

State Society and Governance in Melanesia

DISCUSSION PAPER

Discussion
Paper 2011/1

THE INTERACTION OF MODERN AND CUSTOM LAND TENURE SYSTEMS IN VANUATU

INTRODUCTION

Vanuatu has two different systems of land tenure: a formal system inherited from the colonial period and an uncodified customary system. The customary system is characterised by its elaborate nature, opacity to outsiders, and variety with notable differences over how land is exchanged, inherited or otherwise accessed both within and between islands.

Social organisation is closely bound to land rights and management, to the extent that place of origin and personal identity have been described as synonymous. In apparent contradiction to this immutable sense of place and identity is a society based on different layers of land rights which are widely divested, creating bonds within and between groups. This system permits access to different resources, allows for migration and accommodates shifts in power between groups and individuals. Surplus land can be divested to build power bases. Under custom, the flexible transfer of land-use rights generally allows for and helps maintain the fabric of social relations. Land

is seen as communally owned, to varying degrees, but is uniformly administered by patriarchs.

The formal system of land tenure was introduced under the colonial period and largely continued following Independence in 1980. Although French law has equal status to 'British' law, the formal tenure system is based on the English system of 'Torrens title' in which land is owned by one or more individuals or bodies corporate, and ownership is verifiable through a legally guaranteed entry on a register.

Both tourism and construction, the most important drivers of economic growth in Vanuatu, are land-hungry industries that demand clear and verifiable land titles as assets on which to build and sell. Banks will not lend on customary-owned land as they perceive too many risks in the undocumented network of rights-holders who could later make claims to the land. The Government of Vanuatu also demands sole possession of the state infrastructure; the schools, hospitals and administrative centres that were

**JUSTIN
HACCIUS¹**

nominally returned to customary ownership on Independence. In this context 'development' is equated with a shift to the formal system.

As the fruits of economic development seem to be accessible only through the formal system, both ni-Vanuatu and (largely foreign) investors have incentives to convert customary land into registered title. The government and government officials are also tied into this framework of incentives with the result that a relatively simple system for the registration of leases over customary land has been set up. Flaws in this system combined with imbalances of power between the landowners (who are generally unfamiliar and ill equipped to deal with the formal system) and investors (who are often experts in it) mean the formalisation of land tenure gives rise to complaints of exploitation and postcolonialist land-grabs.

At the same time, the Constitution of Vanuatu is proudly affirmative that the 'rules of custom shall form the basis of ownership and use of land' (Const. art. 74) and that only 'indigenous citizens ... shall have perpetual ownership of their land' (Const. art. 75). There is therefore a substantial gap between the law as it is stated and how it is practically applied in managing land transactions.

This paper is focused on the formal system rather than the customary system. That is, the role and position of the formal system toward the customary land brought within its ambit in this legally pluralistic society rather than the possibilities, problems and potentialities that customary land tenure offers. As such it does not purport to be a comprehensive or even coherent analysis of customary land tenure.

The interaction of the customary and formal land tenure systems often has negative consequences, such as dispossession of customary owners and deterrence of investors. Neither system properly understands the other. Well-intentioned individuals become frustrated at the opacity of the 'other' system, while malicious individuals are able to exploit the lack of commonalities for illegitimate gains. This paper seeks to highlight critical 'points of contact' between the formal and customary systems and to note some of

the impacts these issues have for customary landholders.²

Beginning with the Constitution, expanding ripples of implementing legislation, political leadership, practices of land administration, and certain prejudices within the operation of the private sector mean that Vanuatu has struggled to find equitable paths to realise its commitment to custom.

The Constitution is central to understanding issues within the formal system, and at the same time may offer the best hope of resolving many difficulties. The role of the legal framework it establishes is the focus of the first section. The second section looks at the process of registering land, in particular how certain procedural inadequacies allow the intent of legislation to be circumvented. The third section suggests that problems deriving from the preceding parts are compounded by 'soft prejudices' that confuse and undermine customary-owner negotiations. These last are among the least understood aspects (certainly in the literature) but also perhaps the most important.

The information in this report was compiled through discussions with government officials, private sector professionals and academics working in the Vanuatu land sector, together with an analysis of legislation and court decisions, and a desk review of relevant academic literature. This report is written without reference to the Government of Vanuatu's comprehensive 'Vanuatu Land Sector Framework 2009–2018', which had not been approved at time of research. Grateful mention is also made of excellent research materials produced under AusAID- and NZAid-funded projects whose substantive activities were due to begin at time of writing.

CONSTITUTIONAL AND LEGAL FRAMEWORK

Immediate challenges post-Independence of reconciling the return of land to customary ownership with protecting (foreign-owned) agricultural production

The return of land to customary owners, mandated by the Constitution, raised a number of practical issues; most notably identifying

these owners. Many plantations and urban areas had been long established, erasing the markers that distinguished customary land boundaries. Missionaries had collected different groups of people from their lands and into coastal villages, while others were drawn toward the attractions of colonial administrative centres. Following contact with Europeans, a series of epidemics swept the islands, killing up to 95% of the population on some (Speiser 1923). Furthermore, land is not necessarily inherited by direct lineage in Vanuatu custom and there are many ways, other than by descent, that people could claim land. The drafters of the Constitution were fully aware that by formally returning all land to the customary owners they were unleashing a range of disputes and uncertainties to which there was no quick solution.

At Independence in 1980, Vanuatu was economically dependent on agricultural production. The government was intent on preventing the plantations from collapsing into disputes and carefully considered the management of the return to customary ownership. Thus article 78(1) of the Constitution provides that:

Where, consequent on the provisions of this Chapter, there is a dispute concerning the ownership of alienated land, the Government shall hold such land until the dispute is resolved.

Under the *Land Reform Act 1980* (LRA) passed to handle this transition,³ the expatriates, known as alienators, were entitled to remain on their land until either a lease was agreed or they were compensated. To qualify, they had to be in physical possession of their land 'immediately prior to the Day of Independence' (this excluded the expatriates who had abandoned their properties) and the land had to be 'maintained in reasonably good repair' (LRA s. 1) excluding claims to swathes of undeveloped bush land. If the appropriate customary owners could not be identified, perhaps because of disputes, then the minister could appoint a trustee on their behalf. Further, in cases where expatriate alienators had vacated their land (many had left the country or been deported following abortive secession attempts) and the custom-

ary owners were unclear, the LRA gave the Minister of Lands 'general management and control' (LRA s. 8(1)), including the power to grant leases over the disputed land (Van Trease 1987).

Although the Constitution aspired to a land system based on custom, the return of land to customary ownership led to a more immediate priority — namely establishing a system to deal with 're-leasing' transactions of alienated land back to the alienators to continue agricultural production. The fathers of the Constitution, in common with many postcolonial states, had to balance a vision for the future with the immediate demands of politics and the economy. In the tumult of pre-Independence nation building, the challenge of designing a coherent land tenure system out of the multiplicity, fluidity, and sheer 'otherness' of custom from any available precedent legislation, was assigned to a 'national land law' (Const. art. 76) and to parliament.

The Constitution did not prevent the issuance of leases⁴ to foreigners (although only indigenous citizens could own freehold title) but it was greatly concerned that such leases should be fair to customary owners. Government had to consent to all leases of land to foreigners and this consent was to be withheld if the transaction was prejudicial to the interests of customary owners, the community in whose locality the land was situated, other indigenous citizens, or the Republic of Vanuatu. It was a sensible recognition of the power imbalances that still characterise land negotiations between indigenous ni-Vanuatu and foreigners.

The legal framework for the newly independent republic was therefore characterised by three features:

- i) implementing legislation designed to manage the return of land to customary ownership (and reconversion to leasehold if required), and which included strong powers for the Minister of Lands to manage this process
- ii) a permanent government power to approve or reject transactions between ni-Vanuatu and foreigners (and citizens of foreign extraction)

iii) the unrealised promise of a national land law based on custom to replace a land tenure system based on colonial tenets.

Broadly, the failure to promulgate ii) and iii) has facilitated the misuse of powers in i).

Failure to limit the Minister of Lands' power to deal in disputed land to the parameters set in the 'temporary' legislation

Because the legal framework described above was intended to manage the transfer of land in a transitional period, one would expect there to have been a glut of leases signed by the Minister of Lands on behalf of disputing customary owners immediately after Independence, and that this number would tail away as leases were agreed with alienators and as customary owners resolved disputed ownership and took responsibility for their own lease negotiations, albeit under the supervision of government. In fact the reverse is true. As set out in Figure 1, the number of leases signed by the minister remained relatively low for the first decade after Independence. As Vanuatu entered the 1990s, however, the numbers of leases signed by Ministers of Lands began to climb.

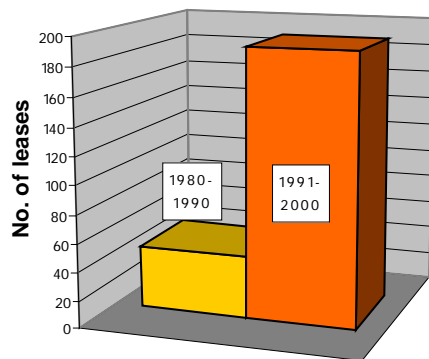


Figure 1 Leases signed by ministers, 1980–2000

Source: calculated from Farran (2002)

Research into leases granted over the island of Efate show that 22% (223) of all leases granted for the island of Efate from 1980 to 2000 were signed by various Ministers of Lands, and 80% of this number was signed between 1990 and 2000. Following the recent property boom, the number is now likely to be substantially higher (Farran 2002).

As Figure 1 shows, the number of leases has increased dramatically. There are two apparent reasons for this. Firstly, many of the disputes between customary owners over land alienated before Independence were never resolved. As this land became more valuable in the course of the tourism boom of the 1990s the determination of the disputants became more entrenched: 'It has been stated that 100% of unsuccessful litigants in land matters currently exercise their right of appeal to the Supreme Court' (Hardy-Pickering 1997). Thus many disputes between customary owners deriving from the return of alienated land remain active, not least the dispute over who owns (i.e. should have received the compensation for) the capital, Port Vila. Even so, one would expect such disputes to decline gradually as the courts worked through them and, concomitantly, a decline in the number of leases signed by the Ministers of Lands.

A second explanation for the ongoing activity of the minister in issuing leases is that the power to sign leases where customary owners are in dispute is being used more broadly than the legislation intends. Constitutional article 78(1), set out above, clearly restricts this power to alienated land. The implementing legislation is less clear. Section 8 of the LRA states:

8. (1) The Minister shall have general management and control over all land
 - (a) occupied by alienators where either there is no approved agreement in accordance with sections 6 or 7 or the ownership is disputed; or
 - (b) not occupied by an alienator but where ownership is disputed; or
 - (c) not occupied by an alienator, and which in the opinion of the Minister is inadequately maintained.

Section 8(1)(b) does not specifically state what type of land it relates to, and as the heading clause refers to all land, it has been taken that subclause (b) refers to both customary and alienated land and consequently

that the Minister of Lands has a power to grant leases over any customary land that is disputed.

This expansive interpretation, however, would seem to exceed the power granted in the Constitution, which refers only to the power of the minister with regard to alienated land. It would also appear to be contrary to the purpose and circumstances surrounding the enactment of the LRA, which, as discussed above, was drafted as a response to the post-Independence return of alienated land to customary owners. Moreover, the expansive interpretation of the minister's power is difficult to derive even from a close literal reading of the text as is made clearer if the phrase is preceded with the different type of land:

8. (1) The Minister shall have general management and control over all:
- [alienated land] not occupied by an alienator or
- [customary land] not occupied by an alienator.

Drawn out in this fashion, the clause doesn't seem to make sense when applied to customary land, as there is no sensible reason why an alienator would occupy such land — indeed a person occupying customary land is by definition not an alienator (at least with regard to that land).⁵

A limited view of the minister's power (to sign leases only over alienated land) is supported by a growing body of academic opinion (see Lunnay et al. 2007, Regenvanu 2008); however, the expansive view is still used in practice.

To summarise, a close analysis of the legislation suggests that the Minister of Lands has a power to sign leases only over land that was alienated at the time of Independence and does not have a power to sign leases over disputed customary land. Use of the power in this more expansive form would be open to challenge in the courts.

Lack of a definition of disputed land allows any trivial claim to trigger the minister's power

If the Minister of Lands is using his power to grant leases over customary land in 'dispute', it is relevant to consider what a 'dispute' is. There is no definition in any of the legislation as to what criteria must be fulfilled for land to be disputed, and no threshold to exclude minor disputes. In short, under the current interpretation of the law anyone can claim a right to land, thereby create a dispute and trigger the power of the Minister of Lands to grant a lease over the land.

The consequences of this legislative omission are exaggerated because of the nature of landholding in the customary system, which incorporates fluid, exchangeable rights of use. 'Ownership' is often portrayed as an intruding foreign concept ('landholding' being a preferred term for custom proponents), while rights to land can be inherited through male and female lines, membership of a *naflak*,⁶ by working land or contributing to a community, or by other means specific to customary areas (Crocombe 1995, Fingleton et al. 2008, Rodman 1995, Van Trease 1987). With so many possible rights-holders, disputes are likely, particularly when a transaction offers the prospect of a windfall.

There is no statutory requirement⁷ for a Minister of Lands to identify the dispute that permits the exercise of his power. In the example in Box 1 (page 6), no attempt to do so was made.

It is difficult to evaluate how many of the disputes that are used to trigger the minister's power are caused by trivial claims involving 'have-a-go' claimants. It is also difficult to distinguish disputes in which disputants do not want the land leased, from those in which the disputants are contesting for the right to lease out the land. The central issue, really, is that it does not matter what the customary owners want. In the case of disputes (which are often present and easily triggered), the Minister of Lands has been able to step in and lease the land without anyone's consent.

BOX 1: THE GOLDEN BEACH LAND DISPUTE

Valuable beachfront land had been the subject of a customary land dispute that was resolved in a Customary Land Tribunal. During 2007, the Department of Lands officer received a request to process a 'disputed land' lease that was being created independently by the Minister of Lands. Due to understaffing, the lands officer was also acting as the Customary Land Tribunal officer, and he recognised that the land under question had had its dispute resolved long ago. The customary owners were able to file for a court order stopping the registration of the lease. If it had not been for the serendipitous involvement of the lands officer in both cases the land would likely have been registered under a lease without the knowledge, until too late, of the customary owner (*Iercet v. Naliupis* [2009] VUSC 5).

The obligation to act in the interests of customary owners

The only additional limitation on the minister's power to deal in disputed land is the obligation in the LRA (s. 8(2)(c)) to:

take all necessary measures to conserve and protect the land on behalf of the custom owners.

Section 8(2)(b) states also that leases must be in the interests of customary owners.

The law contains no further explanation of what is in a customary owners' interest nor does it suggest a process for ascertaining it. A similar constitutional provision (Const. art. 76(2)) that transactions must not be prejudicial to the interests of customary owner, community, or nation reinforces the law but does not clarify how customary owners' interests should be established, nor what should be done if a lease is demonstrably not in their interest.

Case law fills this gap to an extent. Under the LRA (s. 100), the only grounds for rectifying the register of leases are 'fraud or mistake' in its creation. This has been interpreted by the courts to deal with leases that derive from situations of manifest injustice. The courts have held that some ministers have made 'mistakes'; for example, by failing to take into account injunctions against the creation of leases (*Roqara v. Takau* [2005] VUCA 5), or by failing to 'lawfully, properly or validly exercise the powers of the Minister of Lands' (*Ifira Trustees Ltd v. Family Kalsakau* [2006] VUCA 23). Most recently, the Supreme Court in the Lelepa case decided that a min-

ister had made a 'mistake of ignoring his duty to properly consult' with a customary owner:

It can hardly be acting in the interests of a custom land owner to grant a 75 year lease of his land without even consulting the presumptive owner, particularly when he had made it clear to the minister that he did not want a lease granted.

(*Solomon v. Turquoise Ltd* [2008] VUSC 64)

However, the case did make clear that for a minister to consult and for a minister to act according to the views expressed were different matters. The judge in *Solomon v. Turquoise Ltd* goes on to comment: 'the Minister's attitude was such that he would have ignored [the customary owner's] opposition and granted the lease anyway'. It seems there is a distinction in Vanuatu law between knowing the wishes of a customary owner and acting in their best interests.

Moves to limit the power of the Minister of Lands

The exercise of a power to grant leases over land without the consent of the customary owners has caused great anger in Vanuatu, and is probably the single most contentious issue in a subject that causes great rancour. A National Land Summit held in 2006 resolved to remove this power. The National Land Summit resolutions were adopted by the Council of Ministers but this particular resolution was amended to allow grants over disputed land 'used for public interest' (COM 2006). It is not clear if this is meant to mean the power is restricted to when land is needed for public use ('the Government may own

land in the public interest' — Const. art. 80) or if it is simply a restatement of the already current position in the law and the Constitution stated above. The first interpretation would make most sense.⁸

In the November 2008 session of parliament, a Private Member's Bill sought to remove the minister's power by legislative amendment but the Bill was rejected on the grounds that disputes must not hinder development, an argument that recalls the earliest days of Independence.

Based on the discussion above, at least three strong arguments could be put forward to challenge a lease entered into by the minister: (i) that the minister's power only applies to alienated land; (ii) that there is not in fact a dispute or the dispute is trivial or unsubstantiated; and (iii) that the lease is not in the customary owner's interest.

Land cases are clearly receiving judicial attention in the courts. It is therefore a matter of some curiosity that the limitations of the existing legislation seem not to have been explored with a view to better controlling the expansive fashion in which some ministers have exercised their power to deal in customary land.

REGISTERING CUSTOMARY LAND

Comparing the common law 'chain of title' system with the customary oral history system but contrasting the lack of diligence in verifying customary rights-holders

Before the introduction of the Torrens system,⁹ the common law system required proof of ownership of land by 'chain of title', which represented the collected title deeds stretching back, ideally, to the first grant of land by the Crown. Apart from the obvious difference that one is written down and the other recounted orally, there are similarities between this system and custom. There is a large degree of uncertainty in both systems; ownership in both depends on tracing the 'story' as far back as possible through history and, in both, verifying title requires great effort and is time consuming. Both are also

prone to introduction of new, often fraudulent, claims along the 'chain'.

In relation to both unregistered land under common law, and customary land, possession is good evidence of title. In custom, for example, rights of use are easily given and rights to land can be earned by working it (Bonnemaison 1984:2). Therefore, in both, physical verification of land is very important. In the common law system, a purchaser of unregistered land is expected to check land boundaries and landmarks to verify plans and to ask questions about, for example, the status of people obviously living on the land, fishing rights if there was a river and rights of access if there was a path.

Because of the weaknesses of the common law system, and the indefeasibility of title in the Torrens system, great care was taken in western countries when converting unregistered title deeds to registered (Torrens) title. The basic principle in common law is 'buyer beware'.

Under common law, a purchaser of unregistered land (comparable to customary-owned land) who did not have notice of a third party's interest (such as the existence of rights of use or other owners of a group) would take the land free from those interests. In return, however, the purchaser is expected to make reasonable efforts to verify the existence of any third party rights; they will be subject to interests they would have known about had they taken reasonable measures to find out.¹⁰ For this reason, purchasers make thorough investigations of other possible interests (Farran & Paterson 2004).

These principles also exist in Vanuatu legislation. In common with other systems that allow registration of interests in land, the *Land Leases Act 1984* (LLA) states that:

The rights of a proprietor of a registered interest [e.g. a lease] ... shall be held ... free from all other interests and claims whatsoever. (s. 15)

However, registration can be cancelled or amended if the proprietor:

... had knowledge of the omission, fraud or mistake ... or caused such omission, fraud or mistake or *substantially contributed to*

it by his act, neglect or default. (s. 100(2), *emphasis added*)

In Vanuatu the practice appears to be to apply the first rule, but not the safeguard even though failing to properly verify the customary owners would seem to be a 'substantial contribution' to the mistake or omission of entering either incorrect or insufficient customary owners on the Register of Leases, with the result that such leases could be nullified.

Why the state erroneously appears to have assumed responsibility for verifying customary ownership

The only formal investigation of ownership is undertaken by the Department of Lands using a form known as the Custom Owner Identification Form,¹¹ which is signed by a chief. This has several implications. Firstly, it means that yet another step in the process of leasing land can take place without the customary owners' participation or consent. Secondly, it gives the chiefs an effective veto over land transactions. And thirdly, it raises questions over who are the appropriate chiefs and what interests they have, there being no process to verify the correct chief has signed, that they have correctly identified the customary owner, or the land has been properly delineated. The implications of disputed titles of chiefs are clear in these circumstances.¹²

The Interim Transitional Implementation Strategy of the 2006 National Land Summit Resolutions adopted by the Council of Ministers (COM 2006) required that information about Custom Owner Identification Forms be advertised in a public place and discussed in public meetings (with minutes submitted to the Department of Lands) before their inclusion in the lease registration process.¹³ This demonstrates the improvements that can be made on an administrative level. At the same time, the lack of resources to support or verify the process and the lack of provision for enforcement or penalty in case of omission demonstrate the follow-up support that is needed once such administrative requirements are introduced.¹⁴

Another noteworthy aspect of the LLA relates to Certificates of Negotiation established to realise the constitutional provision that the government control the issue of leases to foreigners (Const. art. 79(1)).

No alienator or other person may *enter into negotiations* with any custom owners concerning land unless he applies to the minister and receives a certificate from the minister that he is a registered negotiator. (S. 6(1), *emphasis added*)

Authorisation to 'enter into negotiations' is very different to consenting to the final transaction. The Certificate of Negotiation is another interim measure that has been perpetuated; it was originally intended to manage the 'return and re-lease' of land at Independence. Now it is generally seen as the procedural safeguard implementing the constitutional requirement that consent should not be given to leases that are prejudicial to the interests of the customary owner, community or nation (Const. art. 79(2)). This is a misconception; the certificate cannot provide a safeguard against prejudicial leases as leases are substantively negotiated after the approval of the certificate.

The Certificate of Negotiation specifies the customary owner as identified through the Custom Owner Identification Form. Since in theory this is the first step of the land transaction (the Certificate of Negotiation is a permission to begin negotiations) it seems to have become the view that through the Custom Owner Identification Form process the state has guaranteed the identity of the customary owners and thus freed the purchaser (lessee) of the need to check if there are other claims to the land. In fact, however, nothing in the legislation frees the purchaser from the need to check for other claims. Neither the form nor the Certificate of Negotiation should be seen as a guarantee that the lessor is in fact the true owner of the land in question and vigilant purchasers have scope in the course of subsequent negotiations to properly verify title. In short, a purchaser who does not properly verify title should be subject to reasonably verifiable interests that appear afterwards.

The benefits of not properly verifying customary owners and explaining the relative absence of contested leases in a context of inequitable lease creation

In common law, if a seller turns out not to have owned the land he sold, the transaction would be void under the principle that one cannot sell what one does not own.¹⁵ The extension of this principle to Vanuatu, where the issues are more complex and the likelihood of excluded rights-holders greater, would mean that purchasers/lessees should be proportionately more careful in ascertaining that the persons they are negotiating with are true customary owners with rights to conduct the transaction proposed. In fact, the basic level of care that is taken by purchasers of unregistered land in England is not taken by lessees of customary land in Vanuatu as there is little to lose and much to gain by not trying to fully verify customary ownership. Why this is, goes to the heart of the power imbalance between customary owners and the (often foreign) lessees of their land.

The ultimate cost of failing to verify customary owners for a lessee is to have their lease nullified in court. However, comparatively few court challenges are made against lessees by excluded customary rights-holders. The Valuer General also has a power to forfeit leases where there has been a breach of terms or conditions within a lease, not when a lease is created through fraud or mistake; those cases go to the Supreme Court (Menzies Samuel, Valuer General, pers. comm. July 2009).¹⁶ This means that cases where promises may have been made but which were not included as conditions in a lease do not come under the authority of the Valuer General.

Some flagrant appropriations of land that did not accurately identify customary owners have been set aside but in practice the usual remedy to a successful ownership challenge is to amend the owner's name on the Register of Leases after a decision in a court or tribunal (Director of Lands, pers. comm.). Thus the lease will still stand even though the confirmed customary owner may not have negotiated it.

One reason for this is that many customary owners are actually quite eager to lease their land. Notwithstanding areas and islands of high population density and land scarcity, currently there is more agricultural land available than is needed to grow food. Vanuatu's population has still not recovered from the series of epidemics that decimated the population in the nineteenth and early twentieth centuries. If foreigners wish to lease underutilised and cyclone-vulnerable beachfront land then why not lease it to them? Even low rents are likely to pay more income and certainly require less work than copra production.

A rights-holder excluded from a lease is more likely to be seeking to secure the rents from the lease than to set it aside. Customary owners should be free to decide whether and how to lease their land, just as purchasers should properly verify the rights-holders. Where this has not happened, the desire to secure rents makes it much easier to negotiate one's way out of difficulty and may explain why so few leases, comparatively, are challenged in the courts.

At the same time, there is a clear vulnerability in refusing to lease land. As noted, the chance of windfall payments may precipitate disputes within a group, which allows the Minister of Lands to step in and execute a lease over the heads of contesting rights-holders. Alternatively, with a weak process for verification of ownership, someone within the group may simply lease the land without the consent of other rights-holders. Once the lease has been signed, the other rights-holders are in a difficult position. Many of these transactions should be seen as driven by tenure insecurity.

It is comparatively easy to contest customary ownership of land. Evidence of land rights rests on the fact of possession, and oral traditions that can be falsified or contested, particularly in peri-urban areas where land is most valuable and historically most distanced from customary ownership. At the same time, it is relatively difficult to conclusively establish (or disprove) ownership. To set aside a lease is a lengthy and expensive process at the end of which the courts will require very strong evidence to overturn what has become

a presumption that the person who executed the lease had the power to do so.

Put more simply, asserting ownership of customary land is easy; proving that a lease was granted by the wrong person is extremely difficult. The burden has therefore shifted from the purchaser to verify title and onto the customary owner to prove ownership. With the requisite awareness and financial resources, it is possible to prevent a lease from becoming an immutable reality with rapid and determined legal action. In the circumstances, it is easier by far to take some money, amend the register, and join the lease.

Concepts of customary land tenure that affect the formal land registration process

This paper is limited to reviewing how the formal system manages customary land brought within its ambit. Clearly, differences between the formal system and the customary system lie at the heart of these problems. Although this paper uses certain terms *about* custom (such as 'chief' and 'customary owner') it should not be thought that such terms necessarily represent custom. Rather, these terms represent the formal (previously colonial) system's attempt to grapple with these concepts. These attempts may be summarised as a translation of complex social systems into labels useful and meaningful within the formal system. Translation of this nature is probably intrinsically misleading and vulnerable to disputes.

Custom land tenure is notable for its multiple and flexible land-use rights that individuals claim through their 'egocentric personal networks' (Golub 2007:83). It is probably neither desirable nor possible for such complex socially based rights to be represented in the relatively static device of a registered lease. These are not simply issues of poor translation between the two systems. Golub argues that seeking to represent customary tenets as formal system legal entities has a transformative effect on customary social structures (see Box 2). The formal system allows for a great variety of interests and subsidiary land rights but this does not mean that they are equivalent with customary land rights. In the formal

system, rights are relatively static, limited in number and seen as being attached to the land even while the rights-holders change. In the customary system land rights attach to the person, meaning that the number of rights-holders can increase as the population linked to that land grows. Further study is needed to clarify where and to what extent an equivalence can be found between the subsidiary rights of the two systems. However, in most registered leases in Vanuatu there is no representation of custom or any subsidiary rights at all. This points more to power imbalances between the two systems than any inadequacy in the formal system to describe these rights.

Tension between the Ministry of Lands' role as a disinterested keeper of records and the constitutional (but undefined) duty to ensure transactions are in the best interests of the customary owners

The Department of Lands has received substantial criticism in recent years for its failure to protect customary-owned land and control development through the enforcement of planning provisions and other safeguards. Many of the problems confronting the Department of Lands, however, are simply not within its power to resolve. The Department of Lands has no way of knowing if, in a customary system, a chief would be allowed to sell land nor which chief can rightfully exercise land administration powers, challenges that the National Council of Chiefs itself has been unable to resolve. The Department of Lands could refuse to register a lease on the grounds that other rights-holders had been excluded, but which rights should trigger this power? At what point does a weak right become a fraudulent claim? While to some these questions may be matters of ethnographic curiosity, to the Department of Lands they are genuine and recurring administrative challenges.

Many problems can also be attributed to under-resourcing. There are long delays associated with registering leases due to the limited capacity of staff using limited technology and overwhelmed with a huge backlog.

BOX 2: LOST IN TRANSLATION*Customary owner*

The formal system demands 'a custom owner' sign a lease while custom itself can only provide a group of rights-holders. More important than 'ownership' (which is in a sense immutable), in a society based on shifting cultivation, are multiple land-use rights that can be distributed among groups and individuals maintaining broad networks of social ties. Although user rights and rights-holders are multiple, the land itself is represented by a patriarch. When a patriarch sells land he becomes identified as the customary owner and gains something he never had; an exclusive right to possession that excludes all of the other rights-holders. Thus the formal system's demand for a customary owner is inherently fraught.

Chiefs

Traditional (i.e. pre-contact with the West) Melanesian societies appear to have consisted of scattered groups variously led by people responsible for different activities: leaders for warfare, sorcery, rituals, different forms of food production, etc. The colonial administration 'organised' these groups into villages under the charge of

an appointed chief. Disputes over chiefly titles are rife in Vanuatu.

Many interviewees noted that traditional chiefly powers extended to social organisation rather than land management. Under the current system, chiefs identify customary owners of land, veto leases over that land, and assign ownership where there is a dispute. While 'chief' may appear to be a traditional concept, the position and powers of the modern-day title may be very different from their traditional role.

Group ownership

The complexities of what might loosely be termed group ownership are cultural perspectives as to the degree of control over land between the chief and the group, and the group and the individual. Where custom 'ownership' lies along the complex continuum from group to individual is hotly contested and possibly unanswerable. The formal system has largely disregarded such complexities, preferring to identify, validly or not, a single owner who can give exclusive possession (Bolton 1999, Bonnemaïson 1984, Crocombe 2006, Rodman 1995).

A recent AusAID-funded study noted substantial arrears in rent collection, an important source of revenue for government.¹⁷ Units that are responsible for environment impact assessments, verification of customary owners, and land surveys respectively, have important roles to play in supporting customary owners in the lease process but are similarly under-resourced for the demands placed on them (Lunnay et al. 2007: Att.7; Hassall & Associates 2008:44).¹⁸

Normally, a lands registry is a neutral, disinterested institution that guarantees land titles but does not guarantee the fairness of the preceding land transactions. It is seen as a facilitator rather than an engaged enforcer. In Vanuatu, though, the Constitution and

the transitional legislation have introduced an evaluative element to the process: land transactions involving customary land have to be in the interests of the customary owners, community, and wider national interest. However, there was little guidance given in the legislation as to how to effect this. The LLA detailed how leases should be registered but not how they should be assessed. The Department of Lands has not been given any political guidance on how to engage in the process and little has been done to move the culture of the department toward a more interventionist, protective stance (Steven Tahî, pers. comm.).

The opposite is rather the case. Instead of signing leases in the best interests of customary owners, certain ministers are known to have signed leases for their own self-enrichment (Vanuatu Daily Post 2009; Radio New Zealand 2007; Office of the Ombudsman 1998a, 1998b, 1999). Corrupt political leadership undermines civil service institutions. Under it honest officials become disillusioned while those disposed to self-enrichment can take advantage of an atmosphere of impunity. Small countries are particularly vulnerable to an unhealthy meshing of business and political interests. In Vanuatu, there is something of a 'culture of cronyism' that includes intimidation of lower-ranking officials by purchasers and developers seeking to bluster transactions past long delays caused by understaffing and lack of technology (Department of Lands officials, pers. comm.).

There is a discernable tension between Department of Lands officials and their political leaders that comes out in court cases challenging the decisions of ministers to sign leases:

He [the judge] found they [Lands officials] had made a principle and courageous stand on this matter when they expressed their concerns about the irregularity in the process for the issue of the Plaintiff's lease.

(Peter Bouchard v. Director of Land Records [2003] VUCA 5)

Positive and strong political leadership is required if Department of Lands officials are going to take an interventionist stance when customary owners wish to sell, or if they are going to take on well-moneyed, well-connected and combative developers who circumvent regulations. It would be consistent with the law for the Department of Lands to be more assertive in the execution of its duty to protect customary owners. To do this, the Department of Lands needs guidance on how protective the government should be in carrying out its constitutional responsibility to ensure leases are in customary owners' best interests. Once the political will and direction is expressed, officials can develop processes that implement the political lead.

Weaknesses in the lease registration process

The Certificate of Negotiation was intended as a permission to begin negotiations. At this point, information about the transaction is necessarily scanty and it is not possible to judge how fair a lease will be. At present, the issue of a certificate is taken as official approval of a transaction event although elements that are critical to how fair a transaction is occur after the issue of the certificate.

Just as the Custom Owner Identification Form (a component of the Certificate of Negotiation process) has supplanted proper verification of customary ownership on the part of the purchaser, so the process of issuing a Certificate of Negotiation is assumed to fulfil the government's obligations to only approve leases that are in a customary owner's best interest. But since critical elements such as the negotiation of the lease and the land survey occur after the issue of a certificate it cannot do this. This constitutional obligation remains to be introduced into the lease registration process. Although the final lease is sent to the State Law Office this is only for confirmation that it complies with legal requirements.

A further problem running through the leasing process is the latitude the Minister of Lands has. For all leases he will approve both the Certificate of Negotiation and the entry of the lease into the Register of Leases; for many others (around 20% according to Farran 2002) he will also be the lessor. This gives rise to conflicts of interest, real and perceived, that Department of Lands officials find difficult to manage. Institutions such as the State Law Office or Ombudsman's Office are either unable or unwilling to challenge ministers who act outside their powers.¹⁹ The freedom of ministers to act with impunity coupled with the administration logjam of processing leases means that completion of land transactions depends on political connections rather than procedures. This undermines efforts to manage administration and enforce compliance impartially and effectively.

POSITION OF CUSTOMARY OWNERS IN THE LEASE PROCESS

This section sets out some of the issues confronting customary owners who seek to 'sell' their land; that is, those who negotiate a lease that will convert their customary-owned land into a registered lease. It is perfectly possible to lease customary-owned land in Vanuatu without the consent of the customary owner, either through the Minister of Lands' power to deal in disputed land or by signing with a different purported customary owner and riding out the consequences. But in most cases customary owners willingly or even proactively seek to lease their land in an attempt to realise cash from irregularly used and financially unproductive coast or bushland to meet the demands of the cash economy.

That customary owners (or a patriarchal representative) willingly engage in negotiations does not isolate them from the issues described in the previous sections. It means, instead, that negotiations take place in a context of prevailing tenure insecurity which make protracted negotiations and public marketing of land risky and create incentives for secretive or suboptimal transactions. A customary owner must be assertive in establishing their rights should other purported customary owners appear or if a dispute presents itself and the Minister of Lands intervenes (Section 1); they must be self-reliant in the absence of any government intervention subsequent to the issue of the Certificate of Negotiation that will protect their interests (Section 2); and they must be sophisticated in accessing the best advice to assist them in their negotiations (this section). Unfortunately, these are qualities that too many customary owners lack as they enter the unfamiliar formal land system (Box 3).

BOX 3: GAUA ISLAND — POWERLESS TO PREVENT

An ex-Member of Parliament from a migrant community acted as a middleman on behalf of a Vanuatu-born investor of foreign origin. Four individuals from landowning families on the island were flown to Port Vila and entertained. The objective was to negotiate the lease of 10,000 hectares for a cattle plantation. Apparently no papers were signed but soon afterwards several surveys were conducted and large numbers of migrant workers began clearing the forest.

The customary landowners have no idea how to legally prevent the clearance going ahead. The middleman is a local 'big-man' with good connections to the political establishment. The islanders want development. The land provides a useful food-bank for hunting and collection of wild foods, but it is not producing cash income. The community wishes to participate in a partnership or joint venture ('50:50') but there has been no negotiation in which they can put their views across and they have little idea how such a joint venture would be formed. Several surveys were conducted, but without consultation with customary owners. Some of the customary owners are in favour of the project, while others are not, creating conditions for a dispute.

The economy on Gaua generates little cash locally. The people have put their hope in the Environment Impact Assessment and in the Certificate of Negotiation as they understand these to provide statutory protection against abuses in the leasing process; however, neither of these will help negotiate a good lease. Meanwhile, forest clearance continues. Once the land has been cleared there will be no point in not agreeing a lease. Gaua has several notable tourist attractions and it is common practice to convert agricultural leases to residential or tourism once the land has been removed from customary ownership. Although they own the land, the people of Gaua have lost control of it.

Absence of mandatory protective lease conditions established in legislation

These paragraphs consider what mandatory protections are found in the legislation of Vanuatu. It is in a sense the inverse of the previous section (Registering Customary Land), which looked at how intrusive (or proactive) the Department of Lands should be in supervising dealings in customary lands. If the Department of Lands was very proactive in protecting customary owners' interests then fewer mandatory protections would be needed in legislation, and vice versa. Many common law systems have legislation that imply conditions into leases or protect interests that fall outside them.²⁰ The problem in Vanuatu is that the Department of Lands is not assertive in protecting customary owners' interests, nor are there mandatory protections in legislation.

Conditions that can be implied into leases by statute ('Implied Agreements' — LLA ss. 40–41) tend to control use of the land by the lessee/purchaser; for example, conditions may be implied restricting the use of land or the subsequent sale of the land. A contentious issue in Vanuatu is the leasing of land and subsequent subdivision of it into residential plots without the permission of the customary owner.

Some interests in land will continue to exist even if they are not registered along with the lease ('overriding interests' (LLA s. 17) as in 'overriding the registration'). In England such rights include rights for people or livestock to cross land, to hold fairs, and other rights known generally as 'customary rights'. More modern rights such as leases of less than three years and legal easements are also usually included under these provisions. Although there is unlikely to be direct correlation between traditional rights on opposite sides of the world, this is a neglected area of law in Vanuatu that may hold substantial possibilities for defining and representing customary rights in the formal system.

In Vanuatu, implied conditions are easily excluded from leases²¹ while at the same time including overriding interests in leases is the safest way to establish and protect

them. These are both issues of lease negotiation and drafting. Where a country, such as Vanuatu, has few mandatory conditions in its legislation then the process by which a lease is negotiated becomes much more important; 'power issues' come to the fore such as the knowledge and understanding of the negotiating parties, financial resources and access to professional advice.

This is made clear in the debate over the *Strata Titles Act 2000* (as amended by the *Strata Titles (Amendment) Act 2003*), which does not require the consent of the customary owners ('lessor') to be sought before their land is subdivided into residential plots. The National Land Summit argued that customary owners should have the right to approve such developments. However, as a recent report points out, customary owners do have the right to approve or refuse these. Clauses stating this can be included when the original lease is negotiated or subsequently when a rural lease is converted into a residential lease: 'the real issue is the lack of that knowledge and experience (as well as the negotiating skills) on the part of many customary owners' (Hassall & Associates 2008:13).

Customary owners' lack of legal knowledge and awareness undermines their negotiations with investors

Land legislation and procedure in Vanuatu is complex and scattered across different pieces of legislation, some of which have never been used and others with contradictory elements. For example, responsibility for foreshore planning is divided between two ministries and the provincial governments (Lunnay et al. 2007). There is an absence of freely available information on Vanuatu land law and procedure.²² The Ministry of Lands performs a neutral facilitation role, not a proactive advisory role. Despite the obligation to protect customary owners, the law and land administration treat land sales as being between parties equal in capacity and information.

Although some elite groups of ni-Vanuatu have become adept at land management and dealing, most customary owners will sell land only once. They are eager to sell but ignorant

of both the value of their land and the process by which it will be sold. Although customary owners may be land rich, they are usually cash poor. When they sell land they are dealing with an experienced and informed private sector without the resources to obtain good professional advice for themselves. Indeed, getting this advice may make the land unpalatable to investors in a market where better gains are to be had dealing with the many other customary owners who will negotiate from a position of ignorance. The market for land in Vanuatu fails to reflect a fair price for land because the balance of information between the two groups of negotiating parties is markedly asymmetrical.

Access to professional advice is essential to redress this power imbalance. However, valuers, surveyors and lawyers are expensive. In the outer islands such professionals are unavailable and as their costs will include air fares and stays of several days (due to infrequency of flights) they will be exorbitant to low-income copra farmers. Without a good understanding of the land-dealing process it can be difficult to appreciate the need for these professional services. Most often, customary owners will use these services as paid for by the purchaser. This creates clear conflicts of interest that should be carefully considered by all of the relevant professional bodies.

Purchasers often seek to 'lock in' customary owners at an early stage. Payments or gifts (their exact status is unclear) are made and agreements may be signed. When customary owners show signs of hesitation, threats of legal action to recover these amounts can intimidate customary owners who may have spent the money. The enticement of the principle ('lump sum payment') and rent payments remains, while overarching all is the threat that another party will step in and do the deal.

Substantial inducements may be offered that appear to be for the benefit of the whole community. Property deals are littered with promises of 5-star hotels or joint ventures that will offer employment to whole communities. Such promises are rarely fulfilled and often unenforceable. Land often remains empty in the hands of a developer waiting for

more lucrative opportunities that are unlikely to include the customary owners.

Many customary owners are dismayed when customary land they have sold is registered, and re-sold for many times the amount they received for it. The registration process gives a guaranteed land title, meaning that land can be bought, sold, and borrowed against. This dramatically increases its value. Customary land is not of high economic value because there is no guarantee that someone else with a stronger claim will not come along and take ownership of it. Few customary owners are aware of the added value they would gain if they themselves jumped through those administration hoops. Again, the absence of massive profits may deter property developers from purchasing pre-registered land.

In Vanuatu, a land valuation is required when a lease is transferred in order that government can levy land tax. No valuation of customary land is required before the critical first conversion of customary land into leasehold title. If customary owners knew the improved value of their land after it had been registered they would probably act very differently.

Activities of the private sector professionals

In many countries, estate agents provide professional support to people who wish to sell their property. Estate agents usually act on behalf of the seller and seek to maximise the price as they take a percentage of the proceeds. In Vanuatu, some estate agents are known to purchase land on their own behalf. This sits uneasily with their duty to obtain the best price for their clients.

In a system where there are few administrative safeguards and few mandatory legislative protections, it is critical to protecting customary owners' interests that they obtain good legal advice when leases are being negotiated and drafted. A lawyer's duty is to their client who pays their fees. For this reason, negotiating parties should obtain their own legal advice to protect their interests. It is common practice in Vanuatu for the purchasers of land for leasing to pay all the legal fees. Consequently, these lawyers may be expected to act in the interests of the purchasers

when it is the customary owners whose interests are in greater need of protection. Leases that customary owners sign are remarkable in their brevity and uniformity when good independent legal advice would have allowed such leases to reserve rights over their land (such as reserving permission and benefits for subdivisions) and to negotiate leases that safeguarded longer-term financial benefits (such as emphasising annual rents over up-front premiums).

Property developers are usually foreign and 'white man's law' is seen as serving their interests. Lawyers often have close relationships with property developers who pay for a substantial proportion of lawyers' fee base while a certain disregard for customary owners' interests is apparent in the lack of priority given to disputes involving customary owners.

Legal ambiguities and challenges

Because good legal advice is difficult to obtain, much legal information is passed by word of mouth and is inaccurate or ambiguous. Such ambiguities include a perception that leases must be for 75 years when this is actually the maximum allowed and was anyway intended only for 'big investment projects'; other leases were meant to be limited to 30 years (Lunnay et al. 2007:8).

There is a perception that customary owners must compensate leaseholders for improvements to the property. If this was correct, it would mean that customary owners would have to buy the houses and hotels that have been built on their land before they could receive that land back at the end of a lease. However, the perception is incorrect; it derives from the return of alienated land at Independence and does not apply today.²³

This misconception is compounded by lease conditions that provide for automatic lease extensions or that exclude customary owners' right to refuse a change of use of their land (from agricultural to commercial, for example). Both such clauses are of doubtful legality.

These ambiguities undermine customary owners rather than property developers who are knowledgeable and have access to good legal advice. That they continue to circulate

emphasises the power imbalances between customary owners and the purchasers of their land.

Many customary owners wish to remain involved with the land they lease for development, either as employees on tourist resorts or plantations, or through training or profit sharing. Investors tend not to be interested in such participation; customary owners have few skills or assets to offer the developer beyond labour and their land. Joint ventures impede free action. 'Joint venture' has been a recurring theme in land since Independence but no real understanding or guidance exists as to what form or structure such joint ventures should take.²⁴

Customary owners have seen how quickly cash payments are frittered away and how quickly vehicles purchased with these proceeds deteriorate. To develop mechanisms that protect windfall payments to ensure they provide longer-term benefits remains an elusive challenge.

CONCLUSION

The Constitution was definite in its protection of customary land but the failure to promulgate a permanent national land law, coupled with the need to protect colonial landholdings in the short term, meant that the postcolonial era saw an ironic strengthening of the formal colonial system at the same time that land was nominally being returned to customary ownership.

This paper has described a process of converting customary land to leasehold title that is deeply fraught. Ministers of Lands have wide-ranging powers, the exercise of which opens them to allegations of conflict of interest in a sector where business and political interests have significant overlap. The Department of Lands is challenged by a tension between its constitutional duty to be proactive in protecting the interests of customary owners and its pre-Independence (and more typical) role as a neutral facilitator maintaining the Register of Leases.

Legislative change can improve specific areas but as the legislation that is in place is not systematically enforced this may have limited impact. Substantial improvements

could be made within the current legislative parameters; the power of the Minister of Lands to enter into leases could be scrutinised and reviewed; the Department of Lands could improve procedures, requiring valuations of customary land (at registered land value) and insisting that customary owners receive independent legal advice. Scrutiny of the activities of the professions associated with the process must begin. Customary owners could also be encouraged to act more responsibly themselves.

Finding ways that ni-Vanuatu can participate in economic development while at the same time preserve their customary systems and culture is the key challenge facing proponents of custom such as the National Cultural Centre, the Malvatumauri and, by its own declaration, the Government of Vanuatu.

The land reform program may be the most important driver of change in this area but it should not be the only one. Although land is important to custom, custom is not just about land. Protecting various land-use rights in leases is only one manifestation of how a customary group may engage with the formal system. Problems also occur between the customary and formal systems in criminal justice and governance, even without introducing broader societal issues such as gender imbalances. Moreover, many of the problems and possible solutions lie outside the land sector. Joint ventures can be about land but also about tourism and business. The lack of financial management skills seems to have been a problem in almost every attempt made by customary groups to cooperate in the management of assets.

This paper has sought to highlight serious inequities that derive from the interaction of the formal system of land administration with customary land tenure. At the same time, if Vanuatu is to take full advantage of this nation-defining resource, engagement of custom with the formal system needs to take a cross-sectoral, holistic approach.

AUTHOR NOTES

Justin Haccius is a practitioner in formal legal reform and informal justice programming. The current research was undertaken

while engaged by the World Bank Justice for the Poor project in Vanuatu. He has worked extensively on judicial issues in conflict-affected countries including for the United Nations in Liberia and for the International Committee of the Red Cross in Sri Lanka, Afghanistan and Colombia. Justin is a qualified solicitor with a background in international law and policy. In addition he co-published the EU's Common Foreign and Security Policy: Opportunities for a more Effective EU Response to Crisis-Affected Countries in Africa (ECDPM Discussion Paper 22, 2001).

email: haccius@gmail.com

ENDNOTES

1. Many individuals generously gave their time and knowledge in the course of this research. Particular thanks go to John Alilee, Daniel Adler, Francis Hickey, Anita Jowitt, Alick Karmelu, Chief Seth Kaurua, Ben Kaurua, Russel Nari, Anna Naupa, Chief Tom Numak, Prof. Don Patterson, Douglas Patterson, Jean-Marc Pierre, Chief Petro Rite, Menzies Samuel, Joel Simo, Benuel Tabi, Howard Van Trease, and Alicita Vuti. Thank you to Jennifer Bryant, Derek Brien, Patrick Shing and Milena Stefanova for their support throughout.
2. Legislation under the formal system uses 'custom owner'; proponents of custom argue that formulations such as 'custom landholder' or 'rights-holder' are more appropriate and accurate, denoting a quality of custodianship. This discussion encapsulates the miscommunications between the systems.
3. The intention that this legislation was to be temporary is made clear within it, for example, by the heading preceding Part 1 of the *Land Reform Act 1980*, which reads 'To make interim provision for the implementation of Chapter 12 of the Constitution.'
4. The actual term used in the Constitution (art. 79) is 'land transactions'.
5. The LRA (s. 1) definition of 'alienator' is someone who has freehold title at the time of Independence. Under this

- definition, the Minister of Lands' power to deal in disputed land could be restricted not just to disputes over alienated land in general but only to land that was alienated at the time of Independence.
6. *Naflak* are 'clan identities organised according to matrilineal descent' and are found in central Vanuatu (Fingleton et al. 2008).
 7. See, however, comments by the judge in *Traverso v. Chief Kas Kolou* [2003] VUCA 26: 'Whether there is a dispute or not is a matter for the Court and not for the Minister.'
 8. Information as to whether the minister continues to sign leases over disputed land after the National Land Summit 2006 would be useful in clarifying this point.
 9. In which titles to land are entered in a register, usually guaranteed by legislation and backed by government, instead of proving title to land by deeds.
 10. As these are principles under 'British' law, they apply also to Vanuatu law under the Constitution (art. 95(2)).
 11. The 'Kastom Ona Blong Kraon' form was originally developed for the land committees — an informal dispute resolution system set up to deal with the logjam in the island courts.
 12. See *Vanuatu Daily Post*, 9 March 2009, p. 4, 'with the stripping of the title 'Popovi' from chief Kalontas Daniel, chief Tapangatamate advised investors in north Efate that all leases signed under Kalontas Andrew are automatically nullified'. This dispute has now been appealed to the Supreme Court.
 13. See Lunnay et al. (2007) for complete texts of both documents. For definitive versions please refer to original documents.
 14. In this case the geographical difficulties of an archipelago nation are compounded by the complex bureaucratic structures. The Planning and Enforcement Section (Department of Lands) must work through the provincial governments (which come under the Ministry of Internal Affairs) to access the area secretaries who are the closest government representative to the meetings (Lands officials, pers. comm.).
 15. 'The application of this basic common law rule can ... be quite disastrous for unsuspecting third parties, who deal with an apparent owner of property believing that he or she is the true owner when in fact that is not so.' (Farran & Paterson 2004:156).
 16. The Valuer General's forfeiture powers are defined in the LLA (ss. 43–46) as included under section 37 of the *Valuation of Land Act 2002*. Failure to include lease conditions that protect customary owners' property means there is little in them to enforce and this valuable power is under-utilised.
 17. The 'Report on the land lease audit test over Second Lagoon, Efate, Vanuatu' (draft 4 August 2008) identified an average annual outstanding rent amount of 42 million vatu (nearly US\$400,000) for 2005–2007. The Ministry of Lands was second only to the Ministry of Finance in generating revenue for the Government of Vanuatu (Ministry of Finance figures, Kunal Patel, pers. comm., March 2009).
 18. The relevant units (Environment Unit, Planning and Enforcement section, and Lands Survey section) each have 1–2 operational officers with wide responsibilities and national ambit. Problems of understaffing are compounded by the time and costs attendant on servicing an archipelago nation comprising more than 60 inhabited islands with infrequent air services.
 19. The *State Law Office Act 1998* gives power to the office to advise ministers, not to limit their activities. No prosecutions have taken place under the *Leadership Code 1998*, despite numerous breaches identified in Ombudsman reports.
 20. See, for example, England's *Law of Property Act 1925*, Solomon Islands' *Land & Titles Act* CAP 133, and all states in Australia (where they are called 'paramount interests'). In contrast, neither New Zealand nor Fiji (which modelled its legislation on New Zealand's *Land*

Transfer Act 1952) include them (Prof. D Patterson, pers. comm.).

21. Both sections 40 and 41 of the LLA begin 'Save as otherwise expressly provided in the lease', allowing lease provisions to override the implied agreements.
22. One notable exception has been the 'Graon toktok' series produced by the AusAid-funded Short Term Land Reform Initiatives project.
23. See page 3, and LRA (s. 3) and *Alienated Land Act 1982* (s. 3). Note, however, that in keeping with comments made on inequitable negotiation of leases, some leases appear to include clauses that require compensation for improvements. This is distinct from the statutory compensation discussed here.
24. Under the Land Policy Communique 1980, 'joint ventures' were to be agreed with customary owners to develop rural land, although this provision did not make it into the legislation (Lunnay et al. 2007).

REFERENCES

- Bolton, L 1999, 'Chief Willie Bongmatur Maldo and the incorporation of chiefs into the Vanuatu state', *SSGM Discussion Paper 1999/2*, Research School of Pacific and Asian Studies, The Australian National University, Canberra.
- Bonnemaison, J 1984, 'Social and cultural aspects of land tenure', in P Larmour (ed.), *Land tenure in Vanuatu*, Institute of Pacific Studies, University of the South Pacific, Suva.
- COM (Council of Ministers) 2006, Council of Ministers Decision 138/2006 of 16 November as reproduced in Lunnay et al. (2007).
- Crocombe, R 1995, 'Overview', in R Crocombe (ed.), *Customary land tenure and sustainable development: complementarity or conflict?*, SPC and University of South Pacific, Suva.
- Crocombe, R 2006, 'Improving land tenure and management: some lessons from the Pacific and the world', in *National Land Summit report annex*, Government of the Republic of Vanuatu.
- Farran, S 2002, 'Myth or reality: case study of land tenure in Efate, Vanuatu', paper for South Pacific Land Tenure Conflict FAO/USP/RICS Symposium, Suva, Fiji, 10–12 April 2002.
- Farran, S & Paterson, D 2004, *South Pacific property law*, Cavendish Publishing Ltd, London.
- Fingleton, J, Naupa, A & Ballard, C 2008, 'Village land trusts in Vanuatu: "one common basket"', in *Making land work: volume two case studies*, AusAID, Canberra.
- Golub, A 2007, 'From agency to agents: forging landowner identities in Porgera', in JF Weiner & K Glaskin (eds), *Customary land tenure and registration in Australia and Papua New Guinea: anthropological perspectives*, Asia-Pacific Environment Monograph 3, ANU E Press, Canberra.
- Hardy-Pickering, S 1997, 'A proposal to establish a land tribunal in Vanuatu', *Journal of South Pacific Law*, working paper 4, vol. 1.
- Hassall & Associates 2008, *Vanuatu short-term land reform initiatives (activities #3, 5 & 7)*, final report, May 2008, Canberra.
- Lunnay, C, Fingleton, J, Mangawai, M, Nalyal, E & Simo, J 2007, *Review of national land legislation, policy and land administration*, report for AusAID, Canberra.
- Naupa, A & Simo, J 2008, 'Matrilineal land tenure in Vanuatu: "Hu i kakae long basket?" Case studies of Raga and Mele', in E Huffer (ed.), *Land and women: the matrilineal factor. The cases of the Republic of the Marshall Islands, Solomon Islands and Vanuatu*, Pacific Islands Forum Secretariat, Suva, pp. 73–122.
- Office of the Ombudsman Public Report 1998a, 'Improper sale of government houses by the office of the prime minister under the former prime minister Maxime Carlot Korman', [1998] VUOM 7, 1998.07 (3 March 1998), viewed March 2011, <www.paclii.org/vu/ombudsman/1998/7.html>.
- Office of the Ombudsman Public Report 1998b, 'Improper granting of land

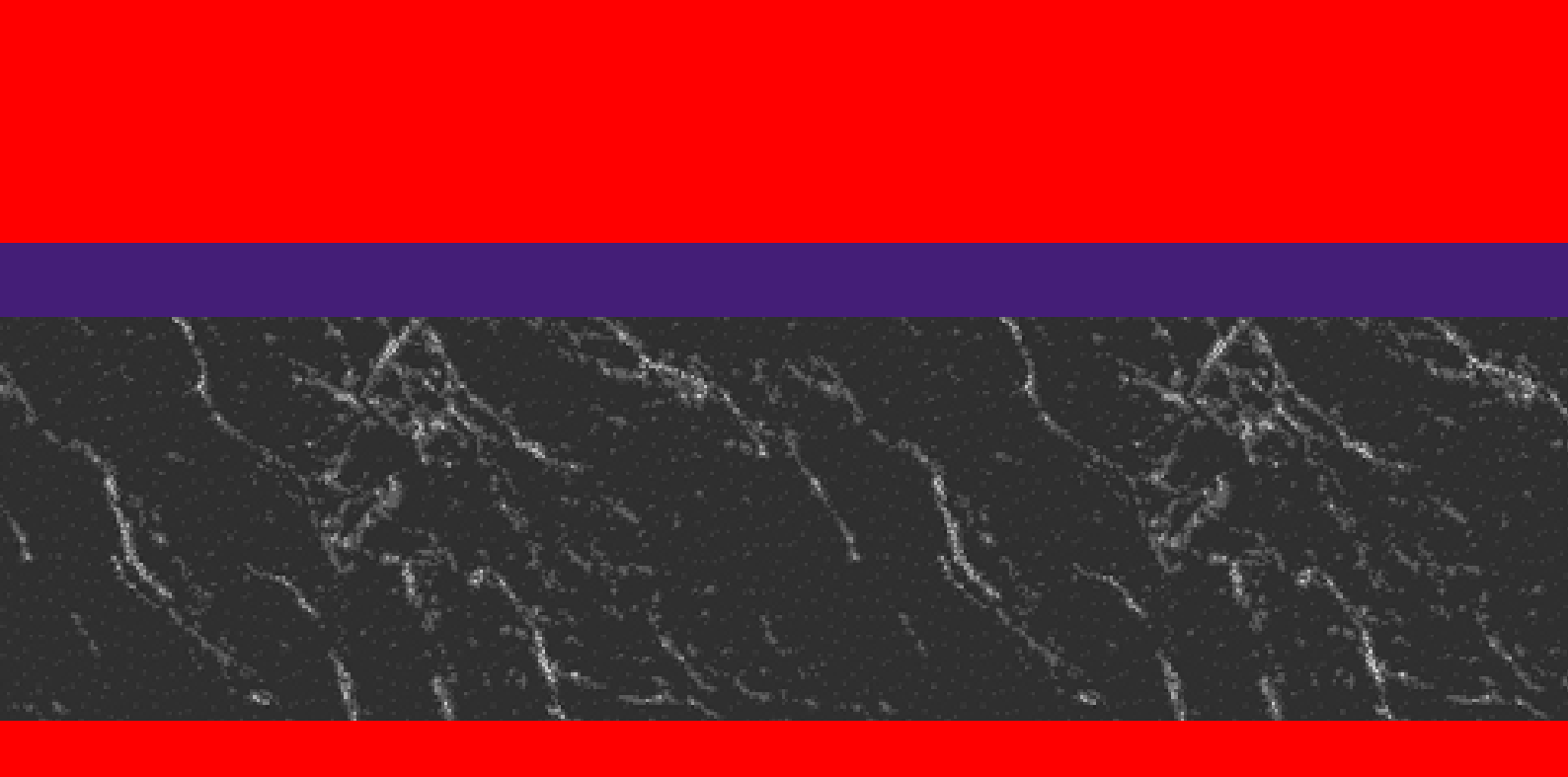
- lease title 11.OE22.016 by the Department and Ministry of Lands' [1998] VUOM 10, 1998.10 (9 April 1998), viewed March 2011, <www.paclii.org/vu/ombudsman/1998/10.html>.
- Office of the Ombudsman Public Report 1999, 'Granting of leases by the former minister of lands Mr Paul Barthelemy Telukluk to himself, family members and wantoks', [1999] VUOM 6, 1999.09 (22 April 1999), viewed March 2011, <www.paclii.org/vu/ombudsman/1999/6.html>.
- Radio New Zealand 2007, 'Transparency Vanuatu concerned about deals linked to lands minister', website post 4 July 2007, viewed March 2011, <www.rnzi.com/pages/news.php?op=read&id=33432>.
- Regenvanu, R 2008, 'Issues with land reform in Vanuatu', *Journal of South Pacific Law*, 12(1):63–7.
- Rodman, M 1995, 'Breathing spaces: customary land tenure in Vanuatu', in RG Ward & E Kingdon (eds), *Land, custom and practice in the South Pacific*, Cambridge University Press, Melbourne.
- Speiser, F 1923, *Ethnology of Vanuatu – an early twentieth century study*, University of Hawai'i Press.
- Van Trease, H 1987, *The politics of land in Vanuatu*, University of the South Pacific, Suva.
- Vanuatu Daily Post 2009, 'Allegations of fraud and abuse of power by former minister of lands Maxime Carlot Korman over land dealings – a destructive pattern', 19 June, p. 4.

This paper represents the views of the author alone who takes all responsibility for errors of fact and interpretation.

SSGM Discussion Paper Series (2005/1–2010/5)

- 2005/1: Nic Maclellan, Conflict and reconciliation in New Caledonia: building the Mwâ Kâ
- 2005/2: Michael Morgan, Cultures of dominance: institutional and cultural influences on parliamentary politics in Melanesia
- 2005/3: Hank Nelson, Fighting for her gates and waterways: changing perceptions of New Guinea in Australian defence
- 2005/4: Allan Patience, The ECP and Australia's middle power ambitions
- 2005/5: Jerry Singirok, The use of illegal guns: security implications for Papua New Guinea
- 2005/6: Jaap Timmer, Decentralisation and elite politics in Papua
- 2005/7: Donovan Storey, Urban governance in Pacific island countries: advancing an overdue agenda
- 2005/8: Jon Fraenkel, Political consequences of Pacific island electoral laws
- 2006/1: Hank Nelson, Governments, states and labels
- 2007/1: Peter Larmour, Evaluating international action against corruption in the Pacific Islands
- 2007/2: Brij V. Lal, 'This process of political readjustment': aftermath of the 2006 Fiji coup
- 2007/3: Hank Nelson, The Chinese in Papua New Guinea
- 2007/4: Paul D'Arcy, China in the Pacific: some policy considerations for Australia and New Zealand
- 2007/5: Geoffrey White, Indigenous governance in Melanesia
- 2008/1: Brij V. Lal, One hand clapping: reflections on the first anniversary of Fiji's December 2006 coup
- 2008/2: Paulson Panapa & Jon Fraenkel, The loneliness of the pro-government backbencher and the precariousness of simple majority rule in Tuvalu
- 2008/3: Kate Higgins, Outside-in: a volunteer's reflections on a Solomon Islands community development program
- 2008/4: Sarah Kernot & Lai Sakita, The role of chiefs in peacebuilding in Port Vila
- 2008/5: Debra McDougall, Religious institutions as alternative structures in post-conflict Solomon Islands? Cases from Western Province
- 2008/6: Abby McLeod, Leadership models in the Pacific
- 2008/7: Nicole Haley, Strengthening civil society to build demand for better governance in the Pacific. Literature review and analysis of good practice and lessons learned
- 2008/8: Richard Eves, Cultivating Christian civil society: fundamentalist Christianity, politics and governance in Papua New Guinea
- 2008/9: Into A. Goudsmit, Nation building in Papua New Guinea: a local alternative
- 2008/10: George Williams, Graham Leung, Anthony J. Regan & Jon Fraenkel: Courts and coups in Fiji: the 2008 High Court judgment in *Qarase v Bainimarama*
- 2008/11: Keith Joseph & Charles Browne Beu, Church and State in Solomon Islands
- 2009/1: Elizabeth Reid, Interrogating a statistic: HIV prevalence rates in PNG
- 2009/2: Michael Green, Fiji's short-lived experiment in executive power-sharing, May – December 2006
- 2009/3: Peter Coventry, The hidden mechanics of Solomon Islands budget processes – understanding context to inform reforms
- 2009/4: Hank Nelson, Mobs and masses: defining the dynamic groups in Papua New Guinea
- 2009/5: Nick Bainton & John Cox: Parallel states, parallel economies: legitimacy and prosperity in Papua New Guinea
- 2009/6: Robert Norton, The historical trajectory of Fijian power
- 2009/7: Alan Rumsey, War and peace in highland PNG: some recent developments in the Nebilyer Valley, Western Highlands Province
- 2010/1: Asenati Liki, Women leaders in Solomon Islands public service: a personal and scholarly reflection
- 2010/2: Nic Maclellan, Under a new flag? Defining citizenship in New Caledonia
- 2010/3: Polly Wiessner, Youths, elders, and the wages of war in Enga Province, Papua New Guinea
- 2010/4: Stephanie Lawson, Postcolonialism, neo-colonialism and the 'Pacific way': a critique of (un)critical approaches
- 2010/5: Jon Fraenkel, Oceania's political institutions and transitions

For details of the SSGM Discussion Papers published from 1996, see the SSGM website:
http://ips.cap.anu.edu.au/ssgm/publications/discussion_papers/



The State, Society and Governance in Melanesia Program (SSGM) is a multidisciplinary research unit within The Australian National University's College of Asia and the Pacific. The program conducts research on important contemporary issues affecting the Pacific, and especially Melanesia, including topics of particular relevance to Australia's aid program and to the Australian and partner government policies more generally.

SSGM's key objectives are to encourage scholarship on governance and state–society relations; generate dialogue throughout Melanesia and the Pacific Islands on these issues; and assist in bridging policy and research.

The program's research and outreach focuses on:

- Island Melanesia — Papua New Guinea, Solomon Islands, Vanuatu, New Caledonia and Fiji
- The culturally related region to the west including Papua/West Papua and Timor Leste
- The countries of the Pacific Islands region to the north and east.

State, Society and Governance in Melanesia
ANU College of Asia and the Pacific
The Australian National University

Telephone: +61 2 6125 8394
Fax: +61 2 6125 9604
Email: ssgm@anu.edu.au

<http://ips.cap.anu.edu.au/ssgm/>