Pacific 2020

BACKGROUND PAPER: LAND

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This paper is one of a series of nine background papers written for the Pacific 2020 project, which was conducted by the Australian Agency for International Development (AusAID) in 2005. Pacific 2020 examines various components of the economies of the Pacific, Papua New Guinea and East Timor. It aims to generate practical policy options to contribute to stimulating sustainable, widely shared economic growth in these countries.

This paper is based on the discussion at a round table meeting of regional practitioners and experts, which occurred in June 2005. The findings, interpretations and conclusions expressed in this paper are based on the discussion at this round table, and from a subsequent peer review process. They are not necessarily the views of any single individual or organisation, including AusAID, the Pacific 2020 Steering Group, contributing authors, round table participants or the organisations they represent.

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CONTENTS

SUMMARY

Pacific island countries are at a cross-road. Their economic growth is not keeping pace with their population increases, and living standards are declining. Measures must be taken to increase productivity and the rate of economic growth. The main targets for such measures in most of the Pacific are land and the need for increased agricultural production.

Security of land tenure is a major factor influencing economic growth.

Many factors have an influence on promoting growth, but security of land tenure is a major factor. Although the many different customary land tenures across the Pacific have served their peoples well in the past, they need to be adjusted to the new demands being put on land by population increase, urban migration, the need for cash and people's raised expectations from life. The challenge facing governments in the region, and the aid agencies assisting them, is to find a 'development model' that will facilitate economic growth without causing widespread dispossession and the poverty and social dislocation that would result.

A central question is to what extent, if any, should customary lands remain inalienable.

In adjusting customary land tenures a central question for governments is to what extent, if any, should customary lands remain inalienable. One view of the way forward is to free up customary lands, so that land can be freely sold, leased and mortgaged to raise funds for development. Others point to the social risks, and ask whether it is necessary, desirable or even possible to abolish the land ownership of customary groups. But 'doing nothing' is not an option in seeking increased growth. The most suitable development model may well be a middle-ground approach under which the land ownership of groups is protected, while individuals are given the security they need to invest in land development.

Land systems need to protect land ownership at the group level and land use at the individual level.

To develop land systems that protect both land ownership at the group level and land use at the individual level, countries need to commit themselves to policies, laws and administrative arrangements that will:

> strengthen land rights, especially the land rights of individuals
> facilitate dealings in land (transfers, leases, mortgages, etc.)
> settle land disputes effectively
> improve land administration services to the public, and
> provide land for public purposes and other special needs.

To achieve each of these, there are many options available for governments to choose from, and many difficult issues to address. Political leadership, however, is the most important requirement.

There is no blanket solution to the land problems of the Pacific. Each country must work out the solution that suits its needs best. The most sensible approach is to proceed step by step – without trying to do too much – focusing on the priority areas, adapting existing tenures rather than abolishing them, and trialling reforms in pilot projects before introducing them more generally.

Government interventions that encourage the progressive reform of customary tenures are likely to promote sustainable growth.

Government interventions that encourage the gradual, progressive reform of customary tenures are likely to promote steady and sustainable growth that balances economic development with social harmony and political stability. The three basic requirements for any land reforms are:

- a real need for change
- strong demand and local support for the change, and
- the necessary administrative and financial resources to support the change.

AN OVERVIEW OF LAND IN THE PACIFIC

The challenge for governments is to manage land tenure reform to facilitate economic growth without widespread dispossession.

One of the greatest strengths of Pacific island societies is that nearly everyone still has access to their customary land. The security that provides is the glue that holds the societies together. Modern developmental pressures are, however, creating demands for reform of the traditional systems of land tenure. The challenge for governments is to manage land tenure reform and the transition to market economies, so that economic growth can be facilitated without widespread dispossession and the poverty and social dislocation that would result. The response to that challenge requires strong political leaders committed to finding a development model that accommodates customary land tenures while meeting the needs of a modern economy, and then implementing that model through policies, laws and administrative procedures that are applied consistently, fairly and effectively.

While the leadership must come from within each country, Australia and other aid donors must be willing to provide funds and technical assistance, so that in partnership a suitable development model for Pacific island countries can be found and implemented.

Land in the Pacific is basically either customary land or alienated land (land 'alienated' from customary tenure). For most of their modern history, land development strategies in Pacific island countries have been based on policies and laws for moving land from customary holdings to the alienated land sector. Initially this was done entirely for the benefit of the colonisers, by land purchase or other methods of land acquisition. Later development strategies aimed to settle indigenous people on individual titles registered in parcels of their own customary land. The most recent approach aims to move away from resource 'alienation' towards direct landowner participation in the development of their resources.

People have a deep-seated fear that they will be stripped of their land.

The alienability of land can be seen as a 'defining issue' in Pacific politics. People have a deep-seated fear that they will be stripped of their land. This has resulted in not only an extreme reluctance to sell land to governments for urban expansion, roads or other vital public infrastructure, but also a widespread view that land should be inalienable.

This attitude has obvious relevance for economic growth. A policy that prevents the alienation of customary lands could have negative consequences for land redistribution, improvements in land use and investment in land development. On the other hand, a policy that allows the unrestricted transfer of customary lands could see a drift to landlessness and poverty, which Pacific islanders dread. A critical question for Pacific island governments is to what extent, if any, should customary lands be alienable.

The results of land alienation varied greatly at independence. Large island countries had significant land still under customary tenure (Papua New Guinea 97%, Solomon

Islands 84% and Fiji 83%) whereas small island countries such as Kiribati and Palau had only about a third of the land still under customary tenure. In Tonga all land belongs to the Crown as a result of reforms forcefully imposed more than a century ago. Most countries accepted the land tenure situation they inherited at independence, but Vanuatu took the radical approach of reverting all land in the country to customary ownership.

Most countries have made little change to their land laws since independence, Papua New Guinea being the exception. There, in 1973, a Commission of Inquiry into Land Matters made recommendations for major changes to the pre-independence land system, and important new land policy and laws were introduced. The reform initiatives, however, soon ran out of momentum.[1]

Any land reforms in the Pacific must be popularly supported, fair and in accordance with the rule of law.

The Pacific island countries are perhaps unique in the extent to which they give special status to custom, customary land and traditional bodies (for example, councils of chiefs) in their independence constitutions, and they all contain 'bill of rights' provisions protecting their citizens' property rights. Any land reforms in the Pacific must be popularly supported, fair and in accordance with the rule of law.

Customary land tenures, too, vary greatly across the region, but they share some common features. While it is risky to generalise, for present purposes some of the main characteristics of customary tenures are listed below.

- The main access to land arises from birth into a kinship group.
- Groups based on kinship or other forms of relationship are the main landholding (or 'owning') units.
- The main land-using units are individuals but, more usually, small household units.
- The membership of groups is based on either patrilineal or matrilineal principles (sometimes both), which are methods of tracing descent. Whatever the basis, male and female members have a right to be allocated portions of group land for their subsistence purposes.
- Although a female member may move after marriage to her husband's land, she retains her right to access her own group's land and may exercise that right if it is practical to do so.
- Senior members of the group (in some areas, chiefs) are recognised as having the main say in decisions over the group's land matters.
- As well as being a source of power, land is a focus for many social, cultural and spiritual activities.
- Strictly speaking, there is no 'inheritance' of land rights. Just as land rights arise from birth, they cease upon death. (That is, there is nothing to inherit, in the western legal sense.)

1 Government of Papua New Guinea, *Report of the Commission of Inquiry into Land Matters*, Government of Papua New Guinea, Port Moresby, 1973.

- Methods usually existed for accommodating the land needs of anyone accepted into the community. Outsiders – for example, refugees from tribal fights – would be adopted by a local group and gain the privileges of group membership.
- Land could be transferred only within existing social and political relationships.
- Rights to access land were constantly being adjusted to take account of changes in group membership – some groups increasing and some dying out – and the need to redistribute land.

Customary land tenures are fundamentally connected to the social, spiritual, political and economic life of Pacific islanders.

It is apparent that customary land tenures are fundamentally connected to the social, spiritual, political and economic life of Pacific islanders. Attempts at land reform must take account of the risks they might present to the social fabric of these countries. From a practical point of view, the main features of customary land tenures are that they are not written down, there are many people with interests in the same piece of land, the land is not regarded as transferable away from the group, and decisions about the land involve many people. These factors can impose major disincentives ('transaction costs') on investment in customary land development. Land policies and reform measures must aim to alleviate the economic impact of these factors.

The main features of tenures in alienated lands follow.

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

Alienated land is located mainly in the most productive and accessible places best supplied with infrastructure.

Although alienated land can represent only a tiny fraction of a country's land area, it is located mainly in the most productive and accessible places that are today best supplied with the infrastructure for development. Furthermore, the government's land services are concentrated on the administration of alienated lands. No administrative service is provided to the great majority who derive their livelihoods from customary land.

Tenures in alienated land tend to be seen as the opposite of customary land tenures – impersonal, official, definite, written down, certain, 'bankable' and easily negotiable. This may be true, so long as the state has the will and the power to support the titleholders. The experience in Zimbabwe is a sad illustration of the weakness of official titles if the government is not inclined to support them. It shows that political influences can sometimes be more important than formal entitlements under the law. But there is no reason to accept that customary tenures are, by definition, less secure

than registered titles in alienated land. They have for countless generations successfully met the needs of Pacific islanders, and there is no reason to believe that they will not continue to do so, provided that they are able to continue to adapt.

LAND AND ECONOMIC GROWTH

Land underpins growth. It also underpins poverty in many places. While many historical and environmental factors may set the conditions for poverty or growth, a country's land system – its policies and laws, how land is owned and managed, how secure the land rights are, and the land services provided to the public – can determine whether it makes the most of its land and land-based resources. Other background papers highlight the need for people to have access to land and to feel secure that they will reap the rewards of their efforts to take advantage of agricultural and other economic opportunities.

Mechanisms are needed for adjusting land tenures to the changing patterns of land settlement.

In some places the present customary land tenures have created serious inequality in land distribution and availability, adversely affecting land use patterns and productivity. Elsewhere, the lack of opportunities at home for development and employment have led to migration, and the presence of large populations of a country's citizens in places such as New Zealand and Australia. Mechanisms are needed for adjusting land tenures to the changing patterns of land settlement, to allow those who remain at home to get the necessary access to land. People growing up in towns and cities are losing contact with their home areas and, for the first time, some are experiencing 'landlessness'.

While the security of land tenures is a major factor in promoting growth, many other factors have an influence. The background paper on agriculture lists the main needs for growth in the sector as improvements in infrastructure (roads, ports, shipping, markets, etc.), good governance, markets, information and skills, an enabling policy environment and access to affordable financial services, in addition to the need for secure access to land. Clearly in some areas people's land access is sufficiently secure for present purposes. For example, in Papua New Guinea agricultural production of subsistence and domestically marketed food and export crops has been on a growth path over recent decades, with almost all the growth occurring on customary land.[2] The alienated land sector – where everyone has 'secure' registered titles – is where growth is limited. The experience in Solomon Islands is similar. True, the growth could be better, but the main constraints at present are the factors mentioned above (poor roads, etc.), not customary tenures.

One of the growth needs referred to above is access to credit. A reason frequently put forward in favour of land registration is the fact that banks can then take mortgages

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2 RM Bourke, 'Agricultural production and customary land tenure in Papua New Guinea', in J Fingleton (ed), *Privatising land in the Pacific: a defence of customary land tenures*, Discussion paper No. 80, Australia Institute, Canberra, 2004.

as security for the repayment of loans. This stimulates investment, land development and growth. However, the record of bank lending for agricultural purposes in the Pacific is not good, and people registering their land with a view to getting credit may be disappointed. In Tonga, where all the land is registered, commercial banks do very little lending on rural mortgages, regarding them as too risky. Secure tenure is obviously important, not just to the banks but to the developer as well, and solutions that satisfy all parties must be found. Commercial banks in Papua New Guinea, for example, were prepared to accept leases over customary lands – even unregistered customary lands – as security for loans, once they had the tenure arrangements explained to them.

Customary land tenures have always been changing, but the rate of change has quickened.

Customary land tenures have always been changing, but the rate of change has quickened greatly recently. Among the factors causing change are:

- populations increasing at a much more rapid pace than ever before
- the cessation of warfare
- greater social mobility (both within traditional territories and to distant places)
- the impact of the state, central governments, democratic institutions and gender equality, Christian missions, legal systems, courts and the police
- the cash economy, greater emphasis on the nuclear family, and raised standards of living and expectations from life, and
- new products and new technologies.

All of these factors put new demands on customary tenures, and the clear direction of change is towards stronger individual rights. The role of governments in responding to this trend is to steer and facilitate land tenure changes in that direction. The challenge for governments is to find the right balance between freeing up the access of individuals and other investors to the development potential of land, and protecting the land ownership structure that underpins Pacific island societies.

The only land reforms that have any chance of being accepted and implemented are changes based on existing customary land tenures.

In responding to that challenge, it is important to note some key constraints on land reform in Pacific island countries. Governments do not have the authority to impose land tenure changes on people who do not want them. And even if it were politically feasible, they do not have the financial and administrative resources to implement such changes. Any attempt to replace customary tenures by force would inevitably face constitutional challenge. The only reforms that have any chance of being accepted and implemented are changes that are based on existing customary land tenures, but that encourage their adaptation to meet people's emerging needs and changing circumstances.

There is now a general acceptance that adaptation, not replacement, of customary tenures is the way forward. The Food and Agriculture Organization (FAO) of the

United Nations endorses the adaptation approach to land tenure reform.[3] Even the World Bank, for long a critic of customary tenures, has given ground, now recognising customary tenures as a viable basis for growth and development. At the Land in Africa Conference, held in London in November 2004, the adaptation approach was given strong support by all the governments and aid agencies that took part.[4]

Adaptation, not replacement, of customary tenures is the way forward.

Growth and poverty outcomes will depend, therefore, on how well land tenures in the Pacific are adapted to emerging needs. At the Pacific Islands' Forum of Economic Ministers Meeting (FEMM) at Rarotonga in 2001, the Ministers discussed 'Land issues in the Pacific', a paper prepared by the Pacific Islands Forum Secretariat. The paper noted:

> The commitment of Economic Ministers to address outstanding land issues emphasises the need to reach some form of compromise between traditional and modern tenure systems so that the needs of both indigenous peoples and potential investors are met. It must be recognised that land issues reach beyond the spread of economic portfolios – into social, security and political issues – and so need support at the highest levels if they are to be successfully addressed.

The main options for land policies, laws and administration and their best and worst case scenarios for growth and poverty reduction are considered in the next section.

OPTIONS FOR LAND POLICIES, LAWS AND ADMINISTRATION

THE 'DO NOTHING' OPTION

One option is to maintain the status quo – that is, countries keep their present land policies, laws and administrative systems. The customary land tenure systems still meet the peoples' basic needs. This is in stark contrast with other parts of the world, where the landless poor live a life of poverty and drift into urban ghettos. Even though landlessness is emerging as a problem and beggars are appearing on the streets of some towns, the great majority of Pacific populations can access land to meet their subsistence needs. While this remains the case, poverty levels are not likely to approach those found in many other regions of the developing world.

Maintaining the status quo will produce worst case scenarios – conflict and exploitation.

However, this option is most unlikely to be a viable long-term policy option. The present land systems in the Pacific island countries, mostly inherited from the colonial era, are becoming less and less workable, relevant or sustainable. Without the necessary funds and skills they will continue to run down, providing a lower quality and level of service to the public. The policies and laws that underpinned them during the colonial era are not being adapted to emerging needs.

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3 Food and Agriculture Organization (FAO), *Law and sustainable development since Rio: legal trends in agriculture and natural resource management*, FAO Legislative Study No. 73, FAO Legal Office, Food and Agriculture Organization of the United Nations, Rome, 2002.

4 World Bank, *Land policies for growth and poverty reduction*, World Bank Policy Research Report, World Bank, Washington, DC, 2003.

This 'do nothing' option will produce *worst case scenarios* of which we are already getting some idea. Without the processes in place to manage the migration of people to urban areas who then settle on other groups' customary lands, the sort of violent conflict witnessed most recently in Honiara and other areas of Guadalcanal in Solomon Islands will become more common. Without processes that provide for landowners to participate fairly in the benefits of wealth generated from their customary lands, more Bougainville-type secessionist movements can be expected. Without adequate safeguards in place, so-called 'leaders' will deceive and exploit their fellow landowners, making deals behind their backs and 'ripping off' their timber or mining royalties. If such trends are not addressed the authority of the state and any respect for laws and due process are soon undermined.

THE 'PRIVATISATION' OPTION

Privatising land would potentially provide great opportunities for some people and leave societies divided.

For many years people have preached the virtues of land 'privatisation' as the only viable avenue to economic growth and raised living standards. Under this option, customary tenures would be radically changed. But governments have to weigh up the need for strengthening individual interests in land, with their responsibility to protect the rights of those who would miss out in a carve-up of their customary lands. A *best case scenario* under privatisation is greater opportunity for the hard-working and more ambitious people to gain secure land titles, build up their wealth and stimulate economic growth, which would provide employment for those forced off the land. A *worst case scenario*, however, is for the powerful and wealthy of today to acquire the best lands, with their kinfolk having to migrate elsewhere to find a living, leaving societies thoroughly divided. Some may see this as inevitable, as the Pacific goes through the same development stages as industrialised countries. In any case, that is a judgement to be made by the countries concerned, according to their own decision-making processes.

THE 'MIDDLE GROUND' OPTION

Blending ownership at the group level with leases or other agreements for the rights to use land at the individual level points to what might be the best way forward.

Instead of the two extremes – do nothing or make radical changes – there is the option to take the middle ground. Land tenure reform need not seek to abolish customary tenures, but to build on them and encourage their adaptation to emerging needs and demands. In economic terms, such reforms are 'demand driven', not 'supply driven'. Customary groups can be protected, while individuals are given the security they need for investment in land development. This blending of ownership at the group level, and leases or other agreements for the rights to use land at the individual level points to what might be the best way forward.

Obviously roads, market access, good governance and so on will also have an important influence on growth in the Pacific island countries. But if improvements can be made to the general growth environment, the evidence from industrialised

countries is that the strengthening of land rights will contribute substantially to long-term economic development. Indeed, growth in an improving economic and political environment may well be impeded if it is not accompanied by land tenure reforms. This means that governments will need to invest more in land policy development and the services to implement the necessary reforms. The *best case scenario* would be long-term sustainable growth, without social dislocation and the ensuing poverty.

A land system that protects land ownership at the group level and land use at the individual level would:

> strengthen land rights
> facilitate land dealings
> settle disputes effectively
> provide appropriate and adequate land administration services, and
> provide land for public purposes and other special needs.

As such a land system seems to be the best way forward, the remainder of this paper briefly considers the policy aims of the proposed land system, discusses the reform options and lists the main issues. It is not being suggested that the need for reform is the same for each country, although all Pacific island countries suffer from weaknesses in their land systems to some extent. The discussion may be useful, however, as a 'checklist' of what is required to achieve the policy goals in the respective countries.

STRENGTHEN LAND RIGHTS

POLICY AIM

To establish land rights that achieve a balance between encouraging economic growth and protecting the social fabric of Pacific communities

Because customary land tenures are usually not written down, some method for recording land rights is needed. An initial choice has to be made between recording all the existing rights, powers and responsibilities over land, or recording only the most important rights. Because of the many different kinds of rights and powers that exist over customary lands, an attempt to record all rights accurately would be very demanding and any such record would soon be out of date. Also, if the aim is to strengthen certain land rights, there is little point in recording only the existing situation. It is important to record:

> the rights of the person who will be developing the land
> who has granted those rights
> how the benefits will be shared, and
> what controls will apply to the development.

The extent to which land rights are lost will depend on the extent to which the customary tenure is changed, as a result of the recording process. There is a wide range of possible changes. At one extreme, all customary interests and controls over the land might be cancelled, except for the land right being recorded. Papua New Guinea, for example, has had a law since 1964 providing for customary tenures to be converted to registered individual freeholds, but experience has shown that people continue to exercise their customary interests and expect to benefit from improvements to the land. The complete removal of land from the effects of custom is almost impossible in the Pacific.

The most practical and acceptable approach is to change land tenure only to the extent that it is necessary.

A more practical approach might be to look for ways of modifying custom so as to allow a strengthening of certain land rights. To provide security for development, it may not be necessary to cancel all customary interests in the land or all customary controls over its use. The most practical and acceptable approach is to change the land tenure only to the extent that it is necessary. This should be a guiding principle for any land tenure reform.

Introduce land tenure reform only where there is a real demand for the change, and strong local support.

The following options outline ways in which rights to customary land can be strengthened, while preserving the status of the land as customary land. It should be remembered, however, that under all of the reform options some change in land rights is inevitable. If people do not agree to that, the reform should not proceed. Another guiding principle should be to introduce land tenure reform only where there is a real demand for the change, and strong local support.

REFORM OPTIONS

Record agreements or register titles, or both?

A simple system can be designed for recording agreements between parties over the use of land. Such a system is not much more than a service provided to the parties – the owners of the land and the person who wants to use it. Some basic questions should be answered. Is the land clearly marked? Are the terms of the agreement to use the land clear? Have any necessary approvals been received? There may be standard forms for different kinds of agreement – for example, a standard lease with conditions regarding the period of the lease, payment of rent, improvement requirements, right of renewal, etc.

Such recorded agreements provide documentary evidence that can be used if a dispute arises, and they are a proof of the person's interest that a bank can rely on. They are not, however, a legal guarantee of the person's rights, as a registered title would be. Nevertheless, such agreements have been useful in raising loans for development. Since the 1960s, simple Clan Land Usage Agreements have been used in Papua New Guinea to secure loans for individuals to develop parts of their customary land. It should be noted that the idea of providing a service for recording

agreements over land use is not a proposal for the registration of deeds. Entries in deed registers do provide statutory protection to the parties, but the system is generally regarded as inferior to the registration of titles in land registers because there is no guarantee of the title. Samoa is only now going through the difficult process of converting from a deeds register to a land register.

A more secure form of interest in land is provided by a registered title. Here, the law gives a guarantee that the rights to a piece of land are as set out in the title. To do this, there has to be more careful investigation of what land rights exist, followed by a 'determination' by some independent body that a title in the land should be issued to the person concerned. The process of investigation, determination and registration of titles has to be carried out carefully, fairly and in accordance with the law, otherwise people will be able to approach a court to overturn the titles. Once a title has been issued, the law guarantees that the title accurately reflects the rights to the land. Clearly this provides better security to the occupier of the land, and people who deal with that occupier (for example, banks).

The registration of titles is much more demanding – in time, skilled personnel, funds and other administrative resources – than a simple recording process. A country's land system could, however, provide for both – land titling in priority areas where the costs are justified, and land recording in other areas. This raises matters considered in the next reform option.

Register land systematically or sporadically, or both?

There are two main kinds of land registration – systematic and sporadic. As its name suggests, systematic registration involves an investigation of all the land rights and interests in a declared area of land, followed by determination of the rights of interested parties and their registration, in an orderly and complete way. By contrast, sporadic registration involves registering scattered pieces of land (that people apply to have registered) without considering all of the interests in the land. The general view is that systematic registration is fairer, more reliable and more cost effective than sporadic registration. The latter has been called 'vicious in principle' for the way in which it deals with only the needs and wishes of one person, instead of handling together all the wishes of all the people with interests in the land.

But again, it is possible to have a combination of systematic and sporadic registrations, so long as the same legal guarantee is not given to a title issued after a sporadic process. This gives the land system more flexibility and allows systematic registrations to be confined to high-priority areas, while providing a lower level of registration to take place outside of such areas.

Abolish all or only some customary interests?

Any customary interests that conflict with registered titles would have to be abolished, otherwise the titleholders could not rely on their registered titles. But there could be other customary interests – for example, rights to hunt or collect bush materials from the land – that could continue without affecting the title. The law would have to specify what these minor rights were, but the aim would be to change the existing land tenure only as much as is necessary.

Conclusive evidence of titles or something less?

If the law makes the registered title 'conclusive' evidence, no one can overturn the title. Clearly, such a high level of legal protection should be given only where the investigation and determination of land rights has been carried out carefully, fairly and independently. Such would be the case with titles issued after systematic registrations. Without systematic registration and in the case of recorded agreements, there cannot be the same level of confidence that the titles or records are correct. But they can still have value as documentary evidence that the rights exist. This is a better situation than having no written evidence of the rights.

MAIN ISSUES

The main questions for governments to answer on the reform options to strengthen land rights follow.

- What rights should be recorded or registered – only ownership or subordinate rights under custom as well?
- Where should the recording or registration system be introduced – only in priority areas, or should it be available on demand?
- Who should be able to be registered as an owner of customary land – only customary groups, or individuals, or both?
- Should the application of a recording or registration system be entirely voluntary, or should it apply to everyone?
- What should be the legal effect of recording or registering land rights – conclusive evidence of the rights or only prima facie evidence?
- Will custom continue to apply to the land after it has been recorded or registered, and to what extent?
- Should any provision be made for compensation if rights to land are lost as a result of the recording or registration?
- How can a recording or registration system be kept within administrative capacity – to identify the rightholders (adjudication), identify the land parcels (survey), register the titles and maintain the land register (registration)?

FACILITATE LAND DEALINGS

POLICY AIM

To create a legal and administrative environment in which land dealings permitted by law can take place efficiently and cost effectively

Although registration of land titles is partly aimed at confirming the existing rights in customary land, one of its main advantages is that it provides security to those who deal with the registered titleholders. This security is a benefit to both parties to a land dealing and is a major incentive for land development and economic growth. In areas where the land registration service is not available, it may be possible to provide a simple recording service as outlined above, under which dealings in land can be checked and documented.

There must be an efficient system in place for making the necessary checks and decisions.

Not all land dealings will be permitted under a country's law. For example, most Pacific countries prohibit the ownership of land to be transferred to non-citizens. There may also be policy reasons why a country might restrict the ownership of land to customary groups, with individuals allowed to hold only occupation rights or leases. The power to lease customary land might also be controlled (for example, restricted to only residents), and limits may be put on who can take mortgages over customary land (for example, only certain banks and other authorised bodies). Where there are such controls on dealings, there must be an efficient system in place for making the necessary checks and decisions.

In many countries, major developments of land have had to go through the state – with leases granted over state-owned land. The supply of state-owned lands is running out, however, and people are no longer prepared to sell their land to the state. They also want to participate directly in the benefits arising from developing their customary lands. At present, customary landowners have only limited ability to deal directly with outsiders (that is, non-members of the group), but various alternatives exist. The best-known one is in Fiji, where land dealings for development by outsiders are negotiated through the Native Land Trust Board. This system was set up over 60 years ago and has allowed most of the available customary land in Fiji to be brought into development. Although some aspects of the system may need to be improved, it provides a valuable model for other countries to consider.

In Australia, various bodies have been set up by law to manage Aboriginal lands. The Aboriginal Land Councils of the Northern Territory have the role of consulting the traditional owners on any proposal relating to the use of their land, and negotiating on their behalf. The Land Council members are chosen by the Aboriginal owners, and they employ a staff of professional advisers such as anthropologists and lawyers. The system works well, but it is expensive. A major problem faced by the new

indigenous bodies managing native titles in Australia is a lack of funds and resources to carry out their management functions.

In Papua New Guinea, the 'lease – lease back' system has received some attention as a way of giving outsiders a registered title to customary land. Under this system the landowners lease an area of their customary land to the state, which then leases the land back to the customary owners (or some representative body of the customary owners), who can sublease the land to the developer. Much of the new plantings of oil palm is taking place on land made available through such a system. It is a time-consuming system, however, and a very roundabout way of achieving a registered title. Involving the state in the dealing has limited value, when the state apparatus to support its titles is weak. A better alternative would be a system allowing for direct dealing between the two parties – the customary landowners and the developer – and registration of the land together with the lease.

REFORM OPTIONS

Record dealings or register the titles created by dealings?

One of the methods for strengthening land rights detailed above is to provide a service for recording rights in land. This would be a low-cost, low-technology service that could be provided fairly easily in areas of need. While the records of dealings would not be as strong as a registered title, the service could still provide a useful contribution to development. Recorded dealings could be entered into between a customary landowning group and one of its members, or between the group and an outsider (non-member).

In those areas where customary land has been registered, it is important to have a follow-up service allowing the results of dealings in the land to be registered. If land is sold or leased, or if a bank takes a mortgage over the land as security for repayment of a loan, the new interest must be registered. Only after it has been registered will the new interest-holder get the protection provided by the registration law. This is, of course, the main benefit of a registration system. The legal and administrative processes for registering interests that arise from dealings must be reliable, efficient and free of corruption.

Deal directly with the developer or deal via the state?

As mentioned above, dealings via the state have been the main method for acquiring secure titles for development purposes in many countries, but with the dwindling supply of state-owned land there is a search for alternatives. The most suitable long-term alternative would be for countries to have a system allowing customary landowners to meet their own and outsiders' development needs directly, without the need for the state to acquire a title first.

But a direct dealing regime must itself be practical. It must be a simple process, leading to the informed consent of the landowners, a fair arrangement for sharing benefits, and a reliable basis for investment in the planned development of the land. Of course there must be checks, which the state could conduct. In Vanuatu, for example, the government must first approve an outsider to negotiate with the customary landowners, and requirements are laid down for the negotiations and contents of the eventual agreement.

If direct dealings between the parties are to be promoted, new inputs will be required. There may need to be guidelines for market-based transactions, covering such matters as the security and duration of the tenure, how it can be used for borrowing, the rent or other benefits, and the enforcement of the dealing as a contract. New services may be needed to facilitate negotiations, to determine appropriate rents, and for ensuring the equitable sharing of benefits among the landowners.

Use an intermediary between landowners and developers?

An intermediary can be a valuable 'fire wall' between the customary landowners and an outside developer, making sure that both sides are protected in the negotiations. On the other hand, care must be taken to ensure that there is real value added by the intermediary, and it does not become a time-consuming, costly and unnecessary extra step. It is a difficult matter to balance the need to protect parties with the need to facilitate genuine dealings that will lead to sustainable growth and benefits.

MAIN ISSUES

The main questions for governments to answer on the reform options to facilitate land dealings follow.

- Should land dealings be regulated and how?
- Who can enter into dealings on behalf of landowners?
- How do customary landowning groups make decisions?
- Can customary groups deal directly with non-members of the group, or is some kind of intermediary necessary?
- If an intermediary is necessary, what kind of intermediary is appropriate?
- What new inputs are required – guidelines for dealings, and assistance with negotiations and with the equitable sharing of benefits?
- What administrative capacity is needed to check the identity of the parties, the description of the land, and the genuineness and legality of the dealing, and to make the necessary adjustments to the records or registers?

SETTLE LAND DISPUTES EFFECTIVELY

POLICY AIM

To settle disputes over customary land and alienated land fairly, efficiently and effectively

It is always better to avoid a dispute in the first place by consulting regularly, reviewing agreements and making revisions if necessary.

Land disputes are an impediment to stability and growth. However, they are a fact of life everywhere, especially where major changes are taking place in society. Some land disputes have a long history, sometimes dating back to ancient battles for the expansion of tribal territory. More recently, serious disputes have arisen where people have migrated from outer islands or more remote districts and settled on urban lands belonging to other people. The main solution to such problems lies in a system that allows their peaceful settlement on the land, by facilitating direct dealings between the customary owners of the land and the new settlers, as discussed above.

Many Pacific island countries have been considering new ways of dealing with land disputes. Vanuatu has just introduced a system for settling land disputes, and Solomon Islands is considering a new system. Papua New Guinea introduced a new system in 1975 through the Land Disputes Settlement Act, which is outlined below. Papua New Guinea also has a special law for dealing with disputes between people claiming compensation for state-owned land and the government. Where such land is being used for public purposes – schools, airports, etc. – these disputes can be very damaging to the general public.

It is always better to avoid a dispute in the first place. In the Pacific islands context, where customary landowners and developers of their land are usually in close proximity, it is very important to make provision in any lease or similar dealing (for example, a timber rights agreement) for continuing consultation between the parties and for periodic review of the terms and conditions of the agreement to make sure that it is working satisfactorily. One of the immediate causes of the Bougainville catastrophe was failure to carry out the periodic review provided for in the mining agreement. The most important requirement for avoiding land disputes is that the agreement provides a reasonable flow of benefits to the landowners over time.

REFORM OPTIONS

Use normal courts or establish special courts?

Governments need to consider whether there needs to be special courts for settling land disputes. Pacific island countries have often made special provisions for handling land disputes, including setting up special bodies that have expert members and can operate more flexibly than the normal courts.

Use normal dispute settlement procedures or establish a special procedure for land disputes?

Part of the reason for having special courts is that land disputes are different from other kinds of dispute, and so special procedures are needed to reach lasting settlement. The 1975 Land Disputes Settlement Act in Papua New Guinea provides that disputes over customary land should go through three stages to attempt settlement, starting with compulsory mediation by a Land Mediator. If a settlement cannot be mediated successfully, the dispute can be taken to a Local Land Court, which has a Local Land Magistrate as chairman and either two or four Land Mediators. The Local Land Court has wide powers under the Act to reach a settlement between the parties, but if no agreement can be reached it can arbitrate (impose) a settlement. In general, disputes cannot be taken further than the Local Land Court, but the Act does allow a limited right of appeal to the Provincial Land Court against a Local Land Court's decision.

The PNG Act is administered largely by the Provincial Land Disputes Committee for the province concerned. Lawyers are generally excluded from appearing in Land Court hearings and the Land Courts are not bound by the normal rules of evidence. The general aim is to have a flexible and informal system that concentrates on reaching lasting settlements between the parties rather than strict legal adjudications.

It would be sensible for the parties to dealings over customary land to make provision for arbitration of any disputes by an independent arbitrator agreed on by both parties.

MAIN ISSUES

The main questions for governments to answer on the reform options for settling land disputes follow.

- Should different kinds of land disputes be handled differently – for example, between government and customary claimants over alienated land, between customary groups, between customary groups and a group member, and between customary groups and a non-member?
- Should legal representation be allowed?
- How should the result of dispute settlements be enforced?
- Is there the administrative (and financial) capacity to staff and service the dispute settlement machinery, pay any necessary compensation awarded by the dispute settlement body, etc.?

PROVIDE APPROPRIATE AND EFFICIENT ADMINISTRATION SERVICES

POLICY AIM

To provide an appropriate, efficient, cost-effective and corruption-free range of land administration services to the consumer

Probably the main constraint on land tenure reform is the capacity and quality of land administration services. None of the services provided by Pacific island governments – which concentrate on administering leases over state-owned land – can be said to be good. Delays in granting leases and processing simple dealings are a major problem for the public and businesses wanting to invest in development. Such delays lead to people using 'influence' or paying money to get simple matters processed. It is hard to plan for extending the involvement of government, particularly into the much more sensitive areas of customary land registration and recording of interests and dealings in customary land, when the present level of service is low and tainted by corruption.

Governments will have to do better without any increase in available funds and resources.

Insufficient funds and a lack of trained staff and technical facilities handicap attempts to improve the level of service to consumers. Some of these conditions are unlikely to change, and governments will have to do better without any increase in available funds and resources. This may mean rationalising existing services and dropping or contracting out some technical operations. Are other non-government options possible – for example, using local customary bodies? The decentralisation of services to make them more accessible and appropriate to consumers' needs is also an important goal, but it may mean more and not less cost. Where technical skills are in short supply, it is difficult to make them widely available.

There are cases where major investment in building up institutions has failed to achieve useful reform. When the large World Bank-funded Land Mobilisation Project undertaken in Papua New Guinea between 1989 and 1995 was assessed after it was implemented, the World Bank attributed its failure to achieve many of its objectives to factors such as poor coordination between departments, and political indecisiveness.

REFORM OPTIONS

Reform existing Lands Departments and related agencies

An obvious place to start is with an examination of the capacity and performance of the existing bodies responsible for providing land administration services. Such reviews have been undertaken in the Pacific island countries before, and a number are under way. The success rate of the bodies responsible for providing land administration services has not been great and is unlikely to improve without more widespread reform of governance and government institutions. Even relatively simple matters such as recruiting staff and retrenching superfluous staff have proved to be major obstacles to administrative reform. While these are 'simple' steps

administratively, in the circumstances of many countries – where many people depend on government jobs and family ties run deep through the system – they can have major social and political consequences.

Nevertheless, the difficult steps must be taken if the improvements needed to underpin land development and economic growth are to be realised. A reform measure such as land registration requires many inputs – surveys to identify land boundaries, investigation of the existing land rights and their fair and independent determination, settlement of any disputes, issuing of land titles, and the follow-up maintenance of the Land Register to enter all subsequent dealings. As far as possible, the registration system should be designed to take local circumstances into account, including the administrative realities of the country concerned. Any proposed land reform measure must be within a country's administrative capacity.

A system designed around the cultural institutions of the country – rather than attempting to overthrow them – is much less administratively demanding and relies much more on the indigenous technology with which the local community feels comfortable. This cultural dimension is an integral factor in designing acceptable and workable land tenure reforms. But land reform, by definition, does involve some 'modernisation', and certain modern technology must accompany the reform for it to be effective. As a modern market in land rights develops, other technical skills such as valuation will be needed. Some of the most important improvements lie in simple matters – making and keeping records safely and with good public access. Many land registers around the world have lost their value as a result of the failure to apply simple record-keeping systems.

Decentralise services, where possible

Decentralisation is a common goal, but it can mean trade-offs must be made. Technical services cannot always be provided at the local level, and supervision may suffer. But these problems are already present in many countries, and they should not stand in the way of attempts to move services closer to the consumers. Modern communication technology opens the way for decentralised decision-making and record-keeping. This applies particularly to the operation of land registers. Governments should take advantage of state-of-the-art technology and ensure that they receive the best advice on what is available. In many cases it will pay dividends, not just in improved service but also in lower costs. The trade-off is the risk of becoming dependent on systems that require expert maintenance and are vulnerable to breakdown through simple causes such as power failure.

Contract out services, where appropriate

Another reform measure often considered when looking at improving the provision of services to the public is privatisation – contracting the private sector to provide the service. Again, there are pluses and minuses, and some aspects of government are too policy sensitive to be passed to the private sector. Many of the technical services in land administration, such as surveying and valuation, do qualify for contracting out, and some countries already have the private sector providing these services to the public.

The guiding principle of keeping technical requirements low comes into play here as well. For example, customary land registration does not require high levels of survey in all cases, and alternative methods for describing land boundaries are used in many countries – both highly developed and developing. Such techniques can easily be passed on and could become a valuable source of employment. There is a wealth of experience of the benefits and risks of privatising the provision of government services, and governments in the region should take advantage of the best advice.

Provide adequate financial and administrative resources to provide the necessary services at an acceptable level

No matter how much effort is put into designing policies, laws and administrative systems that are based on a country's circumstances, cultural institutions and practical realities, any reform will require a certain minimum of resources to have any chance of success. It is better not to introduce a land registration system, for example, if it cannot be adequately resourced.

An option that governments often consider, not just to cover the costs of land administration but also to raise general revenue, is land taxation. One of the earliest reasons for surveying land and recording its ownership was to facilitate taxes on land. In developing countries, land taxation has proved to be problematic. Such taxes often fall most heavily on the poor, are difficult and costly to collect, and have a mixed impact on productivity. But when introducing a land registration system, it is reasonable to link it to some kind of fee for service – either by taxing the registered land or by charging a fee for first registration of the land, and fees for subsequent registrations of dealings.

MAIN ISSUES

The main questions for governments to answer on the reform options for improving land administration services follow.

> What land administration services can the government be reasonably expected to provide – surveying, valuation, land use planning and zoning, land registration, allocation of leases of state-owned land, assistance with land dealings and settlement of land disputes?

- What reforms can be made to improve the delivery of essential land services?
- What services are appropriate for decentralisation or privatisation?
- Is some deregulation possible?
- Is there the financial and administrative capacity to provide appropriate services and to recover costs?

PROVIDE LAND FOR PUBLIC PURPOSES AND OTHER SPECIAL NEEDS

Special arrangements may be required to gain access to customary land to meet the need for land for public purposes and to exploit resources.

Special arrangements may be required to gain access to customary land to meet the need for land public purposes and to exploit resources. It may be possible to use the general arrangements to gain access to land and the reforms outlined above aimed at improving access to customary land by strengthening land rights, facilitating land dealings and settling disputes.

Historically, land needed for schools, government stations, airstrips and the like in Pacific island countries has been acquired from its customary owners. But many of these early acquisitions have been challenged by the current generation of landowners, and governments are finding it almost impossible to acquire new land – even for public purposes that clearly benefit the local community. As a result, more reliance has been placed on leasing customary land for schools and other public purposes.

It seems wrong that governments should have to pay annual rents to provide a service to the local community, but often there is no alternative. There are examples of landowners exploiting their position to demand excessive rents, thereby pushing up the costs of wharves, roads and other public infrastructure. A possible solution might be some form of permanent dedication of the land to the public purpose, so that the land remains in customary ownership, but it must be used for the particular public purpose. A formula providing a flow of benefits to the landowners for the use of their land would probably still be required.

In the case of resource exploitation, the main land-based natural resources in the Pacific region are forests, minerals and, in some cases, petroleum and natural gas. In the larger countries, forestry operations make an important contribution to the national and local economies, but their heavy social and environmental impact has often led to serious problems in the areas affected. Mining and petroleum operations may have less environmental impact, but disputes over the distribution of royalties can be very socially disruptive. It was one of the causes contributing to the secessionist movement in Bougainville.

Other background papers deal specifically with the forestry, mining and petroleum sectors. Countries usually have special legislation providing for access to forestry, mining and petroleum resources and the distribution of benefits. Nevertheless, governments have invariably had to negotiate access to such resources with the

customary landowners, even in countries where ownership of the resources is vested by law in the state. For practical reasons, such negotiations and the provision of a benefit-sharing package have become accepted practice, not just for the landowners from the site of the operations but also those downstream who are affected. This often means invoking some aspects of the country's land system for identifying the owners, making land use agreements, settling disputes, etc. This can become a major burden on the land administration system.

The above discussion shows that special issues about land access and use may arise, and special provision may have to be made in a country's land system to make sure that they do not impede growth.

CONCLUDING REMARKS

In considering land reforms in the Pacific, there are a number of points that deserve emphasis, even though they may be obvious.

- First, the main lesson from previous attempts at reform is not to be too ambitious.
- Second, there is no blanket solution. Just as there is diversity between countries and within countries, so must there be diversity in how each country solves its land problems.
- Third, adopting policy and passing legislation on land have proven to be very difficult. If anything, these difficulties are increasing.
- Fourth, the administrative capacity of the state is weak. It is not likely to improve much in the near future.

In these circumstances, proceeding step by step, not trying to do too much, focusing on the urgent priority areas, concentrating on adaptation not abolition, and trialling any reforms by pilot projects are the responses most likely to lead to lasting improvements. Government interventions that encourage the gradual, progressive reform of customary tenures are likely to promote steady and sustainable growth, which balances economic development with social and political stability. The three basic requirements for any land reforms are:

- a real need for change
- strong demand and local support for the change, and
- availability of the necessary administrative and financial resources to support the reform.