
REFORM OF LEASING REGIMES FOR CUSTOMARY LAND IN FIJI

Matthew Joseph Kennedy Dodd

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Glossary of Terms and Abbreviations

The Bainimarama government has changed many official terms in Fiji by decree. Nomenclature is a sensitive issue in Fiji, particularly the term “Fijian”.¹ This paper makes no normative claims about the appropriateness of those terms but rather aims for clarity by adopting the official legal terminology.

ALTA	Agricultural Landlord and Tenant Act.
CSR Co	Commonwealth Sugar Refining Company which became the Fiji Sugar Corporation in 1972 and is still an economic titan in Fiji.
FICAC	Fiji Independent Commission Against Corruption.
Fijian	Formerly used as a synonym of “native”, or <i>iTaukei</i> , this usage has been displaced by decree. ² It now refers to all citizens of the Republic of Fiji.
GCC	The Great Council of Chiefs (<i>Bose Levu Vakaturaga</i>), a representative body made up of chiefs, that existed from 1875-2012. It had a constitutional role in appointing Senators and the President of Fiji.
Indian	Descendants of Indian migrants to Fiji, most of whom were indentured labourers brought to work on colonial sugar plantations. Legally a person descended from the “indigenous inhabitants of the subcontinent of India”. ³
<i>iTaukei</i>	The indigenous people of Fiji. Legally, an <i>iTaukei</i> is a person descended from the “indigenous inhabitants of Fiji or any island in Melanesia, Micronesia or Polynesia”. ⁴ By decree, <i>iTaukei</i> replaces the word “native” in all laws. ⁵ This dissertation substitutes the word <i>iTaukei</i> for “native” except within direct quotations.
<i>kaivalagi</i>	Person from the land of foreigners, used to refer to European residents of Fiji.
LOU	Landowning Unit or proprietary unit, usually referring to a <i>mataqali</i> .
LUU	Land Use Unit, a division of the Department of Lands and Surveys within the Ministry of Lands and Mineral Resources.

¹ Wadan Narsey "Fijians, I-Taukei, Indians and Indo-Fijians - name changes by military decree" (7 February 2011) Pacific Media Centre - Te Amokura at AUT <<http://www.pmc.aut.ac.nz/articles/fijians-i-taukei-indians-and-indo-fijians-name-changes-military-decree>>.

² Fijian Affairs (Amendment) Decree 2010, No 31 (2 July 2010) *Republic of Fiji Islands Government Gazette* Vol 11, No 73.

³ Interpretation Act (Cap 7), s 2(7)(b).

⁴ At s 2(7)(a) as amended by Fijian Affairs (Amendment) Decree 2010, No 31 (2 July 2010) *Republic of Fiji Islands Government Gazette* Vol 11, No 73, s 4.

⁵ Native Land Trust (Amendment) Decree 2011, No 8 (1 March 2011) *Republic of Fiji Islands Government Gazette* Vol 12, No 19, s 4 and Native Lands (Amendment) Decree 2011, No 7 (1 March 2011) *Republic of Fiji Islands Government Gazette* Vol 12, No 18, s 4.

<i>matanitu</i>	The largest political unit in pre-Cession Fiji, still in existence as the three tribal confederacies. In modern Fijian, it also refers to the State or Republic.
<i>mataqali</i>	Clan or sub-tribe.
TLTB	iTaukei Land Trust Board, formerly the Native Land Trust Board.
<i>tokatoka</i>	Family unit.
<i>turaga</i>	Chief.
<i>vakavanua</i>	Custom of, or in the manner of, the land.
<i>vanua</i>	Land or homeland, with similar connotations to the Māori word <i>whenua</i> .
<i>yavusa</i>	Tribe.
\$	All figures are in Fiji Dollars unless otherwise stated. 1 FJD ≈ 0.70 NZD at the time of writing.

Guide to Fijian Pronunciation⁶

B is pronounced “mb” e.g. Bau (Mbau).

C is pronounced “th” e.g. Colo West (Tholo West).

D is pronounced “nd” e.g. Nadi (Nandi).

G is pronounced “ng” e.g. Nadroga (Nandronga).

Q is pronounced “g” as in “gung” when beginning a word, and “n...g” when within a word such as *mataqali* and *yaqona*: “matan...gali” and “yan...gona”.

Rotuma Excluded

The island of Rotuma is not covered by this work. Although Rotuma is part of the Republic of Fiji, it is geographically and ethnically distinct from “mainland Fiji” and enjoys considerable autonomy.⁷ Rotuman land law is unique⁸ and the TLTB has no powers there.⁹ Similarly, the Land Use Decree does not apply because Rotuman land is not “iTaukei land”¹⁰ as defined in the iTaukei Lands Act.¹¹

⁶ Keiran Barbalich "Sugar and Democracy in Fiji: The material foundations of post-colonial authoritarianism 1970-2005" (Master of Arts in Political Science Thesis, Victoria University of Wellington, 2009) at 9.

⁷ Aubrey Parke *Rotuma: Custom, Practice and Change: An Exploration of Customary Authorities, the Kinship System, Customary Land Tenure and Other Rights* (Coombs Academic Publishing, Canberra, 2003).

⁸ Rotuma Lands Act (Cap 138).

⁹ iTaukei Land Trust Act (Cap 134), s 25.

¹⁰ Land Use Decree 2010, No 36 (2 July 2010) *Republic of Fiji Islands Government Gazette* Vol 11, No 4, s 2.

¹¹ iTaukei Lands Act (Cap 133), s 23.

TABLE OF CONTENTS

Glossary of Terms and Abbreviations	ii
Guide to Fijian Pronunciation	iii
INTRODUCTION.....	1
CHAPTER ONE: The land system of Fiji.....	4
1.1 The evolution of customary tenure.....	4
1.2 Inalienability, demographics and politics.....	7
1.3 What is a leasing regime?.....	9
CHAPTER TWO: An evaluative framework	11
2.1 Why evaluate against customary objectives?.....	11
2.2 Fossilised custom: what standard to apply?	12
2.3 The fundamental objectives of customary landholding in Fiji.....	14
CHAPTER THREE: The iTaukei Land Trust Board	16
3.1 The genesis of the iTaukei Land Trust Board	16
3.2 Rights of LOUs and their members under the TLTB regime	16
3.2.1 Nominal transfer of control	17
3.2.2 iTaukei Reserves.....	17
3.2.3 Residual control and the duty of consultation	18
3.2.4 Right to equal distribution of rent.....	19
3.2.5 Lease conditions	21
3.2.6 Agricultural Landlord and Tenant Act (ALTA) leases	21
3.3 Accountability mechanisms	22
3.3.1 Management participation	23
3.3.2 Enforcement of LOU rights	24
3.4 Evaluation of key features against customary objectives.....	25
3.4.1 Paternalistic control	26
3.4.2 Lease duration and conditions	26
3.4.3 Questionable economic performance	27
3.4.4 Lack of accountability	28
3.5 Conclusion.....	29
CHAPTER 4: The Land Use Unit of the Ministry of Lands	30
4.1 Definition of the LUU regime.....	30

4.2 The mechanics of the LUU regime	30
4.2.1 Designation of land and relinquishment of control	30
4.2.2 Retention of ownership.....	31
4.2.3 Trustee appointment and duties	32
4.2.4 Head-lease and sub-lease.....	33
4.2.5 Lease conditions and rent	34
4.2.6 State ownership of improvements upon reversion	35
4.3 Enforcement and accountability.....	35
4.3.1 Trustee accountability.....	35
4.3.2 Enforcement of LOU rights against the State.....	35
4.4 The limits of leasehold	37
4.5 Evaluation of LUU regime against customary objectives.....	38
4.5.1 Designation repugnant to objective of inalienability.....	38
4.5.2 Accountability	39
4.5.3 Increased economic performance	39
4.6 Conclusion.....	40
CHAPTER FIVE: Conclusions	41
5.1 Both leasing regimes incompatible with customary objectives	41
5.2 Alternatives	42
5.2.1 Freehold inappropriate.....	42
5.2.2 Consent as the guarantor of security.....	43
5.2.3 Imposing statutory duties of consent and accountability.....	44
5.3 Constitutional change.....	45
5.4 Broader conclusions	46
APPENDIX I: Land Use Decree 2010 and Regulations	47
APPENDIX II: Bibliography	64

INTRODUCTION

In Fiji, nothing is more important than land. It is so important that conflict over proposed land law reform has been the cause of four coup d'états in Fiji since 1970. First as a colony of Britain, then as a fledgling democracy, Fiji has attempted to develop a land system that can meet the conflicting needs of a population that is ethnically divided approximately evenly between *iTaukei* and Indians. *iTaukei* hold 87% of the land in Fiji on inalienable customary title: for them, ownership of land is the core of their cultural identity and a guarantee of indigenous privilege. For Indians, the quest to obtain secure land rights is also a matter of identity: it goes to the heart of whether they belong, whether they are “Fijians” or not. The inability of successive Fijian administrations to fashion a sustainable compromise on land policy has polarised the Fijian people, perpetuated a cycle of political instability and retarded Fiji's economic development. No one initiative would make more of a difference to the future of Fiji than successful land reform.

Because *iTaukei* land cannot be sold, the solution to the problem of access to land for non-*iTaukei* has been leasing. Because control of *iTaukei* land is such a sensitive issue, the process for leasing it is heavily regulated. At the centre of the statutory leasing regime is the *iTaukei* Land Trust Board (TLTB), which, until 2010, held a monopoly on the power to lease *iTaukei* land. Since the most recent 2006 coup, Commodore Bainimarama's administration has, refreshingly, made a real effort to tackle Fiji's *bête noire* of land reform by implementing substantial reforms to the TLTB and introducing a competing leasing regime called the Land Use Unit. This dissertation will closely analyse the legal features of the two regimes, evaluate their efficacy against objectives derived from customary law and forecast what these changes might mean for the future of Fiji.

The methodology is simple. Chapter One sets the context. Chapter Two builds an evaluative framework based on customary objectives for land. Chapters Three and Four describe relevant features of each regime, apply the evaluative framework and draw conclusions as to the compatibility of each regime with customary objectives. Chapter Five extrapolates the implications of those conclusions and outlines some potential solutions to the problems identified.

Each chapter draws on a variety of contemporary sources to come to the conclusions reached. The nature of those sources deserves some comment. Fiji is not a democracy. Because Fiji has been under military rule for six years, there is substantial legal and self-imposed censorship in place. It has had a chilling effect on academic discourse and has virtually halted publication of legal scholarship in Fiji. This dissertation is partly an attempt to remedy that deficit, but due to that deficit it has to rely on non-traditional legal materials. What is available is often rough and ready. The reality of legislating by decree has been that legal documents are drafted broadly and contain contradictions and duplicated powers. Cases must be critically analysed for political interference by the Executive in order to have any precedent value. As a consequence this dissertation makes substantial use of online secondary sources that fill in the gaps.

Chapter One canvasses the fundamentals of Fiji's system of land tenure and the key historical, political and social parameters that affect Fijian law regarding the leasing of *iTaukei* land. It aims to illustrate the colonial roots of contemporary Fijian attitudes towards land and leasing. This background is necessary to contextualise reforms that are themselves a product of a military regime and Fiji's chequered history.

Chapter Two develops an evaluative framework derived from customary objectives in regards to landholding. It offers principled and pragmatic reasons for taking this evaluative standpoint while rejecting the notion that customary objectives are 'frozen' in time. It identifies broad competing principles of inalienability and sustenance as the fundamental objectives of landholding custom. It is the conflict between these two objectives which any leasing regime must balance in order to be effective.

The introduction of the competing Land Use Unit leasing regime means that *iTaukei* landowners now have a choice of regimes for leasing their land. For landowners and prospective lessees to make an informed choice about how they lease *iTaukei* land, they need to understand the precise legal implications of both the old and new leasing regimes.

Chapter Three fills a gap in existing scholarship by analysing the precise relationship between the Landowning Unit (LOU) and the TLTB in light of recent reforms. Evaluation against customary objectives demonstrates that despite duties of consultation, the TLTB regime offers landowners a level of control that is insufficient to prevent the loss of a

connection with the land and therefore does not adequately safeguard the objective of inalienability. The imbalance is exacerbated by the fact that the TLTB regime is relatively poor at delivering a steady income stream to compensate for that alienation.

Chapter Four rejects Prime Minister Bainimarama's assertion that "the only difference" between the TLTB and the LUU regimes is that "with the TLTB there is a 15% deduction from your lease payment". It will reveal that the procedure of designating land and head leasing it to the State severs the connection between *iTaukei* and *vanua* to an even greater extent than the TLTB regime because there is no residual customary control over areas designated and not yet leased. Worse still, extensive privative clauses make it near impossible for landowners to enforce their rights against the State. The much-heralded increased economic returns from leasing via the LUU are likely to be illusory in most circumstances because investors recognise the diminished value of unenforceable property rights.

Chapter 5 concludes that a workable leasing regime in Fiji is not impossible. It must balance the customary objectives of inalienability and economic sustenance while at the same time accommodating Indian needs for secure tenure, which would require substantial modification of the existing regimes. The constitutional implications of the LUU regime are considered as are the prospects of necessary reforms. The conclusion is that the future of leasing regimes will both affect and be affected by the turbulent confluence of Fiji's major political currents.

CHAPTER ONE: The land system of Fiji

The word ownership is misleading. A person does not really own the land: he owns rights in land. – Ron Crocombe¹²

Land is the fulcrum around which Fiji revolves. The majority of Fijians rely on the land for their livelihoods.¹³ It is a source of indigenous power, culture and identity. Land rights are the primary flashpoint of ethnic conflict between *iTaukei* and Indians and the root of the political instability that has led to multiple coups since independence. This is the background against which statutory frameworks for leasing customary land have been constructed. At the outset, it is vital to understand the historical and political context of land tenure in Fiji in order to evaluate reforms to the two leasing regimes for *iTaukei* land.

1.1 The evolution of customary tenure

Fiji was a British colony from 1874 when paramount chiefs signed the Deed of Cession,¹⁴ until independence in 1970.¹⁵ It became a republic in 1987.¹⁶ Prior to colonisation, all land in Fiji was held according to *iTaukei* custom. The freeform *tukutuku raraba* (tribal histories) recorded by various Native Land Commissions demonstrate that custom was far from homogenous.¹⁷ Tribes were frequently displaced, their composition was fluid, and hierarchy varied considerably by region.¹⁸ As a consequence, patterns of land tenure varied greatly and were far from rigid.

Generally, a *tokatoka* gained usufruct rights over an area of cultivation in return for furnishing their chief with first fruits. But there was little uniformity as to the social scope or

¹² Ron Crocombe *Improving Land Tenure: A survey of the problems of adapting customary land tenure systems to modern economic conditions in the region served by the South Pacific Commission* (South Pacific Commission, Noumea, 1968).

¹³ Biman Prasad and Clem Tisdell *Institutions, Economic Performance and Sustainable Development: A Case Study of the Fiji Islands* (Nova Science Publishers, New York, 2006) at 105.

¹⁴ Deed of Cession of Fiji to Great Britain (10 October 1874).

¹⁵ Fiji Independence Act 1970 (UK), Fiji Independence Act (Cap 1) (Fiji) and Fiji Independence Order 1970 (6 October 1970) *Fiji Royal Gazette Supplement*.

¹⁶ See FM Brookfield "The Fiji revolutions of 1987" [1988] NZLJ 250 for a description of the multi-stage republican process, culminating in the Republic of Fiji Decree 1987, No 8 (7 October 1987) *Fiji Gazette* Vol 1, No 5.

¹⁷ Peter France *The Charter of the Land: Custom and Colonization in Fiji* (Oxford University Press, Melbourne, 1969) at 10.

¹⁸ At 13-14.

rights of the primary landholding unit.¹⁹ Geographic boundaries were not exclusive: multiple individuals from different social units could all have rights over contiguous blocks of land.²⁰ Land was commonly alienated by gift or exchange of personal rights to land.²¹ Frequently, sales would be authorised solely by the highest chief, with no consultation of the social unit that actually occupied that land.²² Some grants of land were absolute alienations to an individual, others were usufruct rights that were either life interests or passed to male heirs.²³

Colonisation had a powerful impact on customary tenure as diverse customs were marshalled into a rigid orthodoxy by a series of Governors. The first step in this process was the creation of the Native Lands Commission in 1880.²⁴ Recording the actual occupiers of native land proved too cumbersome, so a system that assigned exclusive possession of contiguous blocks of land to social groupings or “land owning units” (LOU) was devised. The Commission introduced the *Vola ni Kawa Bula* (VKB) to record the hierarchy of relationships and members of every social unit in Fiji. Despite the fact that most *iTaukei* were “incapable of classifying themselves” into homogenous social units,²⁵ and even chiefs vehemently disagreed on which social group constituted the primary LOU,²⁶ by 1915 the Commission had produced a “definitive [model] of Fijian social structure” that persists to the present day.²⁷ For reasons of political expedience and parsimony, it transformed the *mataqali* from the social unit “most remote from the exercise of land rights... into the legally registered owner”.²⁸

¹⁹ At 144-145.

²⁰ At 144, 146.

²¹ At 120.

²² At 121.

²³ France, above n 17, at 18.

²⁴ Native Lands Ordinance, No 21 (1880), s 5.

²⁵ France, above n 17, at 171.

²⁶ Peter France "The founding of an orthodoxy: Sir Arthur Gordon and the doctrine of the Fijian way of life" (1968) 77(1) Journal of the Polynesian Society 6 at 16-17.

²⁷ France, above n 17, at 167.

²⁸ At 173.

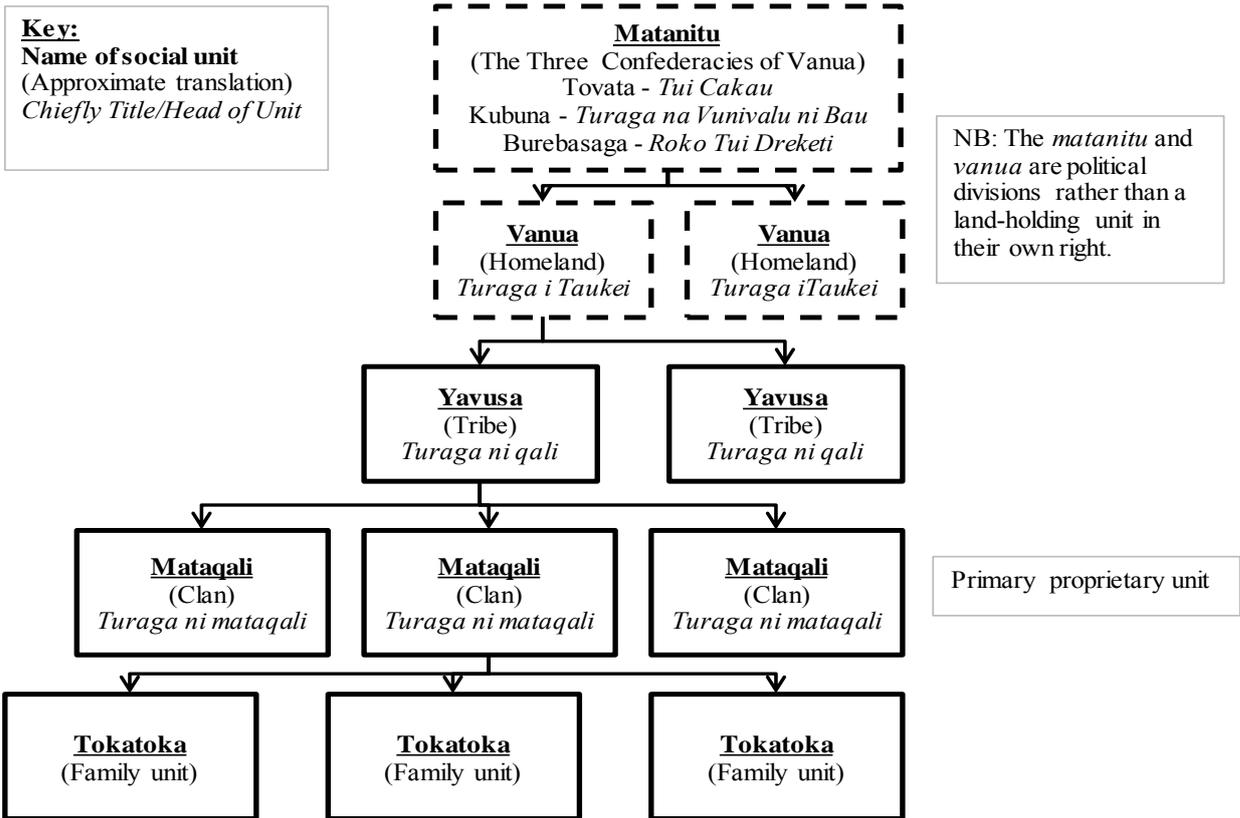


Figure 1: Diagram of orthodox Fijian social structure post-1915²⁹

By 1940, the modern system of *iTaukei* tenure had emerged. The VKB was largely complete, having been filled by evidence gathered on field visits. Almost all *iTaukei* land boundaries had been (very roughly) surveyed and recorded on *iTaukei* Lands Commission maps that covered 90% of the country.³⁰ The Register of *iTaukei* Lands completed the system by cross-referencing the name of the landowning unit from the VKB with a map reference and lot number.³¹ *Mataqali* were “legally entrenched” as the central proprietary unit, although there are also *yavusa* and *tokatoka* that are LOUs in their own right.³² Today the majority of LOUs

²⁹ Compiled from France, above n 17 at 166; Cyril Belshaw *Under the Ivi Tree: Society and Economic Growth in Rural Fiji* (Routledge & Kegan Paul, London, 1964) at 181-186; Ross Himona "Strategic Marriages" (2 August 2000) Te Karere Ipurangi - Maori News Online <<http://maorinews.com/karere/fiji/stratmarr.htm>>; *Kanakana and Others v State* [2010] FJHC 563 at [8]; and *iTaukei Land Trust (Leases and Licences) Regulations* (Cap 134), s 11(1).

³⁰ B Dutt and Mosese Volavola *History of Land Surveying in Fiji* (Ministry of Lands and Minerals, Suva, 1977) at 33.

³¹ *Land Tenure Systems in Fiji* (Department of Lands and Surveys, Ministry of Lands and Mineral Resources, Suva, 2004) at 2-3.

³² *Waisake Ratu No 2 & Another v Native Land Development Corporation & Native Land Trust Board* [1987] FJSC 9, [1991] 37 FLR 146 at 151.

are *mataqali* with an average of around 60 members, although this varies greatly by province.³³

Although *iTaukei* land is nominally held “according to... custom”³⁴, in practice *iTaukei* title is a hybrid creature that is defined as much by statute as by custom. The Register of *iTaukei* Lands is determinative of which LOU owns a contiguous plot of land and its boundaries,³⁵ as is the VKB in regards to membership and chieftainship of that LOU.³⁶ The process of determining what land to register must be executed in accordance with custom, but it is the *iTaukei* Lands Commission - a statutory body – that is the final arbiter of customary entitlement.³⁷ This demonstrates that contrary to the popular belief that it reflects ancient tradition, modern *iTaukei* tenure is a “hybrid product of acculturation”.³⁸

1.2 Inalienability, demographics and politics

The key difference between *iTaukei* land and other types of land tenure is that it is inalienable (except to the Crown). It cannot be sold, transferred, mortgaged or otherwise encumbered.³⁹ The rule against alienation is not customary *per se*. Rather, France points out that “the permanent alienation of land is a common feature of Fijian culture”, and that the power of alienation rested solely with the chief.⁴⁰ It was a bulwark introduced by statute to preserve *vakavanua* (the customary way of life) and prevent widespread native dispossession of land as had occurred in the nearby colony of New Zealand.⁴¹ It was designed to “insulate Fijian tradition against the disintegrative effects of a market in land and labour”.⁴² Inadequate colonial funding also encouraged the preservation of customary power structures through

³³ Mean calculated from data in *Course Materials for G4011 Issues in Fijian Agriculture: History of the Native Land Trust Board* (Fiji National University, Suva, 2006) at 14 and *Fiji Facts and Figures as at 1st July 2008* (Fiji Islands Bureau of Statistics, Suva, 2008) at 6.

³⁴ *iTaukei Lands Act* (Cap 133), s 3.

³⁵ *Waisake Ratu No 2 & Another v Native Land Development Corporation & Native Land Trust Board* at 155.

³⁶ *Ah Koy v Registration Officer for the Suva City Fijian Urban Constituency* [1993] FJCA 44, [1993] 39 FLR 191.

³⁷ *iTaukei Lands Act* (Cap 133), s 6(1).

³⁸ France, above n 17, at xxiii. See also discussion of interaction between statute and customary law by Tuivaga CJ in *Vosailagi v Native Lands Commission* [1989] FJHC 53, [1989] 35 FLR 116.

³⁹ *iTaukei Land Trust Act* (Cap 134), s 5(1).

⁴⁰ France, above n 17, at 52 – 54.

⁴¹ At 110 and 114.

⁴² Margaret Jolly "Custom and the Way of the Land: Past and Present in Vanuatu and Fiji" (1992) 63(4) *Oceania* 330 at 338.

which frugal “indirect rule” could be exercised.⁴³ Apart from a brief period from 1905 – 1908,⁴⁴ the rule has remained in force since 1880.

The figures below highlight the sharp ethnic divide in Fiji and the vast extent of *iTaukei* landholding.

Population	1996	2007
<i>iTaukei</i>	393,575 (50.8%)	475,739 (56.8%)
Indian	338,818 (43.7%)	313,798 (37.5%)
Other	42,648 (5.5%)	47,734 (5.7%)
Total	775,077	837,271

Figure 2: Fiji Census population demographics⁴⁵

Type of Tenure	Freehold	State Land	<i>iTaukei</i> Land	Total
Percentage	8%	5%	87%	100%

Figure 3: Land tenure by area in Fiji in 2006⁴⁶

The rule against alienation of *iTaukei* land has had a huge impact on the political development of Fiji. The centrality of land and ethnicity in Fijian politics means land reform is fraught with difficulty and provokes bitter reactions. A quick survey of the relevant statistics reveals why: *iTaukei* land makes up 87% of the area of Fiji. But 49% of the population are of Indian or another non-indigenous ethnicity. Because they cannot belong to a land-owning *mataqali* and *iTaukei* land cannot be sold, their access to land is limited. This is a fundamental source of political instability and conflict between Indians and *iTaukei*. The 1977, 1987 and 2000 coups were all launched by *iTaukei* elites primarily to prevent newly elected Indo-Fijian led governments from pursuing land reforms that threatened their privileged position.⁴⁷ As a consequence, thousands of ALTA leases to Indo-Fijian cane farmers expired in the early 2000s and were not renewed.⁴⁸ Faced with a landless future, the

⁴³ France, above n 17, at xiii.

⁴⁴ At 160 – 161.

⁴⁵ Compiled from *Fiji Facts and Figures*, above n 33, at 6.

⁴⁶ Statistics vary considerably because Schedule A & B Crown land (*iTaukei* land which no *mataqali* claimed) was converted to *iTaukei* land in 2002. Previously *iTaukei* land made up 83% of the total area of Fiji. See Prasad and Tisdell, above n 13, at 80 – 82.

⁴⁷ Barbalich, above n 6.

⁴⁸ At 110 – 111.

Indian population has dwindled rapidly due to emigration.⁴⁹ Fiji is, at the time of writing, again under military rule following the 2006 coup which brought Commodore Voreqe “Frank” Bainimarama to power. The motives behind this 2006 coup were essentially opposite to its predecessors: to undermine the privileged position of *iTaukei* elites through land reform, amongst other things.⁵⁰ The leasing reforms that are the subject of this dissertation are a product of this political struggle.

1.3 What is a leasing regime?

A leasing regime is a system of entities and regulations that act as a guarantor of Common Law property rights over land held according to custom. They are designed to facilitate leasing as a compromise method of providing access to customary land without (permanently) alienating it. In Fiji there are two leasing regimes that form a layer of certainty at the interface between common and customary law: the TLTB and the LUU. The role they perform raises interesting questions about the interaction between Fiji’s two systems of law.

Leasehold is a Common Law concept: it is an estate in land carved out of a larger estate for a fixed period of time. The key precondition for a lease is that the owner must be able to grant a right of exclusive possession over a piece of land.⁵¹ A lessee’s rights are only as good as the lessor’s underlying title. Prior to 1915 *iTaukei* land was held according to customary law, with no statutory gloss of registration. According to customary law, most *iTaukei* occupiers of land did not exercise exclusive possession over a block of land. Rather, the power to exclude others and alienate land was generally reserved for high-ranking chiefs.⁵² They were perfectly entitled to translate their customary rights into an enforceable Common Law lease. However the precise identity of the chief in which ultimate title vested was often contested, as were boundaries. A *kaivalagi* lessee unfamiliar in the ways of custom had no guarantee that an *iTaukei* lessor’s underlying interest in land was sufficient to grant exclusive possession. What he received might be a *vakavanua* customary licence, but not a lease enforceable at Common Law.

⁴⁹ Narsey, above n 1.

⁵⁰ Brij Lal "Anxiety, uncertainty and fear in our land: Fiji's road to military coup, 2006" in Stewart Firth, Jon Fraenkel and Brij Lal (eds) *The 2006 military takeover in Fiji: a coup to end all coups?* (ANU E Press, Canberra, 2009) at 32 – 33.

⁵¹ *Radaich v Smith* [1959] HCA 45, (1959) 101 CLR 209 at 222, approved in *Street v Mountford* [1985] UKHL 4, [1985] 2 WLR 877.

⁵² R Gerard Ward "Land, Law and Custom: Diverging Realities in Fiji" in R Gerard Ward and Elizabeth Kingdon (eds) *Land, Custom and Practice in the South Pacific* (Cambridge University Press, Melbourne, 1995) at 207.

The introduction of a system of registration eased these difficulties as statute registered individual *mataqali* as having exclusive possession of a contiguous block of land. But lessees in the 1920s and 1930s were still uneasy because in many cases surveyed lease boundaries were either non-existent or inaccurate, sometimes to the scale of hundreds of meters causing “endless boundary disputes”.⁵³ *Mataqali* were also difficult to negotiate with: leases were usually short and not renewable. The solution introduced in 1940 was the TLTB. It monopolised the leasing of *iTaukei* land, and formed a regulatory structure that assumed the burden of negotiating with customary owners of land. A series of statutory protections effectively guaranteed indefeasible leasehold to lessors.⁵⁴ When this dissertation discusses leasing regimes, it is the TLTB and its newly introduced competitor the Land Use Unit that are being referred to.

⁵³ Dutt and Volavola, above n 30, at 23-24 and 33.

⁵⁴ All dealings not authorised by the TLTB are void: s 5(2) *iTaukei Land Trust Act* (Cap 134). The TLTB is to be sued in place of the landowners in disputes: s 23(1). Once registered, a lease granted by the TLTB is deemed to be indefeasible under s 38 of the *Land Transfer Act* (Cap 131): s 10(2).

CHAPTER TWO: An evaluative framework

This chapter builds an evaluative framework for assessing the appropriateness of reforms to the TLTB and the introduction of the LUU regime. It examines why customary objectives are paramount in this process and seeks to expose the core tensions which any leasing regime must reconcile in order to succeed.

2.1 Why evaluate against customary objectives?

The object of the Land Use Decree 2010 is to utilise *iTaukei* land “in the best interest of native land owners”.⁵⁵ The object of the TLTB is also to administer land “for the benefit of the *iTaukei* owners”.⁵⁶ Both regimes explicitly aim to uphold the interests of the customary owners. But that really begs the question: what are the interests of customary landowners? Their main interest seems to be in having a well-regulated mechanism for leasing lands of their choice and deriving income from it, while retaining underlying customary title and therefore their cultural connection with the land.

The 1997 Constitution also highlights the paramount status of customary objectives in regards to land policy. Section six acknowledged “the ownership of Fijian land according to Fijian custom” as well as the rights of *iTaukei* to “separate administrative systems”.⁵⁷ Although the Fiji courts now recognise the Constitution to have been extinguished by decree, rendering the rights it contains unenforceable,⁵⁸ the fact that these objectives were seen as important enough to constitutionalise illustrates the overriding importance to the people of Fiji of ensuring land policy upholds customary objectives.

There are also pragmatic reasons for evaluating land regimes against customary objectives. Most scholars agree that the customary content of contemporary *iTaukei* tenure is a “snapshot” frozen in time taken through a colonial lens,⁵⁹ but political support for the system

⁵⁵ Land Use Decree 2010, No 36 (2 July 2010) *Republic of Fiji Islands Government Gazette* Vol 11, No 4, s 3(1).

⁵⁶ *iTaukei Land Trust Act* (Cap 134), s 4(1).

⁵⁷ Constitution of Fiji 1997, s 6.

⁵⁸ *Kanakana and Others v State* at [36].

⁵⁹ John Overton "Land Tenure and Cash Cropping in Fiji" in Ron Crocombe and Malama Meleisea (eds) *Land Issues in the Pacific* (Macmillan Brown Centre for Pacific Studies, University of Canterbury and Institute of Pacific Studies University of the South Pacific, Christchurch and Suva, 1994) at 118.

as it stands “depends less on its historical accuracy than on its social significance”.⁶⁰ The inalienability of *iTaukei* land and preservation of the land system is hugely symbolic in Fiji’s divided society. *iTaukei* dominance has long been entrenched by legally mandated control over both land and the political system.⁶¹ But the relative economic success of Indians and the fact they (briefly) outnumbered *iTaukei* challenges that dominance and provokes fears of “indianization” that would reverse the balance of privilege and power.⁶² The immediate focus of the Indian-dominated Chaudhry government on land reform (Indian tenant farmers were offered \$28,000 compensation if their ALTA leases were not renewed) after the 1999 election merely confirmed these suspicions.⁶³ It has therefore been “ineradicably absorbed into the Fijian national consciousness” that control of the land is the last defence against the destruction of the *iTaukei* way of life.⁶⁴ Lasaqa explains the dominant *iTaukei* nationalist perception of land reform as “hitting at the heart of Fijian existence... a sensitive area close to the Fijian’s soul”.⁶⁵ Any leasing regime that is wholly incompatible with customary concerns is unlikely to be effective or viable. As Crosetto points out, successful land policy in Fiji demands “gradually dovetailing current needs and practice with tradition”.⁶⁶ This is a further reason to evaluate leasing regimes against customary objectives.

2.2 Fossilised custom: what standard to apply?

One of the most fundamental features of customary law is its flexibility. Like all laws, customary laws need to adapt and reform to suit changing societal circumstances. The flexibility afforded by the fact that amendment is as simple as a pattern of acquiescence is of great value. However, in regards to land policy, many of the customary elements of *iTaukei* land tenure have been codified. That requires that custom be fossilised: frozen in time, stripped of detail, rationalised and recorded for posterity. But of course customary law continues to adapt and invent solutions that circumvent the rigidities of statute. For example, *vakavanua* leases of garden land to neighbouring *mataqali* are commonplace,⁶⁷ and tolerated

⁶⁰ France, above n 17 at 174.

⁶¹ *Waisake Ratu No 2 & Another v Native Land Development Corporation & Native Land Trust Board* at 184.

⁶² Isireli Lasaqa *The Fijian People: Before and After Independence* (Australian National University Press, Canberra, 1984) at 185.

⁶³ John Crosetto "The Heart of Fiji's Land Tenure Conflict: The Law of Tradition and Vakavanua, the Customary "Way of the Land"" (2005) 14 Pacific Rim Law & Policy Journal at footnote 3.

⁶⁴ France, above n 17, at 174.

⁶⁵ Lasaqa, above n 62, at 189.

⁶⁶ Crosetto, above n 63, at 89.

⁶⁷ At 95.

as part of the residual customary jurisdiction over intra-LOU land allocation,⁶⁸ despite being technically prohibited as a “licence...[not] executed under the seal of the Board”.⁶⁹

This raises the question of identification: how can we identify the customary norms against which evaluation shall take place? Are they the norms of the pre-colonial order which, despite their firm historical authenticity, do not enjoy cultural currency? Or are they contemporary custom, the fossilised product of codification, Christianity and colonialism that treats inalienability of land as a “sacred maxim”, rather than as a pragmatic principle, yet openly flouts the restrictions it imposes where it does not suit?

Such a question presents a false dichotomy. The fundamental objectives of custom are not fixed at any one point in time. As Walter puts it, it is a fallacy to claim that “traditional society is not amenable to innovative change, that it possesses no inherent adaptive qualities”.⁷⁰ Customary law is inherently more indeterminate than the Common Law system. It makes no claim to formalism with clearly defined “rules of recognition”, nor does it apply *stare decisis*. Instead, diverse and apparently contradictory customary laws are valued because they represent the application of underlying policy objectives to the circumstances at hand.⁷¹ For example, in 1879, despite numerous pronouncements to the contrary, the Council of Chiefs declared “one general [land] custom for Fiji” and that no *mataqali* was entitled to alienate land.⁷² Wary of the looming spectre of the Land Claims Commission which would determine the validity of pre-colonial land purchases, the chiefs recognised the need to give greater weight to the fundamental objective of retaining a connection with the land and changed the law accordingly.⁷³ It was in essence a utilitarian response in the face of changing social conditions.

A degree of imprecision around fundamental objectives builds systemic resilience by giving a sense of legal continuity at times of social change. When the Tongan chief Ma’afu conquered

⁶⁸ *Waisake Ratu No 2 & Another v Native Land Development Corporation & Native Land Trust Board* at 162 – 163.

⁶⁹ iTaukei Land Trust Act (Cap 134), s 7 and s 8(2).

⁷⁰ Michael Walter "The Conflict of the Traditional and the Traditionalised: An Analysis of Fijian Land Tenure" (1978) 87(2) *The Journal of the Polynesian Society* 89 at 89.

⁷¹ Spike Boydell and Garrick Small "The Emerging Need for Regional Property Solutions - a Pacific Perspective" (Paper presented at the Pacific Rim Real Estate Society Ninth Annual Conference, Brisbane, 2003) at 8.

⁷² France, above n 17, at 113.

⁷³ At 113.

the Lau Islands in eastern Fiji in the mid-1800s, he introduced the Tongan system of individualised land tenure and society reorganised itself accordingly.⁷⁴ The “revolution in tenurial practices” was “met with general approval” because *iTaukei* were aware that “changing conditions demanded modifications in traditional practices”.⁷⁵ No-one argues that the system in Lau is not customary just because it changed or is a regional anomaly. Pre-colonisation, *iTaukei* social organisation frequently had to adapt to regional warfare and migration.⁷⁶ From a utilitarian perspective, it made sense for such people to adopt a customary system of law (particularly land law) that could quickly rebalance competing fundamental objectives to produce a desired outcome. The consequence is that the fundamental purposes of customary landholding can only be distilled as broad principles deduced from their consistent application over time.

2.3 The fundamental objectives of customary landholding in Fiji

Increasingly [iTaukei] are aware of this confusing incompatibility between their love of their Custom and their desire for material advance, and between the official objectives of Tradition and Development.

- OHK Spate (1960)⁷⁷

Fundamental customary objectives can be deduced from consistent values that are upheld and strived for regardless of the exact method of social organisation. In Fiji, the two customary objectives that are perpetually relevant and in conflict are the preservation of *vakavanua*, the customary cultural identity of *iTaukei* with land at its fulcrum, and the need for that same *vanua* to economically sustain the landowners.

The following quote highlights the centrality of land to *iTaukei* cultural identity:

For the Fijian community, their land is an extension of themselves. It is part of the Fijian soul, and the concept of the "vanua" - the land and the people - lies at the heart of Fijian identity. Land represents life and sustenance, race and culture, and Fijians cling fiercely to their ownership of it.

- Ratu Mosese Volavola (1995)⁷⁸

⁷⁴ At 84-85.

⁷⁵ At 90-91.

⁷⁶ OHK Spate *The Fijian People: Economic Problems and Prospects* (Government Press, Suva, 1959) at [57].

⁷⁷ OHK Spate "Under Two Laws: The Fijian Dilemma" (1960) 19(2) *Meanjin* 166 at 169-170.

⁷⁸ Mosese Volavola "The Native Land Trust Board of Fiji" in Ron Crocombe (ed) *Customary Land Tenure and Sustainable Development: Complementarity or Conflict?* (South Pacific Commission, Noumea, 1995) at 49.

Land is not just a layer of dirt within boundary markers. Instead land tenure is a reciprocal relationship. Land is the guarantor of life and defines the human relationships of those related to it. In return, *iTaukei* become guardians of the land and preserve it for those past and future who might continue that relationship. Today that connection is central to *iTaukei* political identity: land retention is a declaration of defiance in the face of fears that the *iTaukei* will become a “nonentity in his own country” through assimilation, urbanisation and culturally neutral sources of authority.⁷⁹ As an evaluative term, this dissertation will use “inalienability” as convenient shorthand for this conglomerate of customary values.

On the other hand, Ratu Sir Lala Sukuna reminds us that this connection with the land is a functional one and that the land must sustain the people:

It is thoroughly understood that the control of our lands is in our hands, but the owner of property has an important duty to perform... It is the bounden duty of land owners to utilise what they possess for the benefit of all.
- Ratu Sir Lala Sukuna (1936)⁸⁰

After all, where the land could no longer sustain the people, the connection would be willingly severed by migration. Conversely, where the land has potential to sustain, it should be used to do so. It was this fundamental objective that prompted the creation of leasing regimes. Idle land is functionless (although land that appears idle may in fact be in use) and urbanisation, population growth, immigration and the introduction of a market economy means there is pressure to alienate land. As an evaluative standard, this customary objective will be referred to as the goal of sustenance.

As Kamikamica and Davey point out, leasing regimes in Fiji should be judged “on an empirical basis” because there is nothing “inherently immutable” about orthodox land policy. The only method of determining their “effectiveness... acceptability... and their practicality” is to examine how they strike a compromise between inalienability and sustenance.⁸¹ That is the subject matter of the next two chapters.

⁷⁹ Lasaqa, above n 62, at 189.

⁸⁰ Brij Lal *Fiji: British documents on the end of empire, Series B, Volume 10* (Stationery Office Books, London, 2006) at 162.

⁸¹ Josefata Kamikamica and Tim Davey "Trust on Trial - The Development of the Customary Land Trust Concept in Fiji" in Yash Ghai (ed) *Law, Government and Politics in the Pacific Island States* (University of the South Pacific, Suva, 1988) at 285.

CHAPTER THREE: The iTaukei Land Trust Board

3.1 The genesis of the iTaukei Land Trust Board

The iTaukei Land Trust Board was created by the Native Land Trust Ordinance of 1940.⁸² It was set up to streamline the process of leasing *iTaukei* land. Prior to 1940, lease arrangements were private matters between landowners and lessees, subject only to approval by the Director of Lands.⁸³ This arrangement was deemed to be insufficiently certain for lessees. The boundaries and membership of a landowning unit were difficult to discern for the lay lessor: neither the VKB nor the Native Lands Sheets were easily accessible. The CSR Company, the mainstay of the Fijian economy, was also influential in demanding longer and more secure leaseholds.⁸⁴ They could only justify substantial investments in transport (sugar cane must be crushed within seven days of cutting) and milling infrastructure if they could rely on a consistent cane harvest.⁸⁵ Short-term leases (some as short as one year) that often were not renewed produced unacceptable fluctuations in cane production. The solution, championed by Ratu Sukuna, drew inspiration from a 1931 ordinance from Ghana that transferred “management, control and administration of native lands” to the state.⁸⁶ He secured the momentous agreement of the Council of Chiefs in 1936 that it was in the “best interests” of *iTaukei* to surrender control of all land not currently required for their maintenance and support “to the Government to lease on behalf of the Fijians”.⁸⁷ Thus was born an institution to “incorporate the principle of communal tenure alongside the demands of capitalist agriculture”.⁸⁸

3.2 Rights of LOUs and their members under the TLTB regime

In order to evaluate the compatibility of the TLTB regime as it stands with customary objectives, we need to examine the legal relationship between the Board’s powers and the rights and obligations of the customary *landowners*.

⁸² Native Land Trust Ordinance, No 12 (1940).

⁸³ Kamikamica and Davey, above n 81, at 287.

⁸⁴ Josefata Kamikamica "Fiji: Making native land productive" in Ron Crocombe (ed) *Land Tenure in the Pacific* (University of the South Pacific, Suva, 1987) at 229.

⁸⁵ Maria Kårëback and Victoria Nilsson "Property Rights (Vanua) in the Fiji Islands: The land issue and how it affects the country's sugar cane industry" (Bachelor of Science in Economics Thesis, Luleå University of Technology, 2005) at 30.

⁸⁶ Ward, above n 52 at 220. See the Land and Native Rights Ordinance No 1 (1927) (Colony of the Gold Coast) referenced in Piet Konings *The State and Rural Class Formation in Ghana: a comparative analysis* (Kegan Paul, London, 1986).

⁸⁷ Kamikamica, above n 84, at 230.

⁸⁸ Overton, above n 59, at 123.

3.2.1 Nominal transfer of control

“The control of all native land shall be vested in the Board and all such land shall be administered by the Board for the benefit of the Fijian owners”

– s 4(1) iTaukei Land Trust Act

This section of the iTaukei Land Trust Act contains the core undertaking of the TLTB regime. In *Waisake Ratu* (HC) Cullinan J held that the effect of this provision is that legal ownership of the land remains with landowning units, but control of native land is transferred to and vested in the TLTB.⁸⁹ This approach was followed by the Court of Appeal in *Nagata* (CA).⁹⁰ There are, however, three substantial limits on what might otherwise appear to be an absolute transfer of powers: the reserves system, residual customary control in areas not leased, and the duty to consult landowners before leasing. These limits will be examined in more detail, but it should be borne in mind that landowners continue to exercise a significant degree of control over their lands despite nominally transferring control to the TLTB.

The core power granted to the TLTB is that it may lease *iTaukei* land as it sees fit, supplanting the right of LOUs to do so. Unless the TLTB consents, all purported transfers of an interest in *iTaukei* land are void.⁹¹ Leases and licences of *iTaukei* land can only be granted in accordance with the Act,⁹² which exclusively empowers the TLTB to do so.⁹³

3.2.2 iTaukei Reserves

The most obvious demonstration that the TLTB’s power of control is not absolute is the existence of a statutory scheme of native reserves.⁹⁴ Reserves were designed to ensure LOUs retain land sufficient for the maintenance and support of their members. Over a period of 26 years from 1940, around 35% of *iTaukei* land was classified as reserve by the independent Reserves Commission.⁹⁵ Land placed in reserve can be leased only after the TLTB obtains

⁸⁹ *Waisake Ratu No 2 & Another v Native Land Development Corporation & Native Land Trust Board* at 161. NB: This case was decided in what became known as the High Court after 1987 and should not be confused with the post-1987 Supreme Court which is Fiji’s highest appellate body.

⁹⁰ *Native Land Trust Board v Nagata* [1993] FJCA 47, [1993] 39 FLR 148 at 163.

⁹¹ iTaukei Land Trust Act (Cap 134) s 5(2).

⁹² At s 7.

⁹³ At s 8(2).

⁹⁴ At s 15.

⁹⁵ Ponipate Rokolekutu "The politicisation of land and the paradox of indigenous ownership: the case of Fiji" (Master of Arts in Political Science Thesis, University of Hawai'i, 2007) at 62.

the consent of the LOU and only to other *iTaukei*.⁹⁶ Land can only be de-reserved if 60% of the LOU consents and shows “good cause” to do so.⁹⁷ LOUs effectively retain full control over *iTaukei* reserve land.

3.2.3 Residual control and the duty of consultation

The LOUs’ control over the other 57% of Fiji that is *iTaukei* land outside reserves is weaker, but far from extinguished. In *Waisake Ratu* it was held that within the boundaries of unleased land, the LOU retains residual customary control and is “free to cultivate, allocate and deal with” that land according to customary law.⁹⁸ This right is drawn from s 3 of the *iTaukei Lands Act*.⁹⁹ After all, a broad definition of “control” would require the TLTB to actively micro-manage the cultivation of nearly every garden in the country. The legislature could never have intended such an absurd outcome.¹⁰⁰

The residual control by members of the LOU over unleased land outside reserve is reinforced by the Board’s twin statutory duties to ensure any land it plans to lease “is not being beneficially occupied by the Fijian owners” and “is not likely during the currency of such lease or licence to be required by the Fijian owners for their use, maintenance or support.”¹⁰¹ If the Board is not “satisfied” that these requirements have been met, then it has no power to grant a lease or licence. What this means in practice is that the LOU can exercise a certain degree of control over the leasing of their lands.

To be “satisfied” requires that the TLTB consider the matter and form an opinion on “reasonable grounds”.¹⁰² That reasonable evidential foundation will often require consultation with the relevant LOU to establish. The Court of Appeal in *Serupepeli Dakai No 1* made it clear that there is no general duty on the TLTB to consult with individual members of a LOU before exercising the power to lease.¹⁰³ Nor is their consent required *per se*.¹⁰⁴ However in *Waisake Ratu*, Cullinan J narrowed the effect of those rulings by finding that the TLTB has a

⁹⁶ *iTaukei Land Trust Act* (Cap 134), s 16(2).

⁹⁷ At s 17(1).

⁹⁸ *Waisake Ratu No 2 & Another v Native Land Development Corporation & Native Land Trust Board* at 162.

⁹⁹ *iTaukei Lands Act* (Cap 133), s 3.

¹⁰⁰ *Waisake Ratu No 2 & Another v Native Land Development Corporation & Native Land Trust Board* at 162-163.

¹⁰¹ *iTaukei Land Trust Act* (Cap 134), s 9.

¹⁰² *Waisake Ratu No 2 & Another v Native Land Development Corporation & Native Land Trust Board* at 163.

¹⁰³ *Serupepeli Dakai No. 1 v Native Land Development Corporation* [1983] FJCA 13, [1983] 29 FLR 92 at 99.

¹⁰⁴ *Waisake Ratu No 2 & Another v Native Land Development Corporation & Native Land Trust Board* at 164.

specific duty to consult in order to satisfy the “maintenance and support” condition.¹⁰⁵ His Lordship reasoned that only the members of the LOU really know whether their future plans are “likely” to require the use of relevant land during the course of what may be a 99 year lease.¹⁰⁶

The TLTB may also be required to consult to establish whether the land is “beneficially occupied”.¹⁰⁷ In some circumstances, the land may clearly be in a condition objectively incapable of current beneficial occupation, but frequently land will prove to be beneficially occupied by some members of the LOU when the TLTB investigates. The ultimate discretion to lease remains with the TLTB, but the fact that some or all of the members of a LOU object is likely to substantially sway the Board’s decisionmaking. Aside from the legal duties involved, the Board is live to the reality that disaffected landowners are prone to harass and threaten lessors.¹⁰⁸ As a result, the Board consults with *mataqali* as a matter of policy¹⁰⁹ and requires that 50-60% of members aged over 21 consent before granting a non-agricultural lease.¹¹⁰ Thus despite the fact that LOU consent is not legally required, the LOU can in practice exercise substantial control over what parts of their land are leased.

3.2.4 Right to equal distribution of rent

One area of the TLTB regime that was changed significantly by reforms introduced in 2010 by Bainimarama is that of rent entitlements. Members of a LOU have a right to a proportion of the rental income from leases on their land. Before 2010, the TLTB deducted 15% for administration costs, 5% went to the *turaga i taukei*, 10% to the *turaga ni yavusa*, 15% to the *turaga ni mataqali* and the remaining 70% went to the members of the LOU.¹¹¹ As a consequence, ordinary members of the LOU only received 59.5% of the gross rental, while a chief who held multiple titles might receive in excess of 25%. But, since the 1st of January 2011, rents must be distributed to “all living members of the proprietary unit, in equal

¹⁰⁵ At 163.

¹⁰⁶ At 166.

¹⁰⁷ At 166.

¹⁰⁸ *Native Land Trust Board v Prasad* [2008] FJCA 100 at [3].

¹⁰⁹ *Native Land Trust Board v Subramani* [2010] FJCA 9 at [8] and [10].

¹¹⁰ "Non-Agriculture Purpose Checklist" iTaukei Land Trust Board <http://www.tltb.com.fj/index.php?option=com_content&task=view&id=49&Itemid=80>.

¹¹¹ iTaukei Land Trust Act (Cap 134), Schedule 4: Native Land Trust (Leases and Licences) Regulations, s 11(1).

proportion".¹¹² This was a very controversial change as it directly challenges the power base of the chiefly elite.

The complexities of distribution may limit the effectiveness of this reform. In June 2012, the TLTB moved to a no-cash system for distributing rent payments. All LOUs are now required to have a bank account in the name of a trustee into which their lease money is paid electronically. It is intended that eventually each individual member will be assigned their own bank account,¹¹³ but as of September 2012, 25% of rent payments have been withheld because even the LOU lacks an account.¹¹⁴ There is the additional problem that the trustees of the account are usually the chiefs who feel entitled to withhold more than their legal share. In an encouraging sign that trustee duties will be upheld and rights of common members enforced, the FICAC has commenced prosecution of TLTB staffers who facilitated trustee misappropriation of lease money.¹¹⁵ If a LOU decides that it does not want equal distribution of rents, there is a legal mechanism for them to agree to assign their proceeds to a community "scheme" with the consent of the Minister of iTaukei Affairs.¹¹⁶

Of course receiving money requires that the lease payments have actually been made. This has been a problem for the TLTB. At the beginning of 2011, \$24m of lease payments in arrears were outstanding.¹¹⁷ In order to remedy the situation, lessees have been told to "prioritise rent payments" and the TLTB is showing much less tolerance for late payment.¹¹⁸ As of July 2012, only \$6.5m was outstanding¹¹⁹ which the TLTB hopes to clear before the end of 2012.¹²⁰

¹¹² Native Land Trust (Leases and Licences)(Amendment) Regulations 2010, s 2(a).

¹¹³ Maika Bolatiki "No Cash: TLTB" *Fiji Sun* (online ed, Suva, 10 July 2012) .

¹¹⁴ Epeli Tukuwasa "No bank accounts no lease money" (24 September 2012) Fiji Broadcasting Corporation News <<http://www.fbc.com.fj/fiji/4978/no-bank-accounts-no-lease-money>>.

¹¹⁵ "Day 7 - Kenatale and Vueti Trial" (15 September 2011) Fiji Independent Commission Against Corruption <http://www.ficac.org.fj/index.php?option=com_content&view=article&id=680:day-7-kenatale-and-vueti-trial&catid=20:press-releases&Itemid=611>.

¹¹⁶ iTaukei Land Trust Act (Cap 134), s 14(3). One *mataqali* in the Mamanuca islands has used this method to assign their lease money to a trust that provides education scholarships and builds new housing for members. See Maciu Malo "A way forward" *The Fiji Times* (online ed, Suva, 5 January 2012) .

¹¹⁷ Serafina Silaitoga "\$24m arrears" *The Fiji Times* (online ed, Suva, 25 July 2011) .

¹¹⁸ "Public Notice: Planning for 2012 - land needs for capital projects" (17 January 2012) iTaukei Land Trust Board - Facebook <<https://www.facebook.com/iTaukeiLandTrustBoard/posts/321441934562982>>.

¹¹⁹ Maika Bolatiki "85% lease renewal planned" *Fiji Sun* (online ed, Suva, 23 July 2012) .

¹²⁰ Maika Bolatiki "TLTB sets lease arrears timeline" *Fiji Sun* (online ed, Suva, 10 September 2012) .

3.2.5 Lease conditions

Landowners have a right to enforce the conditions of the lease over their land or alternatively the TLTB may go to court for them.¹²¹ Some conditions are mandated by regulations,¹²² but most are simply developed as a matter of policy by the TLTB and modified to suit the needs of a particular LOU. Standard conditions include: no development or construction without consent¹²³ and land only being used for purposes specified in the lease.¹²⁴ The maximum term for leases generally is 99 years,¹²⁵ but for agricultural leases the policy is only to grant 50 year leases.¹²⁶

3.2.6 Agricultural Landlord and Tenant Act (ALTA) leases

ALTA sets separate conditions for dealing with leases of agricultural land larger than one hectare that are not on *iTaukei* reserve land.¹²⁷ ALTA leases have a statutory minimum length of 30 years but in practice this tends to operate as a maximum.¹²⁸ The standard lease conditions and form of contract mandated for all ALTA leases are more restrictive on both lessee and lessor than the standard TLTB agricultural lease conditions.¹²⁹ There is no right of renewal.¹³⁰ So although ALTA leases are administered and for the most part granted by the TLTB, the ALTA forms a distinct sub-regime within the TLTB system.

The most controversial feature of ALTA leases is that rents must not exceed 6% of the unimproved commercial value of the land (UCV) as determined by the Committee of Valuers.¹³¹ Frequently the rents paid are even lower because tenants can appeal to the Agricultural Tribunals to fix their rent at a lower level.¹³² The use of UCV as a tool of valuation is entirely unsatisfactory because it is determined by the hypothetical sale price of the land as freehold.¹³³ Commentators have written at length about how this is a farcical comparative standard in a country where freehold land is scarce, generally the most fertile

¹²¹ iTaukei Land Trust Act (Cap 134), s 23(1).

¹²² iTaukei Land Trust (Leases and Licences) Regulations (Cap 134), Schedule 4.

¹²³ At reg 14(1)(c).

¹²⁴ At reg 14(2)(b).

¹²⁵ At reg 6.

¹²⁶ "Agriculture Purpose Application Form" iTaukei Land Trust Board
<http://www.tltb.com.fj/index.php?option=com_content&task=view&id=48&Itemid=79>.

¹²⁷ Agricultural Landlord and Tenant Act (Cap 270), s 3(1).

¹²⁸ At s 6.

¹²⁹ At s 9.

¹³⁰ Vijay Naidu and Mahendra Reddy *Na ghar ke na ghat ke; ALTA and expiring land leases: Fijian farmers' perceptions of their future* (Centre for Development Studies, University of the South Pacific, Suva, 2002) at 7.

¹³¹ Agricultural Landlord and Tenant Act (Cap 270), s 21.

¹³² At s 22(1)(a).

¹³³ At s 22(3).

(and therefore more valuable) and in some regions non-existent.¹³⁴ The general consensus is that ALTA rents are inadequately low, as evidenced by the fact very few LOUs renewed ALTA leases as they began to expire in the early 2000s. The result has been the dislocation and emigration of entire communities of Indian cane farmers.¹³⁵ Instead of undertaking desperately needed reforms,¹³⁶ the present government has introduced the stopgap measure of topping up rents from the average of 5% of UCV paid by lessees to 10% until 2015 in order to encourage LOUs to renew ALTA sugar cane leases.¹³⁷

3.3 Accountability mechanisms

The TLTB has suffered from a serious lack of accountability, once being described as “the epitome of inefficiency and profligacy”.¹³⁸ From 1990-1997 it did not submit annual financial reports.¹³⁹ In 1998 a damning external review by Coopers & Lybrand found that it was “not operating in a business like manner” and is “over resourced and inefficient”.¹⁴⁰ During the 2000 coup, it became something of a law unto itself. The General Manager actively supported coup leader George Speight and promoted the seditious “Deed of Sovereignty” to all landowners.¹⁴¹ Financial irregularities continued well into the 2000s including illegal loans to developers.¹⁴² TLTB expenditure continued to increase and accounting practices were still opaque.¹⁴³ FICAC is currently prosecuting three former managers for abuse of office and fraud¹⁴⁴ after a “severely critical” KPMG audit uncovered the misappropriation of over \$7m

¹³⁴ See Matthew Myers and Krishn Shah "Why Native Lands are Worth Less Than Freehold" (Paper presented at the Pacific Rim Real Estate Society Tenth Annual Conference, Bangkok, 25-28 January 2004) and Barbalich, above n 6, at 53-54.

¹³⁵ Naidu and Reddy, above n 130, at 7 – 8 and 13.

¹³⁶ Ifereimi Nadore "ALTA is out" *The Fiji Times* (online ed, Suva, 14 January 2010) .

¹³⁷ Maika Bolatiki "Big Pay: Govt, TLTB scheme reaps \$22.5 million reward for landowners" *Fiji Sun* (online ed, Suva, 26 July 2012) .

¹³⁸ Oskar Kurer "Land and Politics in Fiji: Of Failed Land Reforms and Coups" (2001) 36(2) *The Journal of Pacific History* 299 at 313.

¹³⁹ At 314.

¹⁴⁰ Barbalich, above n 6, at 65.

¹⁴¹ Niko Nawaikula "Letter from NLTB Board Secretary to Military Commander on NLTB Deed of Sovereignty Document" (20 June 2000) Historic website: People's Coalition Government, Fiji Islands <http://www.fijihosting.com/pcgov/docs_o/nltb_deed_letter_defence.htm> and Brij Lal *Islands of Turmoil: Elections and Politics in Fiji* (ANU E Press, Canberra, 2006) at 194-195.

¹⁴² "NLTB recovers Denarau debt" (26 June 2003) Fijilive <<http://www.fijilive.com/news/show/news/2003/06/26/f.html>>.

¹⁴³ "Concerns Raised Over Increasing NLTB Expenditure" (3 July 2007) FijiVillage.com via Internet Archive: Wayback Machine <http://web.archive.org/web/20070704111420/http://www.fijivillage.com/artman/publish/article_39399.shtml>.

¹⁴⁴ "Former NLTB executives plead not guilty" (3 May 2012) Fiji Independent Commission Against Corruption <www.ficac.org.fj/index.php?option=com_content&view=article&id=767:former-nltb-executives-plead-not-guilty&catid=20:press-releases&Itemid=611>.

of funds for a new IT system in 2007.¹⁴⁵ Finally, two junior officials were jailed in 2011 for embezzling payments from lessees.¹⁴⁶ As a body with a chequered history, accountability measures are extremely important for the TLTB. Efforts have been made to increase transparency since 2006 which is commendable, but there are still some areas of weakness.

3.3.1 Management participation

Because LOUs cede a substantial proportion of their rights over their land to the TLTB, they have a strong interest in ensuring those powers are not used capriciously or abused. There are prophylactic measures in place to ensure the TLTB is accountable to LOUs.

Prior to 2010, the board of the TLTB was made up of 12 members: the President of Fiji, the Minister of iTaukei Affairs, 5 *iTaukei* members appointed by the Great Council of Chiefs (GCC), 3 appointed by the Fijian Affairs Board (FAB) and 2 members from any race appointed by the President.¹⁴⁷ This gave the GCC an extraordinary amount of power over the Board, as they also retained the power to appoint the President under the 1997 Constitution¹⁴⁸ and by implication the power to appoint any non-*iTaukei* members, who hold office at the President's pleasure.¹⁴⁹ This system provided for no direct method of accountability to ordinary landowners.

Since the GCC was abolished by decree in March 2012, the composition of the Board had to change.¹⁵⁰ The Board is now composed of the Minister of iTaukei Affairs and 10 other members that the Minister appoints: 5 members of LOUs, 3 from a list of nominees from provincial councils and 2 others.¹⁵¹ Landowners therefore gain some direct representation on the Board, but they can be removed by the Minister (currently Prime Minister Bainimarama)

¹⁴⁵ "NLTB hunts for new IT company" (8 June 2008) Fijilive <<http://www.fijilive.com/fijilive-print-story.Fijilive?5568.Fijilive>> and "Audit report severely critical of Fiji's Native Lands Trust Board" (30 April 2007) Radio New Zealand International <<http://www.rnzi.com/pages/news.php?op=read&id=31851>>.

¹⁴⁶ *FICAC v Baleiwai* [2011] FJMC 152.

¹⁴⁷ iTaukei Land Trust Act (Cap 134), s 3(1).

¹⁴⁸ Constitution of Fiji 1997, s 90.

¹⁴⁹ iTaukei Land Trust Act (Cap 134), s 3(2)(b).

¹⁵⁰ iTaukei Affairs (Great Council of Chiefs) (Revocation) Regulations 2012 (9 March 2012) *Republic of Fiji Islands Government Gazette Supplement* Vol 11, No 27.

¹⁵¹ Native Land Trust (Amendment) Decree 2010, No 32 (2 July 2010) *Republic of Fiji Islands Government Gazette* Vol 11, No 74, s 2.

for “misbehaviour or for any other cause”.¹⁵² This arrangement grants a greater voice to landowners, but effectively gives the Executive control over the TLTB.

3.3.2 Enforcement of LOU rights

There are several reactive avenues of redress available to LOUs in regards to the TLTB.

(a) Fiji Independent Commission Against Corruption (FICAC)

FICAC is empowered to investigate and prosecute crimes of corruption¹⁵³ committed by a “public body” which explicitly includes the TLTB.¹⁵⁴ Landowners who suspect bribery or corruption in their dealings with the TLTB can complain in confidence to FICAC, which has extensive powers of investigation, including compelling public officers to answer questions and produce documents.¹⁵⁵

(b) Judicial Review

Judicial review of TLTB decisions is relatively common on the standard grounds of illegality, irrationality and procedural impropriety.¹⁵⁶ Proving *locus standi* is still a significant issue in Fiji.¹⁵⁷ However, in *Ratinaisiwa* it was sufficient for a single member of a LOU to bring an application on behalf of himself and the LOU regarding the reallocation of their land to a different *yavusa* by the Native Reserves Commission.¹⁵⁸ Decisions of the iTaukei Lands Commission are also reviewable under certain circumstances.¹⁵⁹ Interestingly, public law damages may be granted where appropriate.¹⁶⁰

(c) Private law

Individual members of a LOU have *locus standi* to sue the TLTB for breach of a personal right. For example in *Waisake Ratu*, the Native Land Development Corporation was flattening a neighbouring section and mistakenly bulldozed the plaintiff’s fruit trees that lay just outside the boundary of the lease on *iTaukei* land. The individual plaintiff successfully

¹⁵² At s 2(b).

¹⁵³ Fiji Independent Commission Against Corruption Promulgation, No 11 (2007), s 2A(1).

¹⁵⁴ Prevention of Bribery Promulgation, No 12 (2007), s 2(1), definition of “public body”, para (e) and Schedule 1.

¹⁵⁵ Fiji Independent Commission Against Corruption Promulgation, No 11 (2007), s 13.

¹⁵⁶ Mohammed Ahmadu and Nainendra Nand *Judicial Review Applications in Fiji: Principles and Materials* (University of the South Pacific, Suva, 2001) at 15.

¹⁵⁷ At 29.

¹⁵⁸ *Native Land Trust Board v Ratinaisiwa* [2010] FJCA 51 at [1].

¹⁵⁹ *Native Land Trust Board v Kaukimoce* [2012] FJCA 17 at [37].

¹⁶⁰ Fiji High Court Rules 1988, Order 53, Rule 7(1).

sued for trespass to the garden adjacent to his house over which he had personal customary rights of cultivation.¹⁶¹ It is no bar to receiving a remedy that the right is derived from customary law: in regards to land, a customary right is a legal right.¹⁶² When the rights breached belong to the group as a whole, if all members agree, the LOU can sue as an unincorporated association. Otherwise there is the option of a single member of the LOU bringing a representative action, so long as all members have a “common interest” in the proceedings.¹⁶³

Another private law method of accountability is to sue the TLTB for breach of its fiduciary duty to members of LOUs.¹⁶⁴ In *Volavola v Attorney General*, Inoke J applied the principles of trust law to the TLTB. If this analysis of TLTB board members as trustees is accepted as appropriate, then it may be possible for landowners to enforce other trustee duties including the duty to gather in trust property (by collecting rent in a timely fashion), preserve that property (for example, by enforcing lease conditions) and to keep and render accounts (by publishing them annually).¹⁶⁵ However in light of the fact that one of his colleagues, Marshall JA, recently described Inoke J as “the nemesis of the rule of law in Fiji”¹⁶⁶ and his work as “most dishonest and manifestly wrong”,¹⁶⁷ future decisions may prefer the orthodox analysis of the TLTB as simply owing a fiduciary duty to use its powers of control for the benefit of the LOU.¹⁶⁸

3.4 Evaluation of key features against customary objectives

In Chapter 2 it was determined that the core tension in *iTaukei* customary land law is the conflict between the inalienability of land and the need for economic sustenance. The TLTB is an attempt to strike a balance between those goals. A close evaluation of its features demonstrates that the goal of non-alienation is quite seriously compromised by its operation, in favour of producing rent.

¹⁶¹ *Waisake Ratu No 2 & Another v Native Land Development Corporation & Native Land Trust Board* at 179-180 and 183.

¹⁶² At 185.

¹⁶³ *Narawa v Native Land Trust Board* [2002] FJCA 9.

¹⁶⁴ *Waisake Ratu No 2 & Another v Native Land Development Corporation & Native Land Trust Board* at 187.

¹⁶⁵ Robert Hughes *Trust Law in the South Pacific* (University of the South Pacific, Suva, 1999) at 210-212.

¹⁶⁶ William Marshall "Petition of William Roberts Marshall QC, SC, Resident Justice of Appeal in Fiji since 16th July 2010 to the Prime Minister of Fiji" (20 September 2012) Justice William Marshall <<https://sites.google.com/site/justicewilliammarshall/petition>> at 181.

¹⁶⁷ At 177.

¹⁶⁸ Isireli Fa "Customary Land Rights over Native Land in Fiji" (Master of Law (LLM) Thesis, University of Auckland, 1989) at 112.

3.4.1 Paternalistic control

Within the areas of *iTaukei* reserve, landowners remain fundamentally in control and connected to their land. Their consent is required for any leases and they remain free to cultivate, live upon, and maintain a relationship with the land, and by extension maintain their identity as *iTaukei*. This is completely compatible with the customary objective of inalienability.

In contrast, the bulk of non-reserved *iTaukei* land falls under a regime that is overly paternalistic and subverts inalienability, losing sight of the underlying reasons that inalienability is valuable in customary law. *iTaukei* land cannot be sold, so absolute alienation by sale is not a problem. But the TLTB regime does strip the LOU of its legal rights to control the land. Although in most circumstances the LOU will be owed a duty of consultation before any lease is granted, the final decision on whether to lease or not rests solely with the TLTB. The fact that it is TLTB policy not to lease without consent is an inadequate guarantee of landowner rights, because there are still cases when the TLTB breaches its own policy and leases without consent.¹⁶⁹ The effect of reserving the “burden” of commercial negotiations for the TLTB in a patronising attempt to “protect” landowners being dispossessed, is that *iTaukei* land is held at arm’s length from its customary owners. This defeats the purpose of upholding the rule against alienation because a steady stream of rents for land leased without consent does little to preserve a close, reciprocal connection with the land. In fact, the Board granting and managing a lease for substantial periods of time all but severs that connection. A regime that does not legally prohibit this practice without landowner consent cannot be said to be adequately balancing customary objectives.

3.4.2 Lease duration and conditions

On the other hand, one of the best features of the TLTB, from the customary perspective of sustaining one’s people, is that it provides a relatively stable source of rents. Leasing through a statutory intermediary allows *iTaukei* to enjoy the economic benefits of a market economy and sustain themselves to a modern standard while insulating themselves from some of the corrupting influences of the market. But that superficial conclusion fails to acknowledge the other weaknesses of the regime.

¹⁶⁹ "Clan seeks answer to land lease deal" *The Fiji Times* (online ed, Suva, 29 June 2007).

The lease conditions that the TLTB regime allows are barely compatible with the objective of inalienability. A purposive analysis of the rule against alienation supports this conclusion. The iTaukei Land Trust Act acknowledges that a lease is an alienation, albeit a permitted one.¹⁷⁰ A 99 year lease, as allowed by the regulations, is a serious alienation: a child may be born and die an old man, having never set foot on the land of his *mataqali*. Long leases grant rights of exclusive possession that preclude fulfilment of the customary objective of maintaining a close connection to the land and drawing cultural identity from it.

3.4.3 Questionable economic performance

If it could be shown that sacrificing the objective of inalienability was necessary to maximise the economic returns that sustain *iTaukei*, it could be said that a balance of sorts had been struck between competing objectives. But it is questionable whether the TLTB regime actually maximises the economic returns to LOUs. The TLTB was, until the introduction of the Land Use Unit in 2010, a statutory monopsonist and monopolist, which gave it the power to manipulate the rents received by landowners.¹⁷¹ But because of the difficulty of constructing a hypothetical competitive land market in Fiji, economists have not been able to conclusively prove that regime is allocatively inefficient.¹⁷²

Regardless of economic theory, LOUs are registering their dissatisfaction with the returns they are receiving by electing not to renew ALTA leases unless they receive rent subsidies. Considering that approximately one third of all *iTaukei* land is unleased,¹⁷³ and that amongst thousands of dispossessed cane farmers there are likely to be some willing to pay more than 6% of UCV, this tends to suggest that TLTB leases do not maximise the economic welfare of LOUs (although there plenty of relevant confounding factors).

The equal distribution policy is difficult to evaluate against customary objectives. On the one hand, the chiefs who used to take a substantial share of the proceeds play a key role in upholding *iTaukei* culture and fulfilling customary obligations. It is their role to sustain the members of the LOU culturally and economically in times of need, for instance when hosting events or after a natural disaster. As the chiefs of Naitasiri point out, they will no longer be

¹⁷⁰ iTaukei Land Trust Act (Cap 134), s 9, marginal note.

¹⁷¹ Prasad and Tisdell, above n 13, at 100.

¹⁷² At 98-100. The Board's ability to exploit its market power is substantially limited by complex rent regulation and valuation mechanisms.

¹⁷³ At 98.

able to meet the monetary obligations expected of their role.¹⁷⁴ On the other hand there is a sense of equity about ensuring that the land sustains all members of the LOU, as it once did by guaranteeing each family a plot for growing their food. There is a growing perception that chiefs who once had to earn their role or face being deposed now take advantage of what they inherit.¹⁷⁵ If chiefs are not fulfilling their obligations or squandering profits for the benefit of a select few, then they can hardly claim that cutting their source of funding violates customary law. On balance, the removal of rent allocations to chiefs reflects an adequate compromise between competing customary values.

3.4.4 Lack of accountability

The imbalance in powers of control between the Board and landowners could perhaps be justified if the TLTB was very efficient at providing for the sustenance of *iTaukei*. The fact is that it is not. As a body corporate dealing with millions of dollars of rent money, with very little in the way of official oversight or reporting requirements, and strong discretionary powers, the TLTB system is inherently vulnerable to financial irregularities and malfeasance by its officers.

In principle, there has been a substantial increase in direct accountability in recent years by the appointment of LOU representatives to the Board. However those Board members serve at the pleasure of the Minister, who also happens to be the Prime Minister. It is disingenuous to speak of accountability when the Board is effectively beholden to the Executive branch of government. The issue is compounded by the fact that in Fiji today there is no legislative branch and the judiciary's independence has been severely compromised.

The rights LOUs do have are expensive to enforce. It is not simply a matter of calling a meeting of landowners and coming to a resolution. There are substantial costs involved in hiring lawyers and going to court, which is an especially bitter pill to swallow for landowners considering it is the rents from their lands that allow the TLTB to fund its defence.

¹⁷⁴ Eddie Mua "Equal distribution of land leases will remain" (22 March 2012) Tawakilagi: Your Fijian Overseas Community Network <<http://www.tawakilagi.com/2012/03/22/equal-distribution-of-land-leases-will-remain/>>. Much of the chiefly concern is focused on the rights of absentee *mataqali* members living in Suva or overseas and the burden of maintenance that falls on resident chiefs. See Kamikamica, above n 84, at 232, for a discussion of how traditional absentees such as fishermen dealt with this issue and provided remittances in return for land rights.

¹⁷⁵ "Expert says Fiji chiefs take too much from community" *Islands Business* (online ed, Suva, 15 March 2012).

The TLTB can hardly be said to be upholding the objective of sustaining the people of the *vanua* if they have to spend substantial amounts of money to claim what is rightfully theirs.

3.5 Conclusion

The TLTB regime fails to strike an adequate balance between inalienability and economic sustenance. It achieves the bare minimum of ensuring land is not sold, but defeats the underlying purpose of the rule, which is to avoid severing connections with the land. As a compromise aimed at increasing the economic welfare of *iTaukei* it also performs poorly because a lot of the economic potential of the land is dissipated by poor administration, opaque rent determination processes and exorbitant costs to enforce rights.

CHAPTER 4: The Land Use Unit of the Ministry of Lands

The sixth pillar of the interim government's "Twelve Pillars of Reform" since 2008 has been a focus on "making more land available".¹⁷⁶ To this end, the Land Use Decree was signed into law in July 2010. It establishes the Land Use Unit (LUU) of the Ministry of Lands, a new regime for leasing customary land and a competitor to the TLTB.

4.1 Definition of the LUU regime

Although the LUU has the power to lease state land (the term is used interchangeably with "crown land" in the decree),¹⁷⁷ this chapter will focus on the powers of the LUU¹⁷⁸ to lease *iTaukei* land.¹⁷⁹ It is interesting to note that while the object of the Land Use Decree is to utilise *iTaukei* land in the "best interest of the [*iTaukei*] land owners"¹⁸⁰, s 3(2) declares that it achieves that objective by leasing land on "longer tenure" with the "purpose of providing a livelihood for all parties concerned".¹⁸¹ Quite frequently, one would expect those measures to clash with the interests of *iTaukei* landowners: they may well not want to lease for long periods of time and "providing a livelihood for all parties" diminishes the interests of landowners. The mandatory considerations posed when considering a leasing proposal are both "the best interest of landowners *and* the overall wellbeing of the economy".¹⁸² What this demonstrates is that the paradigm through which the LUU facilitates leasing is as an agent of compromise for benefit of the State, rather than as a partisan agent for landowners.

4.2 The mechanics of the LUU regime

4.2.1 Designation of land and relinquishment of control

The first step in the process of leasing *iTaukei* land under the LUU regime is that the land in question be "designated" before lessees can apply to lease it.¹⁸³ A precondition to designation is that the land "be free of all encumbrances",¹⁸⁴ including any existing licences.¹⁸⁵ A LOU is

¹⁷⁶ Voreqe Bainimarama and Petero Mataca *Fiji Peoples Charter for Change, Peace & Progress* (National Council for Building a Better Fiji, Suva, 2008) at 27.

¹⁷⁷ Land Use Decree 2010, No 36 (2 July 2010) *Republic of Fiji Islands Government Gazette* Vol 11, No 4, s 2.

¹⁷⁸ Land Use Regulations (4 March 2011) *Fiji Islands Government Gazette Supplement*, Vol 6, No 12, s 8(b).

¹⁷⁹ At s 2, definition of "Land".

¹⁸⁰ Land Use Decree 2010, No 36 (2 July 2010) *Republic of Fiji Islands Government Gazette* Vol 11, No 4s 3(1)(b).

¹⁸¹ At s 3(2)(c).

¹⁸² At s 11.

¹⁸³ Land Use Regulations (4 March 2011) *Fiji Islands Government Gazette Supplement*, Vol 6, No 12reg 3 and 9(1).

¹⁸⁴ Land Use Decree 2010, No 36 (2 July 2010) *Republic of Fiji Islands Government Gazette* Vol 11, No 4, s 4.

deemed to consent to designation if 60% of qualifying members¹⁸⁶ (who must be permanent residents of Fiji over 18 years of age)¹⁸⁷ give their written consent on the approved form.¹⁸⁸ Upon receipt of the form, the Minister of Lands and Resources must refer the land to the Prime Minister, who has a broad discretion to approve the designation of that land.¹⁸⁹ If the Prime Minister approves, the land is then entered onto a register known as the Land Use Bank.¹⁹⁰ This ousts the TLTB's powers to lease the land.¹⁹¹ Land remains designated indefinitely, but the trustees of the land designated may request that the designation be revoked no earlier than 5 years after it was first made.¹⁹² So long as the land is not leased at the time and "in the opinion of the Prime Minister" will not be leased within 12 months, the Prime Minister is obliged to revoke the designation.¹⁹³

Once designated the LOU has no say in how the land is used. The LOU has effectively granted the Director of Lands *carte blanche* to lease their land. There is no requirement that the LOU consent to a specific lease. There is no duty of consultation, although it might be possible to fashion one out of the mandatory consideration that all leases "take into consideration... the best interest of the land owners".¹⁹⁴ For reasons that will be discussed later, such a duty would be largely worthless because it is unenforceable. The LOU is also unable to exercise any legal rights to use or occupy the land while designated because it must be "free of all encumbrances".¹⁹⁵ In practice, landowners may find their use of land that is not yet leased is tolerated but their position will not be secure.

4.2.2 Retention of ownership

It is important to note that contrary to popular speculation, the ownership of designated land does not change. The description of the register of designated lands as the "Land Bank" is somewhat misleading as it is neither a bank (it is not a lending institution), nor is it similar to

¹⁸⁵ "PM [designates] first parcel of Land" (2011) Ministry of Lands and Mineral Resources <<http://www.lands.gov.fj/index.php/medias/news/3-pm-designate-first-land>>.

¹⁸⁶ Land Use Regulations (4 March 2011) *Fiji Islands Government Gazette Supplement*, Vol 6, No 12, reg 4(1).

¹⁸⁷ At reg 2, definition of "Qualifying Member".

¹⁸⁸ At reg 4(3).

¹⁸⁹ Land Use Decree 2010, No 36 (2 July 2010) *Republic of Fiji Islands Government Gazette* Vol 11, No 4, s 6(2).

¹⁹⁰ At s 7.

¹⁹¹ At s 9(1) "This Decree has effect notwithstanding any provision of the Native Land Trust Act" and s 8(b) which makes the LUU responsible for "issuance and renewal of lease" of designated land.

¹⁹² Land Use Regulations (4 March 2011) *Fiji Islands Government Gazette Supplement*, Vol 6, No 12, reg 6(2).

¹⁹³ At reg 6(3).

¹⁹⁴ Land Use Decree 2010, No 36 (2 July 2010) *Republic of Fiji Islands Government Gazette* Vol 11, No 4, s 11.

¹⁹⁵ At s 4.

the land bank system for indigenous land in Sarawak, Malaysia (where small blocks of land are alienated to the government and conglomerated into huge plantations).¹⁹⁶

Instead, ownership of *iTaukei* land remains with the LOU “until such time [as] the land is no longer required under the Decree”.¹⁹⁷ This is unfortunate wording, because strictly speaking it does not explain what happens to ownership of the land after its designation is revoked. The Ministry of Lands has glossed over this flaw in the drafting and interpreted s 5 as meaning “land will be returned to [LOUs] on expiry of the lease”.¹⁹⁸ Even if this provision does not strictly prohibit the conversion of designated land to state land upon the expiry of a lease, consent of the TLTB would still be required to legally transfer an estate in *iTaukei* land.¹⁹⁹ The Land Use Decree does not exclude the operation of this rule under the parallel legislation, because the Decree only prevails where it is inconsistent with the *iTaukei* Land Trust Board Act.²⁰⁰ The fact that the Decree does not contain an express prohibition on acquisition of land upon reversion is not an inconsistency. Therefore the ownership by *iTaukei* of their lands under the LUU regime is secure.

4.2.3 Trustee appointment and duties

After designation each LOU must elect between one and five trustees.²⁰¹ No precise method of election is specified but the LOU must “preside over” the trustees and ensure a Deed of Trust is prepared.²⁰² When read consistently with the requirement that 60% of qualifying members consent to changing a trustee,²⁰³ the implication is that 60% of all qualifying members must democratically elect the trustees and ratify the deed of trust.²⁰⁴ The names of those elected are submitted to the Prime Minister who has a discretionary power to accept or refuse their appointment.²⁰⁵ Trustees must be re-elected yearly.²⁰⁶ The Prime Minister may

¹⁹⁶ Ramy Bulan "Native Customary Land: The Trust as a Device for Land Development in Sarawak" in Fadzilah Majid Cooke (ed) *State, Communities and Forests in Contemporary Borneo* (ANU E Press, Canberra, 2006) at 52.

¹⁹⁷ Land Use Decree 2010, No 36 (2 July 2010) *Republic of Fiji Islands Government Gazette* Vol 11, No 4, s 5.

¹⁹⁸ Filipe Rokovasa "Land Reform in Fiji" (Paper presented at the Commonwealth Heads of Valuation Agencies Conference, Sydney, 2012) at 3.

¹⁹⁹ *iTaukei Land Trust Act* (Cap 134), s 5(2).

²⁰⁰ Land Use Decree 2010, No 36 (2 July 2010) *Republic of Fiji Islands Government Gazette* Vol 11, No 4, s 9(1).

²⁰¹ Land Use Regulations (4 March 2011) *Fiji Islands Government Gazette Supplement*, Vol 6, No 12, reg 5(1).

²⁰² At reg 5(3)(a).

²⁰³ At reg 5(10).

²⁰⁴ At reg 5(3)(a) and (b).

²⁰⁵ At reg 5(2).

²⁰⁶ At reg 5(8).

appoint interim trustees²⁰⁷ and may remove any trustee if the Prime Minister is “of the opinion that the Trustee is not adequately discharging his or her responsibilities under the Regulations”.²⁰⁸ This gives the Prime Minister a substantial degree of control over individual LOU trusts.

4.2.4 Head-lease and sub-lease

Once designated, land is advertised in the press and on the website of Investment Fiji,²⁰⁹ where applications for lease are invited.²¹⁰ Applications must contain details of the financial standing of the lessee, the proposed rent, length of lease, use, and proposed level of development among other things.²¹¹ The Director of Lands may approve or refuse any application without providing reasons²¹² and may negotiate any lease terms and conditions.²¹³ Upon the completion of all formalities (including surveying the land),²¹⁴ the Director must execute the lease on the standard form.²¹⁵ This process is intended to be much faster for lessees than the TLTB regime,²¹⁶ because it does not involve lengthy consultation periods.²¹⁷

Two leases then come into existence: a head lease and a sub-lease. At the time that the sub-lease by the Director (on behalf of the State) to the lessor is executed, a head lease by trustees (on behalf of the LOU) of the land to the Director is deemed to exist²¹⁸ for the duration of the sub-lease plus one day.²¹⁹ The LOU is paid rent directly by the State as head lessee regardless of whether the sub-lessee pays their rent.²²⁰ The head lease is very restrictive on the LOU: they must continue to pay rates and taxes,²²¹ and they may not terminate or assign the lease²²² but the State may unilaterally “vary, and in all respects deal with”, the head lease or sub-

²⁰⁷ At reg 5(6).

²⁰⁸ At reg 5(5).

²⁰⁹ "Investment Fiji: Current Opportunities" (2012) Investment Fiji
<<http://www.investmentfiji.org.fj/pages.cfm/for-investors/investment-opportunities-in-fiji/current-opportunities/?opportunitycat=land-bank&subtitle=Land%20Bank>>.

²¹⁰ Land Use Regulations (4 March 2011) *Fiji Islands Government Gazette Supplement*, Vol 6, No 12, reg 7(1).

²¹¹ At reg 9(2).

²¹² At reg 10(1).

²¹³ At reg 11(2).

²¹⁴ At reg 7(2)(a).

²¹⁵ At reg 13(1).

²¹⁶ Rokovasa, above n 198, at 2.

²¹⁷ "The facts on Land Reforms!" *Fiji Focus* (Suva, 31 July 2010) at 5.

²¹⁸ Land Use Regulations (4 March 2011) *Fiji Islands Government Gazette Supplement*, Vol 6, No 12, reg 14.

²¹⁹ At Schedule 2, Form 4, cl 1, definition of “Term”.

²²⁰ At Schedule 2, Form 4, cl 3(a).

²²¹ At Schedule 2, Form 4, cl 4(a).

²²² At Schedule 2, Form 4, cl 5(c) and 5(d)(i).

lease.²²³ The sub-lessee must register the lease, giving them an infeasible interest in the land.²²⁴ The net effect is that the State guarantees an unimpeachable interest in the relevant block of *iTaukei* land for the duration of the sub-lease. In return for rent, the LOU surrenders all rights except a bare right of reversion.

4.2.5 Lease conditions and rent

The standard form sub-lease conditions apply unless altered in writing by the Director.²²⁵ The lessee may not use the land for anything other than the specified “Permitted Use”, each of which contains a unique set of conditions.²²⁶ Leases can be granted for a maximum of 99 years.²²⁷

Rents are set by reference to “fair market rent” and reassessed every 5 years. If any of the Director, the LOU or the sub-lessee disagree with the assessed rent, they may meet and negotiate a new rent.²²⁸ Alternatively, within 30 days of an assessment, they may ask an expert valuer appointed by the Prime Minister to make a binding rent assessment.²²⁹ Sub-lease rent paid to the State may at times exceed the rent being paid to the head lessor because it can be adjusted yearly,²³⁰ whereas the head lease and sub-lease are synchronised at “fair market rent” only every five years. The State is obliged to “promptly” pay all rent due under the head lease to the LOU trustees “without deduction”.²³¹ The State is not obliged to pass on the “premium”²³² which the sub-lessee is required to pay up-front before the lease is granted²³³ but appears to have done so in practice.²³⁴

²²³ At Schedule 2, Form 4, cl 5(c).

²²⁴ At reg 16.

²²⁵ At reg 13(1).

²²⁶ At Second Schedule, Annexure B, cl 5(a).

²²⁷ Land Use Decree 2010, No 36 (2 July 2010) *Republic of Fiji Islands Government Gazette* Vol 11, No 4, s 10.

²²⁸ Land Use Regulations (4 March 2011) *Fiji Islands Government Gazette Supplement*, Vol 6, No 12, reg 8(4)(i).

²²⁹ At reg 8(4)(ii).

²³⁰ At Second Schedule, Annexure A, cl 1, Item 4.

²³¹ At reg 17(c).

²³² Land Use Decree 2010, No 36 (2 July 2010) *Republic of Fiji Islands Government Gazette* Vol 11, No 4, s 13(1).

²³³ Land Use Regulations (4 March 2011) *Fiji Islands Government Gazette Supplement*, Vol 6, No 12, reg 12(2)(b)(ii).

²³⁴ See details of the Xinfra Bauxite Mine lease at Nawailevu in Editor "Ensuring a better future for villagers" *Fiji Sun* (online ed, Suva, 28 April 2011). The hope may be that over time mineral royalties from the Xinfra Bauxite Mine at Nawailevu and other mining surface leases granted by the LUU will offset the government costs of administering the LUU regime.

4.2.6 State ownership of improvements upon reversion

The LRU regime has clearly delineated rights of reversion. During the lease and upon reversion, buildings and improvements upon the land vest in the Head Lessee (the State),²³⁵ unless the lease conditions state otherwise. The standard lease conditions allow the lessee (within 3 months after the lease expires, and subject to a 1 month notice period) to remove any building or improvement they have erected.²³⁶ This power is subject to the right of the State to elect to purchase any building for “fair value”.²³⁷

4.3 Enforcement and accountability

4.3.1 Trustee accountability

Becoming a trustee imposes substantial obligations on the members of the LOU elected. As well as their general duty to act in the best interests of the beneficiaries of the trust (the members of the LOU), there are substantial statutory duties of accountability imposed on them. The trustees must produce an annual financial statement of accounts audited by the Auditor-General²³⁸ and have them endorsed at an Annual General Meeting.²³⁹ Copies of the minutes of the meeting and audited accounts must be sent to the Director and Permanent Secretary for Lands.²⁴⁰ The trustees’ rights are limited to requesting that designation of the land be revoked, receiving rent money²⁴¹ and dealing with it according to the Deed of Trust. Because the individual members of the LOU are all beneficiaries of the trust, they are entitled to legally enforce their rights under the Deed of Trust.

4.3.2 Enforcement of LOU rights against the State

The LRU regime all but extinguishes the ability of the LOU to legally enforce its rights against the State or sub-lessor. A private law action that purports to “challenge or question” almost any matter under the Land Use Decree (including the decisions of officials, the terms and conditions of a lease, or the cancellation of a lease) must fail because of the extensive privative clause in s 15(1) of the Decree.²⁴² Any proceeding brought in breach of s 15(1) must

²³⁵ Land Use Regulations (4 March 2011) *Fiji Islands Government Gazette Supplement*, Vol 6, No 12, reg 14(2)(b).

²³⁶ At Second Schedule, Annexure B, cl 14.

²³⁷ At Second Schedule, Annexure B, cl 14(a)(b).

²³⁸ At reg 5(7).

²³⁹ At reg 5(8).

²⁴⁰ At reg 5(9).

²⁴¹ At reg 17(c).

²⁴² Land Use Decree 2010, No 36 (2 July 2010) *Republic of Fiji Islands Government Gazette* Vol 11, No 4, s 15(1).

be immediately referred to the Chief Registrar, who must issue a certificate terminating the proceedings and vacating any orders made.²⁴³ The courts have taken a broad interpretation of a similar “certificate of termination” clause in the Mahogany Industry Development Decree 2010²⁴⁴ and immediately referred the proceeding to the Chief Registrar for a certificate of termination.²⁴⁵

A public law action for judicial review of State decisionmaking under the LUU regime stands a very slim chance of success. Generally, the Fijian courts take the *Anisminic*²⁴⁶ approach of allowing judicial review for jurisdictional error despite the existence of a “widely drawn privative clause”.²⁴⁷ Jurisdictional errors might include a decision by the Prime Minister to designate land before consent had been given or the Director executing a lease in excess of his or her powers under the Decree. However, before an application for review gets to the stage of a hearing, the court’s duty to terminate proceedings and the Chief Registrar’s duty to issue a certificate to that effect kick in.²⁴⁸ An additional privative clause that prevents the Chief Registrar’s decision from being challenged forms a second layer of protection for the State.²⁴⁹

It might be possible to attack the jurisdiction of the Chief Registrar to issue the certificate by arguing that the application for review in question was not a claim “in respect of any of the subject matters [in s 15(1)]”.²⁵⁰ This approach is unlikely to succeed because to do so would be to “challenge... any decision of... any State official... made under this Decree”,²⁵¹ which again warrants a certificate of termination. The loop of challenges and certificates of termination could continue *ad infinitum* without ever dealing with the hearing of substance. It is also significant to note that both the English Law Society Charity²⁵² and former Fiji Justice of Appeal William Marshall²⁵³ have issued extensive reports highlighting the collapse of the

²⁴³ At s 15(2) and s 15(3).

²⁴⁴ Mahogany Industry Development Decree 2010, No 16 (12 March 2010) *Republic of Fiji Islands Government Gazette* Vol 11, No 30, Schedule 4, s 5.

²⁴⁵ *Fiji Hardwood Corporation Ltd v Lumber Processors (Fiji) Ltd* [2012] FJMC 182.

²⁴⁶ *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

²⁴⁷ *Venkatamma v Ferrier-Watson* [1995] FJSC 7, [1995] 41 FLR 258 at 265.

²⁴⁸ Land Use Decree 2010, No 36 (2 July 2010) *Republic of Fiji Islands Government Gazette* Vol 11, No 4, s 15(2) and s 15(3).

²⁴⁹ At s 15(5).

²⁵⁰ At s 15(2).

²⁵¹ At s 15(1)(b).

²⁵² Nigel Dodds *Fiji: The Rule of Law Lost* (Law Society Charity (England and Wales), London, 2012).

²⁵³ Marshall, above n 166. His petition runs to over 140 pages (plus hundreds more pages of supporting judgments) and details outrageous political interference with the judiciary from 2009 onwards.

rule of law and interference by the Executive in judicial decision making in Fiji. This climate is not conducive to successful court proceedings against the State.

The privative clauses in the Land Use Decree appear to be ironclad. The consequence is that neither the LOU nor the sub-lessees have access to the courts to enforce their legal rights in regards to the leases they have entered into under the LUU regime. The State holds all the power in the lease relationships: it has a vast array of powers and can exercise these with impunity because there is no judicial oversight. If the courts continue to enforce these privative clauses, the LOU will have, in practical terms, alienated its land as it cannot enforce its rights of reversion. The sub-lessee is effectively in the position of a tenant-at-will because the State could simply elect to terminate because, despite having a registered lease, enforcing it would require questioning the “validity of the cancellation”.²⁵⁴ The rights of the LOU and the sub-lessor are not functionally enforceable property rights in the ordinary sense of the term.

4.4 The limits of leasehold

If the LOU initially has a property right of exclusive possession of an area of land, but after designation and leasing has no currently enforceable rights over that property, the question might properly be asked: is the interest granted a lease or an outright alienation? The answer comes down to whether the LOU retains a bare right of reversion. A useful tool is Simpson’s “bundle of rights” analysis, in which each right over land is a single stick. Ownership of the land is not a stick itself, but rather a container held by the person who “has the right to give out sticks”.²⁵⁵ Different land systems contain different bundles of rights, as do different types of tenure. After land has been designated and leased under the LUU, the LOU has transferred all of its sticks to the State and sub-lessee. But despite having “no presently exercisable rights”, the LOU retains “*proptietas nuda*” or bare ownership because at some point each stick must revert to the container of the bundle.²⁵⁶

One could argue that enforcing that right of reversion is impossible and therefore the LOU has completely alienated its ownership of the land. A demand for reversion requires the owner to demonstrate that the lease has expired. If the State disagreed, the LOU would have

²⁵⁴ Land Use Decree 2010, No 36 (2 July 2010) *Republic of Fiji Islands Government Gazette* Vol 11, No 4, s 15(1)(d).

²⁵⁵ SR Simpson *Land Law and Registration* (Surveyor's Publications, London, 1976) at 6.

²⁵⁶ At 6.

to “question the terms and condition of the lease...” in court which the privative clause in s 15(1)(c) of the Land Use Decree expressly forbids. While it is true that the State could almost indefinitely delay any court action through the certificate of termination process, the right of reversion (and by extension ownership) endures regardless. There remains the possibility that in future the privative clause will be repealed, or otherwise rendered ineffective, at which point the LOU would be able to enforce its dormant right. While this might seem to be disconnected from reality, in regards to a right of reversion, the Common Law is comfortable with rights that appear to be more theoretical than real, allowing leases of 999 years or more.²⁵⁷ Although the fact that the property interest granted is a properly formed lease does not mean it is consistent with the 1997 Constitution’s declaration of inalienability.²⁵⁸ The quasi-ownership rights²⁵⁹ granted to the State over designated land might, for instance, be of great significance if any future constitution of Fiji entrenches the inalienability of *iTaukei* land.

4.5 Evaluation of LUU regime against customary objectives

Like the TLTB, the LUU is a leasing regime designed to manage the conflicting core customary objectives of inalienability of land and the need for sustenance. Unfortunately, like the TLTB, the LUU does not achieve an adequate balance between these goals. Leasing land under the LUU regime might produce a better economic return than the TLTB would. But while the LOU is in control of the initial decision to designate its land, the consequence of designation is that the LOU must surrender even more rights of control, consultation and enforcement than under the TLTB regime. This demonstrates a strong bias towards the customary objective of economic sustenance, and inadequate consideration of the delicate balance that needs to be struck in Fijian land policy.

4.5.1 Designation repugnant to objective of inalienability

While it is true that the introduction of the LUU regime has given LOUs a choice of how they lease their land, neither regime is a panacea. The LUU regime, having been grafted on to the TLTB system, does nothing to reduce the TLTB’s control over non-designated land. What it does do is allow an entrepreneurial LOU to make a functionally irrevocable decision that a particular portion of their land should be available for lease. To the extent that this power

²⁵⁷ Scottish Law Commission *Conversion of Long Leases (Report)* (SLC 204, 2006) at [1.5] and [1.6].

²⁵⁸ Constitution of Fiji 1997, s 6(b).

²⁵⁹ Scottish Law Commission *Conversion of Long Leases (Report)* (SLC 204, 2006) at [1.6].

symbolises that control over land use rests with the LOU, and allows *iTaukei* to be agents of their own change, it is consistent with the customary objective of inalienability. But scratch the surface and a different conclusion emerges. Designation precludes any legal customary use of the land, even if it is lying idle and unleased. This clearly inhibits the continuation of a close physical connection with the land. Worse still, the LOU does not even retain a right of consultation as to how its land will be leased, nor are there any effective enforcement mechanisms available for the LOU to resume possession of the land. The LUU regime fundamentally changes transforms the “umbilical cord” connecting *iTaukei* with the *vanua* into a unidirectional conduit for lease money. Any lease necessarily reduces the connection of *iTaukei* with their land, but the double barrier of designation and leasing under the LUU regime diminishes LOU rights to an extent that is repugnant to the customary objective of inalienability.

4.5.2 Accountability

Within the LOU, the imposition of a trust over the proceeds of the lease promotes accountability in regards to the distribution of lease money. Despite the fact that trustees have been introduced to the TLTB regime too, the Land Use Decree imposes a form of trust that is more compatible with custom. Unlike the TLTB, equal distribution of rent money is not mandatory. Instead the majority of the members of the LOU may specify how income is to be distributed in their Deed of Trust. This approach is much more compatible with the variable and flexible nature of custom because it encourages the adoption of a solution that best suits the circumstances of the LOU. The statutory requirements for audit and yearly election of trustees reinforce the dynamism of a LUU trust and allows the members of the LOU to define their own customs as to how the wealth of the land should be managed – a truly customary approach.

4.5.3 Increased economic performance

Inalienability has to be balanced with the value of increased material prosperity and the greater ability of the land to sustain the LOU when leased. The *quid pro quo* under the LUU is that the LOU surrenders the right to be consulted, and the State may grant leases on relatively favourable conditions to lessees, but in return the LOU can expect more rent than from the TLTB because of reduced administration costs and a market valuation process. The State as head lessor also guarantees rent payment regardless of the financial solvency of lessee. Some of these features are excellent for maximising returns to sustain the LOU. For

example, rents frequently adjusted to market value (with some room for negotiation) ensure land is more likely to be efficiently allocated to those who value it most. But a workable market in property rights requires that they be enforceable. Perversely, by hermetically sealing the courts out of the LUU's sphere of operation in a misguided effort to deliver certainty of tenure to sub-lessees, the State has crippled the enforceability and therefore value of LUU leases. Some lessees with substantial diplomatic or political clout may value the certainty of a state guaranteed lease: for example, the Chinese mining company Xinfu that has taken a LUU lease in Bua. It seems more likely that a commercial enterprise would recognise that their property interest, being unenforceable in court, is extremely vulnerable to the fickle winds of politics that displace governments with alarming regularity in Fiji, and would reduce the consideration offered accordingly.

4.6 Conclusion

The LUU regime overemphasises the customary objective of economic sustenance to the detriment of inalienability. Relative to the TLTB regime, there is a much more extensive surrender of LOU rights required and almost all connections with the land are severed. The purported economic advantage of leasing under the LUU regime is real, but exaggerated. There is some improvement of accountability and a distribution system for rent that is more compatible with custom, but overall the improvement in the ability of the LOU to sustain itself does little to hide the monstrous imbalance of power that is to the detriment of inalienability.

CHAPTER FIVE: Conclusions

5.1 Both leasing regimes incompatible with customary objectives

In Chapter Two, this dissertation listed the objectives of customary landholding, including the conflicting objectives of non-alienation and sustenance. A leasing regime must carefully balance these obligations to be successful. To be compatible with the interests of *iTaukei* landowners, it must allow them to control and lease land of their choice, to derive an adequate and consistent income from doing so, and to retain underlying customary title. This must all be underpinned by an administrative scheme that follows a fair process, is adequately accountable to landowners, and adheres to transparent financial practices. Neither the LUU nor the TLTB regime falls within these parameters.

Leasing land necessarily dictates a degree of alienation in order to exchange temporary rights of use for income, and that alienation may be compatible with customary objectives if the landowners have control over the leasing process. The TLTB regime strips too much control from landowners to satisfy this criterion despite allowing for a degree of landowner consultation and preserving customary title. The LUU regime is even more unbalanced. To participate, landowners must surrender rights of control and enforcement in a fashion akin to outright sale. The fact that landowners must consent to being subject to the LUU regime does not vitiate its ultimate incompatibility with the customary injunction against alienation.

If either regime was close to the margin of those customary parameters, it might have been possible to balance some of the loss of control with the increased rental revenue which fulfils the customary objective of the *vanua* sustaining the people. But, regarding rental revenue, the evidence is that neither regime offers drastically improved returns beyond what might be expected in an open leasing market where no government entity managed the process at all. In fact the TLTB regime's problems with accountability, distribution, administration costs and rent transparency clearly diminish income that might otherwise be received by landowners. The LUU's purportedly "secure" leases may fetch a premium in some circumstances, but overall it appears that the reduced value of largely unenforceable LUU leases may offset the absence of an administration fee.

In practice, some landowners do not have the luxury of deciding if they should lease, but must decide which regime to entrust with their land. Should they stick with the TLTB system

or vote to designate with the LUU? Assuming that they agree with the conceptualisation of customary objectives in Chapter Two, this dissertation argues against designation because from a landowner's point of view it is simply too risky. It puts a huge amount of faith in an unstable government and is incompatible with customary values. The bonanza promised as a consequence of designation may be more illusory than real.

In any case, the LUU is not proving particularly popular. By the end of 2011 only seven leases had been issued.²⁶⁰ As of August 2012, 39 LOUs have had their lands designated and approximately 20 parcels of land are advertised as available for lease.²⁶¹ It may be that landowners are simply suspicious of a new system and biding their time. The more convincing argument is that landowners recognise that opting-in to the LUU compromises their interests. This reinforces the conclusion that leasing regimes that are incompatible with custom are likely to be ineffective at best and counterproductive at worst.

5.2 Alternatives

The consequences of years of failed leasing regulation in Fiji are plain for anyone to see. Disgruntled landowners do not allow leases to be renewed. Unwelcome tenants face both literal and figurative roadblocks to the quiet enjoyment of their land. Fiji loses overall because productive resources are inefficiently allocated. Given that the latest reforms are not a durable or effective solution, what alternatives are there?

5.2.1 Freehold inappropriate

Abandoning leasing regimes and individualising title has occasionally been suggested as a solution to Fiji's land problems. Classical economists argue that exclusive, enforceable and tradeable property rights are the most efficient solution in situations where the goal is to have a stable and equitable distribution of land rights.²⁶² But, in Fiji, granting individual rights over *iTaukei* land and allowing it to be alienated – effectively converting it to freehold – is simply not a viable option. Aside from the fact it would be politically impossible, communal

²⁶⁰ *Economic and Fiscal Update: Supplement to the 2012 Budget Address* (Ministry of Finance, Suva, 2011) at 30.

²⁶¹ Sofaia Koroitanao "40 more land owning units show interest to deposit land" (28 August 2012) FijiVillage.com

<<http://www.fijivillage.com/iframe/?mod=read&id=28081256abb2778a9361cae62893d126386fc271>>.

²⁶² Prasad and Tisdell, above n 13, at 101.

property rights can be more efficient than freehold in regards to marginal agricultural land²⁶³ (of which Fiji has plenty).²⁶⁴ It is arrogant to assume that the development of individualised land tenure is a necessary incident of social progress.²⁶⁵ *iTaukei* simply do not want their land to be alienable and would resist any attempt to impose such a system upon them.

5.2.2 Consent as the guarantor of security

So far this dissertation has largely focused on the appropriate features of a leasing regime from the perspective of an *iTaukei* lessor. But a successful leasing regime must consider the needs of both lessors and lessees. *iTaukei* lessors demand that customary objectives be given paramount status. Predominantly Indian lessees demand secure, durable tenure. Is there room for compromise? Yes: because taking heed of customary concerns pays dividends in security. Certainty of tenure is derived from the ability to enforce property rights in land. In Fiji, central government is not always effective at enforcing property rights. Even Prime Minister Bainimarama acknowledges that, when faced with strong landowner opposition to involuntary leasing of their lands, options for effective enforcement are limited: “the last thing I want to do is to send my troops in”.²⁶⁶ The primary cause of land disputes is a lack of consent. But when landowners consent to leasing and feel their wishes are being respected, they tend to respect the property rights granted. Voluntary compliance through freely negotiated compromise is actually the most effective method of securing property rights. Conversely, property interests that are acquired without consent and incompatible with custom are neither durable nor secure.

The usual riposte to the argument that landowner consent be required for leasing is that not enough land will be leased and that Fijian agriculture (which is dominated by sugar cane growing) would be thrown into chaos. On closer assessment, this is really just a veiled defence of a state-imposed transfer of wealth designed to subsidise Fiji’s inefficient sugar industry.²⁶⁷ If landowners are unwilling to lease land at rates that sugar cane growers can support, then the answer is a direct subsidy to Fiji Sugar, not an indirect transfer of wealth effected by perpetuating leasing regimes that directly damage Fiji’s political stability.

²⁶³ Elinor Ostrom and Charlotte Hess "Private and Common Property Rights" (Paper presented at the Workshop in Political Theory and Policy Analysis, Indiana University, 29 November 2007 2007) at 20 and 22.

²⁶⁴ Spate, above n 76, at 1.

²⁶⁵ See Lugard, quoted in Simpson, above n 255, at 225.

²⁶⁶ Samisoni Pareti "Business Intelligence: Newcrest hits a snag in proposed Fiji mine" *Islands Business* (online ed, Suva, 12 March 2012) .

²⁶⁷ Prasad and Tisdell, above n 13, at 139.

5.2.3 Imposing statutory duties of consent and accountability

Although the LUU regime is generally repugnant to customary objectives, it does at least represent an attempt to provide lessees and lessors with “greater local decision making” and more control than the “formal and inflexible” TLTB system.²⁶⁸ One of the original reasons for surrendering the power to lease to the TLTB was to prevent *iTaukei* engaging with the corrupting influences of a market economy. Now that *iTaukei* are “well and truly living a life-style where prices, production of goods and services determine their living standards” it seems only appropriate to return control to landowners. The simplest method of doing so would be to abolish the TLTB altogether and allow market forces to dictate what land is leased. There are two problems with this approach. It ignores the important oversight, advisory and dispute resolution role that the TLTB plays in what can be a very polarised negotiation environment.²⁶⁹ It would also be politically unsavoury and perhaps unnecessarily disruptive to a system that people have grown used to over a period of more than 70 years.

A more palatable solution would be to impose a statutory duty on the TLTB to gain landowner consent before leasing. It would not be a drastic change, as consultation already occurs as a matter of routine. Longer term, it might be desirable to devolve the responsibilities of the TLTB to the trusts being introduced to manage LOU bank accounts. There are already signs that some of them will grow to become quite sophisticated entities.²⁷⁰ This would reflect the trend of indigenous people rejecting state-imposed methods of landholding, in favour of constructing their own entities.²⁷¹

The other key reform that should be introduced if the TLTB model is to be retained are statutory duties of accountability. The basic audit and publication of financial statements requirements in Part II of the Land Use Regulations could be a model for these duties.²⁷² Review in the courts for illegality must be reinstated, drastic privative clauses repealed and more broadly the new constitution must guarantee an independent judiciary that can stand up to the Executive.

²⁶⁸ Overton, above n 59, at 151.

²⁶⁹ See comments on the importance of statutory intermediaries in regards to leasehold land in Don Paterson "Some Thoughts About Customary Land" (2001) 13(1) *Journal of South Pacific Law* .

²⁷⁰ See for example the complex education fund and building projects being undertaken by a *mataqali* trust in *The Fiji Times* article by Malo, above n 116.

²⁷¹ For example, see discussion of Māori reaction to the paternalistic Waka Umanga (Māori Corporations) Bill 2007 in John Dawson and Abby Suszko "Courts and Representation Disputes in the Treaty Settlement Process" [2012] *NZ L Rev* 35 at 60 – 61.

²⁷² Land Use Regulations (4 March 2011) *Fiji Islands Government Gazette Supplement*, Vol 6, No 12.

5.3 Constitutional change

The Fiji Constitution Commission is currently undertaking consultations around Fiji towards the drafting of a new constitution to be implemented before elections scheduled for 2014.²⁷³ Whether the consultations will have any substantial effect on the outcome of the process is another matter. Judging by Prime Minister Bainimarama's decision to declare a list of constitutional non-negotiables,²⁷⁴ including entrenched immunity for members of his regime,²⁷⁵ the content of the new constitution is likely to be highly influenced by the current military regime.

Land issues have been canvassed in 95% of submissions to the Commission,²⁷⁶ which makes it highly likely that the new constitution will address the status of *iTaukei* land and leasing. The LUU regime offers some clues as to what those constitutional provisions might look like. That regime is one piece in the jigsaw that is Attorney-General Aiyaz Sayed-Khaiyum's master plan to build a united national identity in Fiji.²⁷⁷ Having abolished the Great Council of Chiefs and reformed the TLTB to deprive the *iTaukei* elite of their main source of funding and status, the LUU is designed to further undermine cultural autonomy by creating a powerful "neutral" institution that can lease and control both state and *iTaukei* land.

What this signals is that the new constitution is likely to further emphasise the State's control over the leasing of *iTaukei* land and diminish the role of the TLTB. The LUU regime, despite its flaws, is likely to remain in force. This is significant because these leases will continue to be a feature of Fijian land leasing well into the next century if they go full term. There are unlikely to be any concessions made to increase consultation with landowners, although increased accountability measures may well be entrenched as a consequence of the current emphasis on "the removal of systemic corruption".²⁷⁸ The Bainimarama administration is guilty of much wrongdoing, but it deserves credit for tackling head-on Fiji's most intractable

²⁷³ Fiji Constitutional Process (Constitution Commission) Decree 2012, No 57 (18 July 2012) *Government of Fiji Gazette* Vol 13, No 98, Schedule 1.

²⁷⁴ At s 3(e).

²⁷⁵ Fiji Constitutional Process (Constituent Assembly and Adoption of Constitution) Decree 2012, No 58 (18 July 2012) *Government of Fiji Gazette* Vol 13, No 99, s 8(3).

²⁷⁶ Nanise Loanakadavu "95pc submissions highlight land issue" *The Fiji Times* (online ed, Suva, 14 August 2012).

²⁷⁷ Aiyaz Sayed-Khaiyum "Cultural Autonomy: Its implications for the nation-state" (Master of Law (LLM) Thesis, University of Hong Kong, 2002) at 57 and 69.

²⁷⁸ Fiji Constitutional Process (Constitution Commission) Decree 2012, No 57 (18 July 2012) *Government of Fiji Gazette* Vol 13, No 98, s 3(e)(iii).

issues around land that defied resolution by democratic means. Unfortunately, it is going about it in the wrong way.

5.4 Broader conclusions

Leasing regimes are a symbol of the political fault-lines of Fiji. They operate at the fulcrum of conflicting interests and political tensions by regulating relationships between all the political actors in Fijian society. These stakeholders are divided by commercial, cultural, ethnic, diplomatic, military and class interests. It is hardly surprising that this complex, dynamic and polycentric issue has persistently defied solution. Reforms will have to be made, but, in the short-term, state control over leasing regimes is likely to tighten, increasing accountability but decreasing control for landowners. Long-term, if the egalitarian aspects of contemporary leasing regimes are emphasised over authoritarian tendencies, it will aid recovery from coup culture and set the foundation for a more stable Fiji. Reform of leasing regimes for customary land is crucial if Fiji is to enjoy a future where people are united, rather than divided by land.

APPENDIX I: Land Use Decree 2010 and Regulations

EXTRAORDINARY

805



REPUBLIC OF FIJI ISLANDS GOVERNMENT GAZETTE PUBLISHED BY AUTHORITY OF THE FIJI GOVERNMENT

Vol. 11

FRIDAY, 2nd JULY 2010

No. 78

[1163]

GOVERNMENT OF FIJI

LAND USE DECREE 2010
(DECREE NO. 36 OF 2010)



IN exercise of the powers vested in me as the President of the Republic of Fiji and the Commander in Chief of Fiji Military Forces by virtue of the Executive Authority of Fiji Decree 2009, I hereby make the following Decree—

PART 1—PRELIMINARY

Short title and commencement

- 1.—(1) This Decree may be cited as the Land Use Decree 2010.
- (2) This Decree comes into force on the date appointed by the Minister by notice in the *Gazette*.

Interpretation

2. In this Decree, unless the context otherwise requires—
 - “Director of Lands” means the person holding all State Lands on behalf of the State under section 4(1) of State Lands Act [Cap. 132];
 - “Land” means crown land as defined in the State Lands Act [Cap. 132] and native land as defined in the Native Lands Act [Cap. 133];
 - “lessee” means a natural person or a legal entity to whom a lease has been issued by the Director of Lands under this Decree;
 - “Minister” means the Minister who has the responsibility for the administration of this Decree; and the Ministry means the Ministry of Lands and Mineral Resources;

Object of the Decree

- 3.—(1) The objects of this Decree are—
 - (a) to utilise designated native land in a manner that is in the best interest of native land owners; and
 - (b) to utilise designated crown land with a view to achieving optimal return to the State.
- (2) The Decree achieves these objects by—
 - (a) providing for the establishment of a Land Use Unit within the Ministry;
 - (b) providing longer tenure of leases for a sustainable and progressive development of the agricultural and commercial sector; and
 - (c) providing that all land available are leased with the purpose of providing a livelihood for all parties concerned.

PART 2—DESIGNATION OF LAND TO THE LAND USE UNIT

Land designated to be free of all encumbrances

4. All land designated under the Decree shall be free of all encumbrances, and shall not be the subject of any dispute in any court, tribunal, commission or before any other person or body exercising a judicial function.

Non-extinguishment of title for land designated

5. The ownership of all land designated under the Decree shall remain with the Crown or native land owners until the expiration of the lease or until such time the land is no longer required under the Decree.

Prime Minister to designate land

6.—(1) All land designated for utilisation under this Decree will be referred to the Prime Minister.

(2) The Prime Minister shall then use his discretion to designate land for utilisation under this Decree.

Establishment of Land Use Bank

7. There shall be a register known as the Land Use Bank keeping a record of all land utilised under the Decree.

PART 3—ESTABLISHMENT OF THE LAND USE UNIT

Establishment and responsibility of the Land Use Unit

8. This section establishes a Land Use Unit within the Ministry responsible for—

- (a) the valuation of the land;
- (b) issuance and renewal of lease;
- (c) collection of rental; and
- (d) any other matter that may arise from time to time for land designated under this Decree by the Prime Minister.

PART 4—APPLICATION OF THE DECREE

Application to other Laws

9.—(1) This Decree has effect notwithstanding any provision of the Native Land Trust Act [Cap. 134], Agricultural Landlord and Tenant Act [Cap. 270], Agricultural Landlord and Tenant Ordinance 1966 and any other law and accordingly, to the extent that there is any inconsistency between this Decree and the Native Land Trust Acts, Agricultural Landlord and Tenant Act [Cap. 270], Agricultural Landlord and Tenant Ordinance 1966 or any other law, this Decree prevails.

(2) Any direction given by the Land Use Unit under this Decree to any agency of Government or any other institution to release information pertaining to land shall release such information.

PART 5—LEASES

Tenure of lease

10. All leases issued under this Decree shall be for a period of not more than ninety nine years (99) and shall be in the prescribed form.

Best interest of the native land owners

11. All leases issued or renewed under this Decree shall take into consideration at all times the best interest of the land owners and the overall wellbeing of the economy.

Protected lease

12.—(1) All leases issued under this Decree are protected lease. Therefore it shall not be lawful for the lessee thereof to alienate or deal with the land comprised in the lease of any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever, nor to mortgage, charge or pledge the same, without the written consent of the Director of Lands first had and obtained, nor, except at the suit or with the written consent of the Director of Lands, shall any such lease be dealt with by any court of law or under the process of any court of law, nor, without such consent as aforesaid, shall the Registrar of Titles register any caveat affecting such lease.

(2) Any sale, transfer, sublease, assignment, mortgage or other alienation or dealing effected without such consent shall be null and void.

(3) Any consent required by this section may be given in writing by any officer or officers, either solely or jointly, authorised on behalf of the Director of Lands within thirty (30) days of the request. The lessee shall be given ninety (90) days thereafter to act on the consent, failure to do so, the consent shall lapse.

Premium for fresh lease

13.—(1) Subject to the valuation of the Director of Lands a premium shall be paid by the lessee prior to the issuance of a fresh lease.

(2) Notwithstanding subsection (1) the Director of Lands may use his or her discretion to allow for part payments of premium on individual case basis.

PART 6—REGULATIONS

Regulations by Minister

14.—(1) The Minister may make regulations under this Decree with respect to all leases which may be issued by the Land Use Unit in the prescribed form.

(2) The Minister may make regulations under this Decree with respect to any provisions or matters relating there under.

PART 7—MISCELLANEOUS

Certain decisions not to be challenged

15.—(1) No court, tribunal, commission or any other adjudicating body shall have the jurisdiction to accept, hear, determine or in any other way entertain any proceeding, claim, challenge or dispute by any person or body which seeks or purports to challenge or question—

- (a) the validity, legality or propriety of this Decree;
- (b) any decision of any Minister or any State official or body, made under this Decree;
- (c) the terms and condition of lease issued by the Director of Land under this Decree; or
- (d) the validity of the cancellation of any leases, licenses or other instruments.

(2) Any proceeding, claim, challenge or dispute of any nature whatsoever in any court, tribunal, commission or before any other person or body exercising a judicial function, in respect of any of the subject matters in subsection (1) that had been instituted before the commencement date of this Decree but had not been determined at that date or is pending on appeal, shall wholly terminate immediately upon the commencement of this Decree, and all orders whether preliminary or substantive made therein shall be wholly vacated, and a certificate to that effect shall be issued by the Chief Registrar.

(3) Where any proceeding, claim, challenge, application or dispute of any form whatsoever, is brought before any court, tribunal, commission or any other adjudicating body, in respect of any of the subject matters in subsection (1), then the presiding judicial officer, without hearing or in any way determining the proceedings or the application, shall immediately transfer the proceeding or the application to the Chief Registrar, for termination of the proceeding or the application for the issuance of a Certificate under subsection (2).

(4) A certificate under subsection (2) is, for the purposes of any proceeding in a court, tribunal, commission or any other person exercising a judicial function, conclusive of the matters stated in the certificate.

(5) A decision of the Chief Registrar to issue a certificate under subsection (2) is not subject to challenge in any court, tribunal, commission or any other adjudicating body.

GIVEN under my hand this 1st day of July 2010.



EPELI NAILATIKAU
President of the Republic of Fiji

"State Land" has the same meaning as that term is defined in the State Lands Act [Cap 132].

"Statutory Head Lease" mean the Statutory Head Lease granted under Regulation 14.

"Trustees" mean the elected representatives of a Land Owning Unit.

3. These Regulations apply to all designated land.

PART II—NATIVE LAND

Consent of Native Land Owning Units

4.—(1) A Land Owning Unit will be deemed to consent to the designation of Native Land (including, where applicable, native reserve) under the Decree, if a consent notice is delivered to the Minister signed by a minimum of 60% of Qualifying Members of the relevant Land Owning Unit.

(2) Upon receipt of the consent notice, the Minister must inform the Prime Minister and refer the land to the Prime Minister for designation.

(3) The consent notice must be in writing and lodged in Form 1 in the First Schedule and must include all required information fully and correctly stated.

(4) The Minister must not refer land to the Prime Minister for designation until such time as the consent of the Land Owning Unit has been first obtained.

Trustees of Land Owning Units

5.—(1) Each Land Owning Unit must elect one or more (but not more than five) Qualifying Members to act as Trustees for the purposes of these Regulations and submit the names of the persons so elected to the Prime Minister for approval.

(2) The Prime Minister shall, acting in his discretion, appoint the Trustees of the Land Owning Unit from the names submitted to the Prime Minister under sub regulation (1), or refer the names back to the Land Owning Unit for further names to be submitted.

(3) The Land Owning Unit must:

- (a) provide over the election of the trustees; and
- (b) ensure that a Deed of Trust is prepared in accordance with the Trustees Act (Cap. 65) and registered after the endorsement of the Director.

(4) A person may not become or continue to act as a Trustee if:

- (a) the person has been convicted of any indictable offence or an offence involving fraud or dishonesty;
- (b) the person is an undischarged bankrupt;
- (c) the person is not or ceases to be a qualifying member; or
- (d) the person dies or becomes incapacitated.

(5) The Prime Minister may remove any Trustee at any time where the Prime Minister is of the opinion that the Trustee is not adequately discharging his or her responsibilities under the Regulations.

(6) Where no Trustees have been appointed under this Regulation 5, the Prime Minister may appoint a person or persons to act as Trustees on an interim basis until such time as Trustees are validly appointed by the Land Owning Unit.

(7) The Office of the Auditor General must audit the annual financial statements of accounts for the Land Owning Unit for any calendar year.

(8) The Trustees shall convene an Annual General Meeting before the end of 31st January every year where audited annual financial statements of accounts are endorsed and the election of new Trustees conducted.

(9) Copies of the minutes of the meetings and annual audited financial statements of account shall be provided to the Director and the Permanent Secretary for Lands.

(10) Subject to sub-regulations (5) and (6), any changes to the Trustees shall be made with the consent of not less than 60% of Qualifying Members.

PART III—DESIGNATION OF LAND

Process of designation of land

6.—(1) All land referred to the Prime Minister for designation must be presented in Form 2 in the First Schedule, including—

- (a) a scheme plan if the subject area is not surveyed;
- (b) an approved survey plan;
- (c) a deposited plan; or
- (d) Native Land Commission lot.

(2) The Trustees may from time to time request the Prime Minister in writing that the designation of any land (or part thereof) cease, provided that a minimum of 5 years have elapsed since the date the land was first designated under the Decree.

(3) To the extent that designated land (or part thereof):

- (a) is subject to a request under sub regulation (2);
- (b) is not the subject of any current lease entered into under the Decree; and
- (c) will not be (in the opinion of the Prime Minister) the subject of any lease in the 12 months immediately following the receipt by the Prime Minister of the request under sub regulation (2),

then the Prime Minister must promptly issue a public notice to that effect and the designation of the land will cease effective the date of such notice.

Land Use Band

7.—(1) The Director must ensure that the availability of all designated land is advertised widely in appropriate newspaper or internet advertisements;

(2) The Director must ensure that prior to granting any lease or entering into any agreement to lease with respect to designated land that (at the direction and on behalf of the Director).

- (a) a professional land survey is undertaken with respect to any such designated land which is unreserved; and
- (b) an assessment of the fair market rent is determined in accordance with Regulation 8.

Valuation of designated land

8.—(1) The Director must ensure that following the designation of the land and at least once every 5 years thereafter an assessment of the fair market rent of all designated land is undertaken in accordance with the best principles and practices of valuation and any guidelines or directions made by the Minister.

(2) The Director must ensure that the most recent assessment report is available for inspection by the Minister.

(3) The Director must not enter into any lease for an aggregate consideration of less than the fair market rent as detailed in the assessment required under sub regulation 8 (1), except with the prior written consent of the Prime Minister.

(4) If the Director or any Affected Party does not agree with the findings of the assessment, then either the Director or any Affected Party may:

- (i) meet with a view to reaching agreement as to the fair market rent, and where agreement is reached, the amount agreed will become the current fair market rent as between the parties in agreement; or
- (ii) (within 30 days after receipt of the assessment) refer the assessment to the Prime Minister for determination as follows:
- (a) the Prime Minister must promptly appoint an independent valuer or valuers to determine the fair market rent;
- (b) the Director and any Affected Party may make written submissions to the valuer or valuers appointed;
- (c) any valuer appointed must act as an expert and not an arbitrator;
- (d) the determination of the valuer or valuers will become the current fair market rent and be binding upon the Director and all Affected Parties; and
- (e) as between the Director and the relevant Trustees, the costs of the determination will be borne equally.

PART IV — LEASES

Applications for lease

9.—(1) Any person may apply to the Director for the grant of a lease of designated land.

(2) The application must include any information required by the Director or the Minister, including (where applicable) details of—

- (a) the proposed lessee, including details of the financial standing of the lessee and details of the person or persons in ultimate control of the lessee;

- (b) the proposed lease premiums, rent, rent adjustment and rent review and any other financial consideration to be provided by the lessee;

(c) the proposed term and estimated commencement date;

(d) the proposed use, including details of any environmentally sensitive or hazardous uses;

(e) the proposed development, including details of the likely environmental impact of the development;

(f) any security or third party guarantees to be procured by the lessee; and

(g) any other lease held by the lessee, the applicant or any person associated with the lessee or the applicant and the State or the Director.

Director to approve/revise application

10.—(1) The Director may approve or refuse any application made under Regulation 9 and may approve any such application subject to conditions. The Director is not required to provide reasons for such approval or refusal.

(2) Approval of the application, or approval subject to conditions, does not constitute acceptance of a contractual offer and will not give rise to any contract, lease, estate or interest at law or equity or be the grounds for any estoppel restraining the Director.

Survey and preparation of lease

11.—(1) Upon the approval by the Director of an application for a lease, the Director must—

- (a) notify the applicant in writing of such approval and any conditions attaching thereto; and
- (b) provide the applicant with a letter of offer detailing the in-principle terms and conditions of the lease (which offer will be capable of acceptance by the applicant within not more than 30 days after the date of the letter of offer).

(2) The Director may negotiate the proposed lease terms and conditions and may revise and re-issue any letter of offer at any time, in which case any prior letters of offer provided to the applicant with respect to the same designated land will automatically lapse.

(3) Upon the acceptance in writing by the applicant of a letter of offer, the applicant must pay all sums due and payable as described in the letter of offer.

Drawing and execution of leases

12.—(1) Upon receipt of the acceptance and sums payable under Regulation 11(3), the Director must prepare a lease containing the approved terms and conditions, together with any necessary survey plan.

(2) The applicant and the lessee will not be entitled to enter or occupy the land until such time as:

- (a) the Director has executed the lease;
- (b) the lessee has—

- (i) executed the lease;
- (ii) paid all sums due and payable under the lease;
- (iii) provided evidence of any insurance required to be effected under the lease (such evidence must be to the satisfaction of the Director); and
- (iv) provided any security (deposits, payments in advance, bank guarantees) and any guarantees required under the lease.

(3) Where the Director gives notice to an applicant that the relevant lease is ready for execution and the lessee fails to execute and produce to the Director the lease within 14 days after the date of the notice, the Director may cancel the approval given under Regulation 10 and re-advertise the land as available for letting to other parties.

Form of lease

13.—(1) All leases must be in the form set out in Form 3 in the Second Schedule, subject only to any additions or alterations approved in writing by the Director.

(2) The Director will be, and will be deemed always to be, entitled to be, the lessee of all leases issued on designated land on behalf of the State.

(3) The lease must be executed in triplicate.

Statutory Head Lease

14.—(1) Upon the entry into of any lease of Native Land pursuant to the Decree, a Statutory Head Lease will be deemed to exist on the terms and conditions contained in Form 4 in the Second Schedule (or such other terms and conditions as the Minister may from time to time approve).

(2) Notwithstanding any principle of law or equity to the contrary,

- (a) the Statutory Head Lease may not be terminated or surrendered except as expressly provided in the Statutory Head Lease; and
- (b) the legal and beneficial ownership of any buildings or improvements on Native Land subject to, and during the term of, the Statutory Head Lease may vest in and remain with the Head Lessee or otherwise as specified in the relevant Statutory Head Lease or lease.

Date of commencement of lease

15. The term of the lease will commence upon a date specified by the Director.

Registration of leases

16. The lessee must ensure that an executed original lease is provided to the Registrar of Titles for registration.

Administration of leases

17. The Director must—

- (a) administer all leases and collect all premiums, rents, outgoings, expenses, and other consideration or monies payable under any lease;
- (b) enforce the terms of the lease; and

(c) with respect to Native Land, promptly pay the rent due and payable under all Statutory Head Leases to the relevant Trustees without deduction.

Form of certified copies of lost approvals

18. For the purposes of the issue of certified copies of lost or destroyed approvals granted under the Decree the following provisions shall apply:

- (a) the application for the certified copy shall state the full particulars of the lost or destroyed approval and shall be accompanied by a statutory declaration stating the facts of the case to the best of the declarant's knowledge and belief, and shall be addressed to the Director;
- (b) the application may be disposed of summarily at any time after it is filed, provided that the Director may in his discretion, before accepting any application require the applicant to give at least 14 days' notice to the Governor of his intention to make such application;
- (c) the Director shall, if satisfied with the proof of the loss of an approval issue a certified copy of such licence or lease;
- (d) the copy shall be a true copy of the original and shall bear the following endorsement:—

"Certified copy issued this _____ day of _____ 20____, in lieu of the original, which has been lost (or destroyed)
..... Director of Land"

Fees

19. The Director may charge and collect for the preparation of any lease granted under these Regulations the fees set out in the Third Schedule.

Dated this 1st day of March 2011.

N. SUKANIVALU
Minister for Lands and
Mineral Resources

FIRST SCHEDULE

FORM 1

(Regulation 4(1))

LAND USE UNIT
 MINISTRY OF LANDS & MINERAL RESOURCES
 LAND USE DECREE 36/2010

CONSENT FORM

[Land Use Decree 36/2010]

Village : _____
 District : _____
 Province : _____
 Date : _____

1. We the members of landowning unit _____ residing in the village of _____ have agreed to give our land with particulars listed below to the Land Use Unit to administer.

2. Particulars of the land :
 Name of the land : _____
 NLC Lot No : _____ Tokanaka No: _____
 Reserve Claim No : _____ NLC No : _____
 Sheet No. : _____ Area : _____
 Head of the Yivusa: _____
 Head of the Maraqali: _____

MEMBERS OF LANDOWNING UNIT

NAME (To be clearly shown)	DATE OF BIRTH	SIGNATURE

	
REFERENCE SHEET REF : Scale: FILE REF :	Part Showing DESIGNATED AREA DECREE 26/2010 Legal Description : Title : Province : Designated Area

SECOND SCHEDULE

FORM 3
(Regulation 11)

MEMORANDUM OF LEASE

STAMP DUTY

Original \$ Duplicate \$

Paid with RR of

For Director of Land

LU LEASE

DESIGNATED LAND

THE DIRECTOR OF LANDS (hereinafter referred to as the lessor) of Fiji hereby leases to (hereinafter referred to as the lessee)

Lease No. FOR TITLES OFFICE (LEGISLATION)

FEE'S

Registration Fee

Drawing Fee

Plan Fee

Survey Fee

Total

Revenue Receipt No. Date Initials

UNDER THE LAND USE DECREE 36/2010

All that piece of Land being

C.T. or C.A. 13	Number	Name of Land	Province	Block or Town	Area	Lot No.	Plan No. (if any)

the boundaries of which are more particularly delineated on the plan hereto to be held by the said and at the Rent payable to the Director of Land and subject to the terms and conditions set out in Annexures A and B.

LEASE NO. REGISTERED

Registrar of Titles

ANNEXURE A

REFERENCE SCHEDULE AND SPECIAL CONDITIONS

This is Annexure A to lease between the Director of Land (lessor) and (lessee).

I. Reference Schedule

In this lease, the following items are defined as follows:

- Item 1 Term (Note: Insert details of the term of the lease), commencing upon the Commencement Date.
- Item 2 Commencement Date (Note: Insert Commencement Date)
- Item 3 Rent: (a) Premium: (Note: Insert details of premium) payable in full on or before the Commencement Date. (b) Base Rent: (Note: Insert details of rent) per annum, payable (weekly, bi-annually, annually) in advance in equal monthly instalments. Upon each anniversary of the Commencement Date (other than when the Base Rent is reviewed to fair market rent), the Base Rent will increase by (Note: insert details of (annual) fixed or percentage increase).
- Item 4 Rent Adjustment
- Item 5 Rent Review Upon every (10th) anniversary of the Commencement Date, the Base Rent must be reviewed to fair market rent in accordance with Regulation 8 of the Land Use Regulations 2011.
- Item 6 Outgoings (a) Statutory: All rates, taxes, charges, duties, and impositions assessed with respect to the land, the lessee's use of the land, or the lessee by the State or any lawful authority or statutory body. (b) Operating Expenses: All insurance premiums payable by the lessor (Note: include details of any other operating expenses to be payable (wholly or partially) by the lessee) (Note: Insert details. For example "The granting of firestack")
- Item 7 Permitted Use (Note: Insert details and include a special condition if an option to renew is to apply/SL.
- Item 8 Option to Renew (Note: Insert details of any security deposits, bank guarantees or personal guarantees to be provided by the Lessee)
- Item 9 Security

amounts incurred and include the adjustment in the following statement of outgoings.

(b) The lessee must pay the amount specified in the statement within 14 days of receipt in cleared funds.

4. Assignment and Sub-letting

(a) This lease is a protected lease under the provisions of Section 12(1) of the Land Use Decree 36(2010).

(b) The lessee must not alienate or deal with its estate or interest in the lease or any part thereof, whether by sale, transfer or sublease or any other manner whatsoever, nor to mortgage, charge or pledge the same, without the written consent of the Director of Land and obtained, nor except at the suit or with the written consent of the Director of Land shall any such lease be dealt with by any court of law or under the process of any court of law, nor, without such consent as aforesaid, shall the Registrar of Titles register any caveat affecting such lease.

(c) For the purposes of this clause,

(i) where the lessee is a company and there is either:

(A) a change in the beneficial ownership of the lessee;

(B) a change in the majority shareholding of the lessee; or

(C) a change in the person or persons in ultimate control of the lessee,

or

(ii) where the lessee makes a declaration of trust with respect to the lease, then such occurrence will be deemed to constitute a transfer of the lease requiring the prior written consent of the Director of Land.

(d) Paragraph (c)(i) will not apply where:

(i) the change occurs solely by virtue of a change in ownership of any shares listed on an official list of a stock exchange; or

(ii) where the lessee is a foreign investor within the meaning of the Foreign Investment Act and the requirements of that Act are complied with respect to the change.

(e) The lessee may disgorge and treat as null and void any purported dealing with the lease in contravention of this clause.

(f) As a condition of granting consent, the lessee may require the lessee to repay any fiscal contributions, lease incentives or costs provided or incurred by the lessee under the lease in the immediately preceding ten years. This paragraph will not apply to transfers by way of administration and natural love and affection to the spouse and children of the lessee.

(g) Any consent under this lease may be given in writing by any officer or officers, either solely or jointly, authorised on behalf of the lessee. Any consent given under the lease will lapse if not acted upon within ninety (90) days after the consent is given.

Ann A0 Date of Notice 1st Default Notice Period: (Note: Insert period) [14 days] commencing upon the date the notice under clause 13(a) is given.

2nd Default Notice Period: (Note: Insert period) [7 days] commencing upon the date the notice under clause 13(a) is given.

2. Special Conditions

Notwithstanding any provision of Annexure B, the following special conditions apply:

(a) (Note: Insert details of any special conditions)

ANNEXURE B

GENERAL CONDITIONS

This is Annexure B to lease between the Director of Lands (lessor) and (lessee).

1. Land

(a) The lessor grants and the lessee accepts a lease of the land for the term and at the rent and on the terms and conditions of this lease.

(b) The grant of the lease is subject to the following reservation:

(i) the lessor reserves all precious metals, coals and minerals of every description including crude oil upon, in or under the land with full liberty at all times to search, dig, for and carry away such metals, coals and minerals of every description including crude oil and for that purpose to enter upon the said land or any part thereof.

2. Rent

(a) The lessee must pay the rent in cleared funds when due and without demand.

(b) The lessor may from time to time specify the manner in which the Rent must be paid, including any requirement that rent be paid by electronic funds transfer to an account nominated by the lessor.

(c) The rent will be adjusted and reviewed as the case may be in the manner specified in the Reference Schedule.

3. Outgoings

(a) The lessor may from time to time provide the lessee with a statement detailing the outgoings. The statement may include actual or estimated amounts, however where an estimated amount is included the lessee must promptly reconcile such estimated amounts as against the actual

5. Permitted Use

- (a) The Lessee must:
- (i) use and must continue to use the land for the Permitted Use; and
 - (ii) not use the land for any purpose other than the Permitted Use.
- (b) Where the Permitted Use includes a use specified in the first column of Schedule 1, then the provisions of the second column of Schedule 1 will apply.
- (c) The Lessee must not subdivide the land without the prior written consent of the Lessor obtained and then only in accordance with a plan of subdivision approved by the Lessor in writing.
- (d) The Lessee shall not obstruct in any way the free passage of any person over the public thoroughfare intersecting or adjoining the demised land and shall if required by the Lessor or the Divisional Surveyor so to do forthwith remove any crop or other obstruction placed by him on such public thoroughfare in contravention of this condition. Should any question arise as to whether any path intersecting or adjoining the demised land is a public thoroughfare it shall be referred to the Director of Land whose decision shall be final and conclusive.

6. Repairs and Maintenance

The Lessee must at its cost:

- (a) keep the land and any improvements in good repair and condition, including the carrying out of any structural repairs;
- (b) carry out such drainage works as may be required to the satisfaction of the Lessor; and
- (c) keep clean and open and maintain in good condition all drains, ditches, water-courses and drainage and sewage systems in upon or intersecting the demised land to the satisfaction of the Lessee.

7. Access

The Lessor or any authorised person or persons may at any time without let or hindrance:

- (a) enter upon the land to construct, place, or maintain, posts, pipes, cables or wires and drains of any nature whatsoever above or below the ground anywhere within the land; and
- (b) enter upon such drainage reserve for the purpose of carrying out any drainage works or repairs whatsoever; and
- (c) any rights exercised under this clause will not constitute re-entry or forfeiture of the lease.

8. Protection of assets

- (a) The Lessee must not erect or permit to be erected any structure of any nature whatsoever over or upon any portion or portions of the land:
- (i) where posts, pipes and cables or wires have been placed and where drains of any nature whatsoever have been dug; or
 - (ii) shown on the plan heron as drainage reserve and coloured blue, and the Lessee must not do any act or thing that will or may:
- (iii) damage any post, pipe, cable, wire or drain or impede the flow of water along any drain constructed within the land; or
 - (iv) damage or impede the flow of water along any drain that has been or may be constructed or excavated along such drainage reserve.
- (b) The Lessee must not remove or dispose of by sale or otherwise any forest produce growing upon the land without the written consent of the Lessor first had and obtained and subject to such conditions as to the payment of royalty or otherwise prescribed by the Forest Regulations as the Lessor may direct.

- (c) The Lessee must keep upon and maintain in good condition to the satisfaction of the Lessor all drains, ditches and water courses upon or intersecting the demised land.

9. Boundary marks to be protected by lessee

The Lessee must in all respects at its cost:

- (i) have boundaries of which have been surveyed and marked on the ground;
- (ii) maintain and protect such boundary marks from loss or damage; and
- (iii) maintain such marks and the boundary lines reasonably clear of bushes, weeds, vines, or other undergrowth so as to enable such survey marks and boundary lines to be readily found and followed at any time.

Provided that no boundary mark established by a surveyor shall be moved, replaced or otherwise interfered with by any person not being a registered surveyor other than by re-piling fallen stones or earth around such mark.

10. Insurance

The Lessor may effect prudent policies of insurance with respect to:

- (a) public liability (including personal injury and property damage);
 - (b) building replacement insurance; and
 - (c) industrial special risks,
- and may require the Lessee to reimburse the Lessor a fair proportion of any premiums paid by the Lessor or the State. The Lessee must not do anything which may vitiate or cancel the Lessor's insurance policies.

11. Indemnity

The lessor releases and indemnifies the lessee, the State, the Trustees, native land owners (and any of their respective agents, contractors, officers and employees) from any loss, damage, liability or claims with respect to the use or occupation of the land by the lessee (or anyone under the lessee's control) with respect to the lease.

12. Warranty

Each party warrants to the other that it has legal capacity to enter into this lease and to grant and perform the rights and obligations contained in the lease. The lessee warrants that, to the best of the lessee's knowledge, any information provided with respect to this lease under Regulation 9(1) is true and correct as at the Commencement Date and the lessee indemnifies the lessor from any loss, damage, liability or claims caused by the breach of this warranty.

13. Default

- (a) In the event of any breach by the lessee of any covenant or condition in this lease the Lessor may issue a notice to the lessee specifying the default and requiring that the default be remedied within the 1st Default Notice Period.
- (b) Where the default is not capable of remedy, the lessee will be deemed to have remedied the default upon payment to the lessor in cleared funds reasonable compensation for the default as determined by the lessor (acting reasonably).
- (c) Where the default remains unremedied after the expiry of the 1st Default Notice Period specified in the notice of default, the lessor may give the lessee a further notice stating that if the default remains unremedied within the 2nd Default Notice Period, then the lessor may terminate the lease.
- (d) Where the default remains unremedied after the expiry of the 2nd Default Notice Period, the lessor may automatically terminate the lease by notice to the lessee, such notice must be given at any time within 6 months after the expiry of the 2nd Default Notice Period.
- (e) Upon termination of the lease, the lessor may enter upon and take possession of the land, without limiting any other rights of the lessor.
- (f) Notwithstanding any other provision of this lease,
 - (i) if the lessee becomes (or if one or more of the lessees become) bankrupt or insolvent then the lessor may terminate this lease immediately, and such termination will be without prejudice to any other rights of the lessor; and
 - (ii) where the lessee has defaulted under the lease, the lessor may (but without being obliged to do so) take such steps as are reasonably necessary or convenient to remedy the breach or limit or contain the likely loss or damage arising out of or in connection with the breach.

and may recover its reasonable costs and expenses thereby incurred from the lessee as a liquidated debt and any actions taken by the lessor will be deemed not to constitute re-entry or forfeiture of the lease.

14. Improvements

- (a) The lessor may remove any building or improvement erected by the lessee on the land at any time within 3 months after the expiration of the lease at its own expense provided that:
 - (i) before the removal of any building the lessee shall have paid all rent owing by him and shall have performed or satisfied all his other obligations to the lessor in respect of the demised land;
 - (ii) in the removal of any building the lessee shall not do any avoidable damage to any other buildings or other part of the demised land;
 - (iii) immediately after the removal of any building the lessee shall make good all damage occasioned to any other building or other part of the demised land;
 - (iv) the lessee shall not remove any building without giving one month's previous notice in writing to the lessor of his intention to remove it;
 - (v) at any time before the expiration of notice of removal, the lessor, by notice in writing given by him to the lessee, may elect to purchase any building comprised in the notice of removal, and any building thus elected to be purchased shall be left by the lessee and shall become the property of the lessor, who shall pay to the lessee the fair value;
 - (vi) if the lessee applies for a renewal of the lease the provisions of paragraph (i) shall be deemed to cease to apply as from the date of the application of the lessee for a renewal of the lease; and
 - (vii) that in the event of any breach by the lessee of any covenant or condition in the lease the lessor may enter upon and take possession of the land without limiting any other rights of the lessor.

15. Compliance with Laws

The lessee must comply at all times with all laws applicable to the land, the lease and the lessee.

16. Governing Law

This lease will be governed by the laws of Fiji.

17. Definitions and Interpretation

In this lease:

- (a) references to a person include an individual, firm or a body, corporate or unincorporate;
- (b) terms which are defined in the Land Use Decree 2010 or the Land Use Regulations 2011 have the same meaning in this lease;

SPECIFIC LAND-USE CONDITIONS

Column 1	Column 2
<p>All areas other than commercial, residential, industrial, township sites</p>	<p>In addition to any other conditions which the Director, in the circumstances of any case may see fit to impose, the lessee may only erect such buildings on the land as are necessary for:</p> <ul style="list-style-type: none"> (a) dwellings or dwellings for the lessee; (b) dwellings for persons bona fide employed on the land, such as stockmen, farm, plantation or quarry labourers and supervisors; or (c) accommodation for implements, vehicles, fences, and other stock used in connection with the farm, plantation or quarry or any building connected with the work of a farm, plantation or quarry, as the case may be.
<p>Agricultural purposes</p>	<p>In addition to any other conditions which the Director in the circumstances of the case may see fit to impose, the lessee must:-</p> <ul style="list-style-type: none"> (a) keep the whole of the land in good condition and must not allow any part to become impoverished and must use such artificial or other manure as may be required by the lessee or an officer authorised by or on behalf of the lessee in that behalf in writing; (b) apply such measures to check soil erosion as may be required by the lessee in writing and shall maintain such measures to the satisfaction of the lessee or of an officer appointed by the lessee in writing. Without prejudice to the generality of this paragraph, such measures may include one or more of the following - <ul style="list-style-type: none"> (i) strip cropping; (ii) terracing; (iii) contour-planting; (iv) cover cropping; (v) retention of cropping; (vi) construction of drains or dams; and (vii) construction of fences;

- (c) the word "includes" or "for example" or similar expressions does not limit what else is included unless there is express wording to the contrary;
- (d) clause headings and sub-clause headings shall not be used in the interpretation of the lease;
- (e) words in the singular include the plural and words in the plural include the singular, according to the requirements of the context. Words importing a gender include every gender and other parts of speech and grammatical forms of a word or phrase defined in the Lease have a corresponding meaning;
- (f) unless otherwise provided, all references to monetary amounts in the lease are in Fiji dollars;
- (g) if any provision of the lease is deemed to be or becomes void, voidable or unenforceable, it shall be read down or, if incapable of being read down, severed and the remaining provisions of the lease shall continue to have full force and effect;
- (h) a reference to a decree, statute, regulation, proclamation, ordinance or by-law includes all decrees, statutes, regulations, proclamations, ordinances or by-laws amending, consolidating or replacing it, and a reference to a decree or statute includes all regulations, proclamations, ordinances and by-laws issued under that decree or statute;
- (i) a reference to a party to a document includes that party's successors and permitted assigns;
- (j) no provision of the lease will be construed adversely to a party solely on the ground that the party was responsible for the preparation of the Lease or that provision; and
- (k) a covenant or agreement on the part of 2 or more persons binds them jointly and severally.

- (c) not fill trees or clear or burn off bush or cultivate any land within a distance of 7 metres from the bank of a river or stream; and
- (d) not without prior consent of the lessor clear, burn-off, cultivate or permit excessive grazing of the top 25 per cent of the hills (as measured vertically) which have a slope exceeding 25 degrees from the horizontal.

In addition to any other conditions which the Director in the circumstances of any case may see fit to impose, the lessee must:

- (a) within a specified period and under penalty of re-entry erect to the satisfaction of the lessor a dwelling house on the demised land at a minimum expenditure of of such dimension or both as shall be specified in the lease;
- (b) not without the written consent of the lessor erect or permit to be erected on the demised land a greater number of dwelling-houses than is specified in the lease;
- (c) not use or permit to be used the demised land or any part thereof or any dwelling-house or accessory out-building to be erected thereon, for any trade, business, occupation or calling whatsoever; and no act, matter or thing whatsoever shall, during the term of the lease, be done in or upon the said land or buildings or any part thereof, which shall or may be or grow to the annoyance, nuisance, damage or disturbance of the occupier, lessee or owner of the adjoining land. Provided that a home industry approved by the lessor in writing or a professional practice may with the written consent of the lessor first had and obtained be conducted within a dwelling-house; and
- (d) at all times maintain and keep in good repair and tenurable condition, to the satisfaction of the lessor, all buildings erected upon the demised land.

In addition to any other conditions which the Director in the circumstances of any case may see fit to impose, the lessee must:

- (a) within a specified period erect to the satisfaction of the lessor a commercial or industrial building as the case may be on the demised land at a minimum expenditure of of such dimension or both as shall be specified in the lease; and

Residential purposes

- (b) at all times maintain and keep in good repair and tenurable condition, to the satisfaction of the lessor, all buildings erected upon the demised land.

In addition to any other conditions which the Director in the circumstances of any case may see fit to impose, the lessee must:

- (a) within a specified number of years and under penalty of re-entry effect to the satisfaction of the lessor such permanent improvements, which shall include fencing, as maybe specified in the lease;
- (b) stock the land in the manner specified in the lease;
- (c) plant the land with grass in the manner specified in the lease;
- (d) keep the areas planted in compliance with the provisions of paragraph (c) at all times free from weeds and undergrowth to the satisfaction of the lessor;
- (e) not without the prior consent of the lessor clear, burn off, cultivate or permit uncontrolled grazing of the top 25 per cent of hills (as measured vertically) having a slope exceeding 25 degrees from the horizontal;
- (f) apply such measures to check soil erosion as may be required by the lessor in writing and shall maintain those measures to the satisfaction of the lessor or of an officer appointed by the lessor in that behalf in writing. Without prejudice to the generality of this paragraph, such measures may include the restriction of grazing, terracing, construction of fences;
- (g) not without the prior consent of the lessor in writing, take, use or otherwise injure any forest tree growing upon the demised land except for the purpose of clearing the land for the planting of grass or of erecting fences or buildings incidental to the use of the land for grazing purposes; and
- (h) ensure that the whole or any portion of the land used for the grazing of stock shall be enclosed with good and substantial fencing so that all stock kept upon the land shall at all times be adequately fenced in.

Grazing or dairying purposes

Tourism, commercial or industrial purposes

Signed by the Director of Lands for and on behalf of the Lessee:

.....

Witnessed by:

.....

Signed by the Lessee

.....

Witnessed by:

.....

Correct for the purposes of the Land Transfer Act (Cap. 131)

.....
Solicitor

Tramway purposes

In addition to any other conditions which the Director in circumstances of any case may see fit to impose,

- (a) the lessee must not erect on the land any building not incidental to the use of the land for tramway purposes;
- (b) the lessee must ensure that the owners and occupiers of adjacent land which enjoy the benefit of a right of way over the lease land shall have the right at all times to cross any tramway lines laid or constructed provided they do not hinder or obstruct the passage of trains thereon or cause any damage thereon;
- (c) the lessee must form and maintain in good order to the satisfaction of the lessee during the currency of the lease, all level crossings and gates and such bridges as the public have the right to use;
- (d) that, subject to the prior written consent of the Director, the lessee shall have the right at any time during the currency of the lease to remove the said tramway line and bridges connected therewith except any bridges or bridges that may connect portions of the public highway;

Quarrying purposes

Land must be used solely for the removal of sand, common stone, lime or other similar material and for the housing of the machinery and implements necessary therefore and the labourers employed thereon and the royalty to be paid for such material and the manner of payment and the nature of the improvements required to be effected shall be set out in every such lease in detail.

FORM 14
(Regulation 14)

STATUTORY HEAD LEASE

The terms and conditions of the Statutory Head Lease are as follows:

1. Definitions

Terms used in this Head Lease and defined in the Land Use Decree 2010 or the Land Use Regulations 2011 have the same meaning in this Head Lease.

"Commencement Date" means the commencement date specified in the Lease.

"Current Fair Market Rent" means the most recent fair market rent assessed, agreed or determined as the case may be under Regulation 8 of the Land Use Regulations 2011.

"Lease" means a Lease entered into by the Director under the Regulations;

"Lessee" means the lessee under the Lease;

"Head-Lessor" is the true owner from time to time of the Native Land within which is situate the Premises, and represented at all times by the Trustees;

"Head-Lessee" is the Director of Lands on behalf of the State;

"Premises" means the land the subject of the Lease;

"Rent" means the rent specified in Clause 3;

"Statutory Obligations" means all rates, taxes, charges, duties, and impositions assessed with respect to the Premises, the Head-Lessee's use of the Premises, or the Head-Lessee by the State or any lawful authority or statutory body.

"Term" means the term of the Lease plus one day, commencing on the Commencement Date.

2. Grant

(a) The Head-Lessor grants, and the Head-Lessee accepts, a head lease of the Premises for the Term and the Rent and otherwise on the terms and conditions set out in Clauses 3, 4 and 5.

(b) The grant of the Head-Lessee includes the grant of all rights and benefits reasonably necessary and convenient for the Head-Lessee to grant the Lease (as accreted from time to time).

No. Registered at	No. Registered at
To	To
Registrar of Titles	Registrar of Titles
No. Registered at	No. Registered at
To	To
Registrar of Titles	Registrar of Titles
No. Registered at	No. Registered at
To	To
Registrar of Titles	Registrar of Titles

3. Rent

- (a) The rent shall be payable annually in advance to the Trustees without demand. For the avoidance of doubt, rent shall only be payable after a Lease is entered into by the Director in respect of the land in question.
- (b) The rent shall be the Current Fair Market Rent as determined in accordance with Regulation 8 of the Land Use Regulations and the Lease.

4. Outgoings

- (a) The Head-Lessee must pay when due all Statutory Outgoings.
- (b) The Head-Lessor must provide all reasonable assistance to the Head-Lessee to enable the Head-Lessee to comply with its obligations under this Clause 4.

5. General Terms and Conditions

- (a) (Use) The Head-Lessee may use and develop the land for any use or development permitted by law.
- (b) (Improvements) The Head-Lessee may erect buildings or improvements on the land at any time and without the consent of the Head-Lessor. As between the Head-Lessor and the Head-Lessee, legal and beneficial ownership of such buildings and improvements will vest in and remain with the Head-Lessee.
- (c) (Assignment and Subletting) The Head Lease will not be capable of assignment. However, the Head-Lessee may grant, vary, and in all respects deal with the Lease and any estate or interest granted under the Lease without the consent of the Head-Lessor.
- (d) (No termination) Notwithstanding any provision of the Head Lease or any principle of law or equity to the contrary:
 - (i) the Head-Lessor will not be entitled to terminate the Head Lease for any reason (including without limitation any purported repudiation of the Head-Lessee);
 - (ii) (subject to clauses 3, 4 and 5) the Head-Lessor's right to contractual damages, compensation or any financial remedy will be limited to the corresponding amount actually recovered by the Head-Lessor from the Lessor; and
 - (d) the Head-Lessor will not be entitled to any remedy or relief (including injunctive relief) against the Head-Lessee except to the extent that the Head-Lessee can actually require the Lessee to fully perform and comply with such remedy or relief.

- (e) (Surrender) If the Lease is terminated for any reason (including the effluxion of time), the Head-Lessee:
 - (i) may surrender this Head Lease automatically without payment of any surrender sum or compensation with effect on and from the date the Lease is terminated; and
 - (ii) will be released in full from performance of any obligations which fall due for compliance on or after the date the Lease is terminated.

THIRD SCHEDULE
(Regulation 17)

PHES	\$
(i) On application for a lease, tenancy or licence	100.00
(ii) Preparation of lease inclusive of issue of approval notice but exclusive of plan, provided that where special clauses are required this fee may be increased by an amount not exceeding \$100 at the discretion of the Director	200.00
(iii) Preparation of extension or variation of lease	50.00
(iv) Preparation of licence (exclusive of plan)	200.00
(v) Plan fee if plan drawn on lease or licence	50.00
(vi) Plan fee if photocopies of plan attached to lease or licence	50.00
(vii) Certified copy of lost or destroyed licence including plan	50.00

(All fees being charged are VAT Exclusive)

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