from Fiji Water, which will form the basis of the trust fund. The trust fund is intended to provide an alternative source of income for landowners and support management activities in the protected area. The legal mechanism for establishment and management of the protected area is currently subject to discussion, but is likely to include a conservation lease, together with one or more financing and management agreements.

¹² Birdlife International (2006) *Important Bird Areas in Fiji: Conserving Fiji's Natural Heritage*, p.17.

LEGAL OPTIONS FOR THE ESTABLISHMENT OF PROTECTED AREAS

Fiji does not currently have any dedicated protected areas legislation. Nonetheless, there are a variety of existing statutory mechanisms with the potential to deliver site-based conservation benefits. The table below provides a brief overview of key legislative provisions. These are discussed in more detail below.

Legislation	Key Features	Sections
<i>Native Lands Act</i>	Recognises and maintains communal ownership of native lands.	s.3
<i>Native Land Trust Act</i>	Establishes the Native Land Trust Board, and empowers the board to: (1) enter into leases and licenses on behalf of native landowners; (2) place conditions on the use of leased native land; and (3) declare certain areas to be native reserves.	ss.7-9 s.10
<i>National Trust of Fiji Act</i>	Establishes the National Trust of Fiji, and empowers the trust to: (1) acquire and manage property of natural or cultural heritage significance; (2) create by-laws for the regulation and protection of Trust properties; (3) enter into heritage conservation covenants with landowners; and (4) declare national heritage areas.	s.4 s.18 s.10 s.20
<i>Forestry Decree</i>	Empowers the Minister for Forests to: (1) declare multiple use forest reserves (2) declare strict nature reserves	ss.7-8 ss.7-8
<i>Land Conservation and Improvement Act</i>	Establishes the Land Conservation Board and empowers the board to make conservation, closing and work orders.	s.3 ss.7-9
<i>Water Supply Act</i>	Empowers the Minister to declare protected water catchment areas.	s.4
<i>Bird and Game Protection Act</i>	Prohibits the killing, wounding or taking of protected bird species and regulates the hunting of game species.	ss.3, 6
<i>Endangered and Protected Species Act</i>	Prohibits the possession, sale, display or trade of listed endangered and protected species.	s.23
<i>Environmental Management Act</i>	Requires environmental impact assessment of development activities that are likely to have a significant impact on the environment, including existing or proposed protected areas.	ss.2, 27

NATIVE LANDS ACT [CAP 133]

The overwhelming majority of land in Fiji is native land, held under customary title by indigenous Fijians.¹³ As a result, an understanding of the legislative provisions dealing with ownership, use and control of native land is essential to planning and implementation of community-based conservation initiatives in Fiji.

The *Native Lands Act* provides for the continued occupation and use of 'native lands' by indigenous Fijians. 'Native land' is land which is neither Crown land nor land subject to freehold title.¹⁴

Section 3 of the Act provides that:

Native lands shall be held by native Fijians according to native custom as evidenced by usage and tradition. Subject to the provisions [of the *Native Lands Act*] such lands may be cultivated, allotted and dealt with by native Fijians as amongst themselves according to their native customs and subject to any regulations made by the Fijian Affairs Board, and in the event of any dispute arising for legal decision in which the question of the tenure of land amongst native Fijians is relevant all courts of law shall decide such disputes according to such regulations or native custom and usage which shall be ascertained as a matter of fact by the examination of witnesses capable of throwing light thereupon.¹⁵

The *Native Lands Act* recognises and maintains communal ownership of native lands, and defines 'native owners' as 'the *mataqali* or other division or subdivision of the natives having the customary right to occupy and use any native lands'.¹⁶ This statutory recognition of traditional communal ownership of native lands provides a legal basis for community level decision-making about the use and conservation of natural resources on native land.

Communal decisions about land use – for example, prohibiting the felling of trees in a particular area – are binding on both members of the *mataqali* and third parties, provided that such decisions are made according to custom. However, it is important to note that the Native Land Trust Board may grant leases and licenses over native land, and that these leases and licenses take precedence over community land use decisions.

NATIVE LAND TRUST ACT (CAP 134)

Under the *Native Land Trust Act*, all native land in Fiji is controlled by the Native Land Trust Board (NLTB), and administered for the benefit of the Fijian owners.¹⁷ Native land must not be sold, granted or transferred, except to the Crown, and must not be transferred, charged or encumbered without the consent of the Board. Any legal instrument which seeks to transfer, charge or encumber any native land without the consent of the Board shall be null and void.¹⁸

LEASES AND LICENCES

The Native Land Trust Board may grant leases or licenses over portions of native land, provided that the Board is satisfied that the land is not being beneficially occupied by the Fijian owners, and is not likely to be required by the owners for their use, maintenance or support during the term of the lease or license.¹⁹ Leases and licenses over native land are made in the name of the Native Land Trust Board, and executed under the seal of the Board.²⁰ Leases over native land must be recorded in the 'Register of Native Leases'.²¹ Licenses over native land must be recorded in the 'Register of Licenses in respect of Native Land'.²²

¹³ According to the Native Lands Trust Board, 'Native land ... comprises 87% of all the land in Fiji': www.nltb.com.fj.

¹⁴ *Native Lands Act* [Cap 133], s.2: "'native lands" means lands which are neither Crown lands nor the subject of a Crown grant'; *Land Transfer Act* [Cap 131], s.10: 'Crown grants of land in Fiji shall be grants in fee simple.'

¹⁵ *Native Lands Act* [Cap 133], s.3.

¹⁶ *Native Lands Act* [Cap 133], s.2.

¹⁷ *Native Lands Trust Act* [Cap 134], s.4(1).

¹⁸ *Native Lands Trust Act* [Cap 134], s.5.

¹⁹ *Native Lands Trust Act* [Cap 134], ss.8-9. See also *Native Lands Trust Act* [Cap 134], s.7: No native land may be leased, and no license in respect of native land may be granted, except in accordance with the provisions of the *Native Land Trust Act*, or subject to the provisions of the *Crown Acquisition of Lands Act*, *Forest Act*, *Mining Act* or *Petroleum (Exploration and Exploitation) Act*.

²⁰ *Native Lands Trust Act* [Cap 134], ss.8.

²¹ *Native Lands Trust Act* [Cap 134], ss.10.

²² *Native Lands Trust Act* [Cap 134], ss.11.

Native land may be leased for such purposes, and subject to such terms, conditions and covenants as the Board deems proper, subject to the *Native Land Trust (Leases and Licenses) Regulation*.²³ The regulations set out (a) standard conditions applying to all leases on native land, and (b) conditions applying to leases for particular purposes (for example, residential, agricultural, gardening, grazing and quarrying purposes).

In a number of cases, the standard conditions contained in the regulations support positive conservation outcomes. For example:

- ‘the lessee shall not fell trees or clear or burn off bush or cultivate any land within a distance of twenty-four feet from the bank of a river or stream’: *r.25 (agricultural leases)*.
- ‘the lessee shall apply such measures to check soil erosion as may be required by the lessor in writing’: *rr.25, 28 (agricultural leases, grazing leases)*.
- ‘the lessee shall not remove or dispose of by sale or otherwise any forest produce growing upon the demised land without the written consent of the lessor’: *r.34 (all leases)*.

The Board may also enter into leases for non-specified ‘special purposes’, subject to such terms and conditions as the Board deems appropriate.²⁴ This power has been used by the Board to enter into leases for conservation purposes (see *Case Study – Upper Navua Conservation Area* below).

If the lessee of native land breaches the terms and conditions of the lease, or carries out unauthorised development on the land (including using the land for a purpose different to the purpose for which the lease was granted), the Board may terminate the lease and resume possession of the land.²⁵ Any person who unlawfully occupies native land is liable to immediate eviction, a fine of \$100 and/or imprisonment for six months.²⁶

CASE STUDY – UPPER NAVUA CONSERVATION AREA

The Upper Navua Conservation Area was established following several years of negotiations between landowners, the Native Land Trust Board (NLTB) and a private tour operator, Rivers Fiji.

In 1997, Rivers Fiji initiated discussions with nine *mataqali*, seeking to persuade landowners that whitewater rafting tours presented an economically viable and ecologically sustainable alternative to the logging and gravel extraction activities being conducted in the catchment of the Upper Navua River at that time. In 2000, with the support of landowners, Rivers Fiji entered into a native land lease with the NLTB. The lease area extends 200 metres either side of a 16 kilometre stretch of the Upper Navua River, a total area of 615 hectares.

Key features of the lease agreement include:

- 25 year term, with option of renewal for 25 years, at the discretion of the NLTB;
- payment of rent by Rivers Fiji, including a set minimum rate and a user payment per guest;
- members of the *mataqali* to receive first preference for employment opportunities with Rivers Fiji;
- Rivers Fiji to provide training for members of the *mataqali* employed in its tourism operation;
- appointment of a member of the *mataqali* as a liaison officer for matters related to the lease area;
- resolution of disputes by an independent arbitrator, in accordance with the *Arbitration Act* [Cap 38];
- NLTB to ensure that no other venture is granted a lease or license within the conservation area.

By agreeing to refrain from granting leases or licenses within the conservation area, NLTB effectively guaranteed that extractive activities such as logging and gravel quarrying would no longer be lawful within the conservation area for the term of the lease. The Upper Navua conservation lease demonstrates the application of native land leases for conservation purposes, and is an inspiring example of private sector engagement in conservation.

²³ *Native Lands Trust Act* [Cap 134], ss.10.

²⁴ *Native Land Trust (Leases and Licenses) Regulations*, r.33.

²⁵ *Native Lands Trust Act* [Cap 134], s.10.

²⁶ *Native Lands Trust Act* [Cap 134], s.27.

The Board may issue licenses over native land, granting rights to use the land for such purposes and subject to such terms, conditions and covenants as the Board deems appropriate.²⁷ The granting of licenses to take forest products is regulated by the *Forest Decree 1992*. This legislation is discussed below.

NATIVE RESERVES

The Board may, by publishing a notice in the Gazette, set aside any area of native land as a native reserve.²⁸ The Board may only grant a lease or license over land within a native reserve in very limited circumstances and, in most cases, with the consent of the native owners.²⁹ The Board may only remove an area of land from any native reserve – either permanently or for a specified period – with the consent of the native owners of the land.³⁰

Due to the limitations placed on the issuing of leases and licenses over native reserves, the declaration of a native reserve may be an appropriate mechanism for establishing a community managed conservation area.

Legal Mechanism	Key Features
<i>Native Lease</i>	<ul style="list-style-type: none"> Native Land Trust Board (NLTB) may issue leases over native land. ss.8-9 Native leases are written agreements with NLTB, granting rights to occupy and use land for a fixed period, in exchange for rent payments. s.10 Native leases may be subject to terms and conditions. Breach of terms and conditions may lead to termination of a lease. Native leases may be used to establish conservation areas, by excluding activities such as logging, quarrying and tourism development.
<i>Native Reserves</i>	<ul style="list-style-type: none"> NLTB may set aside any area of native land as a native reserve. s.15 NLTB may only issue leases and licenses over land within a native reserve in limited circumstances, and usually with the consent of landowners. s.16 NLTB may only remove land from native reserve with landowner consent. s.17 Native reserve may be used to support community-based conservation areas, by limiting the capacity of NLTB to issues leases over the land.

TEXT BOX – MANAGEMENT PLANS

Protected area management plans are written documents intended to guide the management of protected areas. The topics considered in a management plan will vary according to the objectives of the protected area and the features of the area that it protects, but might include: conservation of biological diversity, cultural heritage, water and soil; and, management of visitor impacts, resource extraction and human habitation.

The legal status of management plans varies, ranging from non-binding statements of intent to legally binding instruments with civil and criminal sanctions for non-compliance. Mechanisms for making management plans legally binding include:

- making compliance with the management plan a condition of a lease or license;
- making compliance with the management plan a condition of a permit or other approval;
- incorporating restrictive elements of the management plan in a conservation covenant;
- adopting by-laws that require compliance with lawfully adopted management plans; or
- adopting legislation that requires compliance with lawfully adopted management plans.

²⁷ *Native Lands Trust Act* [Cap 134], s.11; *Native Land Trust (Leases and Licenses) Regulations*, r.10.

²⁸ *Native Lands Trust Act* [Cap 134], s.15.

²⁹ *Native Lands Trust Act* [Cap 134], s.16. In particular, the Board may only grant a lease or licence over land within a native reserve: to a native Fijian, with the consent of the native owners; to the Board of the Land Development Authority; or, subject to the provisions of the following legislation: *Crown Acquisition of Lands Act*, *Forest Act*, *Petroleum (Exploration and Exploitation) Act*, *Mining Act*.

³⁰ *Native Lands Trust Act* [Cap 134], s.17.

NATIONAL TRUST FOR FIJI ACT (CAP 265)

The National Trust of Fiji ('the Trust') is a statutory trust established by the *National Trust for Fiji Act 1970*.³¹ The purposes of the Trust are:

- to promote the permanent preservation of lands (including reefs), buildings, and objects of national historic, architectural or natural interest;
- to protect and augment the amenities of any such land or buildings and their surroundings and to preserve their natural aspect and features;
- to protect animal and plant life; and
- to provide for the enjoyment by the public of such lands, buildings and chattels.³²

For the purpose of achieving these objects, the Trust is empowered to acquire, purchase and hold land and other property and to deal with property vested in it upon such terms as it deems fit.³³

The Trust currently administers eight sites of national natural or cultural significance. These sites are held by the Trust under (a) freehold, (b) Crown leases, or (c) native leases.

The *National Trust Act 1970* endows the Trust with certain special powers, including: (a) the power to enter into binding covenants with landholders; and, (b) the power to make by-laws for the regulation and protection of Trust properties.

CONSERVATION COVENANTS

Section 10 of the *National Trust Act* provides that the Trust is empowered:

*in a case where any person is willing to agree with the Trust that any land or any part thereof shall, so far as his interest in the land enables him to bind it, be made subject either permanently or for a specified period to conditions restricting the planning, development or use thereof in any manner, to enter into an agreement with such person or accept a covenant from him to that effect and to enforce such agreement or covenant against persons deriving title under him in the like manner and to the like extent as if the Trust, were possessed of or entitled to or interested in adjacent land and as if the agreement or covenant had been or had been expressed to be entered into for the benefit of that adjacent land.*³⁴

In other words, the Trust may enter into a voluntary agreement or covenant with landholders, placing binding restrictions on the use or development of the land. These restrictions may apply for a fixed term or in perpetuity. The restrictions also apply to lessees and subsequent owners of the land. The Trust may enforce a covenant against the landholder, lessees or subsequent owners by commencing civil court proceedings.

Conservation covenants may apply to freehold land, crown land and native lands. However, any conservation covenant on native land would require the consent of the NLTB, as any instrument which seeks to encumber native land without the consent of the Board is null and void.³⁵ If compliance with the covenant is included as a condition of subsequent leases, breach of the covenant would provide grounds for terminating the lease.

Conservation covenants are a flexible – and, to date, underutilised – mechanism for long-term protection of natural and cultural heritage values. The Trust has not yet used its power to enter into conservation covenants with landowners, but has resolved to develop a model conservation covenant, drawing on international examples, and to formulate a strategy for promoting the adoption of conservation covenants by landholders.³⁶

³¹ Section 4, *National Trust for Fiji Act 1970*.

³² Section 3, *National Trust for Fiji Act 1970*.

³³ Section 4, *National Trust for Fiji Act 1970*.

³⁴ Section 10(c), *National Trust for Fiji Act 1970*.

³⁵ *Native Lands Trust Act* [Cap 134], s.5.

³⁶ For example: www.deh.gov.au/land/publications/covenants, www.nationalparks.nsw.gov.au/npws.nsf/content/conservation_partners.

BY-LAWS

Section 18 of the *National Trust Act* provides a broad power for the Trust Council to make by-laws for the effective protection and management of Trust properties:

Council may make by-laws for the purpose of carrying out the functions of the Trust including the regulation and protection of, the prevention of nuisances and the preservation of order upon, any lands or other property of the Trust.

By-laws made by the Trust Council are 'subsidiary legislation' and 'written laws' within the meaning of Section 2 of the *Interpretation Act 1967*.³⁷ By-laws must not exceed the scope of the empowering Act,³⁸ must be prepared in accordance with the requirements set out in the *National Trust Act*,³⁹ and must be published in the Gazette before taking effect.⁴⁰ Council has the power to set penalties for breaches of its by-laws of up to four hundred dollars, six months imprisonment, or both.⁴¹ Breaches of Trust by-laws may be investigated by the police and prosecuted by the police or the Director of Public Prosecutions.

Council has not yet adopted any by-laws. However, Council has resolved to make by-laws for the management of Trust properties, and is currently considering draft by-laws for the management of Trust properties. Key features of the draft by-laws include: (a) procedures for the preparation of plans of management; (b) a requirement to obtain approval from the Trust before undertaking actions that have, or are likely to have, a significant impact on the natural or cultural heritage values of a Trust property, including actions outside the boundaries of the Trust property; and (c) civil enforcement mechanisms, offences and penalties.

By-laws offer a flexible and effective mechanism for the conservation and management of Trust properties. By creating offences, Council shifts responsibility for enforcement action to the police, avoiding the need for costly and time consuming court proceedings by the Trust itself. However, Trust by-laws are subject to one significant limitation: as Trust by-laws only apply to 'lands or other property of the Trust' (ie. belonging to the Trust), cancellation of a lease held by the Trust will make any by-laws applying to the leased property null and void.

NATIONAL HERITAGE REGISTER

Sub-section 20(1) of the *National Trust Act* (inserted by the *National Trust of Fiji (Amendment) Act 1998*) provides that the Trust Council:

may, with the approval of the Minister, by order published in the Gazette, declare any area of land (including reefs) and any building, furniture, picture or chattel as being of national historical, architectural or natural interest or beauty.

An area of land or reef declared under subsection 20(1) is to be known as a National Heritage Area. A building declared under subsection 20(1) is to be known as a National Heritage Building. Any furniture, picture or chattel declared under subsection (1) is to be known as a National Heritage Artifact.⁴²

The Council must keep and maintain a National Heritage Register for the purpose of recording the details of and relevant information relating to every National Heritage Area, National Heritage Building and National Heritage Artifact.⁴³

The declaration of any area, building or artifact does not affect the rights of the owner of any such area, building or artifact.⁴⁴ Nonetheless, the declaration does provide a formal means of recognising the national significance of a particular area, building or artifact.

³⁷ Section 2, *Interpretation Act 1967*: 'subsidiary legislation' means any legislative provision ... made in exercise of any power in that behalf conferred by any written law by way of by-law, notice, order, proclamation, regulation, rule, rule of court or other instrument; 'written law' means all Acts and all subsidiary legislation.

³⁸ Section 25(b), *Interpretation Act 1967*.

³⁹ Section 18, *National Trust for Fiji Act 1970*.

⁴⁰ Section 21, *Interpretation Act 1967*.

⁴¹ Section 25(e), *Interpretation Act 1967*.

⁴² Section 20(2)-(4), *National Trust for Fiji Act 1970*.

⁴³ Section 20(5), *National Trust for Fiji Act 1970*.

Legal Mechanism	Key Features
<i>Conservation Covenant</i>	<ul style="list-style-type: none"> • Voluntary agreement between landholder and the National Trust. s.10 • Legally binding restriction on use or development of land. • Binds landholder, lessees and subsequent owners. • Remains in force for a fixed term or in perpetuity. • Freehold, crown or native land (with NLTB approval). • Enforcement: civil proceedings by National Trust.
<i>Trust By-Laws</i>	<ul style="list-style-type: none"> • Subsidiary legislation adopted by Council of the National Trust. s.18 • Legally binding rules on management and use of Trust properties. • Freehold, crown or native land owned or leased by the National Trust. • Council may create penalties for breach: \$400 and/or six months prison. • Criminal prosecution by police; civil enforcement by National Trust.
<i>National Heritage Register</i>	<ul style="list-style-type: none"> • National register of nationally significant areas, buildings and artifacts. s.20(1) • Public recognition of natural or cultural heritage values. • No legal effect.

TEXT BOX – IS A FORMAL LEGAL MECHANISM NECESSARY OR APPROPRIATE?

- Are there management issues that cannot be resolved by traditional or informal means?
- Are there benefits that can only be obtained by using a formal legal approach?
- Do these benefits outweigh any additional time and expense associated with a legal approach?
- Do stakeholders support or oppose the use of a formal legal mechanism?
 - resource owners?
 - resource users?
 - project partners?
 - government agencies?
- Is a formal legal approach necessary to control the actions of third parties?
- Does a legal mechanism provide added certainty for stakeholders? Is this important?
- Do legal negotiations provide an opportunity to identify and resolve underlying conflicts?
- Is the legal mechanism flexible enough to reflect changing community aspirations over time?

⁴⁴ Section 20(6), *National Trust for Fiji Act 1970*.

FOREST DECREE

The *Forest Decree 1992* aims to: regulate the felling and extraction of timber, the taking of non-timber forest products and the clearing of land; establish a licensing regime; and, provide for the establishment of multiple use forest reserves and strict nature reserves.

The decree prohibits the felling or extraction of timber without a license or authority.⁴⁵ In addition, the decree prohibits the taking of non-timber forest produce and the clearing of land on Crown land and unalienated native land (ie. native land which has not been leased) without an authority or license.⁴⁶

CUSTOMARY RIGHTS

The decree does not prohibit or restrict the exercise of the following rights on native land, provided that the land has not been declared to be a forest reserve or nature reserve:

- ‘the exercise of any rights established by native custom to hunt, fish, or collect fruits and vegetables growing wild’; or
- ‘the cutting or removal by any native in accordance with native custom of forest produce which may be necessary for the permanent abode of himself and his family, for the construction of temporary huts on any land lawfully occupied by him, for the upkeep of any his fishing stakes and landing places, for the construction and upkeep of any work for the common benefit of the native inhabitants of his village or for firewood to be consumed for domestic purposes’.⁴⁷

The protection of customary rights in the decree does not include a right to set fire to grass or undergrowth.⁴⁸

The Minister may publish a notice in the Gazette prohibiting the felling or removal of particular classes of timber, including the felling or removal of such timber in accordance with native custom.⁴⁹

DECLARATION OF RESERVES

The Minister may, on the recommendation of the Forestry Board, declare any of the following classes of land to be a forest reserve or nature reserve:

- unalienated State land;
- land leased by the State; or
- unalienated native land.⁵⁰

In the case of native land, the Minister must obtain the consent of landowners and the Native Land Trust Board before declaring the establishment of the forest reserve or nature reserve.⁵¹

Any land that was declared to be a forest reserve or nature reserve under the *Forest Act* (Cap 150) continues to be a forest reserve or nature reserve under the *Forest Decree*.⁵²

The Minister may, upon recommendation of the Forestry Board, dereserve a forest reserve or nature reserve.⁵³

⁴⁵ *Forest Decree 1992*, s.8

⁴⁶ *Forest Decree 1992*, s.8

⁴⁷ *Forest Decree 1992*, s.21(1)

⁴⁸ *Forest Decree 1992*, s.21(2)

⁴⁹ *Forest Decree 1992*, s.21(3)

⁵⁰ *Forest Decree 1992*, s.6

⁵¹ *Forest Decree 1992*, s.6

⁵² *Forest Decree 1992*, s.6

⁵³ *Forest Decree 1992*, s.6(2)

FOREST RESERVES

Forest reserves are intended to be utilised for multiple uses, including the felling and extraction of timber. The decree provides that forest reserves 'shall be managed as permanent forest in order to provide on a permanent basis the optimum combination of benefits of protection and production of which they are capable'.⁵⁴

It is an offence to carry out the following activities in a forest reserve without a license or authority:

- fell or extract timber;
- take other forest produce;
- take peat, rock, sand, shells and soil (other than minerals as defined in the *Mining Act*);
- clear land;
- cut, burn, uproot, damage or destroy vegetation;
- erect any buildings or livestock enclosures;
- allow any domestic animal to enter therein;
- plant any crops or trees;
- construct or obstruct any roads paths or waterways;
- set any trap, snare or net or use or to be in possession of any gun, poison or explosive substance;
- hunt or fish.⁵⁵

Forestry licensing officers may issue licenses authorising the following activities within forest reserves:

- fell or extract timber;
- take other forest produce;
- take peat, rock, sand, shells and soil other than minerals as defined in the *Mining Act*;
- graze animals or permit them to be therein;
- erect any buildings or livestock enclosure;
- plant any trees;
- hunt or fish.⁵⁶

The licensing officer may specify such conditions in the license as they think fit, in accordance with good logging practice.⁵⁷ The Conservator may suspend operations under a license if a violation of the conditions of the license has occurred or is likely to occur.⁵⁸

NATURE RESERVES

Nature reserves established under the decree must 'be managed for the exclusive purpose of permanent preservation of their environment, including flora fauna, soil and water'.⁵⁹ It is an offence to carry out the following activities in a forest reserve without a license or authority:

- fell or extract timber;
- take other forest produce;
- take peat, rock, sand, shells and soil (other than minerals as defined in the *Mining Act*);
- clear land;
- cut, burn, uproot, damage or destroy vegetation;
- erect any buildings or livestock enclosures;
- allow any domestic animal to enter therein;
- plant any crops or trees;
- construct or obstruct any roads paths or waterways;
- set any trap, snare or net or use or to be in possession of any gun, poison or explosive substance;
- hunt or fish.⁶⁰

⁵⁴ *Forest Decree 1992*, s.7(1)

⁵⁵ *Forest Decree 1992*, s.8(1)(a)

⁵⁶ *Forest Decree 1992*, s.9(a)

⁵⁷ *Forest Decree 1992*, s.13(1)

⁵⁸ *Forest Decree 1992*, s.19

⁵⁹ *Forest Decree 1992*, s.7(2)

The decree does not provide for the issuing of licenses in relation to nature reserves. As a result, nature reserves are essentially strict reserves in which the activities listed above are prohibited absolutely.

Importantly, the provisions in the decree which allow the exercise of customary rights to hunt, fish and collect non-timber forest products do not apply to forest reserves or nature reserves.⁶¹ For this reason, nature reserves may not be an appropriate mechanism for establishing protected areas in cases where native landowners wish to maintain traditional harvesting activities.

CASE STUDY – NAMENALALA ISLAND

There is currently only one nature reserve on native land in Fiji. Namenalala is a 45 hectare island, located to the south of Vanua Levu. The island is not occupied by the native landowners, as they live on Vanua Levu.

The nature reserve was established following negotiations to secure a native land lease for the purpose of building a resort on the island. The resort proposal covered only ten per cent of the island. The developers offered, in exchange for the right to build and operate their resort, to manage and conserve the remaining ninety per cent of the island as a strict nature reserve.

With the support of the landowners, NLTB signed the lease and the Minister for Forests declared a nature reserve over most of the island. The resort owners are actively involved in management of the nature reserve, and lease payments from the resort provide a sustainable source of income for the landowners.

OFFENCES AND PENALTIES

It is an offence to damage or destroy vegetation, obstruct any road, path or waterway, set any trap, snare or net or use or be in possession of any gun, poison or explosive substance in a forest reserve or nature reserve.⁶² No license or authority is available for these activities.

It is also an offence, without a license or other lawful authority, to clear land, fell or extract timber, take other forest produce, take peat, rock, sand, shells and soil (other than minerals as defined in the *Mining Act*), graze animals, erect any buildings or livestock enclosures, plant any crops or trees, hunt or fish, light a fire, cut or uproot vegetation, or construct any roads or paths in a forest reserve or nature reserve.⁶³

The maximum penalty for offences under the decree is a \$10,000 fine and/or 12 months imprisonment.⁶⁴ If a person is convicted of unlawfully extracting timber, they may also be liable to a fine equal to the royalties that would have been payable if the timber had been taken lawfully.⁶⁵

⁶⁰ *Forest Decree 1992*, s.8(1)(a)

⁶¹ *Forest Decree 1992*, s.21(1)

⁶² *Forest Decree 1992*, s.28(1)(h)

⁶³ *Forest Decree 1992*, s.28(1)(h)

⁶⁴ *Forest Decree 1992*, s.29(1)

⁶⁵ *Forest Decree 1992*, s.29(2)

Legal Mechanism	Key Features
<i>Forest Reserves</i>	<ul style="list-style-type: none"> Minister may declare, on the recommendation of the Forestry Board, declare an area of land to be a forest reserve. s.6 Prohibition on unlicensed development activities, including logging, quarrying, grazing, burning, clearing, hunting and gathering. s.8 Licensing officers may issue licenses for logging and other activities, subject to conditions. s.9 Licenses may be suspended if conditions breached. s.19 Penalties for breach: \$10,000 fine and/or 12 months prison. s.29
<i>Nature Reserves</i>	<ul style="list-style-type: none"> Minister may declare, on the recommendation of the Forestry Board, declare an area of land to be a nature reserve. s.6 Nature reserves managed for permanent preservation of the environment, including flora, fauna, soil and water. s.7 Prohibition on unlicensed development activities, including logging, quarrying, grazing, burning, clearing, hunting and gathering. s.8 Penalties for breach: \$10,000 fine and/or 12 months prison. s.29

TEXT BOX – MINING AND PROTECTED AREAS

The *Mining Act* includes broad powers to issue licenses or permits for prospecting, exploration and mining activities. Licenses or permits for these activities may ordinarily be granted over land owned or leased by other persons, including native landowners. However, the Act includes a list of areas that are closed to prospecting, exploration and mining activities, including:

- any Fijian village;
- any land used as a place of burial or set apart for any public purpose;
- any land within 30 metres of an inhabited building, except with the consent of the owner or occupier;
- any land used for the planting of crops, except with the consent in writing of the owner or occupier;
- any land within the boundaries of any town or city except with the consent of the owner of surface rights;
- any land reserved for the purpose of any railway or public road or within 15 metres of any such railway or road, except with the consent of the owner thereof, or, the Permanent Secretary for Works;
- any land within 60 metres of any spring in use as a source of water supply or any area declared as a catchment area for water supply purposes or any artificial reservoir, water-works or water supply buildings, except with the consent of the Commissioner of Water Supply;
- any reserved forest declared under the *Forest Decree*, except with consent of Conservator of Forests.⁶⁶

In the event that consent is refused – for example, by the Conservator for Forests in relation to a reserved forest – any aggrieved person may appeal to the Mining Appeals Board. The decision of the Board is final.

In effect, the Act provides some limited protection for declared water catchment areas, forest reserves and nature reserves, by requiring the consent of the Commissioner of Water Supply or the Conservator for Forests.

However, it is important to be realistic about the high economic value of mining activities and the political pressure to facilitate mineral exploration and mining operations, and to advise landowners that existing legal mechanisms do not provide a firm basis for excluding mining activities from protected areas.

⁶⁶ *Mining Act*, s.11

LAND CONSERVATION AND IMPROVEMENT ACT

The *Land Conservation and Improvement Act* establishes a Land Conservation Board, comprising representatives from the government departments responsible for agriculture, land, works and forestry, as well as five appointed members.⁶⁷ The functions of the Board are:

- to exercise general supervision over land and water resources;
- to stimulate public interest in the conservation and improvement of land and water resources;
- to recommend to the Minister the nature of legislation that it deems necessary for the proper conservation and improvement of land and water resources; and
- to make conservation, closing or work orders (see below).⁶⁸

The Board may also appoint Conservation Committees for specified areas of land, to advise the Board on matters relating to the conservation of land and resources within its area.⁶⁹ This may provide an opportunity for engaging community representatives in the conservation and management of local land and water resources.

CONSERVATION ORDERS

The Board may, where it deems it expedient for the conservation or improvement of land or water resources, make 'conservation orders'. By issuing a conservation order, the Board may:

- prohibit, regulate and control the breaking up or clearing of land for cultivation or any other purpose;
- prohibit, regulate and control the grazing and watering of livestock;
- prohibit or restrict the cultivation of crops;
- regulate the method of cultivation of land; or
- prohibit, regulate and control the lighting of fires and burning of vegetation.⁷⁰

Conservation orders may be general (ie. applying to a broad area) or particular (ie. applying to particular parcels of land). General conservation orders must be published in the Gazette. Particular conservation orders must be addressed to, and served upon, the owner and/or occupier of the land to which it relates.⁷¹ Failure to comply with a conservation order is an offence. The maximum penalty is a \$200 fine and/or six months imprisonment.

The broad discretion of the Board to regulate clearing of land, burning of vegetation and cultivation of crops provides a flexible mechanism for the conservation of land and water resources. For example, a conservation order could be used to protect a water catchment area with high conservation value, by prohibiting any clearing, burning or cultivation within a specified 'core' area and prohibiting clearing and burning in a 'buffer' zone, while still allowing continued small-scale cultivation, consistent with soil conservation conditions.

CLOSING ORDERS

The Board may issue 'closing orders', where in its opinion land is being or has become despoiled. Closing orders must be published in the Gazette. The order must specify the area to which it applies, and state that occupation and cultivation of land, depasturing of cattle and destruction of vegetation are prohibited within that area.⁷² Breach of a closing order is an offence, attracting a penalty of \$200 and/or six months imprisonment.

Since closing orders may only be used for land that is being – or has become – despoiled, it is unlikely that such orders will be useful for directly protecting areas of high conservation value. However, closing orders may be valuable in circumstances where landscape restoration is required to achieve conservation outcomes – for example, by improving catchment health or restoring connectivity between areas of high conservation value.

One closing order has been made in Ba Province, covering an area of more than 17,800 hectares.⁷³

⁶⁷ *Land Conservation and Improvement Act*, s.3

⁶⁸ *Land Conservation and Improvement Act*, s.5

⁶⁹ *Land Conservation and Improvement Act*, s.6

⁷⁰ *Land Conservation and Improvement Act*, s.7

⁷¹ *Land Conservation and Improvement Act*, s.7

⁷² *Land Conservation and Improvement Act*, s.8

⁷³ *Land Conservation and Improvement Act*, Orders 25 May 1959, 24 June 1960, Legal Notice No.98 of 1979.

Importantly, conservation and closing orders do not alter the tenure of land, and do not require the payment of rent, royalties or compensation.

Legal Mechanism	Key Features
<i>Conservation Orders</i>	<ul style="list-style-type: none"> The Land Conservation Board may issue conservation orders, where it considers expedient for conservation of land and water resources. s.7 Conservation orders may prohibit or regulate clearing, grazing, burning and the cultivation of crops. Failure to comply is an offence: \$200 fine and/or 6 months prison.
<i>Closing Orders</i>	<ul style="list-style-type: none"> The Land Conservation Board may issue closing orders to promote the restoration of land that is, or is becoming, badly degraded. s.8 Closing orders prohibit occupation, cultivation, grazing and clearing. Failure to comply is an offence: \$200 fine and/or 6 months prison.

WATER SUPPLY ACT

The catchment protection provisions of the *Water Supply Act* provide a mechanism for regulating activities which may lead to the pollution of drinking water supplies. The Minister may declare any area of land or water to be a protected catchment area by publishing a notice in the Gazette. Following this declaration, any act which causes pollution of water within the catchment area is prohibited.⁷⁴

Pollution is defined to include 'directly or indirectly adding to water any substance, liquid or gas which affects its taste, smell or purity, or renders or is likely to render it toxic or in any way harmful or dangerous to the health of humans'.⁷⁵ This definition is broad enough to cover extractive activities, such as logging and quarrying, which may affect the purity of water in the catchment area by increasing water turbidity and particulate matter.

Polluting water in a catchment area is an offence, with a maximum penalty of \$100.⁷⁶

Legal Mechanism	Key Features
<i>Catchment Area</i>	<ul style="list-style-type: none"> Minister may declare any area to be a water catchment area. s.4 Pollution of water within a catchment area is an offence. s.24

⁷⁴ *Water Supply Act (Cap 144)*, s.4.

⁷⁵ *Water Supply Act (Cap 144)*, s.4.

⁷⁶ *Water Supply Act (Cap 144)*, s.24.

BIRD AND GAME PROTECTION ACT (CAP 170)

The *Bird and Game Protection Act* prohibits the killing, wounding or taking of 'protected birds' and regulates the hunting of listed 'game' species. In particular, the Act provides that it is an offence:

- to wilfully kill, wound or take any protected bird;⁷⁷
- to take, remove, injure or destroy the nest or egg of a protected bird;⁷⁸
- to expose for sale or knowingly possess any protected bird or any part of such protected bird, or the nest or eggs of any protected bird;⁷⁹
- to export or attempt to export the skin, plumage, nest or eggs of any protected bird;⁸⁰
- to kill, wound or take, or attempt to kill, wound or take, any game, without a licence.⁸¹

'Protected bird' is defined to include all birds, except for:

- (a) tame or domesticated birds;
- (b) species listed in Schedule 1; and
- (c) 'game' species listed in Schedule 2.⁸²

Schedule 1 lists the following introduced bird species:

Malay Turtle Dove
Red-vented Bulbul
House (or Brown) Mynah
Field (or Grey) Mynah
Java Rice sparrow
Strawberry Finch
European Starling.

Schedule 2 lists the following 'game' species:

Fijian Wood Pigeon (Peal's Pigeon or Barking Pigeon)
Fruit (or Chili) Pigeon.

Schedules to the Act may be amended by an order of the Minister.⁸³ This allows the Minister to add or remove species from the list of excluded species – for example, by adding new invasive species – and to add or remove species from the list of game species.

The Permanent Secretary may authorise a person to take, kill or keep protected birds, or to take or remove their nests, for scientific or other purposes.⁸⁴

Licenses to kill or take game may be issued by a licensing officer upon payment of the prescribed fee.⁸⁵ Game must not be hunted during the closed season, from 14 June to 14 May.⁸⁶ Hunters must carry their licence with them when hunting, and must produce the licence to a game ranger on demand.⁸⁷

⁷⁷ *Bird and Game Protection Act*, s.3(a)

⁷⁸ *Bird and Game Protection Act*, s.3(b)

⁷⁹ *Bird and Game Protection Act*, s.3(c)

⁸⁰ *Bird and Game Protection Act*, s.3(d)

⁸¹ *Bird and Game Protection Act*, s.6

⁸² *Bird and Game Protection Act*, s.2

⁸³ *Bird and Game Protection Act*, s.13

⁸⁴ *Bird and Game Protection Act*, s.5

⁸⁵ *Bird and Game Protection Act*, s.9

⁸⁶ *Bird and Game Protection Act*, s.13

⁸⁷ *Bird and Game Protection Act*, s.9(3)

The Permanent Secretary may appoint game rangers to prevent and detect offences under the Act.⁸⁸ Game rangers are empowered to enter property, carry out searches and seize protected birds or game.⁸⁹ It is an offence to interfere with, obstruct or resist a game ranger in the execution of their duties.⁹⁰ The Minister may, by order, declare reserves for the protection of game species. It is an offence to hunt game species, or to take or destroy their nests or eggs, within a game reserve.⁹¹ There are currently six declared game reserves in Fiji, including Mount Korobaba and the islands of Makogai and Makodraga.

The maximum penalty for offences under the Act is \$50 and/or three months imprisonment.⁹²

In areas where hunting presents a threat to bird species, the appointment of a community member as game ranger (on a paid or voluntary basis) may provide a useful mechanism for enforcement of the Act. If community members are concerned about hunting pressure on local populations of game species, the establishment of a game reserve, together with the appointment of local game rangers, may be a practical response.

Legal Mechanism	Key Features	
Game Rangers	<ul style="list-style-type: none"> Permanent Secretary may appoint game rangers to detect and prevent unlawful killing of protected birds and game. 	s.10
Game Reserves	<ul style="list-style-type: none"> Minister may declare reserves for the protection of game species. 	s.11

ENDANGERED AND PROTECTED SPECIES ACT

The *Endangered and Protected Species Act 2002* regulates and controls the international trade, domestic trade, possession and transportation of listed endangered and protected species, including species listed under the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES).

The primary purpose of the Act is to establish a legal and administrative framework for controlling international trade in endangered species. Nonetheless, the Act does include provisions in relation to possession and domestic trade in endangered and protected species that are potentially relevant to the management of protected areas which have been established for the purpose of promoting the survival of endangered species.

In particular, a person 'who has in his or her possession or control, offers or exposes for sale or displays to the public' a protected species without lawful authority commits an offence and is liable on conviction to a fine of \$5,000 or two years imprisonment.⁹³

The Act defines 'protected species' to include (a) plant and animal species listed in Appendix I, Appendix II or Appendix III of CITES; and, (b) plant and animal species listed in Schedule 1 or Schedule 2 to the Act.⁹⁴

The Director of Environment may appoint any person as an authorised officer under the Act.⁹⁵ Authorised officers have powers of entry, seizure and detention, and it is an offence to hinder or obstruct an authorised officer in the performance of their duties.⁹⁶

If a person reports a breach of the Act, and that report leads to a conviction, the national CITES Management Authority may pay a reward to the person providing the report.⁹⁷

⁸⁸ *Bird and Game Protection Act*, s.10; *Birds and Game Protection (License Fee) Regulations*, r.10

⁸⁹ *Bird and Game Protection Act*, s.18

⁹⁰ *Bird and Game Protection Act*, s.10

⁹¹ *Bird and Game Protection Act*, s.11

⁹² *Bird and Game Protection Act*, s.15

⁹³ *Endangered and Protected Species Act 2002*, s.23(2).

⁹⁴ *Endangered and Protected Species Act 2002*, ss.2, 3.

⁹⁵ *Endangered and Protected Species Act 2002*, s.8.

⁹⁶ *Endangered and Protected Species Act 2002*, ss.25, 26, s3(5).

⁹⁷ *Endangered and Protected Species Act 2002*, ss.29.

In cases where a protected area has been established for the purpose of protecting endangered plant or animal species, the offence provisions of the Act may be used to prevent activities such as (a) hunting and trapping of listed endangered animals, and (b) harvesting (including logging) of listed endangered plants. The appointment of community members as authorised officers, and awareness raising about the availability of rewards for reporting breaches of the Act, may improve endangered species conservation within the protected area.

Legal Mechanism	Key Features	
<i>Authorised Officers</i>	<ul style="list-style-type: none"> Director of Environment may appoint authorised officers to protect endangered plant and animal species. 	s.8
<i>Rewards</i>	<ul style="list-style-type: none"> Management Authority may issue a reward for reports which lead to a conviction. 	s.29

ENVIRONMENTAL MANAGEMENT ACT 2005

The *Environment Management Act 2005* provides, amongst other things, for the environmental assessment and approval of development activities. The commencement of the Act, on 1 January 2008, represents a major milestone in the development of environmental law in Fiji. Environmental assessment of proposed development activities is an important tool for identifying and managing the impacts of development on protected areas.

The Act applies to ‘development activities or undertakings’, which are defined broadly to include:

any activity or undertaking likely to alter the physical nature of the land in any way, and includes the construction of buildings or works, the deposit of wastes or other material from outfalls, vessels or by other means, the removal of sand, coral, shells, natural vegetation, sea grass or other substances, dredging, filling, land reclamation, mining or drilling for minerals, but does not include fishing.⁹⁸

The Act requires the assessment of ‘development proposals’, defined as:

a proposal for a development activity or undertaking submitted to an approving authority for approval under any written law.⁹⁹

For this purpose, an ‘approving authority’ means:

a Ministry, department, statutory authority, local authority or person authorised under a written law to approve the proposal.¹⁰⁰

Under the Act, an approving authority must (a) examine every development proposal received by it; and (b) determine whether the proposed activity or undertaking is likely to cause significant environmental impacts.¹⁰¹

If the approving authority determines that the activity or undertaking will cause a significant environmental impact, the development proposal must be made subject to the environmental impact assessment (EIA) process required under the Act.¹⁰²

The Act sets out three broad classes of development proposal:

1. proposals that must be processed by the Department of Environment;¹⁰³
2. proposals that must be processed by the approving authority;¹⁰⁴ and
3. proposals that may not require environmental impact assessment.¹⁰⁵

⁹⁸ Section 2, *Environmental Management Act 2005*.

⁹⁹ Section 2, *Environmental Management Act 2005*.

¹⁰⁰ Section 2, *Environmental Management Act 2005*.

¹⁰¹ Section 27(1), *Environment Management Act 2005*.

¹⁰² Section 27(4), *Environment Management Act 2005*. See Part 4, Environmental Impact Assessment.

¹⁰³ Schedule 2, Part 1, *Environment Management Act 2005*.

¹⁰⁴ Schedule 2, Part 2, *Environment Management Act 2005*.

Proposals that must be assessed by the Department of Environment are listed in Schedule 2, including:

a proposal that could harm or destroy **designated or proposed protected areas** including, but not limited to, conservation areas, national parks, wildlife refuges, wildlife preserves, wildlife sanctuaries, mangrove conservation areas, forest reserves, fishing grounds (including reef fisheries), fish aggregation and spawning sites, fishing or gleaning areas, fish nursery areas, urban parks, recreational areas and any other category or area designated by a written law.¹⁰⁶ [emphasis added]

TEXT BOX – ENVIRONMENTAL ASSESSMENT OF FORESTRY ACTIVITIES

In order to illustrate the operation of the environment assessment provisions of the Act, it is useful to consider the case of commercial logging operations.

1. *Is a native forest logging operation a ‘development activity’?*

Yes. A native forest logging operation is ‘likely to alter the physical nature of the land’ and involves ‘the removal of ... native vegetation’.

2. *Is a proposal to undertake native forest logging a ‘development proposal’?*

Yes. Logging operations require a license from the Department of Forestry under the *Forest Decree*, therefore it falls within the definition of development proposal: ‘a proposal for a development activity or undertaking submitted to an approving authority for approval under a written law’.

3. *Which agency will be the ‘approving authority’?*

The Department of Forestry will be the approving authority, as it is ‘authorised under a written law to approve the proposal’.

4. *What are the responsibilities of the approving authority?*

The Department of Forestry is required to examine the proposal and determine whether the proposed logging activities are ‘likely to cause significant environmental or resource management impact’. The Department of Forestry is required to inform the Department of Environment of its decision. If the Department of Forestry decides that the logging activities will have a significant impact, the proposal must be made subject to the environment impact assessment process under the Act.

5. *Which agency will be responsible for processing and approving the proposal?*

The Department of Environment is responsible for processing and approving the proposal. Schedule 2 of the Act lists development proposals which require approval by the Department of Environment, including proposals for ‘commercial logging’.

OFFENCES, PENALTIES AND ORDERS

The *Environment Management Act* sets out a variety of offences, imposes strong penalties for key offences, and provides a flexible array of court orders to deter breaches and remedy environmental harm.¹⁰⁷

The penalties and remedies set out in the Act far exceed those available under existing natural resource and environmental legislation in Fiji. For example, a person who carries out a development activity which is subject to the EIA process without an approved EIA report commits an offence and is liable upon conviction to a fine not exceeding \$750,000 and/or a term of imprisonment not exceeding 10 years.¹⁰⁸

¹⁰⁵ Schedule 2, Part 3: construction of certain residential dwellings, construction of traditional structures and certain emergency actions.

¹⁰⁶ Schedule 2, Part 1, para (n), *Environment Management Act 2005*.

¹⁰⁷ Part 6, *Environment Management Act 2005*.

¹⁰⁸ Section 43(1), *Environment Management Act 2005*.

The court, when convicting a person for an offence under the Act, may make a variety of orders, including the following:

- prohibiting the person from doing any act or engaging in any activity or undertaking that may result in the continuation or repetition of the offence;
- ordering work to stop temporarily or permanently, on any activity or undertaking on a development proposal;
- ordering the restoration of the area on which any activity or undertaking on a development proposal is taking place, to as near to its original condition with the cost to be borne by the proponent;
- carrying out of improvement or remediation work on the area with the cost to be borne by the proponent;
- requiring the person to comply with any other condition the court considers appropriate in the circumstances.¹⁰⁹

If a person is convicted of an offence under the Act, the court may also order the convicted person to pay:

- compensation for loss or damage to property or income suffered as a result of the offence; or
- the cost of any preventative or remedial action reasonably taken as a result of the offence.¹¹⁰

If a person fails to comply with a court order relating to restoration, improvement or remedial of an area, the Department may undertake the restoration, improvement or remediation work, and the cost shall become a debt recoverable in court.¹¹¹

THIRD PARTY ENFORCEMENT

The Act provides that ‘Any person may institute an action in a court to compel any Ministry, department or statutory authority to perform any duty imposed on it by this Act or a Scheduled Act’.¹¹² The third party enforcement provisions of the Act provides a mechanism for compelling government agencies to fulfil their duties arising under environmental management legislation including, potentially, duties to protect the conservation values of protected areas.

Legal Mechanism	Key Features
<i>Environmental Assessment</i>	<ul style="list-style-type: none"> • Environmental assessment required for development proposals that are likely to have a significant impact on the environment. s.27 • Department of Environment must process any proposal that is likely to harm or destroy a designated or proposed protected area. s.27 • Failure to obtain an approval is a serious offence, which may result in substantial penalties and/or court orders, including remediation orders. s.43, 47

¹⁰⁹ Section 47(1), *Environment Management Act 2005*.

¹¹⁰ Section 47(2), *Environment Management Act 2005*.

¹¹¹ Section 47(3), *Environment Management Act 2005*.

¹¹² Section 54, *Environment Management Act 2005*. ‘Scheduled Act’ means any Act listed in Schedule 1 and includes any subsidiary legislation made under a Scheduled Act. The Acts listed in Schedule 1 are: *Factories Act (Cap. 99)*, *Fisheries Act (Cap. 158)*, *Forest Decree 1992*, *Ionizing Radiations Act (Cap. 102)*, *Litter Decree*, *Marine Spaces Act (Cap. 158A)*, *Mining Act (Cap. 18)*, *Ozone Depleting Substances Act 1998*, *Petroleum Act (Cap. 190)*, *Public Health Act (Cap. 111)*, *Rivers and Streams Act (Cap. 136)*, *Quarries Act (Cap. 147)*, *Sewerage Act (Cap. 128)*, *Town Planning Act (Cap. 139)*, *Water Supply Act (Cap. 144)*.

RECOMMENDATIONS

Concerted action by conservation organisations, government agencies and local communities is required if Fiji is to achieve the protected area objectives set out in its *National Biodiversity Strategy and Action Plan*.

The existing legal framework in Fiji offers a range of mechanisms with the potential to support the establishment and management of terrestrial protected areas. The mechanisms discussed in this paper are summarised in the table below. The conservation potential of these legal mechanisms is currently underutilised.

The absence of a coherent legal framework for protected areas presents challenges for the current generation of proposed protected areas. In particular, the existing legal mechanisms are not well-suited to the establishment and long-term management of large, co-managed conservation areas.

The Department of Environment has recognised this, and has invited the National Trust of Fiji and Conservation International to lead a consultative process for the development of national protected areas legislation for Fiji.

Accordingly, the authors recommend the following actions:

1. **[briefing session]**
2. **[consultation on priorities]**
3. **[training materials, awareness raising]**
4. **[non-legislative: templates for conservation covenants, conservation leases, conservation orders, etc]**
5. **[legislative: consultation, options paper, drafting instructions, draft legislation]**

SUMMARY OF EXISTING LEGAL MECHANISMS

<i>Native Land Trust Act</i>		
Native Lease	<ul style="list-style-type: none"> • Native Land Trust Board (NLTB) may issue leases over native land. • Native leases are written agreements with NLTB, granting rights to occupy and use land for a fixed period, in exchange for rent payments. • Native leases may be subject to terms and conditions. • Breach of terms and conditions may lead to termination of a lease. • Native leases may be used to establish conservation areas, by excluding activities such as logging, quarrying and tourism development. 	<p>ss.8-9</p> <p>s.10</p>
Native Reserves	<ul style="list-style-type: none"> • NLTB may set aside any area of native land as a native reserve. • NLTB may only issue leases and licenses over land within a native reserve in limited circumstances, and usually with the consent of landowners. • NLTB may only remove land from native reserve with landowner consent. • Native reserve may be used to support community-based conservation areas, by limiting the capacity of NLTB to issues leases over the land. 	<p>s.15</p> <p>s.16</p> <p>s.17</p>
<i>National Trust of Fiji Act</i>		
Conservation Covenant	<ul style="list-style-type: none"> • Voluntary agreement between landholder and the National Trust. • Legally binding restriction on use or development of land. • Binds landholder, lessees and subsequent owners. • Remains in force for a fixed term or in perpetuity. • Freehold, crown or native land (with NLTB approval). • Enforcement: civil proceedings by National Trust. 	s.10
Trust By-Laws	<ul style="list-style-type: none"> • Subsidiary legislation adopted by Council of the National Trust. • Legally binding rules on management and use of Trust properties. • Freehold, crown or native land owned or leased by the National Trust. • Council may create penalties for breach: \$400 and/or six months prison. • Criminal prosecution by police; civil enforcement by National Trust. 	s.18
National Heritage Register	<ul style="list-style-type: none"> • National register of nationally significant areas, buildings and artifacts. • Public recognition of natural or cultural heritage values. • No legal effect. 	s.20(1)
<i>Forest Decree</i>		
Forest Reserves	<ul style="list-style-type: none"> • Minister may declare, on the recommendation of the Forestry Board, declare an area of land to be a forest reserve. • Prohibition on unlicensed development activities, including logging, quarrying, grazing, burning, clearing, hunting and gathering. • Licensing officers may issue licenses for logging and other activities, subject to conditions. • Licenses may be suspended if conditions breached. • Penalties for breach: \$10,000 fine and/or 12 months prison. 	<p>s.6</p> <p>s.8</p> <p>s.9</p> <p>s.19</p> <p>s.29</p>

Nature Reserves	• Minister may declare, on the recommendation of the Forestry Board, declare an area of land to be a nature reserve.	s.6
	• Nature reserves managed for permanent preservation of the environment, including flora, fauna, soil and water.	s.7
	• Prohibition on unlicensed development activities, including logging, quarrying, grazing, burning, clearing, hunting and gathering.	s.8
	• Penalties for breach: \$10,000 fine and/or 12 months prison.	s.29

Land Conservation and Improvement Act

Conservation Orders	• The Land Conservation Board may issue conservation orders, where it considers expedient for conservation of land and water resources.	s.7
	• Conservation orders may prohibit or regulate clearing, grazing, burning and the cultivation of crops.	
	• Failure to comply is an offence: \$200 fine and/or 6 months prison.	
Closing Orders	• The Land Conservation Board may issue closing orders to promote the restoration of land that is, or is becoming, badly degraded.	s.8
	• Closing orders prohibit occupation, cultivation, grazing and clearing.	
	• Failure to comply is an offence: \$200 fine and/or 6 months prison.	

Water Supply Act

Catchment Area	• Minister may declare any area to be a water catchment area.	s.4
	• Pollution of water within a catchment area is an offence.	s.24

Birds and Game Protection Act

Game Rangers	• Permanent Secretary may appoint game rangers to detect and prevent unlawful killing of protected birds and game.	s.10
Game Reserves	• Minister may declare reserves for the protection of game species.	s.11

Endangered and Protected Species Act

Authorised Officers	• Director of Environment may appoint authorised officers to protect endangered plant and animal species.	s.8
Rewards	• Management Authority may issue a reward for reports which lead to a conviction.	s.29

Environmental Management Act

Environmental Assessment	• Environmental assessment required for development proposals that are likely to have a significant impact on the environment.	s.27
	• Department of Environment must process any proposal that is likely to harm or destroy a designated or proposed protected area.	s.27
	• Failure to obtain an approval is a serious offence, which may result in substantial penalties and/or court orders, including remediation orders.	s.43, 47