Customary Land Management and Conflict Minimisation:

Guiding Principles and Implementation Framework for Improving Access to Customary Land and Maintaining Social Harmony in the Pacific

Land Management and Conflict Minimisation Project

Pacific Islands Forum Secretariat

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Preface

The Land Management and Conflict Minimisation (LMCM) project has its broader origins in national, regional and international discussions and decisions regarding land. Past interest in land in the Pacific has often been from an economic perspective (access to land by individuals or groups for economic purposes), or from a conflict perspective (land issues underlying conflict and crises). Both approaches have acknowledged the central role played by land in the identity, security and well-being of people in Forum Island countries. In 1994, The Pacific Islands Forum Leaders acknowledged the fundamental requirements for the efficient use of land. The Leaders also recognised the centrality of indigenous rights and customs and the special relationship of indigenous people to their land and that the usage of land varies between countries. The Forum Leaders also agreed on the need to prevent degradation of land. In 1999, the Forum Economic Ministers stated that:

…In considering issues related to facilitating investment for development and growth, we recognise that access to land ranks high in the list of factors inhibiting investment but that the other reality is that land issues are complex and sensitive to Pacific Islanders (1999 FEMM Action Plan).

In 2001, the Forum Economic Ministers noted that common areas for promoting the economic use of land as well as minimising conflict included: land leasing processes (including for Government access to land for public purposes); enabling the use of customary land as collateral for economic activity by members of customary landowning groups; and dispute resolution systems. The Ministers also endorsed a series of land policy guiding principles, which emphasise what issues countries may need to consider when developing their own land policy. These guidelines, though, do not fully reflect the interplay between land administration and conflict, which led the FEMM in 2002 to request “detailed examination of issues surrounding leasing processes, dispute resolution systems and the use of land as collateral or for commercial purposes with emphasis on safeguards regarding both alienated and customary land”.
From a conflict perspective, the 2000 Biketawa Declaration refers to land as one of the underlying causes of tensions and conflict, and calls for the Forum to constructively address this – and other – causes of tensions and conflict in the region. Between 2001 and 2004, the Forum Secretariat commissioned a series of national security study reports to investigate the internal causes of insecurity in Forum Island Countries. The 2005 Forum Regional Security Committee (FRSC) discussed a report on common conflict related themes that emerged from these studies, and identified land as a common theme to be further explored by a study on land and conflict.

Internationally, too, land has been approached from the perspective of making customary land available for increased economic use, or conflict. The 1992 Earth Summit in Rio De Janeiro noted that Governments should implement policies on land tenure and property rights for economic use, and assign clear titles, rights and responsibilities for land for individuals or communities to encourage investment in land (s.14.8 b and 14.18 c). More recently, in 2002 the international community called on governments and donors to “promote and support efforts and initiatives to secure equitable access to land tenure and clarify resource rights and responsibilities, through land and tenure reform processes that respect the rule of law and are enshrined in national law, and provide access to credit for all, especially women, and that enable economic and social empowerment and poverty eradication as well as efficient and ecologically sound utilisation of land ….” (United Nations 2002: 47).

Rarely, if at all, have economic and conflict-related dimensions of land been pursued simultaneously. In a workshop organised by the OECD on Land, Conflict and Development it was noted that the link between conflict involving land and economic development has in the past not been explicitly considered. It noted that ‘to sustain peace, land reform must succeed both in terms of meeting claims and in enhancing agricultural [economic] growth. (OECD 2004: 12).

Given the sensitivities regarding land issues in the region, the FRSC in 2006 endorsed this Land Management and Conflict Minimisation project, reflecting the linkages between land, economic development, and conflict, while recognising the central role of land in people’s social, economic and cultural well being. The dual approach to this investigation of land management and conflict minimisation adds value to previous efforts to investigate land issues from separate perspectives. As such, it reflects the vision of Leaders as expressed in Auckland at the launch of the Pacific
Plan: “Leaders believe the Pacific region can, should, and will be a region of peace, harmony, security and economic prosperity, so that all of its people can lead free and worthwhile lives.”

As a first step, the Forum Secretariat commissioned 10 consultancy reports to cover the breadth of issues relevant to the subject matter. This report reflects the findings of these consultancies, as well as AusAID’s case study reports under their Pacific Land Programme and other regional and international research. This is a collaborative effort between the Political and Security Programme and the Sustainable Development Programme at the Pacific Islands Forum Secretariat. Oversight was provided by a PIFS Steering Committee and a member country-based Reference Group.
Acknowledgement

The Pacific Islands Forum Secretariat acknowledges the contribution and support provided by Forum Island countries to the consultants appointed to undertake the 10 consultancy reports. Constructive comments received from internal and external reviewers are very much appreciated, particularly those from Professor Don Paterson, Professor Ron Duncan, Dr Jim Fingleton, Ms Marita Manley and Mr Russell Nari.
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<th>Description</th>
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<td>ACIAR</td>
<td>Australian Centre for International Agricultural Research</td>
</tr>
<tr>
<td>ADB</td>
<td>Asian Development Bank</td>
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<tr>
<td>ALTA</td>
<td>Agricultural Landlord and Tenants Act</td>
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<tr>
<td>AusAID</td>
<td>The Australian Government’s overseas aid program</td>
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<tr>
<td>BCL</td>
<td>Bougainville Copper Limited</td>
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<tr>
<td>BRA</td>
<td>Bougainville Revolutionary Army</td>
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<tr>
<td>BRF</td>
<td>Bougainville Resistance Forces</td>
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<tr>
<td>CEDAW</td>
<td>Convention on the Elimination of Discrimination Against Women</td>
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<td>CLAC</td>
<td>Customary Land Appeal Court (Solomon Islands)</td>
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<td>CLT</td>
<td>Customary Land Tribunal (Vanuatu)</td>
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<td>CROP</td>
<td>Council of Regional Organisations of the Pacific</td>
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<td>FEMM</td>
<td>Forum Economic Ministers Meeting</td>
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<td>FRSC</td>
<td>Forum Regional Security Committee</td>
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<td>FSC</td>
<td>Fiji Sugar Corporation</td>
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<td>FSM</td>
<td>Federated States of Micronesia</td>
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<td>GCC</td>
<td>Grand Coalition for Change</td>
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<td>GIS</td>
<td>Geographic Information System</td>
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<td>GRA</td>
<td>Guadalcanal Revolutionary Army</td>
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<td>GTZ</td>
<td>German Technical Cooperation</td>
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<td>IFM</td>
<td>Isatambu Freedom Movement</td>
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<td>ILGs</td>
<td>Incorporated Land Groups</td>
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<tr>
<td>Acronym</td>
<td>Full Form</td>
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<td>LIS</td>
<td>Land Information System</td>
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<td>LMCM</td>
<td>Land Management and Conflict Minimisation</td>
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<td>LOU</td>
<td>Landowning unit</td>
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<td>LTC</td>
<td>Land and Titles Court (Samoa)</td>
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<td>NLC</td>
<td>Native Land Commission</td>
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<td>NLTA</td>
<td>Native Land Trust Act</td>
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<td>NLTB</td>
<td>Native Lands Trust Board</td>
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<tr>
<td>NRI</td>
<td>National Research Institute</td>
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<tr>
<td>OECD</td>
<td>Organisation for Economic Co-operation and Development</td>
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<td>PICs</td>
<td>Pacific Island Countries</td>
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<td>PIFS</td>
<td>Pacific Islands Forum Secretariat</td>
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<td>PNG</td>
<td>Papua New Guinea</td>
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<td>PLA</td>
<td>Panguna Landowners Association</td>
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<td>SDL</td>
<td>Soqosoqo Duavata ni Lewanivanua</td>
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<td>SPC</td>
<td>Secretariat of the Pacific Community</td>
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<td>TOL</td>
<td>Temporary Occupancy License</td>
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<td>UCV</td>
<td>Unimproved Capital Value</td>
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<td>UNTAET</td>
<td>United Nations Transitional Administration of East Timor</td>
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<tr>
<td>USP</td>
<td>University of the South Pacific</td>
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<tr>
<td>UTS</td>
<td>University of Technology, Sydney</td>
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<td>WSSD</td>
<td>World Summit on Sustainable Development</td>
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Glossary

Conflict

Conflict involves at least two parties who disagree over the distribution of material or symbolic resources or perceive their underlying cultural values and beliefs to be different. As such, it is a broader concept than the term dispute.

Conflict Resolution

Conflict resolution is the process of attempting to resolve a conflict.

Customary land tenure

Customary land tenure is a complex system based on familial group or clan and individual access rights and founded on intricate relationships tied to kinship and politics. Landowning groups ‘own’ a collection of rights, each of which carries various social responsibilities, obligations and restrictions. Under customary land tenure ownership is based on an enduring notion of inter-generational stewardship or guardianship of the physical property and what it represents to the group.

Dispute

A dispute arises when two or more people or groups who perceive their needs, interests or goals to be incompatible, communicate their view to the other person or group.
*Forum Island countries*

These are independent Island nations in the Pacific – Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Nauru, Niue, Palau, Papua New Guinea, Republic of Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu.

*Land administration*

Land administration is the process of recording and disseminating information about ownership, value and use of land and its associated resources to support economic development and other social objectives. It also includes processes put in place to facilitate land dealings.

*Land management*

Land management deals with issues relating to achieving an acceptable return from land interests owned, and maintaining or enhancing the value of the land interests owned.

*Matrilineal*

Inheritance rights pertaining to land are traced through the mother’s side.

*Patrilineal*

Inheritance rights pertaining to land are traced through the father’s side.

*Pacific Island countries*

All independent island nations and Territories in the Pacific – American Samoa; Cook Islands; Federated States of Micronesia; Fiji; French Polynesia; Guam; Kiribati; Nauru; New Caledonia; Niue; Northern Marianas; Palau; Papua New Guinea; Pitcairn Islands; Republic of Marshall Islands; Samoa; Solomon Islands; Tokelau; Tonga; Tuvalu; Vanuatu; and Wallis and Futuna.
Private property rights

Private property rights are property rights held by individuals or legally recognised entities. They define ownership and/or use rights, and are defensible by law.

Recording

Recording involves deciding on the level of group holding – family, clan or other larger groupings – and their land claims. This involves agreeing on a social process for establishing the rightful owning group, members of the group and the physical land area claimed by the group.

Registration

Registration is a process whereby the State maintains a register of parcels of land showing all relevant particulars affecting their ownership, individual or group title holders. The land register guarantees these particulars to be complete and correct and is the final authority on landownership. It reflects latest land transactions.

Rent seeking

Rent seeking occurs when an individual, organisation or firm seeks to benefit by manipulating the rules governing the use and management of land in their own interests.

Principal-agent problem

The principal-agent problem arises when the interests of the agent/authorised person are not aligned with those of the principal/landowning unit, and the agent takes an action in his/her own interest.
**Market-based rent**

Land rent is based on local market supply, demand of land for rent, and expected returns to land as an input in that use.

**Premium, ‘turn key’ payment**

One-off payment usually made at the outset of a land lease arrangement.

**Transaction costs**

A cost involved in making an economic exchange/transaction.

**Trust and trustee**

A trust is a legal instrument whereby a person/persons or trustee(s) are given the power to administer a property for their clients. Trustees ideally do not have any direct interests in the property they administer, other than a fee that they may receive for their services.

**Unimproved Capital Value (UCV)**

A notional value of land that is administratively determined and because of the absence of a customary land market the UCV does not reflect market-based land value.
Executive Summary

The Land Management and Conflict Minimisation project has its broader origins in national, regional and international discussions, and decisions made over time regarding land. Past interest in land in the Pacific, and decisions made by the Forum Leaders, Forum Economic Ministers, and the Forum Regional Security Committee have often been from an economic perspective (access to land by individuals or groups for economic purposes), or from a conflict perspective (land issues as underlying conflict and crises). Internationally, too, land has been approached from either one of these two perspectives. Rarely, if at all, have economic and conflict-related dimensions of land been pursued simultaneously. Experience globally also emphasises that there can be no peace without equitable development and there can be no development without sustainable management of resources, including land, in a democratic and peaceful space (Maathai 2004).

Recognising the intertwined dimensions of the issue of improving land-based economic development and the minimisation of conflict, the FRSC in 2006 endorsed the Land Management and Conflict Minimisation project.

The starting point for the LMCM project is the recognition of the centrality of customary land tenure in the lives of the people of the Pacific. Therefore, efforts to improve economic and social wellbeing of the people must take customary land tenure as a starting point, and work towards a better fit between introduced land administration systems and customary land tenure.

The LMCM project has taken a dual approach to investigating economic access to land while minimising land-related conflict, thus adding value to previous efforts that have been undertaken to investigate land issues from separate perspectives. Discrepancies between key aspects of introduced land management systems and customary land tenure are potential sources of poor economic development and local level land-related conflict, and can be placed within a broader context of the changes that are taking place in Pacific Island societies, where globalisation and modernisation processes are causing a shift from egalitarian and communal lifestyles to a greater emphasis on individual economic wealth accumulation. Land-related grievances have, in
circumstances where they are combined with other factors, escalated into larger-scale violent conflicts.

As a first step, the Forum Secretariat commissioned 10 consultancy reports (Attachment 1), to cover the breadth of issues relevant to the subject matter. This report reflects the findings of these reports, as well as AusAID’s case study reports under its Pacific Land Programme and other regional and international research.

**Background**

Land is integral to the people of the Pacific, being a traditional source of sustenance, social and political relationships and identity. Traditional access to and use and management of land is closely tied to the social fabric of communities, and customary tenure defines not only the nature and scale of economic development but also social harmony. Land is a sensitive issue because it has a much broader meaning for indigenous Pacific people than just its value as an economic commodity. For the people of the Pacific, ties to land are central to identity and provide a sense of belonging. The importance to the people of the Pacific of acknowledging customary land tenure as the foundation of land management cannot be overemphasised. Sensitivities over land partly also arise because of tensions and conflicts that come to the surface during elections, when people’s emotions are manipulated for political ends.

Customary land issues are context-specific and reflect local and national social, economic, cultural and political circumstances and dynamics. However, similar groups of stakeholders are involved and there are common drivers of poor economic growth and conflicts. In addition, there are common causes and processes through which economic and social effects manifest themselves. These commonalities can inform common approaches to solutions.

Land is in most cases the only significant natural asset of Pacific people, and is therefore an integral part of national development efforts aimed at improving social and economic wellbeing. For the Forum Island countries, this has to occur within customary land tenure systems that have been subject to outside influences. Missionaries and colonisation processes introduced a cash
economy and Western land tenure concepts, thus bringing new dimensions to the use and management of customary land, and the distribution of benefits derived from it.

Modernisation and globalisation have brought fundamental changes to Pacific societies, affecting values, goals, and social norms. There is a shift taking place from egalitarian and communal lifestyles, to lifestyles where there is a greater emphasis on individual economic wealth accumulation, leading to increasing pressures to derive economic benefits from customary land. Basic human follies of greed and personal power influence people who are in positions of power, so that their decisions are at times being made for their own personal gains, and not in the interest of the landowning group as a whole. These changes have put pressure on customary land tenure and raised questions about the suitability of the introduced land administration systems, which are largely based on Western notions of property rights, to an environment where customary land tenure predominates.

**Customary land tenure**

Customary land is ‘owned’ by groups with different rights held by individuals, defined by inheritance and social relationships. In traditional societies ‘ownership’ of land relates to the notion of custodianship, where individuals and society jointly have a responsibility and duty of care towards current and future generations. Customary land is also a source of social insurance. For indigenous Pacific people, ties to land bring together ecological, geophysical, social, spiritual and economic dimensions, as captured in traditional terms used to describe the notion of customary land, such as *vanua* in Fiji, *fenua* in Tuvalu, *enua* in Cook Islands, and *whenua* in the Maori language.

Decisions about the transfer of land (through gift or purchase) were usually made communally or, in chiefly societies, by chiefs or ‘big men’. At the community level, individuals made decisions about land over which they had individual use rights. Conflicts were mediated by senior members of the community with expert knowledge of group genealogy and history and using sanctioned mediation processes.
Economic development

Market-based economic systems are generally based on the Torrens Title property rights system, where individualised property rights are clearly defined – individuals or entities own a piece of clearly specified land and thus have the right to make decisions about its use and enjoy the exclusive benefits of its use. Land ownership and associated rights such as of those of exclusivity, divisibility and transferability are defensible and enforceable by law. The maximisation of personal and national economic benefits is the primary motivation behind the use and management of private property.

There is an apparent disjoint between the notion of group ‘ownership’ in customary land tenure and the Western concept of private property rights that is seen as fundamental to a modern market-based economy. This misalignment has been at the core of less-than-desirable use of customary land for commercial purposes, particularly where customary landowners have not been formally recorded and landownership rights in groups are not accepted by financial institutions.

Rural to urban migration and emigration are adding others layers of demands on customary land tenure. Urbanisation and migration have raised the issue of lack of clarity of the rights of members of landowning groups who are away from their land for extended periods of time, as well as the issue of access to customary land for settlement, while ensuring that landowners do not lose their superior rights. Not only do these challenges cause local-level anxiety and disagreement, they can lead to conflicts that are taken to courts. Such conflict resolution processes can be time consuming and affect economic growth.

Land-related conflict

Land-related conflict takes place at two broad societal levels in the Pacific region. Inequitable economic development, perceived or real differences in benefits derived from land, as well as the inability to access Government services, public resources and information have played a role in local-level land-related conflicts between different stakeholders with differing agendas, interests and power, including customary landowners, State agencies, investors and residential settlers.
As indigenous people have become more integrally involved in market economies, and the demand for personal wealth to meet basic needs and aspirations increases, conflicts over fair returns arise between landowners, landowners and investors, and landowners and the State. The increasing value of land has led to the misuse of representational and distributional authority of those landowning group members who hold such powers, with decisions made for personal gains rather than in the interests of the landowning group as a whole.

In some circumstances, where land-related grievances are compounded by a number of additional factors, escalation of large-scale conflict or crisis has taken place. Experience in the region and elsewhere confirms that political, ethnic, cultural or class differences play a role in conflict escalation but inter-group differences do not lead to large-scale conflict or crisis in themselves. Such escalation is bound up with other factors including the manipulation of inter-group differences and imbalances of power by actors for their own political interests.

Key challenges

Customary and introduced land systems have coexisted almost independent of each other. Periodic efforts have been made to improve land administration by addressing specific aspects of introduced administration systems with the aim of facilitating access to customary land. Such efforts have been met with limited success. They often did not explicitly address the strengthening of customary land tenure systems or the better alignment of customary and introduced land management practices.

Group ownership and individual use rights

The disjoint between customary and Western notions of ownership has been considered a major constraint on the increase of economic activity. However, it is now generally accepted that individualisation of customary ownership rights is not a necessary condition for increased economic activity. Improved economic activity can be achieved by maintaining and protecting
the group-based customary tenure and allowing individuals to use rights consistent with the requirements of a market-based economy.

**Clarity regarding customary land tenure, group ‘ownership’, membership and decision-making authority**

Lack of clarity over customary landowning groups and their claims plays an important role in the apparent disjoint between customary and introduced notions of ownership. In most countries there is limited formal recording of customary landowning groups, their membership and decision-making processes. Even where efforts have been made to formally record and register customary land, these have had limited successes, and in some countries have itself been a source of conflict.

There is also a lack of clarity and in some cases uncertainty around the processes used to identify members of landowning groups, in particular the members with authority to represent the group in land dealings. Customary and formal rules can lack clarity or contain restrictions that impede access to land and the equitable sharing of returns to land between landowners and investors, and among landowners.

**Informal arrangements**

In many countries, the use of customary land by members of landowning groups under informal arrangements has helped landowners achieve some improvement in their economic wellbeing. Such uses are generally negotiated using customary practices, including the making of ‘payments’ or traditional token gifts. Such payments can be significant in size, although they are usually less than formal land rent payments. It is found that informal arrangements over customary land may help produce some economic wealth, particularly where customary rules allow exclusive use and outside funding is not required. However, without proper legal backing, they do not provide sufficient certainty for individuals to invest in longer term productive activities. Nor do they provide sufficient security for lending agencies to give loans. Informal arrangements also do not give security to people using customary land as residential sites,
particularly in urban areas. Settlers often ask for greater security of ‘tenure’ but landowners can be reluctant to provide this, fearing that doing so will erode their ownership claims to the land.

**Formal leasehold conditions and inequity**

Leasehold conditions are guided by State legislation and include the tenure of lease, lump sum premium and/or periodic land rent payments, conditions for renewal, and compensation for improvements on expiry. Some leasehold conditions may encourage the optimal economic use of land but they can also become a source of conflict between landowners and investors and between generations of landowners. Landowners may not know the economic value of their land at the time of entering into a land lease agreement. As new information becomes available to a next generation of landowners, this may become a source of conflict. Such conflicts can in turn discourage outside investors. Where the State has acquired land for public purposes, inadequate compensation and lack of due process can be a source of conflict.

**Benefit sharing between landowners and investors and asymmetric information**

Most countries do not have an active land rental market. Therefore, governments have used administratively determined rental systems which usually do not reflect local market conditions. Where land rent and lease conditions are directly negotiated between landowners and investors, differences in access to information between investors and landowners, and at times, between different members of landowning groups can result in the inequitable distribution of returns between landowners and investors, and among landowning groups. Such inequitable economic development, combined with changing needs and aspirations of individual landowners, can become a source of tension and conflict. In combination with other factors, land-related grievances when manipulated for political or personal gain, particularly in the context of incomplete information or misinformation, can escalate into large-scale conflict or crisis.
Inequitable benefit sharing among landowners and decision-making authority

The inequitable sharing of benefits between members of landowning groups is linked to the nature of customary land tenure and decision-making rights over land matters. Under customary land tenure, the authority to make decisions rests with key individuals but they may not always make decisions in the group’s interests. Instead, with changing values and lifestyles and in the absence of appropriate rules to ensure accountability and transparency, individual interests may override customary group responsibilities. This can become a source of contention over inequitable economic improvements among landowners and can lead to local-level conflict.

Local-level land-related conflict and escalation into larger conflict

Most countries face challenges in resolving local-level land-related conflicts because customary conflict resolution mechanisms are becoming less suitable, and people increasingly turn to formal court processes which can be costly and time consuming. Local-level land-related grievances, when not appropriately addressed, can transform into larger-scale conflict or crisis when fuelled by other factors like the manipulation of (mis)perceptions and (mis)information for personal or political gain.

No single conflict resolution mechanism can be applied across the region or sometimes even within one country due to a difference in local contexts. A combination of customary and introduced conflict resolution mechanisms may be desirable depending on the circumstances.

Strengthening the administration of customary land and conflict minimisation

An effective and sustainable land administration mechanism linking customary land systems with formal land administration systems managed by the State is essential if improved access to customary land for economic purposes and minimisation of local-level conflicts are to be achieved. Similarly, mechanisms to resolve local-level land-related conflict can be strengthened...
by finding an appropriate balance between customary and introduced conflict resolution processes. Such improvements must reflect basic principles of accountability and transparency at all levels of Government and within landowning groups.

Key areas of customary land and formal land administration systems that need particular attention include recording and – where demands for land are high - registration of customary land; recording of customary laws, including inheritance rules, decision-making authority and processes to obtain group consensus; and the clear demarcation of the role of Government and customary landowners in land dealings. The availability of appropriate information needs to be improved to support customary landowners to effectively engage in land dealings and negotiate land lease arrangements that provide fair and equitable returns on their land, and to prevent the mobilisation of (mis)perceptions and (mis)information, which can lead to conflict escalation.

Specific solutions and institutional design pertaining to land issues will however need to be ‘home grown’, to reflect local aspects of customary land tenure. These aspects are different in each country and can even vary within one country, depending on local and national social, economic, cultural and political conditions and dynamics. Some common key lessons from the region and abroad are summarised in Attachment 2.

**National land policy and improving customary land administration**

The strengthening of customary land administration must occur in the context of broader national development and be guided by a national customary land policy linked to national development goals. To overcome sensitivities over land, stakeholder-based consultative processes are vital, in order to arrive at a common understanding of issues and concerns, and to agree on a framework for land administration reforms, supported by a technical assessment of the current situation and past efforts.

The development of a national land policy would ideally precede any improvements made to land administration systems. Governments, through their land policy, would indicate the broad outcomes expected from reforms of customary and introduced land administration in the context
of national development goals. It is at this stage that the dual objective of improving access to land for economic development and conflict minimisation would be emphasised.

A national land policy would guide Government and key stakeholders in their efforts to identify short-term and long-term strategies to address the national land reform agenda, reflecting policy goals, institutional capacity and resource availability. The prioritised land reform programme of initiatives if used to engage with development partners can also help achieve the goals of the Pacific Principles of Aid Effectiveness.

**LMCM Guiding Principles**

The principles outlined below are intended to provide member countries with a framework within which to discuss country-specific matters of land reform. These principles are consistent with the principles set out in the Biketawa Declaration (Forum Leaders 2000) and the Forum Principles of Good Leadership (Forum Leaders 2003), and also build on the Forum’s Potential Guidelines for Good Land Policy (FEMM 2001).

The guiding principles when considered together with the implementation framework that follows, will guide the identification of strategies to bring about desired reforms in customary land administration and management.

The improvement in land-based economic development while minimising land-related conflict, entails the two following closely intertwined dimensions:

A. The improvement of customary land administration and land management to facilitate economic use of customary land while minimising local-level land-related conflict; and

B. The improvement of land-related conflict resolution mechanisms for local-level land-related conflict and the prevention of escalation of land-related grievances into large scale conflict.

In addition there is a set of principles that are applicable to both dimensions:

C. The role of Government, information and capacity development.
A. *The improvement of customary land administration and management to facilitate economic use of customary land while minimising local-level land-related conflict*

**Principle 1:** Customary land policy reforms should respect and protect customary ownership and individual use rights as defined by social relations and customary laws.

**Principle 2:** Customary land reform efforts should be placed in the broader context of national development goals, recognising that there can be no security without equitable development and that optimal economic development cannot be realised without an enabling social and political environment that also promotes democratic and peaceful existence.

**Principle 3:** Customary land reform efforts should be based on the recognition that Pacific societies are in a state of flux, with changing needs, values and aspirations of people as a result of modernisation, global integration and imperatives of the cash economy.

**Principle 4:** Active participation of customary landowners and other stakeholders in customary land management efforts is essential if nation-wide ownership of the process and outcomes is to be secured.

A nation-wide or incremental approach to customary land reforms should be guided by a stakeholder-based national land policy that articulates a clear national vision about the balance between customary laws and the formal systems of customary land administration and land management.

Consultation and active participation by all stakeholders in the negotiation of leases is crucial to ensure their acceptability and to minimise the opportunity for future disputes.
Consensus-based solutions should include the strengthening of customary and formal institutions and decision-making processes that suit local social, cultural (customary) and political characteristics, and reflect principles articulated in the Biketawa Declaration, principles of good leadership and gender equity.

**Principle 5:** Customary land tenure can be strengthened by the clarification of its core elements. The clarification of customary land tenure requires the recording of landowning groups and their membership, claimed land area, the rights of members residing on customary land, the rights of absentee members, representational and distributional authority, and the customary laws that are used to determine such rights and roles. These processes would be consistent with national commitments on equity, including gender equity where the country is signatory to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

Formal registration of landowning groups may be attempted as a second step but only in high demand areas where the need for more formalised land registration is essential.

Customary land reform processes adopted in a country should allow for diversity in customary laws found across landowner groups, and the recognition that communities differ in the strength of their traditional lifestyle and degree of individualism found in the group.

**Principle 6:** Dealings in land should be fair and reflect equitable returns to customary landowners, investors and lessees, based on the economic value of their inputs and market principles.

Leases should be secure and lease conditions should be clear about key factors including exclusivity, duration, renewal on expiry, compensation for any improvements at the time of expiry, amount of premium and annual rent, and conditions regarding sub-leasing or trading of leases.

Returns to landowners, in the form of land rent plus premium, and lessees must be based on market principles and be fair to the lessees’ investment and landowners’ superior interests.
Governments must follow due process of acquisition for public purposes and provide landowners a fair market-based compensation for land acquired. Alternatively, governments may consider negotiating a long-term leasing arrangement under ‘fair’ market rental conditions instead of outright acquisition.

Distribution of returns to land among current and future generations of members of landowning groups should be based on core principles of equity, taking into account agreed local customs. This distribution can be facilitated using landowning units (LOUs)/ village-level trusts or similar arrangements, combining elements of traditional systems and company structures and processes, and guided by good governance principles.

**B. The improvement of land-related conflict resolution mechanisms for local-level land-related conflict and prevention of escalation of land-related grievances into large scale conflict.**

**Principle 7:** Customary and formal resolution mechanisms should be treated as part of a continuum of the resolution of local-level land-related conflicts.

The improvement of land-related conflict resolution mechanisms should consider the balance between the need for impartiality and contextual knowledge pertaining to land, and the balance between the need for win-win and win-lose solutions. These questions, in turn, need to be balanced with considerations of cost and accessibility.

The improvement of land-related conflict resolution mechanisms should be based on the recognition that Pacific societies are in a state of flux, resulting in changes in customary authority and decision-making processes. This implies that land-related conflict resolution mechanisms may need to be revised at various points in time.

**Principle 8:** The prevention of large-scale land-related conflicts and crises requires the prevention of the mobilisation of land-related grievances and misperceptions.
For the prevention of the mobilisation of often long-standing grievances into large-scale conflicts, easily accessible, accurate and comprehensive information on different aspects of land use is essential, including information about leasehold conditions and distribution of returns to customary landowners.

For the prevention of the escalation of conflict, a whole-of-country approach is important to ensure equitable economic development, mutual respect regardless of differences, and the rule of, and respect for, law.

C. The role of Government, information and capacity development

**Principle 9:** Governments should play a supporting role in customary land dealings by creating an enabling environment for recognising, protecting and enforcing customary land tenure, encouraging and enforcing fair dealings in the fair use of land, as well as resolving conflicts over land.

A clear legislative framework should provide for integrated customary institutions and formal land administration systems, removing overlap and increasing clarity and coordination of formalised land administration.

A clear legislative framework for dispute resolution should provide for the appropriate mix of customary conflict resolution mechanisms and introduced conflict resolution processes and mechanisms to suit local situations.

**Principle 10:** Governments should provide for a central geo-referenced information system of landowning groups, their claims, customs and customary laws, and a registry of land dealings and other selected land use and management related information.

Governments must adopt a national framework to support landowners documenting and recording, and registering where relevant, their landowners’ groups, membership rules, customs and customary laws about land, consistent with the national land information framework.
Customary land information should be made available to end users, the landowners and other stakeholders in an appropriate form to support them in land dealing negotiations, land use and management decisions, and conflict resolution.

Land use planning and zoning of customary land should be adopted in areas of high demand to systematically guide development.

**Principle 11:** Customary landowners and outside investors should have appropriate understanding about customary land tenure and introduced land leasing requirements to negotiate fair and equitable land leases and benefit sharing arrangements, minimising the scope for local-level conflict.

Potential investors should have a good understanding of customary tenure systems, including customary laws and decision-making processes, in addition to formal land leasing processes.

Customary landowners should have sufficient understanding regarding customary land tenure and its relation to commercial use, land lease arrangements and financial management to ensure land lease conditions provide fair and equitable returns to the landowners and equitable distribution within landowning groups.

**Principle 12:** Public land management institutions should be well resourced, competent and responsible.

Public land management institutions should have the necessary knowledge, skills and tools to implement customary land administration and management in a transparent and cost effective manner. Included in this set of knowledge, skills and tools are those related to social aspects of customary land tenure and mediation, in order to support customary land dealings and minimise the scope for conflict.
Implementation Framework

Experience in customary land reform efforts in the region over the last two to three decades suggests that for the implementation of the guiding principles, political commitment and a nationally-owned land reform process are critical. Further, given the sensitivities associated with customary land, systematic and measured reform processes supported by robust information would help overcome misplaced perceptions and fears.

Member countries may take the following steps in land reform efforts, based on a national sustainable development strategy, that emphasises stakeholder-based outcome focussed adaptive program planning and budgeting cycle (Dalal-Clayton and Bass 2002). This is consistent with the Pacific Plan Initiative 5.1, which emphasises the strengthening of national sustainable development strategy based national development planning and budgetary allocation. These steps can help countries to be in the driver’s seat of their own land reform process and better coordinate national efforts and resources with those of development partners to address their high priority initiatives, consistent with the Pacific Principles of Aid Effectiveness.

**Step 1:** Obtain political commitment for a customary land reform process.

**Step 2:** Adopt a stakeholder-based approach and hold nationwide discussions on land-related matters, to define the land reform agenda. This could be facilitated by (a) nationally respected champion (s), who could be politicians, community leaders or public officials.

**Stakeholder consultation**

Countries may choose from different forms of stakeholder dialogue. They could choose to take national land forum approaches, as followed recently by Papua New Guinea and Vanuatu (Manning 2007 (draft)), where land issues were addressed in a holistic manner. On the other hand, they could hold consultation as part of a development land project, such as is the case in an the ADB funded project in Samoa (Grant 2007 (draft)).
Whatever pathway is chosen, it is critical that a nationally-driven process is adopted that involves all the stakeholders in open and objective dialogue and discussion, which is supported by objective information about issues based on local experiences.

**Topics for discussion**

To focus stakeholder discussions, key user-friendly discussion papers prepared by various stakeholders, officials and professionals could help in the identification of relevant issues and a common understanding of the issues involved. Key issues for discussion may include the current status (based on practical examples), key constraints to any changes; root causes of disputes and conflicts and areas that need strengthening as related to topics summarised in Attachment 3.

**Step 3:** Once a common understanding has been achieved, stakeholders together identify a national vision and national land policy framework for customary land reforms, which articulates expected outcomes and key guiding principles to underpin land reforms.

**Step 4:** Obtain Government endorsement of the national land policy framework with clear land reform outcomes linked into national development goals.

**Step 5:** Government and key stakeholders decide on strategies to address the national land reform agenda focusing on the key outcomes desired, reflecting national land policy goals.

Governments could adopt an area specific pilot project approach and implement a package of initiatives appropriately sequenced to collectively help achieve the desired outcome.

**Step 6:** Obtain development partner support for priority outcome-focused programmes of initiatives.
Chapter 1: Introduction

Land is integral to the people of the Pacific, being a traditional source of sustenance, identity and social and political relationships. In recent years, it has also come to play an important role in national development, as a source for economic development and to enable access to health, education and other public services. Land has also been at the core of many conflicts in the Pacific, both at the local-level and in large-scale conflicts and crises.

Traditionally, local-level land-related conflicts concerned boundaries or claims over use rights or decision-making rights and these would have been resolved using traditional conflict resolution mechanisms. Today, sources and causes of land-related conflict are multifaceted. At the core of many of these conflicts is the desire for economic returns from customary land and the difficulties that are experienced in matching customary land tenure with the institutional demands of potential investors in the modern economic environment. The issue of fair dealings in land including land lease conditions and the distribution of benefits derived from the development of customary land between landowners and investors – as well as between customary landowners – also play a role in land-related conflicts. These conflicts play out in a context of differences between customary institutions and introduced land management systems, as well as in a context of constant change in customary land tenure arrangements, accompanied by differences of opinions, interests, agendas and power struggles.

Traditional conflict resolution mechanisms are no longer always found to be appropriate or sufficient to deal with land-related conflict. Consequently, there is an increasing usage of introduced, court-based conflict resolution mechanisms. However, conflict resolution through court systems is often found to be time consuming and costly. Adversarial court processes are seen to lack compatibility with customary conflict resolution mechanisms.

It is generally recognised that there can be no peace without equitable development, and, conversely, that good governance and optimal economic development cannot be realised without an enabling social and political environment that promotes democratic and peaceful existence (Maathai 2004). In the Pacific, the improved economic use of land is integral to the achievement
of economic development. Equally important is the recognition that the goal of economic development cannot be achieved without accepting the existence of customary land tenure as a starting point within a market economics framework. Customary tenure defines how landowners interact with each other over land and how they interact with other stakeholders to generate benefits from the use of land, which collectively determine local and national economic wealth and social harmony (as well as environmental outcomes). Social sanctions may be derived from customary rules and/or formal legal systems.

In 2006, in a paper presented to the Forum Regional Security Committee, the Forum Secretariat sought FRSC’s endorsement to find acceptable practical answers to the question, “What type of land tenure and administration system is needed in each country to help avoid, prevent or minimise conflict over land? That is, what type of land tenure and land administration system can facilitate cost effective, reliable, secure and equitable access to land for commercial use and economic growth, for residential needs and for landless people to meet their basic livelihood needs, while also recognising the multifaceted traditional values of communal land and customary landownership systems, as well as reflect key international and regional commitments made on issues such as indigenous rights, gender equity, good governance, fair and equitable benefit sharing, cost effectiveness and efficiency?”

This question is the focus of this report.

**Customary land and the Pacific people**

Customary land in the Forum Island countries varies from 50% in Kiribati to approximately 99% in the Cook Islands, with traditional access to and use and management of land being closely tied to the social fabric of communities (Table 1.1). Customary tenure defines not only the nature and scale of use but also social harmony.
Table 1.1 Land Statistics and Land Ownership in the Forum Island Countries

<table>
<thead>
<tr>
<th>COUNTRY</th>
<th>Land Area (Km²)</th>
<th>Percent (%) customary</th>
<th>Percent (%) of State</th>
<th>Percent (%) of Freehold</th>
<th>Percent (%) of customary land registered</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cook Islands</td>
<td>240</td>
<td>~ 99</td>
<td>&lt;1</td>
<td>little</td>
<td>65</td>
</tr>
<tr>
<td>Federated States of Micronesia</td>
<td>700</td>
<td>65</td>
<td>35</td>
<td>&lt;1</td>
<td>Very little</td>
</tr>
<tr>
<td>Fiji</td>
<td>18,272</td>
<td>88</td>
<td>4</td>
<td>8</td>
<td>Most</td>
</tr>
<tr>
<td>Kiribati</td>
<td>726</td>
<td>50</td>
<td>&lt;5</td>
<td>&gt;45</td>
<td>Most</td>
</tr>
<tr>
<td>Nauru</td>
<td>21</td>
<td>&gt;90</td>
<td>&lt;10</td>
<td>0</td>
<td>Most</td>
</tr>
<tr>
<td>Niue</td>
<td>259</td>
<td>98.5</td>
<td>1.5</td>
<td>0</td>
<td>10</td>
</tr>
<tr>
<td>Palau</td>
<td>487</td>
<td>Some</td>
<td>Most</td>
<td>Some</td>
<td>Most</td>
</tr>
<tr>
<td>Papua New Guinea</td>
<td>462,000</td>
<td>97</td>
<td>2.5</td>
<td>0.5</td>
<td>0</td>
</tr>
<tr>
<td>Republic of Marshall Islands</td>
<td>181</td>
<td>&gt;99</td>
<td>&lt;1</td>
<td>0</td>
<td>Very little</td>
</tr>
<tr>
<td>Samoa</td>
<td>2,934</td>
<td>81</td>
<td>15</td>
<td>4</td>
<td>Some</td>
</tr>
<tr>
<td>Solomon Islands</td>
<td>28,000</td>
<td>95</td>
<td>8</td>
<td>5</td>
<td>0.2</td>
</tr>
<tr>
<td>Tonga</td>
<td>688</td>
<td>100</td>
<td>0</td>
<td>Na</td>
<td></td>
</tr>
</tbody>
</table>
Past influences of missionaries and colonisation, and more recent changes accompanying modernisation and globalisation processes, including increasing population pressures, have led to a growing interest in accessing customary land for commercial use and residential purposes by landowners and others. Missionaries and colonisation introduced land tenure concepts and land administration systems in response to the introduction of cash economy. This brought new dimensions to customary land tenure, the use and management of customary land and the distribution of benefits derived from it. Modernisation and globalisation is causing a shift among indigenous societies, from a more egalitarian lifestyle to a lifestyle based on cash economy, consumerism and an emphasis on individualism, as recently noted during the PNG Land Summit in 2005:

There is little doubt that the traditional lifestyles of our indigenous Papua New Guineans are changing – from a largely subsistence way of life, based on a subsistence economy, to a cash economy, where there are immense pressures placed on our people to make money and engage in the modern sector, or else one is left behind. If you do not have money, you do not get medical treatment at health centres or hospitals! If you do not have money, you cannot send your children to school! It is these kinds of social pressures which have driven our people to be engaged in the cash economy. It is the same socioeconomic pressures which will drive many more of our people to engage in the cash
economy – which is of course a good thing for everyone, the citizens concerned and the country as a whole (National Research Institute 2006).

Population increases in many Forum Island countries have led to the increasing pressure on, and fragmentation of, land – decreasing the share of returns to land with each generation. Consequently, the smaller areas of land available to each landowner group-member are becoming economically unviable and are leading to increased competition over land. Migration is in some cases seen as a release valve for such pressures. (Crocombe and Tongia 2007(draft)).

Internal migration from rural to urban areas, which is a growing phenomenon, and the limited availability of State and/or freehold land, has forced people to settle on customary land under informal arrangements without much security (Chand and Yala 2007(draft)). Settlers often ask for greater security of ‘tenure’ but landowners are often reluctant to provide this, fearing that doing so will erode their ownership claims to the land (Chand and Yala 2007(draft)).

Further, rural to urban migration and emigration are adding other layers of demands on customary land tenure. The migration of landowners has led to a lack of clarity of the rights of members of landowning groups who are away from their land for extended periods of time, even generations. These challenges cause local-level disagreements and conflicts, and can lead to court cases that delay, and at times stop economic use of land.

Such changes are placing pressure on customary land tenure. Landowners have a growing interest in accessing customary land for economic use, for which exclusive access to customary land by individuals or a legally recognised group or entity is protected under law. This requirement is at odds with the flexibility inherent in group-owned customary land tenure, where individual use rights are provided mainly for subsistence. In response to such problems, questions are being raised about the role and relevance of customary land tenure in encouraging economic development. Where customary land has been made available, there are concerns and conflicts over who has the rights to decide over the use of land, including the sharing of benefits between landowners and outside investors, as well as between landowners.

In recent local-level and large-scale land-related conflicts in the region, inequitable economic development, perceived or real differences in benefits derived from land, as well as the inability
to access Government services, public resources and information have played a role. The escalation of large-scale conflict is bound up with the manipulation of land-related grievances, inter-group differences and imbalances of power by actors for their own political or financial interests and rent seeking behaviours, as well as other contributing factors.

The combination of such contributing factors can vary from country to country or even within one country. Solutions pertaining to land issues will also differ depending on the local circumstances. Given the sensitivity of land issues, there is a need for ‘home grown’ solutions. Such solutions can include institutions like constitutions, laws, rules and customs, behavioural norms and enforcement rules (North 1990). These institutions are designed to constrain and shape humans’ interaction with each other and with the environment to produce the desired outcome.

To identify appropriate practical and acceptable solutions to land-related concerns, a good understanding of the existing constraints to economic use of customary land and the causes of land-related conflict, and of experiences in strengthening customary land tenure, land administration and land management, are important. Any lasting solutions will need to also reflect a clear understanding of the local conditions of economic, social, cultural and political aspects of land use and their linkages to conflict, as well as the interaction between organisations, actors and institutions associated with customary land administration and land management. Land management, which deals with issues relating to achieving and maintaining optimal return from land and maintaining or enhancing the environmental value of land, is a subject beyond the scope of this study. However, some aspects of land management, including land tenure, role of actors and stakeholders, and land use planning, are also common to the land administration debate.

This synthesis report discusses these issues in detail by providing an overview of key issues related to land administration and conflict minimisation and lessons learnt in the Pacific, and including some experiences from elsewhere. It also discusses aspects of land management that have direct bearing on land administration and related decision-making processes and conflict minimisation.
The premise of this report is that increased participation in the cash economy must occur within a framework of customary land tenure. As such, this report argues that the integration of customary and introduced land administration systems and land-based conflict resolution mechanisms is paramount to enabling the economic use of customary land while minimising land-related conflict.
Chapter 2: Economic Development, Customary Land and Local-level Conflict

Increased market-based economic development to support improvements in economic and social wellbeing of Pacific people is one of the key national development goals throughout the region. Market economies are based on the Western notion of private property rights in relation to ownership or clearly defined use rights. In the Pacific, customary tenure – based on group ownership – is often at odds with the requirements of commercial activities. The presence of customary land tenure has generally been viewed as discouraging economic growth. But it is also the effects of modernisation on needs and aspirations, and values, of individual landowners that generates tension within society and which are often at the core of land-related local-level conflicts. This tension is played out in a context of differences between customary and introduced land administration systems, as well as differences of agendas, interests and political power. While specifics may vary between countries and even within a country, issues concerning customary tenure across countries share some common features.

The purpose of this chapter is to examine these issues surrounding customary land tenure in today’s Pacific and the role they play in encouraging or constraining economic development and local-level land-related conflict. It first provides an overview of the key tenets of property rights and economic growth, to contextualise the discussions on customary land and economic growth to follow. Drawing on experience from within and outside the region, the chapter then provides an overview of the changes in customary land tenure, values, needs, aspirations and individual goals as a result of influences of Christianity, colonisation and modernisation processes. The implications of these changes on economic growth and fair and equitable returns to landowners are also discussed. The chapter concludes by drawing out some lessons learnt in order to address the nexus between access to customary land for economic development, while ensuring fair and equitable returns to landowners and tenants, and local-level land-related conflict minimisation.
Private property rights and economic development

International and regional experience suggests that national development based on private sector led market-based economies provides highest economic growth and the most cost effective use of national resources. Market-based economic development is rooted in the notion of private property rights and free and competitive market transactions. Property rights define the relationship between the persons owning the property as well as relationships between the property right owners and others in a society (Pejovich 1990). Property rights describe the rights to own or use a resource and benefit from it and roles of owners and others; restrictions people have; and obligations of owners and non-owners in relation to that use. Private property rights, held by individuals or legally recognised entities, define ownership and or use rights defensible by law. Global experience suggests that prerequisites for a stable and efficient land market, which also encourages sustainable economic development, include clear property rights and their sound administration (Dale 2000). Clarity in property rights includes; owners are clearly known, the exclusivity of the owner’s rights is clear; and decision-makers are clearly known and are able to allocate and transfer land. These rights must be defensible and protected under the law (Bromley and Cernea 1989). Sound land administration includes a register of properties and title holders, a simple and inexpensive process to transfer property rights, and transparency and accountability in all matters relating to the land.

Under the Western notion of land tenure, individualised private property rights in land – whether freehold or long-term lease – are seen to provide the ultimate set of rights on which the modern market economy is founded. Freehold ownership provides exclusive rights over the use of land and over the reception of benefits from investment in or use of land. Leasehold provides defined rights to use of the land and receipt of the benefits from the use, with the superior ownership rights unaffected. Title holders’ rights are protected by law, which prevents others from using the land without permission. Title holders can also use their land titles as collateral to raise capital for economic purposes. With secure and durable titles, owners thus have every incentive to maintain and/or improve the natural asset in land. Efficiency in land use is also encouraged by
the ability of landowners to subdivide and transfer parcels of land that promotes higher valued uses.

**Customary land tenure**

There are important differences between customary land tenure in Forum Island countries and the notion of individualised property rights described above. Customary land tenure is a complex system based on familial group or clan and individual access rights, founded on intricate relationships tied to kinship and politics. Landowning groups ‘own’ a collection of rights, each of which carries various social responsibilities, obligations and restrictions. As noted by Crocombe (2001)

> rights to land were in all cases multiple, conditional and negotiable. What was owned was not the land or water so much as rights to it – rights *vis-à-vis* other people. No rights were absolute. Some rights were held by individuals, but there were many shades of difference between the rights of even close relatives…. No one person held all rights to any one plot…individual rights were nested with those of extended families, lineages, clans, tribes’ (Crocombe 2001: 295-296).

Traditionally land boundaries at the individual or communal level were defined in terms of physical markers such as rivers, mountains, hills, stones, and trees; in many countries land boundaries are still loosely defined using such markers. The birth of a person into a family provides inheritance rights over land. These may be traced through lineage as defined by cultural norm – either through the father’s side (patrilineal) or the mother’s side (matrilineal), or some other relationship built through marriage or adoption. In some countries both systems can be found, although traditionally not in the same place.

The rights of individual members of a group vary considerably, defined by their relationship to the group. For example, lineage members who acquire land through inheritance have superior claims to those who marry into or are adopted by the group. These latter groups frequently have only use rights. At the same time, senior members generally have superior claims to junior members, and men and women have differing claims, as do people who have been adopted into
communities (Fingleton and ToLopa 2007[draft]). Men and women who cleared and cultivated new plots of land had strong claims to that land, while rights tended to lapse if the land was not regularly cultivated. When members are absent from the community for an extended period, absentee rights may be suspended for the duration of absence but could be reassigned upon return depending on needs and acceptance back into the community (Crocombe and Tongia 2007[draft]: 9).

Traditionally, customary land tenure has not been without conflict. Conflict has often occurred over land boundaries and over leadership ‘titles’ which carried authority and status (Ward. and Kingdon 1995:6). The resolution of land-related conflict, whether through non-violent customary mechanisms or through warfare, was often temporary, with claims to land being re-presented over time and new conflicts occurring.

Traditionally, the customary land tenure system provided flexibility, adapting to changes in the social and natural environment. This feature has been regarded as its strength. However, in recent times, the pace of change has accelerated at such a rate that customary land tenure systems have been unable to adapt sufficiently (Jones and Holzknecht 2007; Kabutaulaka and Rokolekutu 2007; May 2007). In addition, such flexibility itself poses difficulties in the modern economic context, particularly since modern economic imperatives require a measure of certainty and clarity over ownership and use rights.

The Pacific, however, is not alone in this regard. Woodhouse, for example, noted in relation to the West African experience: “when competition for land intensifies, the inclusive flexibility offered by customary rights can quickly become an unchartered terrain on which the least powerful are vulnerable to exclusion as a result of the manipulation of ambiguity by the more powerful” (Woodhouse 2003). For the Pacific, the challenges are, however, more acute because of their limited natural resource endowments, critical constraints affecting their ability to engage in commercial activities.
Differences between customary tenure and Western notion of property rights

Under customary land tenure, ownership is based on an enduring notion of inter-generational stewardship or guardianship of the physical property and what it represents to the group. This contrasts markedly with the Western notion of ownership, which as discussed earlier, is defined in terms of individuals (or commercial entities), physical property and the State. This lack of specific individual rights is often seen as one of the key constraints to better economic use of customary land. Much international literature suggests that where individuals do not own land or do not have secure title, there is less incentive for them to make full use of their land, because they do not have individual rights to exchange ‘their’ land with others for money or other currency. Such constraints can affect economic wealth generation from customary land (Deininger 2003). Lack of land titles also affects the ability to raise credit (Feder et al. 1988: 44-69) and may even increase the cost of credit when landowners are forced to access loans through informal channels.

These assertions underpin the notion that some form of individualised rights to customary land is the main, if not the only, way to promote large scale and small-holder-based economic development (De Soto 2000; Gosarevski et al. 2004; Gosarevski et al. 2004b). It also has been argued that without secure private property rights, commercial financial institutions will not provide loans for development projects (see, for example, Holden et al. 2004:87, 91).

However, international and Pacific experience suggests that privatisation of customary land is not a necessary or sufficient condition for increasing security of tenure (Deininger 2003; Bourke 2005; Fingleton 2005). Similarly, the World Bank recently noted, that ‘increasing security of tenure does not necessarily require formal individualised titles, and in many circumstances more simplistic measures to enhance tenure security can make a big difference at a much lower cost than formal titles’ (World Bank 2003: 39).

Experience with formal lease arrangements in Fiji and Vanuatu, and ‘lease-lease back’ arrangements in Papua New Guinea, demonstrate that innovative arrangements within customary land tenure systems can lead to large scale and small holder-based economic growth. At the local
level, the flexibility of the customary land tenure system, where individuals can be assigned exclusive rights, has actually contributed to an increased production of locally traded areca nuts and pepper fruit (Mosko 2005). However, while flexibility may allow commercial uses when competition is low and land is plentiful, when demand and competition for land increases such flexibilities can become a constraint to economic use and local-level conflict, as discussed below.

**Customary land tenure and modernisation**

Modernisation processes have led to fundamental changes in customary tenure systems. Despite the inherently flexible nature of customary tenure, the pace of these changes has made adaptation more difficult. Gerard Ward notes that ‘to retain older styles of life and socio-economic organisation in the face of the incorporation of the region into global commercial and political systems would require extraordinarily strong commitments to customary practices, and a degree of community solidarity which the people of few other regions have achieved in the face of comparable forces’ (Ward 1995: 2).

Christianity and colonisation brought major influences that redefined the meaning of ‘traditional’. Modernisation has brought a shift from subsistence to market economies. Cooperative or communal modes of life, where labour mobilisation and exchange of goods and services are based on reciprocal obligations, are being gradually replaced by wage labour and money (Ward. and Kingdon 1995:1-2). The nuclear family has become the main socio-economic unit at the household level. Such changes also bring changes in values, norms, attitudes and aspirations, which in turn lead to changes in actions of members of landowning groups, practices, regulations and institutions (Jones and Holzknecht 2007).

**Confusion over what is traditional**

Customary land tenure has been redefined over time, firstly under the influence of Christianity and introduced concepts of inheritance and later under colonial rule and developments since independence. This has caused confusion over elements of customary land tenure (see Box 2.1).
Box 2.1 ‘Traditional’ rights over customary land – a product of kastom and modern forces

In Mele and Ifra villages on South Efate, the matrilineal naflak kinship system plays a central role in distributing chiefly titles and rights to land. With the arrival of Polynesian immigrants, who subsequently inter-married with indigenous Melanesian Efate communities, confusion and internal tensions emerged, in particular because the immigrants used patrilineal descent of rights to land to define inheritance while the Melanesian Efate people traditionally inherited land claimed according to matrilineal naflak principles. The confusion and tensions were aggravated by the subsequent influence of the Presbyterian Church which also promoted patrilineal descent of chiefly titles and other rights.

Today, rights to land and chiefly titles are based on a combination of matrilineal and patrilineal systems, with the principles of matrilineal descent both determining land rights and chiefly titles, and the missionary-inspired kinship based system of patrilineal descent applying to chiefly titles and rights to land. This system is now regarded as ‘traditional’, but that too is subject to “manipulation”, which may be a strength as well as a weakness. It is noted that the system allows communities to address the changing social and natural environments, while remaining rooted in basic cultural values.

Source: (Naupa 2005).

Such changes have created confusion over the principles of land inheritance and ownership of customary land, which often resulted in local conflicts. In Chuuk, for example, many conflicts are found to be occurring within customary landowner groups or families (Hezel 1994). Similar conflicts over land also occur among members of the landowner group at the family level or kainga in Kiribati (Kabutaulaka and Rokolekutu 2007).

Changes in decision-making rights

Colonialism introduced processes and structures that changed customary decision-making rights and mechanisms, including the role played by women. Under traditional customary tenure, inheritance over land and membership of customary groups were defined according to either mother’s (matrilineal) or father’s (patrilineal) lineages and there were socially-sanctioned decision-making processes. In patrilineal systems, male members would almost always have the speaking and decision-making rights. In matrilineal societies, women may have had rights over land, however, there are indications that with regards to control of economic resources and
participation in political decision making, women had a lower status than the men in their group (Nelson 2007: 16). Nonetheless, colonisation and modernisation processes have eroded women’s rights over land. There are a number of documented cases in different Pacific countries where women’s customary rights of full involvement in decision making have been usurped by male relatives when economic development of land or land titling takes place (Jalal 2006). Conversely, customary systems can also be seen to reinforce the subjugation of women, with introduced reform measures seen as positive, providing opportunities for equal participation in decision-making processes and increasing women’s ability to reduce their economic and social vulnerability to outside influences (Nelson 2007).

Today, under the commitments made by member countries to the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) gender equality is a key development goal, reflecting global experience that only by ensuring that women and men have equal opportunities to participate in decision making in an informed way, and development policies, processes and modalities validate their interests equally, can economic and social progress be achieved. Commitment to CEDAW principles by a country will influence the processes to be used in customary tenure recordings and decision-making processes (as discussed in the next section).

In Fiji, colonialism introduced new decision-making rights in the form of the Native Lands Trust Board (NLTB), which established a centralised land administration system to encourage access to customary land while protecting customary ownership. While this was the accepted norm for almost half a century, with changing times and values, and poor governance and accountability by the NLTB, the decision-making powers and authority of the NLTB over leasing of customary land have been questioned in recent times. These questions are being raised particularly as large sums of money are at stake.

Even in countries where the introduced systems recognised customary tenure, the situation could be at odds with customary law. Introduced systems could bring a variation in customary practice, such as in the Cook Islands (see Box 2.2). As a result, what constitutes customary land tenure and what are the acceptable and recognised rights of customary owners, has been questioned and more disputes are being taken to courts for resolution throughout the region.
Traditionally, rights of males differed from those of females, the rights inherited from fathers differed from those inherited from mothers, the rights of seniors differed from juniors and the rights of residents differed from absentees. Needs and acceptable behaviour were among the criteria used to define access rights.

The Land Court in the Cook Islands had decided that ‘succession [to land] was not to all descendents, but only to ‘those who, according to Native custom of succession were entitled to succeed [inherit]’. The Appellate Court in 1957 however, ruled that ‘…all children inherit equally’ using the principle of Maori custom (quoted in (Crocombe and Tongia 2007(draft)), although no such custom had previously been defined. The Appellate Court also ruled that custom would no longer apply once land was registered, even though the law of the land had said that custom should apply.

This Appellate Court decision is said to have destroyed the custom (there is however, no consensus about what constitutes custom), with the result that every person would inherit a share in all the lands of parents, their four grandparents and their eight great-grandparents and so forth. This meant that ‘ever-decreasing shares in land would belong to ever increasing numbers of Cook Islanders’ (p 8). In addition, it is believed to have opened the way for powerful, knowledgeable and greedy actors to acquire disproportionate areas of land through occupation rights, leases or other means to the disadvantage of relatives.

Source: (Crocombe and Tongia 2007(draft): 8,15)

Urbanisation and informal lease arrangements

Urbanisation has increased markedly in the Pacific, where one in four people live in urban areas. If PNG is excluded, then almost half the population in the Pacific today lives in urban towns and cities, and this is growing rapidly (Secretariat of the Pacific Community 2007). The urban population is expected to double in less than one generation and in some countries such as Vanuatu and Solomon Islands, double in around 16-17 years. Rural-urban migration brings increased demands for affordable housing and supply of services and infrastructure.

Associated with the resulting high-density living are problems related to access to land and security of tenure. A 2006 study reported that 80-90% of all new housing in the Pacific islands is built either informally or illegally (Island Business 2006). Given the rapid pace of urbanisation
and limited availability of State and/or freehold land, most people are being forced to live on customary land under informal arrangements without much security. Settlers often ask for greater security of ‘tenure’ but landowners are often reluctant to provide this, fearing that doing so will erode their ownership claims to the land (Chand and Yala 2007(draft)).

**Absenteeism**

Migration also raises the issue of absenteeism. Traditionally, when individuals were away for long period of time, their rights were put on hold during the landowners’ absence (Crocombe and Tongia 2007(draft)) (Ward 1995). Upon return, absentee landowners would seek access to land through cultural practices. Today, in some cases absentees have equal legal rights as the residents or where family leaders may have given priority to resident members, these decisions are often challenged in courts or bypassed through other means. In the Cook Islands, for example, the 1970 Land Facilitation of Dealings Act restricted decision making for leases in land meetings to at least 25 percent of resident landowners. However, many absentee landowners return for their cases or give their power of attorney or proxy to co-right holders overseas and send a representative to claim land in the Land Court. As a result, many rights to land remain with absentees when 90 percent of Cook Islanders live abroad.

Culturally, when people migrate but still live in other parts of their country of birth, they may maintain regular social contact and try to fulfil their social obligations as members of their landowning groups. In some cases, parents regularly send their children ‘back home’, even if they cannot go back, to retain their linkages and claims over their land. Their customary rights may thus still be recognised by their social group (Oswald Tolopai, PNG pers. comm. September 2007).

However, the absentee landowners that result from emigration lead to problems in many Forum Island countries. Absenteeism leads to problems related to the nature of consultation with absentees, and thus decision-making processes over customary land; disagreements as to the kind of customary land rights that can be claimed by people who have been absent and have not made
traditional contributions towards their community back home; and problems related to the informal caretaker arrangements that are put in place to look after their interests while landowners are away (Jones and Holzknecht 2007: S 2.4).

People generally retain their claim over their customary land even though the country’s land laws may be clear about them losing their rights if absent for an extended period of time; in Fiji, for example this period is two years, in Kiribati it is seven years; whereas for Niueans it is 20 years (Crocombe 2001). Although such formal rules exist they are seldom applied, because socially it is very difficult and customary owners are ‘too embarrassed’ to claim their land back. Efforts to change absentee rights also face considerable difficulties, as was the case in Niue, where a bill regulating absentee rights had to be withdrawn following vigorous protests from Niueans living abroad (Crocombe 1994).

With absent landowners exercising their customary rights, resident owners are often handicapped in making effective use of their lands. Attempts to negotiate with absentee owners are very time-consuming and frustrating (Tongatule1981, referenced in accessUTS 2007: 29). In some cases, such as in Niue, absent landowners were reluctant or even refused to enter into negotiations, collectively or individually (Crocombe 1994). Costs of such delays in negotiations can be significant as the number of emigrant Pacific Islanders who can claim association increases with time, particularly when these absentee ‘landowners’ are without clear socially acceptable and legally enforceable rules of access and decision-making rights over customary land.

**Changing notions of authority and decision-making rights**

Traditionally, decision-making consensus was vested with the family, clan, kinship group or tribe, and recognised titles of chiefly or group leaders have the rights to speak and make decisions. An authorised person, for example a chief (in Fiji), a ‘big man’ (in PNG), or title holders (in Samoa), represents the landowning group in negotiations with lessees, investors and State institutions. Consequently, they often receive the benefits of land development for distribution among the other landholders. However, the authorised person may not always make decisions in the interest of the group, as expected under customary law. Many examples can be
found throughout the region where representatives of the customary landowning group have acted in their own interest rather than the group, particularly when significant economic benefits are involved. Consequently, respect for traditional authority is diluted and this in turn impacts upon customary land management and conflict resolution mechanisms.

In Kiribati, for example, disputes have been reported in cases where the ‘master of lineage’ has sold some of the lineage land against the wishes of others in order to get money he needs or where subsequent generations contest the land gift that was made by their ancestors, although the land gift was public but there was no certificate deeding the land over to the recipients (Kabutaulaka and Rokolekutu 2007). Similar sentiments were raised during the recent Ni–Vanuatu Land Summit, where it was noted that “many chiefs’ declarations were disputed as some chiefs [were] not [being] honest in their decision making and no clear custom rules are available for chiefs to go by” (Government of Vanuatu 2007).

The lack of clarity over who has authority to act on behalf of the customary landowners, and lack of processes to guide the authorised person when negotiating lease arrangements with outside investors, discourages investment and economic growth. Furthermore, a lack of clear rules for benefit-sharing creates grounds for conflict among the landowning group, particularly when decisions are made without consultation with members of the landowning group.

**Misperceptions about alienation of customary land**

Alienation of customary land occurs when customary landowners no longer have ownership of, and access to, their ‘traditional’ land. Although alienation of customary land is prohibited by law throughout the region, the fear of alienation still remains, and has been an important factor behind high sensitivity over land in the region. This may have occurred as a result of the legitimate or illegitimate sale of land mainly before and during colonial periods. Crocombe notes that ‘in the early stages [the latter half of the 19th century] there were many instances of cheating and fraud on both sides. The worst European speculators deceived Vanuatu people of enormous areas…Samoans sold Europeans three times the total area of Samoa. …expatriates generally found plenty of people willing to sell their land’ (Crocombe 2001).
Controversies over alienation of land have also occurred over the compulsory acquisition of land for public purposes such as plantations and Government stations and public infrastructure such as roads and airstrips, to fuel economic development and tax revenue bases. Alienation for public purposes usually occurs under legislation that allows for the compulsory acquisition of land by the Government for public purposes. However, while governments may have seen themselves as obtaining freehold title to land, customary landowners, it is said, often believed that they were granting the use of land for a ‘limited period of time’ (May 2007).\(^2\) This difference in perception has affected governments’ ability to acquire customary land for public purposes even if the legislation is clear on the governments’ powers. This difference in perception has also been at the root of some past and contemporary conflicts between governments and customary landowners. Today, while in many countries, such as Vanuatu (Government of Vanuatu 2007 (draft - 6/9/06): xx), there is a general acceptance of the need for governments to acquire land for public purposes, disagreements and conflicts have arisen largely from misunderstandings of the processes involved, misuse of Government powers, and issues relating to compensation.

**Concluding Remarks**

Needs and aspirations of the people of the Pacific in this globalised world cannot be adequately addressed without accepting the reality of the predominance of customary land in each country and that market economy is an integral part of life. Further, dual – customary and private – property rights systems exist in most Pacific countries. However, the lack of awareness about the dual systems and the presence of uncertainties associated with customary tenure and authorised persons to represent landowners, as well as misalignment of customary and introduced property rights systems have generally been at the core of difficulties in accessing customary land for economic use. Different aspects of this tension manifest as causes of local-level land-related conflict. National development goals of improved economic wellbeing and minimised conflicts cannot be achieved without strengthening customary land tenure systems and decision-making processes and the nexus between customary land tenure and requirements of market transactions, as well as improving the availability of relevant information to all stakeholders. Such solutions
lie within the realm of integrated customary and introduced land administration systems design in the context of national development, as discussed in the next chapter.

**Key lessons**

- Uncertainty and lack of clarity over aspects of customary land tenure such as the inheritance of rights to land, the land area of claims and decision-making rights, and their incompatibility with individual property rights requirements for commercial use underpins poor economic growth and local-level land-related conflicts.

- Customary land policy reforms should maintain and protect customary tenure of group ownership and individual use rights defined by social relations and customary laws.

- Customary land reform efforts and solutions should be based on the recognition that Pacific societies are in a state of flux, with changing needs, values and aspirations of people as a result of globalisation, modernisation and imperatives of the cash economy.
Chapter 3: Promoting Economic Development and Local-level Conflict Prevention - Customary Land Administration

The purpose of a well-functioning land administration is to ensure the integrity of the record of rights and interests in land and property; information concerning the rights, restrictions and responsibilities of land are readily available to all; land transactions can occur efficiently and effectively; contracts are enforced; the formation of capital based on land is supported; and conflicts over land can be minimised (AusAID 2001:6).

In this chapter, key aspects of customary land tenure and its nexus with the formal land administration are discussed, emphasising specific areas that could be strengthened to improve access to land for commercial purposes, while preventing local-level land-related conflict. There are two dimensions to this issue: clarifying customary landowning groups, landowner rights and roles; and creating some formal mechanism for formally recognising landowning group as an entity for commercial purposes.

Clarity over customary landowning groups, landowner rights and roles

Earlier discussions highlighted how land is ‘owned’ by locally-recognised customary landowning groups, whose members collectively and individually hold a set of rights over a piece of land. They also discussed how globalisation, modernisation and associated social changes have led to a lack of clarity over these rights and their incompatibility with the demands of commercial uses. In this section, approaches that could be used to increase clarity over customary tenure are discussed, focusing on recording and registration of landowning groups, formal recognition of landowning groups and vesting of authority to represent landowners in land dealings and make decisions.

Increasing clarity over customary tenure has two key dimensions: recording and registration of landowning groups and their land claims; and clarifying decision-making rights and authority to engage in commercial land dealings.
Recording and registration of landowning groups and their land claims

Recording involves deciding on the level of group holding - family, clan or other larger groupings - and their land claims. This involves agreeing on a social process for establishing the rightful owning group, members of the group and the physical land area claimed by the group. Recording would thus take place through local level consultations, genealogical tracing, social mapping and oral history. The outcome of the recording process would involve formal recording of the land tenure and by implication, recognition of the group’s claim over land by non-members and the Government, if the recorded tenure has not been challenged. It may be noted that recording does not always imply universal recognition of the recorded information as a challenge may be mounted sometime in the future regarding the rightful owners.

Recording of customary land essentially meant some codification of the then-prevailing flexible traditional customary land tenure that could adapt to changing circumstances and needs. Codification became sealed when land was registered, documenting groups of landowners with a title over the piece of land whose boundaries had been formally surveyed. At the national level, registration of titles is defined as: ‘a process whereby State maintains a register of parcels of land showing all relevant particulars affecting their ownership, and guarantees these particulars to be complete and correct. The register is the final authority on landownership... [and] transactions are affected by making an entry in the [land] register – and only by these means’ (Simpson 1969). The recording of landowning groups and their claims using consultative and consensus-based approaches is thus seen as a first step towards formal recognition under law.

Most Pacific Island countries have legislation that allows for registration of customary land, but except in a few countries most of the customary land remains unregistered (see Table 1.1). Fiji is one Pacific country where both the recording of customary landowning groups and the registration of these groups and the physical area of their land claims was largely completed during the colonial period; only a small area of customary land remains un-surveyed and unregistered (Fonmanu 1999) (Box 3.1).
Box 3.1: Recording and registration of customary land in Fiji

The native land tenure system was designed by the British colonial Government based on the then-Governor Gordon's strong belief in the need to protect native landownership and the understanding of the communal nature of customary tenure at the turn of the 20th century. The Native Lands Commission (NLC) was established in 1905 under the Native Ordinance Act, to determine land claims by local communities, and by settlers. Indigenous Fijians' ownership in the group was recognized and customary landowning groups were primarily registered under mataqali, or clan, with some registered at the higher collective unit, yavusa, or smaller extended family, itokatoka. The land holdings were surveyed, mapped and recorded by the NLC. Land for which no landowning groups could be identified, either because the mataqali had become extinct or that was not claimed by any one group, was registered as belonging to the State.

Initially, land boundaries were demarcated with piles of earth, gravel, stones or rocks. Later these boundaries were subject to more rigorous cadastral survey techniques, although not without difficulty. Confirmed and agreed land claims were then registered in the Native Lands Register maintained by the Native Lands Commission. The NLC also maintains a record of chiefly titles at all levels and has the ultimate authority over determining claims over chiefly titles.

The landowning groups are defined in the centralised register of Fijians, Vola ni Kawa Bula, based on genealogy of members in the first half of the twentieth century. Since then, the Vola ni Kawa Bula has been updated regularly with changes recorded in the linked National Register of Births, Deaths and Marriage. All Fijians who can trace their genealogy through the male line are registered in the Vola ni Kawa Bula; only a small area of customary land remains un-surveyed and unregistered (Fonmanu 1999). Today, following a recent decision by the Government to transfer unclaimed land that originally was classified as State land, about 88% of all land in Fiji is registered as native land, including native land in reserve.

Source: (France 1969; Nayacakalou 1971; Fonmanu et al. 2003)

Registration does not always follow recording of customary tenure, nor is this always necessary. In the past, recording and registration were attempted together without necessarily recognising the cultural and social dimensions of the two processes, resulting in some difficulties. In various Pacific Island countries, such as Papua New Guinea and Solomon Islands, attempts have been made in the past to formally record and register customary land, with limited success. In more recent times, growing pressure for increased access to customary land for economic development has led to land recording and registration attempts in Vanuatu, Niue, Solomon Islands and Papua New Guinea, often supported by AusAID and the World Bank.
Such attempts have not been without resistance. In some countries where large-scale registration was attempted, there has been much apprehension about the privatisation of customary land, related to fears of people ‘losing their land’. In Papua New Guinea, a World Bank-supported policy on land mobilisation, which included land registration, was strongly opposed and student demonstrations led to the deaths of four students (Box 3.2). Similarly, in Solomon Islands, despite the Government enacting the 1992 Customary Land Records Act, only small portions of land have been registered because of resistance from local communities. The Act is not well understood by local communities or officials, adding to the difficulties faced in recording and registering. Although the value of recording customary land in order to obtain formal recognition of property rights was recognised, large scale formal registration did not result because of the community’s unwillingness to commit to a formal (Government-controlled) process due in part to the fear of alienation of their land (Cook 2007 (draft); Sullivan et al. nd: 21), particularly in the presence of poor or incomplete information. Many examples can be found throughout the region, where misinformation or lack of information concerning recording and registration of customary land are at the core of fears of alienation.

**Box 3.2: Land registration and escalation of conflict**

The World Bank approved an Economic Recovery Programme loan in 1995 conditional on the completion of a policy framework for the registration of customary land at the provincial level, the completion of the draft ‘framework’ legislation for land registration in East Sepik and East New Britain, and the necessary administrative procedures and structures to implement the legislation. Fuelled by political manipulation, playing on the fear of landowners losing their customary land, massive unrest followed the approval of the World Bank Land Mobilisation Programme, including public riots during pre-election in 1997, and again in 2002 when four students were killed during the riot. Not only the conditions attached to the Economic Recovery Programme were withdrawn, the registration in the two provinces was never started, let alone completed.

*Source: (Fingleton 2005: 9)*
**Customary law and decision-making rights**

While recording of customary land would clarify customary landowning groups and their claims, formal documentation of customary land laws and processes used to determine members is also important before customary land and formal land administration systems are linked. In particular, it is important to know who has the authority to engage in land dealings, and their accountability to the group. While many countries have adopted some system of recognising group identity for the purpose of entering into Government-backed leases with individual landowners and outsiders (discussed below), there is often no formal legislative basis to define internal processes for identifying who has the authority to make decisions on behalf of the group or how such persons can be held accountable.

In addition, in many Pacific Island countries there is a disconnect between formal administrative systems that define and guide processes to be followed in land lease negotiations and registration, and customary land tenure systems that define the actors who may be involved in land lease negotiations. In Vanuatu, for example, there is a comprehensive set of laws for negotiating and registering leases and other interests, physical planning and so forth. However, there are no laws for identifying custom owners, or owners who are entitled to negotiate leases (Fingleton *et al.* 2007(draft)), leaving communities to define their own processes and mechanisms, resulting in outcomes that are not readily predictable or are unclear to outside investors. The challenge of identifying the rightful customary landowner group representative becomes more acute where customary land tenure systems vary not only between countries but also between islands within a country, or between different cultural groups on the same island.

**Improving recording and registering of customary land and improving clarity over decision-making rights**

To increase certainty over landownership, there is a growing consensus in the region that rather than attempt wholesale registering of customary land, a more pragmatic approach is desirable. For the Pacific, communities may at least undertake the recording of their landowning group. Once an agreed recording of the landowning group and their area of claim is known, it could
provide confidence to potential investors or users that the land boundaries and ownership have been accepted by neighbouring groups, chiefs, or other traditional land arbiters, and Provincial Governments.

For example, in Auluta Basin on the island of Malaita in Solomon Islands, the successful establishment of the oil palm plantation was possible on the basis of only the recording of landowning groups and their use rights. Extensive consultation was involved in identifying, mapping and recording landowning groups and land use rights (Sullivan et al. nd). Local-level disputes over boundaries were resolved using local-level mediation process. This suggests that recording of customary landowning groups and their claims over physical area of land, together with clarity over who has the authority to engage in land dealings, can be sufficient for engaging in a commercial activity.

Global experience too, shows that registration is not always necessary. Where land has limited value, is plentiful and/or there are few transactions, low cost mechanisms of identifying boundaries such as physical marks (hedges, rivers, trees, stones) that are recognised by communities will generally suffice (Deininger 2003). However, where land acquires a higher value, a more precise and expensive means of demarcation will be required. This may be also required where transactions become more frequent and cross traditional boundaries of community and kinship, and may become involved in a commercial activity.

Recording of landowning groups and their land claims is a first step towards formal recognition under law and in improving economic use of customary land and minimising local-level conflict. In places like Choiseul, Solomon Islands, for example, customary landowners have been meeting regularly under the banner of the Lauru Land Conference since 1980s to collate their voluntary efforts to define land boundaries down to line or family level using genealogical information tracing back to ‘original discoverers some 17 generations ago’ (Sullivan et al. nd).

However, to provide a consistent basis for linking customary tenure system and formal land administration, such recording of customary laws must be supported by appropriate legislation that provides an enabling mechanism for determining how custom owners are identified. As a minimum, governments should implement a clear framework that customary landowners could
adopt for recording customary landowning groups, land boundaries, customary laws related to land and traditional land dealings. Such an approach would then provide a formal nationwide process (but not a one-size-fits-all solution) for defining membership, and the roles of different members, including women, in decisions pertaining to land. The 2006 Vanuatu Land Summit, for example, noted that the national and provincial governments, and the Malvatumauri National Council of Chiefs, must ‘assist people to document traditional (kastom) land policies (Customary Land laws) in each village, area and island including traditional communities’ kastom boundaries, traditional (kastom) land dealings and other rules of kastom’ (Government of Vanuatu 2007). The Summit also highlighted the need to also identify who has the authority to engage in commercial land dealings and the roles of other members of LOUs in land dealings, including women.

Experience in the region suggests that the consensus-based process of recording of customary tenure can be time consuming and resource demanding. This can pose some serious challenges for PICs where there are many small islands scattered across large areas of water, transportation costs are high and governments constrained by limited financial resources. In Fiji, for example, the process took more than 50 years at a time when the indigenous groups were not as educated and were not necessarily aware of their rights as they are today, and when suspicion about Government may not have been as strong as it is today. Today, better educated communities are more aware of their rights and the potential value of their land. This means that the task of a consensus-based process may not be easy and recording can take considerable time. In countries such as Papua New Guinea, where there are potentially 70,000 land groups and more than one million land parcels to register, this process can be onerous (Power and Sullivan 2007 (draft)).

It is thus important to note that recording of customary land cannot be rushed and must be undertaken using local customary processes guided by a customary land recording framework and at a pace that encourages confidence regarding the recording process. Once such confidence is built, land registration could be the next step but only where there is a need and demand.
Recognition of landowning groups

The absence of formal registration does not necessarily preclude customary landowners from engaging in commercial activity, provided it is possible to create some form of recognisable entity for legal purposes. Customary landowning groups need to be recognised as an ‘entity’ to engage in land dealings if land dealings are to be recognised by law and commercial financing institutions are to provide loans. In some cases, countries have established formal legal means to encourage economic use of customary land, even if formal recording and registration of landowning units has not been completed. Among these are the Incorporated Land Groups (ILGs) and village trusts. These have been effective in encouraging landowners to engage in land dealings, although they have not been without difficulties and controversies.

Incorporated Land Groups

An incorporated land group is identifiable as a commercial entity, the same way an incorporated company has a legal presence under an Act of Parliament. In PNG, for example, the Land Groups Incorporation Act (1974) helped create legally recognisable commercial entities, and Incorporated Land Groups, that could engage in commercial activities. An ILG has legal authority over its land and the representing committee manages the land on behalf of its members. An ILG remains subject to custom and powers of the group are confined to land – its ownership, use and management and the distribution of benefits to its members (Power and Sullivan 2007). Even though the customary land concerned may not have been formally registered and the LOU may not hold a registered title, the ILG in PNG has been recognised and treated as a *de facto* landowning group for the purpose of dealing in customary land.

ILGs have, however, had mixed success. ILGs have been found to be very effective avenues for engaging in business opportunities, particularly when supported by capable business and legal advice. In the case of the New Britain Oil Palm industry, for example, leaders of landowning groups took strong leadership roles and exercised their customary powers (Power and Sullivan 2007 (draft): 11). On the other hand, where ILGs were used to only receive royalty payments as in the mining and petroleum sectors, they have suffered from rent-seeking behaviour where
people in positions of power changed or at least influenced decision making and benefit sharing rules in their own interest. In some cases, authorised persons made decisions in their own interest without any means of holding them accountable; a problem referred to as principal agency problem (discussed further in chapter 5 under the section on fair dealings).

For effective use of the ILG concept to recognise customary landowning groups, the requirements of establishing ILGs must be simple or the system may not be easy to use and abandoned. In New Zealand, the Te Ture Whenua Māori Act (1993) identifies the basic requirements for the establishment of ILGs, together with the way benefits are to be shared as well as how ILGs are to be managed. It seems that because of the complexities of requirements for establishing ILGs, it has not been the preferred form of recognising landowning groups. Instead, local-level trusts, which too can be established under the Act, is the preferred modality of engaging in commercial ventures (Kingi 2007(draft)).

**Land trusts**

A trust is a legal instrument whereby a person/persons or trustee(s) is given the power to administer a property for its clients. A trustee does not have any direct interests in the property it administers, other than a fee that it may receive for its services. All returns from the land are returned to the beneficiaries. The village land trust is based on the Western trust model, whereby traditional chiefs exercise the role played by trustees under the Western law. Trustees then become the link between the customary landowners and the administration system. Depending on the powers authorised by the landowners, trustees may be authorised to represent the landowners in land dealings. However, there is one fundamental difference between the village land trust and Western trust models. In the village land trusts, the trustee is also a member of the landowning group which can result in a conflict of interest. One of the outcomes of this is the splintering of trusts, as has been the experience in Vanuatu (Fingleton et al. 2007(draft)).

In Fiji, where a centralised trust structure in the form of NLTB has been generally regarded as a success story when it comes to encouraging economic access to customary land (Lightfoot et al. 2007(draft)), the NLTB has come under criticism in recent times for not acting in the interests of
the members. There are increasing demands from landowners to allow them to negotiate leases directly with potential investors and for the disbanding of the NLTB, or at least the removal of its powers to represent the landowners. Landowners are also considering setting up their own local-level *mataqali* trust.

**Concluding remarks**

Clarity over customary land tenure arrangements, landowning groups, their membership, and their claims over physical areas of land, together with clarity over who has the authority to engage in land dealings, is essential if optimal economic use of customary land without increasing the scope for conflict is to be achieved. In addition to recording and registration, where there is current or potential demand for major economic developments and resources have acquired high economic values, it is also important to document customary land law used to define inheritance, membership, the roles of members of LOUs in land dealings, including women, and who has the authority to engage in commercial land dealings. Because of the large variation in custom within a country, such documentation needs to be supported by appropriate customary land legislation to ensure consistency in the process to be used for determining how customary owners are identified and rules governing roles and decision-making rights over customary land.

Furthermore, to be able to engage in commercial activities, customary landowners may also need to identify a legally recognisable commercial entity, with a clearly specified person authorised by the landowners to engage in commercial land dealings. ILGs and village trusts, appropriately designed, could serve as the required ‘entity’ for commercial purposes. They can also serve as the *de facto* landowning group and the link between the customary land system and the introduced land administration system.
Key lessons

- For increased commercial access to customary land, increased clarity in customary land tenure, recognisable entities and authorised persons that can enter into land dealings, are critical.

- A distinction must be made between processes of land recording and land registration. Community-based recording of landowning groups and their land boundaries and customary laws is a necessary first step towards a more formalised land registration.

- To increase clarity over customary land while minimising land-related conflict, it is important to adopt a pragmatic approach and move towards land recording followed by land registration only in areas of demand.

- Recording and registration of customary land cannot be rushed, must be participatory and include all relevant stakeholders, and be undertaken at a pace that encourages confidence regarding recording processes.

- When recording customary land, it is important to identify what process is used to define inheritance, group membership rights, decision-making rights, and roles of landowning units’ members, including women.

- The recording of landowning groups needs to be clearly documented and supported by legislation that provides an enabling mechanism for, and consistency, in determining how customary landowners are identified.
Chapter 4: Improving Commercial Access to Customary Land -
Informal and Formal Arrangements

Access to customary land for economic use while minimising conflict depends on the design of appropriate institutions for dealings in land. As mentioned earlier, institutional design defines roles and responsibilities of the different stakeholders, including landowners, Government agencies and investors, and constrains actions of individuals to help produce desired outcomes. To unleash the potential economic value of customary land, landowners have two options: allow their members to access their land consistent with commercial requirements, or allow non-members access to their customary land under conditions that provide them with fair return. Countries have used informal and formal systems, both with members of landowning groups and others, to allow access to customary land. These systems have had varying degrees of success, which suggests that further strengthening of the systems may be necessary to achieve the desired outcomes. This chapter discusses these issues drawing on experiences from the region, particularly Fiji.

Informal (customary) arrangements

In many countries, informal arrangements to provide economic access to customary landowners have had some success. Such access is generally negotiated between a landowning group and a member, using customary practices, including the making of customary payments or traditional token gifts. These payments can be significant in size although they are usually less than formal land rent payments. Examples of such informal arrangements between members of landowning units and the LOUs can be found in most countries although statistics on informal arrangements are limited.

Rights to land obtained through such customary means are usually not formally registered with the Government. Such permissions are at the goodwill of the traditional owners and lack any certainty or security in law. Consequently, such ‘rights’ are not acceptable to commercial
financial institutions for lending purposes for several reasons (Box 4.1). This no doubt affects investment decisions on the part of the ‘lessees’, including investments in improvements in land quality. Informal use rights are seen as temporary and can constrain ‘lessees’ in realising the full economic potential (Duncan 2002).

**Box 4.1 Use of customary land as collateral and limitations of informal arrangements**

Lending agencies prefer to use as collateral the kinds of private assets that, in the event of a default, can be easily disposed to recover funds. Banks are also reluctant to accept customary land as collateral because no one can ‘claim its ownership’ and informal arrangements between customary LOUs and members are often not recognised by financial institutions as a bankable asset. They are also reluctant because lending institutions are often not free to deal with such defaulters and enforce mortgages, particularly when Constitutions and or legislative provisions in Forum Island countries prevent the sale of customary land.

Mortgages are only valuable if they can be enforced, and the land can be disposed of to recoup the loan in the event of default. In the Republic of the Marshall Islands, for example, customary land cannot be pledged as security, or seized and sold to recover debt, without the agreement of the senior land interest holders – the *iroij*, *alab* and *drijerbal*. In Vanuatu, mortgages of customary land and leaseholds on customary land must be approved by the Minister of Land. Such approvals are often difficult to obtain and thus make it almost impossible to access loans.

There are also other types of restrictions placed by some Forum Island countries. For example in Tonga and Vanuatu, mortgages involving land can only be given by lending institutions approved by the State, with a tacit understanding that they will not push for the enforcement of mortgages in case of default of loans (Pacific Islands Forum Secretariat 2002). Some countries have placed restrictions over the disposal of mortgaged land. In Solomon Islands, for example, High Court approval is required before a mortgage can be enforced, and in Vanuatu, Supreme Court approval is required for enforcement. In the Cook Islands the power to take control of defaulted land under occupation rights is only accorded to Government lending institutions. Under such conditions, customary land has no or limited value as collateral against loans from commercial lending institutions. Other means have to be found so that land landowners can make full commercial use of their land.

*Source: (Pacific Islands Forum Secretariat 2001; accessUTS 2007b)*
Informal arrangements for non-members

Informal arrangements are also used by people who are not members of customary landowning groups. In Honiara, for example, 34% of the population is believed to live in informal settlements (Chand & Yala 2007 (draft)). In Fiji about 5% of approximately 11,000 sugarcane leases on native land involve such informal arrangements. Landowners use such an approach to get around official systems to ensure they receive the land rent directly, rather than the NLTB deducting 25% management fees (Lal et al. 2001). Here too, permission is obtained at the goodwill of the traditional owners with the exchange of traditional gifts. As seen earlier, landowners are often unwilling to formalise such arrangements with the fear of losing control over their land or in extreme cases they fear their land becoming alienated over time.

It is found that informal arrangements over customary land may help outside investors produce some economic wealth where outside funding is not required. However, without proper legal backing they do not provide sufficient certainty for individuals to invest in longer-term productive activities. Nor do they provide sufficient security for lending agencies to give loans. Even where informal customary arrangements have been given legal recognition, such as in the Cook Islands and Niue, financial institutions have been reluctant to accept them as collateral as the power of control over defaulted land may not rest with them, as discussed in Box 4.1. This has affected the operations of financial markets which tend to rely on land as security for mortgages, discouraging people using such leases for commercial purposes (Pacific Islands Forum Secretariat 2001).

Formal leasehold arrangements

In contrast to informal arrangements, secure leasehold titles create opportunities for those who have ownership of the land (have ‘superior’ interests) to provide access to their land to those who have the capacity to use it for economically productive purposes. A land lease is a contract between landowners and another party, either a member of the landowning group or others, for the use of the land for a specified time, usually in return for a number of periodic payments (rent) (Pearsall quoted in (accessUTS 2007)).
Secure (that is, Government-backed) leasehold titles with defined, clear tenure, are forms of ‘individualised’ use rights for the duration of the tenure. This mechanism creates opportunities for those who have ownership of the land to provide access to their land to those who have the capacity to use it for economically productive purposes. The owners retain their superior rights and the land reverts back to the landowners after the expiry of the lease (Farren and Paterson 2004 quoted in accessUTS 2007). The ownership and leasehold title holders know what their rights are and that their rights are protected at law. They can receive exclusive benefits from their investment in and use of land, and prevent others from using their resources. Title holders can also use their land as collateral to raise capital for economic purposes.

With clearly defined leaseholds, leaseholders while not having ownership entitlements, have other use entitlements but bear responsibilities as well as face restrictions. Under such conditions and with leaseholds of sufficiently long duration, leasehold title holders have the incentive to develop the land to its full potential (Duncan 2002), as has been the experience in developed countries, where the proportion of rented farmland is high (World Bank 2003).

However, such leases are only ‘secure’ if the ownership of the customary land is not in dispute. Therefore, in order for the lease to have collateral value, ownership of the customary land itself must be recognised by the Government and disputes over the customary ownership must be prevented. Secure leasehold arrangements can deliver the same national economic benefits as individualised private property rights but without the social costs associated with individualisation of customary land.

**Access by members of landowning groups**

For individual landowners or groups of landowners to access their own customary land for commercial purposes, they could do what landowners do in Fiji, where specific legislation stipulates the process that can be used to obtain legally recognised leases. Landowners can secure leases in the same way as other investors, meeting leasing conditions stipulated under the Agricultural Landlords and Tenants Act (ALTA- for agricultural leases only) and Native Land Trust Act (NLTA for all other leases). Alternatively, landowners could lease their own land
using an indirect method, making use of existing legislation, as can be seen in Papua New Guinea and the Solomon Islands. For example, as mentioned above, in Papua New Guinea landowners are permitted to register their collective interests in a commercial entity, an Incorporated Land Group. This group, or an individual with an approved right from their group, can use the Government’s ‘lease-lease back’ system to formally lease land from the group (Box 4.2). However, here too the question regarding who are the ‘rightful’ owners can be an issue where there is no formally recognised system for recording group members, and multiple ILGs may have claim over the same land. In these cases, the value of the lease as collateral is diminished.

**Box 4.2: Access to customary land by the members of the customary landowning unit – the Lease-Lease Back System**

In a lease-lease back scheme, the Government leases customary land (as Special Agricultural and Business Lease) for a fixed period of time, usually 99 years (but it can be shorter) and then leases that land back to the original landowners or to a business entity.

The Government, upon receiving an application, including a survey plan of the land area indicating land boundaries, from one or more landowners, ensures that all members of the customary land group have agreed to the lease being granted. A person applying for the Special Agricultural and Business Lease has to obtain necessary agreements, which may be given with conditions, and which the Government is obliged to include when leasing the land back to the owners.

Banks recognise the leases and may provide money secured by the land as mortgage. If the lessee defaults, the Bank can (theoretically at least) occupy the land or sell the lease to another entity for its use for the remainder of the 99 years-term.

Source: (PNG's Department of Lands Physical Planning nd)

To ensure that formal leases do not become a source of conflict, returns to landowners and lessees must be fair and market-based. Here lies the challenge, as in many countries leases are not secure, nor do they encourage optimal use of land. Landowners also often do not have good information available to them, resulting in negotiated lease agreements which may not provide
them fair and equitable returns and which may become a source of local-level conflict. We now turn to this issue of fair dealings.

**Lease negotiations and fair dealings**

In most Forum Island countries, the leasing of customary land for economic and residential purposes is negotiated between landowners or their representatives, and potential tenants under Government legislation. Throughout the region there is dissatisfaction with customary land dealings, even in the longest serving lease system found in Fiji, (Box 4.3), where the NLTB has made it possible for customary land to be made available for use under leasehold property rights which have the essential characteristics of secure, individualised and transferable use rights. Among the issues raised in the region are the role of governments and lease conditions. These are examined next.

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**Box 4.3: Commercial land dealings in Fiji by NLTB, as the custodian of all customary land**

Fiji’s customary land administrative system was primarily designed during the colonial era to encourage outside ‘investors’ to develop customary land for economic development, while protecting customary land rights. Under the Native Land Trust Act (NLTA), 1940, a centralised Native Lands Trust Board was established as the custodian of all customary land in Fiji and to engage in land lease negotiations on behalf of the landowners. NLTB has custodianship over 88% of land in Fiji that is owned by groups of indigenous Fijians. The NLTB has absolute powers over leasing of customary land, and conducted its business without much, if any, consultation with the landowners. Under NLTA, leases could be issued for variable lengths, often ranging from 10-99 years, and renewed subject to the NLTB’s consent.

Since the mid 1960s all agricultural leases on customary land have also been issued by the NLTB under the Agricultural Landlord and Tenants Act (ALTA). The ALTA provides for maximum of 30-year lease with specific conditions about use and land rent based on administratively determined unimproved value of land (UCV). In addition, tenants pay premiums of between $10,000-20,000 a lease regardless of size or productivity, even if these are not legally required.

The NLTB did help to release customary land for economic purposes, particularly the growing sugar industry, and reduce transaction costs involved in potential tenants negotiating land leases with often undefined or unknown indigenous Fijian land-owning units. It also served, during the colonial era at least, as a ‘firewall’ between tenants and landowners, minimising the scope and potential for ongoing demands by landowners for additional payment from tenants.
At the same time, the NLTB seemed to have been plagued by poor governance. It charged land administration fees of 25\%, which was reduced to 15 \% in the late 1990s after protests from the landowners. Despite such high fees, it still had to be periodically subsidised by the Government. Land rental assessments carried out under the ALTA at times provided over-inflated estimates, only to be overturned by the Agricultural Tribunal. This further fuelled the misperception that ALTA was not in the interests of the landowners and that the land rent paid was low, which has contributed to the tension between the Fijian landowners and Indo-Fijian tenants. Land rents were not always collected, with arrears of about $20 million reported in 2007.

In the recent past, the NLTB’s actions seem to suggest that at times it seems to have become captive of certain political interests; NLTB for example actively campaigned not to renew the leases which was seen to contribute to the overthrow of an elected Government in 2000 (Prasad 2006:6).

There has also been growing dissatisfaction among the landowners with the NLTB, with landowners wanting greater say in the leasing of their land and on conditions that provided greater returns to them. A gradual shift can be seen today where landowners are negotiating directly with potential investors and include ‘goodwill’ payments of premiums in addition to an annual rent; leases though still need to be between the NLTB and the investor.

Source: (Lal et al. 2001; Duncan 2002; Prasad 2006) www.nltb.com.fj

**Government and Ministerial Powers**

While in general a lease is negotiated between an investor and the landowners or their representative, in some Pacific Island countries, key decision-making powers over land leases are vested in Government Ministers. They may have additional powers to act as an intermediary trustee between investors and landowners and make the final decisions about leasing arrangements, as is the case in Samoa. In Vanuatu, the Lands Minister has powers to enter into a lease in a situation where there is dispute over the ownership of land. While this arrangement was intended to be transitional and such powers may have been intended to be used only in cases where there were unresolved disputes over landownership, at times governments have been seen not as ‘friendly partners’ but as ‘enemy’ of landowners (Government of Vanuatu 2007). What role the Government should play is not clear, as noted by Nari: ‘whether the Government should play the role of facilitator only or whether it should play an active referee role to ensure that everyone applies the existing standards and rules’ (Nari 2007). The 2006 Vanuatu Land
Summit recommended removal of the discretionary powers of the Minister (Government of Vanuatu 2007).

Forum Island countries may approach this question differently and the solution may vary from country to country, depending on the context. Nonetheless, there is a need to ensure that customary landowners are free to engage in land dealings, without undue interference from Government or any other persons. However, the Government has an important supporting role to play by providing a robust land administration system, including robust land information and an appropriate legislative basis for land dealings. Information must include details on the difference between customary land tenure and Western property rights system, market value of land and fair and equitable land lease conditions.

To avoid conflict between landowners and the Government, countries must clarify the role they expect their Government to play and the extent of discretionary powers a Minister and Government agencies should have over customary land dealings. For the landowners, too, it is important to understand that, while they may be suspicious of their Government’s involvement in their land matters, governments can play an important role to help increase their benefits, as has been the experience in the Papua New Guinea forestry programme. In a forestry project involving Jant Ltd of Japan, landowners in the Madang Province were able to receive higher returns for their timber and monopoly control of the company on timber prices was curtailed with the help of the Government. The commercial company was also assured of a long term supply of timber and the landowners also dropped their demands for compensation for roads and bridges (Mendani, R. (Ex) Senior Resource Economist, National Forestry Authority, Feb 2008, pers. comm.).

**Lease conditions**

Several common issues over lease conditions are found in the region. These have not only adversely affected the optimal economic use of customary land but also aggravated conflicts over land. These relate to the issue of fair dealings including duration, renewability of leases, and fair and equitable returns to landowners. These are discussed next.
Duration and renewal of leases

Appropriateness of the length of leases has been a common concern throughout the region, particularly when combined with other lease conditions such as those related to compensation by landowners for any improvements made to the land on the expiry of the lease, as well as demands of rapidly growing indigenous populations and their changing needs and aspirations. Leasehold lengths generally vary from 15-99 years, and in many cases there are options for renewal for at least one additional term of equal duration.

Landowners usually want to issue short leases. Short leases – relative to the time frame during which returns from possible investment may accrue – generally discourage investment, particularly where this requires longer-term leases such as for tourism, some agricultural activities, and housing developments. Short leases also do not provide incentives for improvements in the quality of land or sustainable land management (Duncan 2002; Deininger 2003). Landowners may themselves enter into leases as long as 75 years, as for example in Vanuatu. Under such long-term leases landowners have no control over their land (Government of Vanuatu 2007 (draft - 6/9/06)). However, landowners mostly prefer shorter term leasing arrangements that not only provide them with access to returns in the short term but also give them the option of directly using their land when leases expire. This is the argument, for example, used by the indigenous landowners in Fiji arguing for land to be leased under Native Land Trust Act (NLTA), where the tenure of lease could vary, instead of the Agricultural Landlord and Tenants Act (ALTA) under which a minimum period of 30 years is stipulated for agricultural leases (Lal et al. 2001).

Where there is clear stipulation of the possibility of renewal of another fixed term of equal duration, renewals are generally expected and given by customary landowners, effectively resulting in implicit alienation of their customary land. Such issues can become sources of conflict, particularly when the landowners feel that the dealings in their land have ‘locked’ them out of their own land, and that they have not had a ‘fair’ share of the economic returns on their land. Where leases are not renewed, this often becomes a major issue upon expiry (see Box 4.4)
Box 4.4: Issues associated with non-renewal of leases

In Fiji, the limited term of agricultural leases under the ALTA has been a major source of debate with the latest renewal of leases beginning to expire in the late 1990s. This led to landowners deciding to not renew their leases when the leases began to expire in 1997, with the main intention of making their land available for their members who wanted to enter sugarcane farming. Although the non-renewal of leases is understandable from the perspective of landowners, it nonetheless caused a major emotional and economic turmoil when agricultural tenants removed whatever they could move from their place of residence on land whose leases had expired and not been renewed.

Landowners too believed that they had every right to the improvements and at times forcibly evicted tenants and moved into the homes. Long term solutions to the issue of land renewal have not been forthcoming and there is no end in sight (Ratu Joni Madraiwiwi 2001). Arguments abound and are often dependent on the ethnic bias of the proponents of the two different landlord and tenant legislations (ALTA & NLTA). Confusion and uncertainty continues and the expiry of leases has been used by different political parties for their own ends, leaving both tenants and landowners in a ‘lose lose’ situation.

Source: (Lal. et al. 2001); (Ratu Joni Madraiwiwi 2001).

Lease conditions at expiry

Even if landowners do not want to renew their land leases because they wish to use the land for their own purposes, they may not have any choice but to renew, particularly when they do not have the capacity to meet the conditions of the leases. The commonly adopted wording in the leases is that any improvement erected by the lessee (tenant) on the land shall be removed within three months of the expiry of the lease but also with the provision that the landowner may purchase the improvement (building) upon payment of fair value to the lessee (accessUTS 2007). However, this assumes that landowners have the capital to purchase the improvements which often is not the case.

In Samoa, the Minister for Natural Resources, as the representative of the landowners, recently entered into a lease with a developer for a 30 + 30 year lease, with a lump sum ‘key money’ or premium, plus 5% of UCV in annual rent. The lease contained provisions relating to the lease conditions such as the right of the tenant to clear improvements or be compensated for them upon the lease expiry. Under such conditions, landowners will not have access to their land for
30 + 30 years and the rent is nominal only. It is believed that even if the rental payments were cautiously invested, the returns at an accumulative rate could never generate returns sufficient to compensate the tenants for their tourism infrastructure improvements on expiry of the lease (accessUTS 2007: 63). It has been noted that although the expected return of SAT 90,000 per hectare may seem significant to a poor subsistence community, it is likely to become a source of inter-generational discord. On several levels, it is believed that this arrangement is likely to lead to infighting and political challenges (if the actions of the Trustee are challenged, which while not likely in the short term, given the chiefly nature of the Trustee, could inevitably be the cause of matai distrust and infighting in future years), particularly as the expiration of the second lease term approaches (accessUTS 2007b: 76). Such an argument assumes that landowners are left with an asset with little economic value, and in particular, that the improvements are allowed to depreciate towards the end of the lease.

Such issues of duration of leases are also closely linked to concerns over fair returns on customary land to current LOU members, restitution of renewal of leases and inter-generational equity.

Concluding Remarks

Strengthening of informal and formal arrangements can help increase access to customary land, but with varying degrees of success. Informal arrangements, which may be relevant for small scale development, are not suitable for commercial uses particularly where longer term security is needed to ensure acceptable returns on investment can be achieved. Secure and durable formal leasehold arrangements on the other hand, provide the same characteristics that are found in private property rights that usually support optimal economic growth. Leasehold arrangements can be strengthened by ensuring security of leases and leasehold conditions that provide a fair and market-based returns to landowners, as superior right holders, and investors as lessees. Careful design of leasehold conditions has the potential to increase economic well being of
landowners and minimise local-level conflicts within LOUs and between landowners and investors.

**Key lessons**

**Informal leasehold arrangements**

- Informal arrangements over customary land may help produce some economic wealth, particularly in circumstances where outside funding is not required. However, without proper legal backing, informal arrangements do not provide sufficient certainty for individuals to invest in longer term productive activities. Nor do they provide sufficient security for lending agencies.

- While it may provide some security, the legal recognition of customary land tenure may not be sufficient to encourage its use as a bankable asset if financial institutions are constrained in their ability to recover their funds when borrowers default.

**Formal leasehold arrangements**

- Secure formal leasehold arrangements can deliver the same national economic benefits as individualised private property rights but without the social costs associated with individualisation of customary land.

- Leases should be secure and lease conditions should provide for fair and market-based returns to landowners as superior right holders, and investors as lessees. Leasehold conditions should be clear about key factors, including market-based rent (including premium if any), exclusivity, duration, renewal on expiry, and compensation for any improvements at the time of expiry.

- Appropriate land administration mechanisms need to be established that allow customary landowners, either as individuals or as groups represented by a commercial entity, to obtain bankable formal leases.
• To avoid conflict between landowners and Government, landowners should be free to engage in land dealings without undue interference from governments or others. Countries must clarify the role they expect their Government to play and the extent of discretionary powers a Minister and Government agencies should have over customary land dealings.

**Information and landowner awareness**

• Customary landowners must be supported by a robust land information system, and an awareness of the land administration system, which links customary and introduced land systems. Increased landowners’ awareness about matters such as the difference between customary land tenure and the Western property rights system, and fair and equitable land lease conditions, will improve their engagement in land dealings.
Chapter 5: Fair and Equitable Returns

Fair and equitable returns have always been a major concern in customary land dealings. This issue has wide implications for economic growth as well as for the occurrence of local-level land-related conflicts. Returns that are less than market rates discourage investors and can result in less-than-optimal economic growth. Concerns about poor returns to landowners are often at the core of many local-level conflicts. Such concerns are particularly raised in countries where economic interests in land are high such as in Vanuatu (Government of Vanuatu 2007); Papua New Guinea ((National Research Institute 2006); Kiribati (Pacific Islands Forum Secretariat 2001); and Fiji (see (accessUTS 2007); (Kabutaulaka and Rokolekutu 2007); (May 2007), (Jones and Holzknecht 2007).

Common issues that come to the forefront related to fair and equitable returns over land include size of premium and annual rent paid by lessees, secondary lease market and returns to landowners, and fair compensation for land acquired for public purposes. Related to the issue of fair return is also the concern about equitable sharing of returns from land within landowning groups (intra-generation) and between generations (intergeneration). Before we discuss these, it will be useful to briefly examine what comprises ‘fair return’.

What comprises fair return on land?

Where there is a mature market and competitive conditions exist, rental markets can provide market-based returns that are fair to the investor and the landowners. A market is considered to be competitive if, for example, there are several ‘renters’ and several pieces of land are available for rent at rental values that reflect their respective potential productivities; there is clear and accurate information available to all parties; the landowners and investors have similar information about the ‘economic value’ of their land (that is, the landowners and the potential investor have symmetrical information); and transaction costs are minimal. The economic value of the land is expected to be identical to the land price, which reflects local demand and supply.
conditions. Demand for land captures the willingness to pay by potential users of a piece of land which would normally reflect scarcity of land, its location and other characteristics desired by the potential users. On the other hand, supply of land reflects what landowners are willing to accept for the piece of land. Further, the sum of the present value of the annual return from the use of that land over time will equal the market price of the land, provided there is perfect knowledge and information (Barlowe 1972).

In the Pacific, such conditions are often violated, particularly since landowners often have asymmetrical information about the value of their land for the proposed commercial use compared to the investors when they enter into a lease agreement. At times, what comprises market value may not be well understood. In Kiribati, for example, a difference in understanding between the market notion of land rent/land price and the traditional notion of the value of land has caused some concern. Until recently in urban South Tarawa, many I-Kiribati tended to purchase land on the basis of a ‘parcel of land for a parcel of money’ (Jones and Holzknecht 2007). Such exchanges have been constrained by a lack of information about the precise area and boundaries of the land, which were not recorded in the minutes of the Kiribati Land Court. Payments have been in cash or in kind such as a motorbike or canoe. Often there is no direct linkage between area and price. Concepts such as ‘market value’ and ‘market potential’ of land have not been considered as key determinants in transactions. This is now changing rapidly in South Tarawa as pressures for development of a limited land supply continue to rise (Jones and Holzknecht 2007).

Rental markets in rural areas are limited and thus information about rural land market rents is scarce. In the absence of a functioning land lease market, governments in the region have commonly established an administrative basis for charging rents using the concept of unimproved capital value (UCV), introduced during the colonial era. UCV is only a notional quantity as there is no positive market evidence of value (sale price) because little land is sold in the Pacific (accessUTS 2007b: 31). Usually opinions of so-called valuation experts are used to estimate UCV, a practice that appears to have its origin in the colonial history that saw land valuation methods imported from the first world into environments that had no land market
whatssoever. Similarly, there is no rational basis for arriving at the percentages adopted to compute rents from UCV.

While such an approach may be useful in practice given its relative simplicity, evidence indicates that this simplicity leads to inconsistent valuation which can lead to conflict. For example, rural land leased from customary owners in many Forum Island countries is valued using the same formula regardless whether it is to be used for plantation crops or tourism, despite massive difference in the value of these land uses (accessUTS 2007b).

Another common problem in the region is that although an agreed percentage of the UCV is applied – for example 5% in PNG or 6% in Fiji and Solomon Islands – it is common to find that far lower percentages are actually received than those permitted under various country legislation. For example, in Fiji the maximum rent under both the Agricultural Landlord and Tenant Act and the Native Land Trust Act is 6% of the UCV. In practice, the Native Lands Trust Board as Trustee of the customary owners only collects 2½-3% of the UCV. The situation is similar in Honiara, Solomon Islands, where the Valuer General’s office has charged as low as ½-3% of UCV on urban Government land based on reasonableness and affordability. Low rental collection is a common issue throughout the region with reports of even as high as 69 percent of rents being in arrears in Kiribati. (Brotoisworo 2003, quoted in access UTS 2007b).

Administratively-determined land rents are unlikely to keep pace with increases in the market value of land, particularly in fast developing sectors or countries, leading to prospects for increased disputes in the future.

**Premium and land rents**

Where there is strong local demand for land, tenants are often expected to pay an upfront ‘goodwill’ payment, ‘key money’ or premium, which together with annual rental gives the returns to land for the landowners. However, landowners may often not see premium payment as a component of land rent paid by tenants. In Fiji, for example, perceptions abound that low rents are being paid by tenants under ALTA but this ignores the fact that tenants also pay premiums. When taken together, tenants are found to pay 10-14% of gross value product in land rent.
Although this is comparable to the rental percentages paid internationally, the perception remains that land rent paid is on the low side, perhaps also because of the low collection by the agencies (Lal et al. 2001).

In response to such unfairness, the NLTB has moved towards rental based on a percent of gross turnover in the tourism industry. Similarly, in the Guadalcanal Plains palm oil initiative in Solomon Islands, payments to landowners are based on a percentage of the profit (Power and Sullivan 2007 (draft)). Such an approach is a common feature of Western rental environments, for example in retail leases in shopping centres, where tenants pay a percentage of turnovers to the centre owners in addition to a base rent.

Improved access to information could help landowners better negotiate returns to their land in terms of a combination of premium and annual rent as desired. It should however be noted that gross returns or profit-based rentals are not without risks, particularly as the landowners can expect to see a large variation in their income. Moreover, if based on profits, they may not receive any returns at times, which is why an upfront payment, premium, and a regular annual (or monthly) rental payment may be more desirable (Lal et al. 2001).

**Fair rent and secondary market**

The issue of ‘fair’ returns also arises when there is a secondary market for property, especially in urban markets through subleases of customary land either through strata titles, as in Vanuatu, or subleasing as in Fiji and Papua New Guinea. For example, in Boroko, Papua New Guinea, it is estimated that subleasing results in the customary owners being paid a rental amount equivalent to 0.001% of the true market rental (accessUTS 2007b: 32). In such cases, the lessee receives the capital gains, if any, from the sale of ‘leases’ but with the landowners usually not benefiting at all. Here too, landowners feel disadvantaged and the sense of unfairness causes resentment. The intensity of such feelings is greater when the leases are of longer duration and inequitable economic development persists and/or little land is left for use by customary owners as has been the case in some places in Fiji (Lal et al. 2001). Lease conditions should include conditions
related to sharing between landowners and lessees of any capital gains realised at the time of the sale of lease.

**Fair compensation for land acquired for public purposes**

Issues of equitable returns to landowners also arise where land has been acquired for public purposes and the negotiated rental amount may not be acceptable as time passes. Such issues have been raised in many countries including Fiji, Samoa and Papua New Guinea. In Fiji, for example, a 2005 High Court decision awarded a group of landowners $52.8 million as compensation for the land acquired by the Government in the 1970’s for the construction of the Monasavu hydroelectricity dam. The lease negotiation was with the NLTB as the custodian of Fijian Land. The Monasavu landowners were unhappy with the terms and condition of the lease and in the late 1990s demanded compensation for the use of their land. The initial lease payment was $250,000 per year for 25,075 acres. After protests, the Government agreed to a compensation sum of $5 million, which was later increased to $14 million. But after taking the case to the High Court, the landowners won the case and were awarded $52.8 million (Lal 2005: 7).

Similar concern over ‘fair returns’ can be found in Samoa in relation to the land acquired by the Government for proposed infrastructure development on Savaii (Grant 2007(draft)). Here the Government Valuer estimated a value of Tala 4.5 million, while two independent valuers arrived at a figure in the order of Tala 45 million. In Vanuatu, too, the failure to pay compensation for land acquired for public purposes has created serious problems (Manning and Hughes 2007 (draft): 20).

The reasons for such concerns are varied but often arise when due process is not followed. Demands for increased rental or compensation payments by subsequent generations are also expected when major structural changes occur including those due to rapid economic development and/or changing expectations of subsequent generations. In Papua New Guinea, the issue of compensation for public land has also included situations where questions of good governance have arisen and allegations of corruption in Government authorities have been made...
(Manning and Hughes 2007 (draft):14). Such cases of a Government’s lack of use of due process or fair compensation can provide grounds for landowners to make claims about unfair compensation; but not all the claims are legitimate.

Governments must follow due process when acquiring land for public purposes and landowners must be given a fair market-based compensation for the acquired land. Governments may consider negotiating leasing arrangements under ‘fair’ market rental conditions and periodic review clauses, instead of outright acquisition of customary land for public purposes. This would provide a better mechanism over time to periodically review the rent and take into account market movements.

Many observers have also pointed to the importance of consultation processes in accessing public land. An officer of the Planning and Urban Management Agency in Samoa writes that community consultation needs to be considered in the early stages and that ‘planning is an unpredictable process, and if good relations are fostered early on, the project will be more likely to receive community support that is adaptable to unforeseen circumstances’ (McCarthy 2005).

There are various State institutions that are at the interface between the State and customary landholders, related to land, forestry, agriculture and urban planning. Officers working at this interface are often the first to encounter and consult with landowners. However, because of the emotive nature of land issues, communication with landowners may be difficult at times which itself may contribute to conflict between Government and landowners, as noted by Crennan in Kiribati:

…thorough consultation and ratified agreement between Government and landowners prior to acquisition of land could prevent development of many of the problems referred to in this study. However this apparently desirable procedure may be complicated by a number of interrelated factors which should be anticipated in the planning of any such consultation. The personnel selected to conduct the negotiations on behalf of the Government, and the manner in which the process is conducted, are also vital issues that will determine the efficacy of Government/community relations in regard to water resource security (Crennan 1998).
Equitable sharing of returns between landowners

Intra- and inter-generational distribution of benefits within customary landowners is a growing area of dispute, particularly as the needs and aspirations of landowners change and access to financial wealth becomes more important. Concerns over the distribution of benefits between landowners may be for several different reasons. Customary benefit sharing systems may have been designed such that some individuals within a landowning group received a greater share of returns consistent with their traditional role, such as chiefs. At other times, concerns may arise because traditional decision-making rights and cultural institutional arrangements have not kept up with changing times.

In Fiji, for example, at the time when the customary land administration system was institutionalised during the colonial period, a sharing formula that gave about 47% of land rent to chiefs was agreed to with the remaining 53% of rent to be divided among all adults over the age of 21 years. Questions of equitable distribution have been raised today when the old sharing formula is still used, while chiefly roles have changed with globalisation and modernisation (Lal et al 2001). In Samoa land titles are held in the name of matai, and the rental amount shared with the members of aiga is up to the matai, who may no longer operate within the expected cultural norms. Many people have expressed unhappiness with the way that matai have total control and that there is a lack of equity. Matai are supposed to have a governance role and custodial role, rather than a ‘take-take’ function (accessUTS 2007b:116).

In Papua New Guinea, on the other hand, although equitable sharing of returns to land is expected among members of the landowning group, institutional designs for sharing of the benefits are influenced by ‘big men’ and they have not always equitably shared returns from customary land due to rent seeking and principal agency problems (See Box 5.1).
Box 5.1: Effectiveness of ILGs as a means of benefit sharing among landowning units in PNG

PNG established community-based Incorporated Land Groups (ILGs) to provide a mechanism for customary landowners to be formally recognised. At the time of their establishment in the early 1990s there were few rules regarding their operation within the landowning group, particularly in relation to the sharing of benefits, such as royalties. Many of the group leaders capitalised on this gap, establishing finance and management rules that benefited themselves rather than their communities.

In one of the Foe areas, a prominent leader of one group, together with some other Foe group leaders, even convinced the Treasury Department to directly transfer close to K2.6 million to him from the Incorporated Land Group Trust (a fund kept for the benefit of future generations) for ‘community projects’. Little evidence was found of such projects ever being implemented. In another ILG in the Fasu area, leaders seem to have been paid about K10.5 million for an office complex in Port Moresby using landowner equity funds. This payment was made without the full consent of the landowners. What was also of concern was that the sale price was K7 million, which left an unaccounted for K3 million. This caused tension and conflict among the ILG members.

Ultimately, the community-based incorporated land group system broke down, as noted by the then Prime Minister Haiveta (PNG Government Press Release, 29 December 2000): ‘One of the main causes of the breakdown of the distribution system is the practice of interest groups and individuals such as landowner leaders, provincial governments and self-styled consultants and advisors to landowners trying to do special deals with, or obtain favoured status from, politicians and officials’.

Source: (Koyama 2002)

The issue of unfair dealings in land has also arisen when due process was not used to acquire land for public purpose or when subsequent generations engaged in rent seeking behaviour, particularly after the true value of economic activity on their land becomes known. Issues of unfairness may also arise when current or subsequent generations change their mind about lease conditions and demand additional payments or when they wish to cancel the lease.

In Fiji, for example, landowners of Tailevu and Serua accused the Government of cheating over the sharing of returns from the logging of mahogany planted on land leased by the Forestry Department in the 1960s. At the time the land was leased from the NLTB, without the direct involvement of the landowners. The Government regularly paid the rent stipulated in the lease ($262,263 a year for 63,846 ha, or about $4/ha/year (Daily Post July 20, 2000). Thirty years on, when the market value of mahogany became apparent, a dispute between the landowners and the
Government emerged over the sharing of the net returns from the sale of mahogany. The stumpage value of the mahogany forests planted by the Government is claimed to be billions of dollars and the landowners received only a fraction of it. Landowners demanded a 50:50 percent sharing between landowners and the Government.

In Nauru, a lease over much of the island was negotiated more than a century ago by the National Phosphate Commission and during the economic boom period Nauruans were not overly worried about the low rents being paid on their leases. However, with the economic downturn in the 1990s, landowners became concerned about low rents that did not reflect the true value of economic activities on their land (Jones and Holzknecht 2007).

The above discussion emphasises that unless returns for leases are reflective of market conditions, local-level conflict can be expected, which can discourage economic use of customary land. The use of due process and fair compensation must be addressed if the revisiting of compensation by current or future generations and conflicts over land is to be avoided. Distribution of returns to land among current and future generation of members of landowning groups should be based on core principles of fairness and equity, taking into account agreed local customs and regional commitments including gender equity.

**Addressing intra- and inter-generational equity issues**

To address intra- and inter-generational equity issues, village or community trust arrangements have been used as financial management instruments. This can be found, for example, in Ifira and Mele, Vanuatu (see Box 5.2). Experiences in Vanuatu suggest that trust arrangements work best when the design of a trust combines key elements of traditional customs and Western incorporated company structures and processes.

For trusts to be effective in addressing intra- and inter-generational equity issues, their design must carefully reflect consideration of key aspects of principal agency problems and rent seeking. The design of trusts must also carefully reflect considerations of good governance principles of accountability and transparency that minimise the scope of principal agency and
rent seeking behaviour. This can be facilitated through consensus-based decision-making processes involving all members including women.

It also has been suggested that the financial management of trusts must be kept separate from the landownership entity. Recent experience from NZ suggests that for trusts to work effectively in a commercial sense, the business entity must be separated from the landownership entity and clear legal authority over commercial use of land must be provided (Kingi 2007 (draft)). This approach has been promoted by the Maori Land Court. It separates commercial objectives from socio-cultural objectives, allowing landowners to overcome the problem of using their customary land as collateral and encouraging them to explore innovative ways of accessing capital, as well as impose a level of self discipline.

Other safeguards suggested in the design of trusts include: the role of trustee should be performed by a corporation or a group of people to spread the risk; trust rules to ensure trustees can only act on behalf of the customary landowning group and only after a process of informed consent, and in accordance with directions given by landowners; rules and processes are in place to ensure and safeguard transparency and accountability; and that trusts are periodically reviewed and adjustments made as necessary. (Fingleton et al. 2007(draft): 21).
Box 5.2: Land Trusts in Vanuatu

Village trusts were set up as a company with members of the community acting as trustees. Trustees' powers were defined by an advisory body. The emphasis had been on public benefits for the community rather than sharing the benefits out individually. These were set up not just as legal bodies for economic decision making but also as bodies to protect long-term social and cultural interests.

Village trusts allowed customary groups to be effectively involved in decision making over their land, to collect revenues, make investments in businesses and provide wide ranging services to the village. They have also helped ensure equitable inter-generational and intra-generational access to the land rent and other returns from their investments. The Ifira Land Trust is said to hold the community together and helped ‘everybody eat [s] from the one common basket’ (Fingleton et al. 2007(draft): 13). It has provided various services to its members including a pension scheme for all islanders over 50 years of age; tertiary scholarships; supply of water and electricity across islands; support for local schools and community organisations; and interest-free loans for school fees.

It is found that village-level trusts worked best, as has been the case of Ifira and pre-1990 Mele Village Trusts, where the institutional design of the trusts combined modern company structure and processes (boards of directors, annual meetings and reports) with traditional elements of *kastom* – the village leadership, kinship groups, and family ties. Where traditional customary controls were removed or diluted without adequately addressing the issue of, for example, group versus individual interests, as was the case in Mele Land Trust post-1990, individual interests overrode the traditional group’s ‘one common basket’ interests (Naupa 2005), decision making suffered, revenues collapsed, services were not funded, and the trust’s authority over village landholdings became threatened. The economic growth and economic well being of the village suffered.

*Source:* (Fingleton et al. 2007(draft)) and (Naupa 2005).

Traditionally, landowning groups would normally determine the beneficiaries of returns to their land, based on customary rules of inheritance, which may also be tempered by other considerations such as gender equity. With increasing mixed marriages and changing values, landowners would also need to consider their effects on institutional design for benefit sharing among members of LOUs (access UTS 2007b).
Concluding Remarks

The importance of addressing issues related to fair and equitable return on customary land cannot be over-emphasised. Among the areas to be addressed are enabling mechanisms and support services necessary to ensure land lease negotiations result in fair and equitable returns to landowners and investors. The design of financial management structures for the landowning units and rules must also be developed to encourage equitable benefit sharing among current members of the landowning group, including women, and between current and future generations of landowners. Experiences in the region highlight the following key lessons.

Key lessons

- Returns to landowners and lessees must be based on market principles and be fair to the lessees’ investment and landowners’ superior interests.
- Administratively determined Unimproved Capital Value based returns to customary land must be avoided. Although these may seem uncomplicated, they do not facilitate fair returns to landowners.
- Noting potential increases in the value of leases over time, lease conditions should include conditions about the sharing of capital gains derived from such potential increases between landowners and lessees.
- Governments must follow due process when acquiring land for public purposes and landowners must be given a fair market-based compensation for the acquired land. Alternatively, governments may consider negotiating a leasing arrangement under ‘fair’ market rental conditions instead of acquisition.
- Distribution of returns to land among current and future generations of landowners should be based on core principles of fairness and equity, taking into account agreed local customs and regional commitments, including those related to gender equity.
Intra- and inter-generational equity could be facilitated using village level trusts or similar arrangements, combining elements of traditional systems and company structures. Such arrangements must be managed according to commercial and good governance principles.
Chapter 6: Preventing escalation of land-related conflict

Local-level conflicts, if unresolved, have the potential to remain as latent grievances and escalate into larger scale conflict under certain circumstances. As discussed in earlier chapters, local-level conflicts over land often arise when actors and stakeholders have different interests, incentives, perceptions and goals, and actors act in their own interests which may be at odds with the interests of others. In the Pacific, the scope for land-related conflict has been growing in the light of changing values, needs and aspirations of indigenous people in a rapidly globalised environment where a cash economy has taken a central role in people’s lives, their decisions and actions.

It is acknowledged that a certain measure of discussion, disagreement and conflict is an inevitable part of such transition processes. Furthermore, some measure of disagreement can be seen as natural in societies in which relationships between people are paramount to people’s sense of security and wellbeing. Indeed, it has been argued:

> Particular conflict episodes are part of an ongoing community dialogue in which events and relationships are continually shaped and reshaped in the moral negotiations of everyday life (White and Watson-Gegeo 1990).

Clearly, not all land-related disagreements are in need of attention. However, where disagreements become serious or are not resolved, local-level conflicts have the potential to transform into large scale conflict and even violent conflicts under certain social, economic, and political conditions, although no one factor can be regarded as the single cause of escalation of conflict.

The intention of conflict minimisation is not to preclude the positive role that can be played by disagreements and discussions over differences of opinion. Instead, conflict minimisation aims to minimise conflict that disrupts people’s lives, threatens their security, and constrains possibilities for people in Pacific Island countries to utilise their land in the way in which they choose.
This chapter focuses on the prevention of escalation of land-related conflict by outlining mechanisms to assist in resolution of land-related conflict across different levels of society in Pacific Island countries. The prevention of escalation of large-scale land-related conflict can be seen to include two aspects: the resolution of local-level land-related conflict, and specific interventions to prevent escalation. To contextualise conflict resolution discussions, this chapter begins by briefly revisiting the local-level land-related conflicts discussed in chapters 2 to 5. A brief summary of different types of local-level land-related conflict is presented, highlighting the different actors involved. Next, this chapter describes the different customary and court-based mechanisms to resolve local-level land-related conflict. The third section outlines key factors that may contribute to escalation of large-scale land-related conflicts, using Fiji, Solomon Islands and Bougainville as examples, and mechanisms that could be used to prevent such escalation.

**Local-level land-related conflict**

Local-level conflicts involve actors – customary landowners, State agencies, investors, and settlers – who may come together as part of land leasehold or other arrangements used to facilitate access to customary land. In addition, local-level land-related conflict takes place within landowner groups over rights of inheritance.

**Conflict between landowners**

Conflicts between landowners can arise because of issues over equitable distribution of benefits or over chiefly or other titles that hold authority and therefore benefit from economic development of land. Shifts from communal to individual life styles have also led to conflict over the inheritance of land. In addition, the leasing or selling of land agreed to by one generation of landowners can be questioned by the next generation, in particular where payments are made on a one-off basis and the next generation sees no direct benefits. Across the Pacific, there are many landowners who are no longer residing on their land. Instead, these absentee landowners are living in urban centres or have migrated overseas. Absenteeism can make consultation and thus decision-making processes concerning customarily owned land more complex, and can lead to
disagreements as to the kind of customary land rights that can be claimed by people who have been absent and thus not contributed to land management according to custom.

**Conflict between landowners and lessees**

Where formally-registered lease agreements are concerned, there can be conflict over details pertaining to these lease agreements and benefit sharing. For example, in Fiji, there have been uncertainties as to the ownership of improvements made by tenants upon the expiration of leases. Misperceptions and lack of knowledge of lease agreements can also play a role.

Informal lease agreements between settlers and landowners abound across Pacific Island countries. They are often not written down on paper and based on customary exchanges of food and other items or cash. As long as the communication and social relationship between landowner and lessee is maintained and there is ample supply of land, such agreements can be sustained for a long time without leading to conflict. In Solomon Islands, people from Malaita and other provinces had been settling around Honiara since the end of the World War II, in many cases based on arrangements with Guadalcanal landowners. For many years these arrangements underpinned a relatively harmonious relationship between settlers and landowners. But over time settlements grew into new areas and a next generation of settlers lost contact with the original landowners. The tensions and grievances arising from these developments played an important role in the lead up to the Tensions in Solomon Islands (Carter 2006: 40-41).

**Conflict between landowners and the State**

States need to access land for infrastructure and other public uses. Most of the Forum Island countries have constitutional provisions that allows the State to appropriate land for such purposes but this has been difficult to implement in practice, in particular because there can be disputes over who are the customary landowners and thus entitled to compensation for the acquisition of land. Where land has been acquired and compensation paid, malpractices, misunderstandings regarding the arrangement, and poor record keeping by State agencies can lead to renewed demands for compensation. Landowners’ grievances can be legitimate but
under-resourced State agencies, coupled with pressures to open roads and airports, can lead to manipulation based on greed rather than grievance (Manning and Hughes 2007 (draft)).

Conflict between landowners and investors

Conflict between customary landowners and investors occurs over the amount of compensation paid for the lease of land or other benefits. Major investors in the region comprise resource extraction industries like mining and logging, and the tourism industry. For resource extraction industries in particular, issues of compensation can be complicated and aggravated by environmental consequences of these industries. The prospect of large-scale industries can raise unrealistic hopes and expectations among people who see these as a means to development, in particular access to the generation of large amounts of wealth (Filer and Mcintyre 2006).

Multiple actors and deflection in local-level land-related conflict

Many local-level land-related conflicts are more complex than the four categories identified above. Indeed, in many instances, customary landowners, State agencies, investors, lessees or squatters can play a role in a single dispute. Anthony Regan’s description of the events that sparked the sabotage of the Panguna mine is illustrative:

The initial spark of the conflict was an inter-generational dispute within landowner groups around the mine over the distribution of compensation and rents. Resentment about other impacts of the mine heightened the tensions involved. Frustrated in their efforts to gain control of landowner organisations from the older leadership and to extract concessions from Bougainville Copper Limited and the national Government, in April 1988 a younger leadership group claimed compensation of 10 billion kina.... In November 1988, dissatisfied with the results of a Government-appointed study of the environmental and other impacts of the mine, [Francis] Ona’s supporters destroyed BCL property with explosives and demanded closure of the mine (Regan 1998).

This multiplicity of actors is related to the issue of deflection. In many cases of land-related conflict, the real underlying grievances can get deflected onto others. For example, landholders’
grievances over the benefits received from the economic development of their land are often targeted towards companies, State institutions or migrant settlers. In reality, however, part of the problem may lie in the way in which the representatives of the landholder groups divide the benefits that they receive as a point of first contact.

Such deflections can also be employed quite deliberately at times. In the Southern Highlands Province of Papua New Guinea there are examples of landowner groups blocking roads and damaging power lines with the aim of seeking attention from Government, based upon grievances related to a lack of service delivery rather than the goal of damaging the company itself (Lavu 2007). The prevalence of deflection away from the real issues in land-related conflict points to the importance of investigation into the root causes of these conflicts in order to uncover the real grievances.

**Conflict resolution mechanisms of land-related conflict**

Conflict resolution mechanisms to settle local-level land-related conflict comprise customary and introduced mechanisms. Customary conflict resolution processes comprise conciliation processes where decisions are made on a consensual basis, mediation where a third party is involved or decision making by customary leaders. Introduced processes involve various modes of land commissions and courts. This section provides an overview of these customary and introduced conflict resolution mechanisms in Forum Island countries, with assessments of their effectiveness. Unless otherwise indicated, it largely draws upon the work of the Australian Centre for Peace and Conflict Studies (2007).

It is important to note that judging the effectiveness of mechanisms presents challenges, in that it is difficult to define ‘success’ in conflict resolution. What appears to be a successful resolution of conflict at one particular point in time may in future be challenged. In addition, the ‘resolution’ of a conflict can be dictated by a powerful actor, while the underlying issues remain.

**Customary conflict resolution processes**

In pre-colonial times, the resolution of land-related conflict, whether through non-violent customary mechanisms or through warfare, was often non-permanent with claims to land being
re-presented over time, and new conflicts occurring. Some observers of Melanesian countries have argued that there are linkages between the natural role played by some measure of conflict in close-knit societies in which relationships are paramount, and an often non-permanent nature of conflict resolution. Weiner states that:

An agreed upon exchange is always a situational and temporary agreement at best...it is the tension, as it were, of unbalanced and uncompleted exchanges, which maintains the social relationships between the original parties (Weiner 2002; Goldman 2007).

Similarly, a delay in decision making until a situation has calmed down and an aversion to confrontation is an aspect of the small scale of many Pacific Island societies. For example, Micronesian practice is to postpone a decision until after some of the emotional heat cools down, even if this may take years. At times, disputes over land might lie undecided for years until one of the parties had died and it now no longer was the sizzling issue it once had been (Hezel 2002).

Customary conciliation/mediation processes

Customary conciliation processes are processes of debate that are facilitated by a third party within the LOU. Conciliation is also known by some as mediation. For example, a chief, elder or ‘big man’, acting as a mediator, can chair a meeting of conflicting parties and facilitate discussion. These are participatory processes where conflicting parties jointly arrive at a decision. The involvement of a number of witnesses serves to lend weight to consensual decisions and prevent escalation of emotions into violence. Customary conciliation processes are widespread throughout the Pacific but vary, for example, in terms of the nature of conflict, the amount of control of processes by the third party, and the degree of formalisation of discussion.

In a description of a conciliation process in Kumara, Papua New Guinea, for example, Warren describes how local big men will come to the scene of a dispute and move the disputants to an assembly ground where big men from other villages gather, as well as spectators. Such an assembly of people provides an arena in which violence is less likely. A self-appointed chairman facilitates discussion and the parties take turn to make speeches. If no settlement is reached, the processes continues until bystanders and the parties tire and slip away from the meeting. Then,
final speeches are made to exhort the parties to refrain from violence, and to make arrangements for a next meeting (Warren 1988 in Australian Centre for Peace and Conflict Studies, 2007).

In Samoa, the Village Fono Act 1990 formally recognises the customary conflict resolution mechanisms of the Samoan village council – the *fono*. It empowers the *fono* to regulate the development and use of village land. However, with regards to conflict resolution, its powers are sometimes limited to uncultivated village land, as normally the *matai* make decisions on cultivated land in consultation with the family (Corrin 2007(draft)).

Customary conciliation processes are used at the community level across the Pacific to attempt a resolution of different types of conflict, which may include some types of land-related conflict. On the one hand, conciliation processes can result in win-win solutions that are permanent and accepted by all parties. The processes are inclusive, cheap and usually less time-consuming than court processes. On the other hand, personal negotiating power of conflicting parties may influence the outcome and the outcome may be accepted, but still be perceived as unfair or biased, and feelings of being aggrieved may remain.

**Decision making by customary leaders**

In many customary conflict resolution processes that concern land matters, local customary leaders are involved as actual decision makers. On the one hand, customary leaders know the customs and histories of the area and are able to decide in accordance with accepted norms. Such processes are also cost-effective and quick, and where chiefs are respected, their decisions may carry greater weight than decisions made by State institutions.

On the other hand, as seen in Chapter 2, modernisation, economic development and associated changes in socio-cultural order have impacted greatly on customary leadership throughout the Pacific. In many places, there are disputes over chiefly titles and big men status, and consequently it becomes difficult to establish who has the right to decide certain disputes. In land-related conflicts in particular, the rising value of land and pressure to earn money results in circumstances where the neutrality of customary leaders to reach fair decisions in such matters is increasingly being questioned.
Furthermore, the authority of customary leaders and hence their ability to act as decision-makers in local-level land-related conflicts is tied to a particular tract of land. In the case of conflict between different villages and/or people from different ethnic background, it can be difficult to find a customary leader with the authority to make decisions over land. This is also the case in East Timor, where most land-related conflict is settled through customary mechanisms, but research has shown that where there is conflict resulting from resettlement involving different cultural groups, it cannot be resolved through customary mechanisms alone.

**Reconciliation**
Reconciliation processes, including apologies, are widespread in Forum Island countries. Because the restoration of relationships after conflict is paramount, many Pacific societies have developed elaborate processes to enable such restoration after one person has committed a crime against another person. The communal nature of Pacific societies means that such processes take place between families or clans rather than only between individuals. In many Forum Island countries, reconciliation processes involve exchanges of gifts or money as compensation payments. Many customary conflict resolution mechanisms include ceremonies pertaining to apologies and other means to restore relationships.

Reconciliation processes overlap to some extent with mediation/conciliation, in that respectful listening and opportunities for all parties to air their concerns are central. However, reconciliation and restorative justice processes focus on the restoration of the relationships, whereas conciliation/mediation focuses on finding a win-win solution in disputes. Therefore, reconciliation processes can be seen as a specific part of conflict resolution processes, whether customary or court-based.

**Applicability of customary conflict resolution mechanisms**
Customary conflict resolution processes can be used to resolve conflicts within landowner groups, for example, over the use of communally owned land. These methods can still be effective where population density is low, land is used mainly for subsistence gardening, and it is clear who has the authority to make decisions pertaining to land. However, where decision
making by customary leaders is involved, changes and conflict over who has such decision-making authority can preclude effective conflict resolution through customary means.

**Introduced conflict resolution mechanisms**

Introduced conflict resolution mechanisms comprise the various types of formal, State-based commissions and courts. Different Forum Island counties have established different combinations of first instance and appellate courts to resolve land-related conflicts. This section provides an overview of these different types of formal conflict resolution mechanisms, their advantages and disadvantages.

*Land commissions*

Land commissions were one of the earliest forms of mechanisms established to resolve land claims particularly during the colonial era and can therefore be seen as early forms of conflict resolution mechanisms for land-related conflict. Land commissions comprise officials appointed by Ministers, elected by relevant Government councils, or can include certain set official positions. The advantage of commissions is that they are less complex, more flexible and cheaper than courts. However, such flexibility and lack of strict procedure can also lead to a (perceived) lack of fair procedure.

*Land tribunals*

Tribunals are bodies that are established to determine a matter by relying on evidence, and tribunal members are expected to be impartial. They follow certain procedures but these are usually not as elaborate as court procedures. Tribunals allow for the inclusion of customary knowledge from experienced and respected community members in decision-making processes regarding customary land. However, the experience of the Customary Land Tribunals that were established in Vanuatu in 2001 has also uncovered a number of weaknesses, in particular the problem of finding sufficiently impartial tribunal members (Box 6.1).
Box 6.1: Customary Land Tribunals in Vanuatu

Customary Land Tribunals were introduced in 2001 in an explicit attempt to strengthen customary conflict resolution over land matters. If the dispute relates to issues of ownership of customary land or the boundaries of customary land, and resolution is not achieved through traditional customary dispute resolution, then disputants may commence proceedings before the Customary Land Tribunals. The disputants have to inform the principal chief and then the chiefs appoint a Chairman, Secretary and two members for the tribunal. Each village has a list of approved members of the tribunal, and this list is published. Disputants can object to the choice of people for the CLT if there are family links to one of the disputants. The Supreme Court exercises supervisory powers over the CLTs to ensure that they are observing statutory requirements about procedure and natural justice but it does not become involved as to the substance of the decision. People can appeal to the Supreme Court to halt or not hear a case, or to appoint other members on the CLT.

While the CLTs have brought custom to the forefront of dispute resolution in land matters, there are a number of concerns around procedures, outcomes and processes. Claimants need to put their dispute in writing and allow 21 days for opposing claimants to put their case forward; an approach that more closely reflects the procedures and outcomes of the Island or Magistrates' Court which is based on Western law. Another ‘Western’ aspect of CLTs is the fact that they result in decision that favours only one party – they are essentially adversarial systems. Tribunal decisions will be handed down and noted in the name of a particular representative of a landowning unit, and this can lead to those names becoming equated with private landownership, rather than this landowner representing a landowning unit. Finally, it has proven difficult to find independent arbitrators in village settings, and in some instances chiefs abuse their powers in regards to the settlements of land disputes. There are many appeals related to the choice of the members of the tribunal.

Source: (Joe Mackey, Vanuatu Case Study in (Australian Centre for Peace and Conflict Studies 2007))

Land courts

In Kosrae and Pohnpei (Federated States of Micronesia), Papua New Guinea, Samoa, Solomon Islands, Tonga and Tuvalu special land courts have been established – with some being courts of first instances, others being special appellate land courts. In Samoa, the Lands and Titles Court has the jurisdiction on customary land and title related matters (Box 6.2). In Papua New Guinea, local land courts have jurisdiction to mediate and arbitrate land-related conflict.
Box 6.2: Land and Titles Court in Samoa

The Land and Titles Court (LTC) in Samoa has jurisdiction to decide on all customary land and title-related matters. The LTC is constituted by at least four members but usually comprises six members: a deputy president; three judges and two assessors. Candidates must be titleholders (matai).

The LTC has jurisdiction over four types of disputes:

- Claims and disputes between Samoans relating to customary land including rights of succession;
- The determination of which matai has pule (authority) over customary land that is being acquired by Government;
- Hearing of objections to granting of lease or licenses of customary land; and
- Appeals from the village fono.

The only right of appeal is to the Appellate Division of the Land and Titles Court, although matters pertaining to constitutional rights can be appealed to the Supreme Court.

Formally, the Act that governs the Land and Titles Court provides for the same rules of procedure as the Supreme Court. However, in practice, the LTC has taken an inquisitorial approach and provides a decision-making setting grounded in Samoan custom, including the use of prayers, kava ceremonies and Samoan customary courtesies. Lawyers are not used; instead all parties are given opportunity to speak.

Questions have been raised regarding the constitutionality of some aspects of the LTC. For example the fact that its decisions are judgements in rem and thus apply to all persons affected, whether they are parties to the case or not, may conflict with the constitutional right to a fair hearing. Furthermore, Samoan custom is not defined or written down and the Land and Titles Court has resisted declaring general rules of custom.

These matters capture the difficulty of balancing a more holistic approach to conflict resolution, drawing on customary means, with constitutionally guaranteed rights, included the need for accountability and transparency.

Source: (Corrin 2007(draft))

The appellate Customary Land Appeal Court in Solomon Islands has faced problems in that it often needs to hear cases afresh because the recording at lower court levels is unsatisfactory. Furthermore, many decisions of the CLAC are appealed to the High Court in turn.

On the one hand, special land courts provide an opportunity for judges with specific land-related knowledge to make decisions on land-related cases. On the other hand, the establishment of separate courts for land issues can require a large input of resources. A 1995 review of land
dispute settlement organisations and mechanisms in Papua New Guinea found many problems related to the capacity of the various institutions and processes involved (Oliver and Fingleton 2007(draft)).

**Modified ordinary courts**

In an ordinary court that is modified to hear land-related cases, the panel of judges is made up of people with relevant knowledge. Modified courts are used in Cook Islands, Niue, Kiribati and the Republic of Marshall Islands. Modified ordinary courts are cost effective as they use existing court infrastructure. They combine legal expertise, independence and impartiality with knowledge on customary land tenure. However, modified courts share the drawbacks of other introduced courts, in that they come with relatively high costs for the disputing parties, take time, and result in win-lose solutions.

**Ordinary courts**

In some Pacific Island countries, jurisdiction over land-related conflict falls to the ordinary courts, with original jurisdiction given to local-level courts such as village, island, or magistrates courts, with options to appeal to superior courts. The hearing of land-related cases in ordinary courts has a number of advantages. These courts draw on existing resources, resulting in cheaper court systems than where special land courts are established. Judges tend to be impartial, with experience in assessing witness testimonies. On the other hand, compared to customary mechanisms, court procedures are slow and expensive, and result in winners and losers. Legal practitioners often lack familiarity with customary land tenure and customarily acceptable ways to resolve conflicts over land.

**The applicability of introduced conflict resolution mechanisms**

Court-based conflict resolution mechanisms are important in the resolution of land-related conflicts between landowners and the State, or landowners and investors. For example, in 1998, the Government of Samoa published a public notice setting out its intention to take land for the purpose of developing a new township so that residents of the island of Savaii could access similar services to those on Upolu. No objections were registered, and in 2000 the Government...
acquired 2,872 acres of land. In 2005 however, some chiefs of the village sued the Government for more compensation than had already been received. The court found in favour of the village, but instead of paying more compensation, the Government decided to return most of the land to the village, keeping only 400 acres (McCarthy 2005; Va’a 2007).

In addition, formal court-based conflict resolution provides an important avenue of recourse in cases of abuse of customary decision-making authority over land or where such authority is itself disputed. In some cases such as in the Cook Islands, recent legal rulings over customary law itself has become a source of confusion over who are the rightful owners, and thus the rightful decision-makers on land matters (see Box 2.2 in chapter 2).

**Customary and introduced conflict resolution processes**

The existence of both customary processes of conflict resolution – whether partially codified or not – and introduced courts, including appellate courts, leads to the abuse of this plurality of systems. Even where customary mechanisms are working and lead to a decision, unsatisfied parties can move their case to the formal system or keep appealing to higher courts. This can be linked to the increase in monetary value of land, which can be linked to a growing search for formal win-lose resolution of land-related conflict. In addition, under the influence of increasing land values, in some Forum Island countries decision-making rights over land are themselves becoming sources of conflict, making it difficult to find appropriate customary decision-makers.

The number of local-level land-related conflicts is increasing in Forum Island countries, and as a result court-based conflict resolution mechanisms face significant backlogs. The 2006 Land Dispute Settlement Committee in Papua New Guinea found that the delay in dealing with land disputes led to disharmony, fights between clans and tribes, and an increase in crime (Oliver and Fingleton 2007(draft)). These backlogs are at least partially related to the proliferation of appeals as well as an increase in case load. However, some aspects of these backlogs may also be linked to the custom of avoiding confrontation and delaying decision making until a situation calms down (Hezel 2002).
On the one hand, customary conflict resolution mechanisms have many advantages: they are cheaper and quicker than courts. The inclusive and participatory nature of such processes and the fact that they draw on customary laws that are intricately linked to customary land tenure arrangements, can lead to more sustainable resolution of land-related conflict. On the other hand, there are few safeguards in place to prevent the abuse of customary conflict resolution by powerful actors and these mechanisms may disadvantage women disproportionately. Customary forms of governance, including customary conflict resolution mechanisms are changing. This raises questions as to the applicability of customary conflict resolution mechanisms.

State-based courts can ensure fairness and consistency in the resolution of land-related conflict but they can be costly, removed from the majority of people, and time consuming. However, there are examples of modified courts and specific land courts and tribunals where customary laws on land issues can be taken into account. Furthermore, as noted above, as the value of land increases and development leads to increasing individualisation, Pacific Islanders may increasingly prefer codified win-lose solutions. In addition, not all types of land-related conflict can be resolved through customary forms of conflict resolution, in particular where the parties are from different cultural groups.

**Designing local-level land-related conflict resolution mechanisms**

The differences between Forum Island countries in terms of land tenure and customary forms of land-related conflict resolution preclude ‘one-size-fits all’ statements about the most effective and efficient conflict resolution mechanisms. However, it is possible to draw on the overview presented here to outline a number of questions that are in need of consideration when designing or reforming land-related conflict resolution mechanisms in Forum Island countries.

As noted throughout this paper, Forum Island societies are in the midst of change processes that see essentially communal social structures incorporate elements of individualism. These change processes are taking place in different ways and at a different pace in each Forum Island country. They impact upon a number of matters relevant to the effectiveness and efficiency of conflict resolution mechanisms.
Firstly, although customary conflict resolution mechanisms can provide more legitimate, effective and efficient resolutions of local-level land-related conflict, changes are taking place in customary authority structures and in the nature of land-related conflicts that are occurring. The rise of land value and pressure to earn money raises questions as to the availability of neutral customary decision-makers. This complicates the search for a balance between impartiality and the need for knowledge of local land-related customs. Secondly, individualisation and monetisation can be linked to an increasing preference for win-lose solutions of land-related conflict, rather than settling for compromises in win-win solutions. This also impacts upon the usage of appeal processes.

The desired balance between impartiality and contextual knowledge, and win-win and win-lose solutions needs to be carefully thought through when considering the design or reform of land-related conflict resolution mechanisms, taking into consideration issues of cost and accessibility. The constant state of change of Pacific societies implies that land-related conflict resolution mechanisms may need to be revised periodically over time.

**Alternative Dispute Resolution**

Alternative dispute resolution is a label used for interest-based conflict resolution mechanisms such as negotiation (where a negotiation is reached between two parties without assistance), mediation (where parties reach a win-win solution with the help of a third-party who facilitates discussion) and arbitration (where a third party renders a solution). Alternative dispute resolution mechanisms were developed in the Western world as a result of an interest to broaden conflict resolution beyond litigation.

**Box 6.3: Conflict resolution by land officers: the case of East Timor**

Under the United Nations Transitional Administration of East Timor (UNTAET), a land conflict resolution model was introduced into the Land and Property Directorate. Land officers were trained as mediators and a set of guidelines for the mediation processes established, so that land officers can act as mediators in land disputes if all parties consent to such mediation. The mediators can facilitate interim agreements and commitments to non-violence pending resolution. Because the mediators are land officers, they can also suggest practical solutions
such as sale, lease, division or swap of land. This system has been successful in resolving a large number of potentially violent disputes and forms a bridge between customary forms of conflict resolution and the court system. On the other hand, it is only applicable to certain land-related conflicts, excluding a large number of conflicts where one party is the State, as well as many conflicts that cannot be resolved through mediation due to their complex nature related to the background of Indonesian occupation and the social tensions resulting from this.

Source: (Fitzpatrick 2007 (draft))

Faced with a growing case backlog, courts in Forum Island countries are looking to strengthen or renew the application of alternative dispute resolution mechanisms. Many court regulations already include provisions for the use of conciliation or mediation before litigation commences. In Papua New Guinea, the Land Dispute Settlement Act provides for two stages of mediation. The first stage is compulsory mediation by a land mediator. If settlement is unsuccessful, the dispute can be taken to a local land court. The local land courts can mediate a settlement of the dispute or impose a settlement through arbitration (Oliver and Fingleton 2007(draft)). In Vanuatu, the courts’ rules of procedure state that active case management by the court includes ‘encouraging parties to use an alternative dispute resolution procedure if the court considers it appropriate, and facilitating its use’. Similarly, Magistrate courts in Kiribati, Solomon Islands and Tuvalu include provisions to encourage settlement without the recourse to litigation. Samoa has recently passed new legislation to strengthen the use of alternative means to resolve disputes. In Vanuatu and Pohnpei, investigations into an expanded use of alternative dispute resolution procedures are also underway (Interviews in Port Vila and Pohnpei).

The Land and Titles Court in Samoa provides an interesting example of the role that can be played by the court registrar in assisting the settlement of land-related conflict without litigation. The registrar plays a crucial role in the settling of cases before they go to court, and a large number of cases get settled at this point. Personnel working in the Registrar’s office where land-related cases are first raised, are being trained in mediation, integrated with elements of customary conflict resolution (Interviews in Apia).

Justice Kandakasi, the chairman of the current Judicial Committee on Alternative Dispute Resolution in Papua New Guinea, has stated that mediation can be a mechanism for the resolution of land-related disputes, noting that there should be attention to the cultural context of
Mediation may not work if agreements reached are not considered binding. It is therefore important that either the mediated agreement is assumed to be binding or is brought before a court to be approved as such. In addition, if there are costs associated with mediation processes, disputants may opt for litigation to avoid the risk of having to pay twice.

There are thus similarities between alternative dispute resolution techniques and customary conflict resolution mechanisms in Forum Island countries but there are also differences between circumstances of communal and individually based societies. With careful consideration of these differences, alternative dispute resolution techniques, integrated with customary approaches to conflict resolution, could help to alleviate backlogs in Forum Island countries’ courts, including for land-related conflict.

**Escalation of large-scale land-related conflict**

Land has played a role as an underlying cause of large-scale violent conflict and crises in a number of Forum Island countries, most notably in the crises in Bougainville, Solomon Islands and Fiji. However, escalations into large-scale violent conflict and crises are complex. A number of different causes are invariably involved. This section draws mostly on analyses of the major crises in Bougainville, Solomon Islands and Fiji to describe how multiple causes come into play. Some of these causes other than land issues that have been important in the escalation of these major crises are described. The dynamics of mobilisation of grievances, the mobilisation of perceptions, and the difficulty of responding to conflict escalation at various levels have compounded land issues to lead to these large-scale violent conflicts and crises. These are outlined in turn.

**Multiple causes of large scale land-related conflict**

Large-scale land-related conflicts are never caused by one issue. Although land has played an important role as a cause of crisis and conflict in these three countries, disagreement over land
does not lead to larger-scale conflict by itself. Furthermore, once violence has been triggered, new and different dynamics may come into play to perpetuate large-scale conflict. A brief summary of the conflict on the island of Bougainville in Papua New Guinea clarifies this point (Box 6.4).

**Box 6.4: Conflict on Bougainville**

The conflict on the Papua New Guinea island of Bougainville has its roots in long-standing grievances surrounding the environmental, social and economic impacts of the Panguna mine. The benefits and jobs associated with the mine brought inequalities into a society which was based on strong egalitarian principles and the mine had major environmental impacts. Furthermore, there had been disagreements over the distribution of benefits of the Panguna mine that dated back to before Independence, intertwined with calls for greater autonomy or independence for the province. The mine and associated economic activity attracted large numbers of migrants from other parts of Papua New Guinea into Bougainville. These migrants, with different cultural backgrounds to the Bougainvilleans, were perceived to be assuming dominance in the informal sector and to be getting the majority of jobs in the mine.

What triggered the violence were inter-generational conflicts within landholder groups around Panguna Mine, operated by the company Bougainville Copper Limited (BCL) over the distribution of benefits. In the early 1980s, the Panguna Landowners Association had negotiated a new compensation agreement but this largely benefited the members of the PLA instead of society more broadly. The next generation of landowners saw few of these benefits and lost faith in the ability of the older PLA to obtain redress for the impacts of the mine. In 1987, a new PLA was formed and began to demand further compensation for environmental damage and the improvement of environmental protection. When BCL refused to acknowledge responsibility for some of the environmental impacts, the first attacks against the mine began to take place.

The deployment of the Papua New Guinea security forces, many of whom included people from other parts of Papua New Guinea, brought a new dynamic into the escalating conflict, with the Bougainville Revolutionary Army fighting a guerrilla campaign against these forces. In 1990 this led to the closure of the mine and the withdrawal of the security forces. Although a Bougainville Interim Government was established by the BRA, it was unable to control all the militias with access to weapons, some of whom began to run rampant in certain parts of the island. This, plus disagreements over whether Bougainville should secede from Papua New Guinea, in turn led to the establishment of the Bougainville Resistance Force (BRF). These dynamics led to many more years of conflict, and greatly complicated the peace process that eventually did get traction and led to an end of large-scale violence in 1998.

*Source: (Wilson 2007)*
The example of the crisis on Bougainville shows how many different causal factors come into play in the escalation of land-related grievances to large-scale conflict. Land-related grievances underlie many of the large-scale conflicts and crises in the region but these cannot be explained in terms of land-related issues alone.

Within the context of these broader crisis situations, local-level land-related conflict can become aggravated. On Bougainville, following the growth of *raskol* BRA gangs after the withdrawal of the PNG security forces, old conflicts over land or other issues were recalled and personal agendas were played out. Moreover, some of the *raskol* BRA used the power they had through their access to weapons and the absence of a strong State, to engage in criminal activities and worse. In these circumstances, neutrality was no longer an option. Many in the BRA took the view that you were either with them or against them. The BRA began to target highlanders and then in some places people who had been working for the Government, e.g. public servants, village magistrates and former army and police officers. Individuals that kept outside the fighting themselves used the BRA or the Papua New Guinea defence forces to execute opponents in more localised conflicts like land disputes (Howley 2002).

**Inequalities**

The roots of the conflict on Bougainville show how inequalities play a role in conflict escalation in a number of different ways. Inequalities in the distribution of benefits of the mine between the Papua New Guinea Government and the people of Bougainville were a long-standing grievance, and played a role in the escalation of the local-level conflict around the mine area, to a larger-scale conflict across the province of Bougainville. Inequalities also played a role in broader impacts of the mine on local communities. Benefits from the mine brought inequalities into a society that was based on communal values and principles of equality. Furthermore, with the influx of migrants to work in the mine profiting from its developments, inequalities in benefits between landowners and settlers (whether perceived or real) also played a role.

Since the end of the World War II, migrants from other parts of Solomon Islands, attracted by the capital and the opportunities for work in the plantations on Guadalcanal, had been steadily moving to Guadalcanal. Long-standing grievances over the influx of Malaitan settlers in
particular onto the plains of Guadalcanal and around the outskirts of Honiara were at the heart of the escalation of the Tensions in Solomon Islands in 1998. Land played an important role in these grievances. Much of the best agricultural land on Guadalcanal had been alienated from customary landowners through the establishment of oil palm plantations. Revenue from these ventures went mainly to the national Government and private companies. Coupled with weaknesses in the delivery of services by central and provincial governments, this meant that Guadalcanal landowners felt they saw few benefits from these developments. While the first of the Malaitan settlers obtained permission from local landowners, subsequent generations and expansion of settlements exceeded such agreements.

As pressures on land grew and Malaitan settlers were perceived to take up many of the employment opportunities, a younger generation of landowners began to resent these previous arrangements. The differences between the matrilineal customary land tenure on Guadalcanal and the patrilineal system brought by the Malaitan settlers, also played a role in these tensions, as some male members of the landowner group sold land to settlers without consulting the correct members of the hereditary line (Wilson 2007).

**Inter-group differences**

Differences between different ethnic, religious or ideological groups have been an important factor in the escalation into large-scale land-related conflict. In Fiji, land-related grievances are overlaid with differences between indigenous and Indo-Fijians to form the backdrop of a succession of coups. However, these are not the only inter-group differences that play a role in the crises in Fiji, as evidenced by this statement by Ratu Joni Madraiwiwi:

> We are a divided society, but the ethnic differences so often remarked upon by observers and lay people alike are but one aspect of the problem. To the ethnic divisions extant since 1879...we now have intra-ethnic differences most recently apparent in the Fijian community. The rural/urban divide, provincial loyalties, eastern and Western ties, professional and non-professional as well as chiefly and commoner interests have all played their part. These tensions are caused by the impact of change and modernity (Madraiwiwi 2001 cited in Boydell, 2001).
In Solomon Islands, cultural differences between Guadalcanal and Malaitan people overlapped with other issues to cause the clashes between Guadalcanal and Malaitan militias between 1999 and 2000. On Bougainville, the conflict between the BRA and the Bougainville Resistance Forces played out along the lines of older frictions between different groups. For example, despite having settled more than 100 years ago from Solomon Islands, tensions still existed between Torau people and their neighbours, the Nasioi. During the Bougainville conflict, the Nasioi suspected that the Torau could side with the Papua New Guinea army and join the resistance against the BRA (Howley 2002).

Inter-group differences can be expressed along the lines of religion, ethnicity, regional identity or ideology. Despite the importance of inter-group tensions in the escalation of conflict to large-scale violence, it is important to stress that inter-group tensions alone do not lead to large-scale violence. The co-habitation of different groups of people does not in itself lead to large-scale conflict. Furthermore, group identities can change as tensions rise and positions become more polarised. In Solomon Islands, different clan groups joined together for a period of time to form Guadalcanal and Malaitan militias. However, after the Townsville Peace Agreement, these groups reverted to more localised group identities.

Alienated youth

Young men who are unemployed and estranged from traditional community social structures can be drawn into gangs or militias in large-scale conflict. An observer of the escalation of the Tensions in Solomon Islands describes the beginnings of the Isatambu Freedom Movement as follows:

…It quickly became a popular young people’s movement on Guadalcanal. It began with almost a sense of excitement that harnessed the energies of a lot of disenfranchised young men from the villages. For the group aged between 14 and 30, who had little status within the village, little education or stimulating work prospects, IFM [Isatambu Freedom Movement] provided a common cause behind which to unite (Carter 2006).

Under-educated and alienated youth also played a role in the escalation of conflict on Bougainville. They played a role in growing criminal activities in the lead up to the conflict in
the 1980s and formed a large part of the Bougainville Revolutionary Army fighters (Regan 1998).

The Bougainville experience demonstrates that escalation scenarios of large-scale land-related conflict are multi-causal. Inequalities, inter-group differences and alienated youth are some of the other factors that play a role in the escalation to large-scale conflict. Therefore, efforts to prevent such escalation need to take into account a broader set of issues than land only and are therefore better placed within a broader framework for conflict prevention.

**Dynamics of escalation into large-scale land-related conflict**

The dynamics of escalation into large-scale conflict are conflict specific and often very complex, and a result of several different forces and factors, some unrelated to land, coming together and underpinning the mobilisation of long standing grievances.

**Mobilisation of long-standing grievances**
Land-related grievances appear in virtually all Pacific Island countries. In themselves, they do not escalate automatically into large-scale conflict. It is the building up of grievances over time and their mobilisation that can play a role in conflict escalation.

The mobilisation of the grievances outlined above played an important role in providing a trigger to the uprising of the Guadalcanal Revolutionary Army (GRA) in Solomon Islands in late 1998. Although the exact circumstances remain contested, a speech by Guadalcanal Premier Alebua in November 1998 is widely cited as the turning point. Demanding compensation for murder of Guadalcanal people and for the use of Honiara as the capital, Alebu’a’s speech contained references to ‘general feeling of unrest steaming throughout the province’ and was seen as threatening violence (Fraenkel, 2004: 45).

The role played by the mobilisation of long-standing grievances in the escalation of large-scale land-related conflict suggests that it is important to address long-standing land-related grievances related to land before they have a chance to escalate. In addition, such mobilisation could be
countered by the raising of awareness as to how this has occurred in the past, so as to prevent its occurrence in future.

**Mobilisation of perceptions/lack of information**

Because of the emotional nature of the topic of land for many people in Pacific Island countries, perceptions of land-related issues can be as, if not more, important than facts in conflict dynamics. The case of Fiji provides relevant examples (Box 6.5).

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**Box: 6.5 Mobilisation of perceptions regarding land matters in Fiji**

In Fiji, there are perceptions that Indo-Fijians are wealthier, that part of this wealth is derived from agriculture on land that is leased from indigenous Fijians, and that in return inadequate rents are being paid. There are a number of different points of view as to the rental arrangements under the ALTA legislation, with some arguing the rent is too low, others pointing to the fact the NLTB has not collected all land rental payments, and yet others focusing on the fact that it is the distribution of rent among the landowner groups that results in the impression of low rents among landowners.

The perceptions of inequality are linked to perceptions that indigenous Fijian rights will be threatened if Indo-Fijians dominate in Government. Politicians have mobilised particular aspects of the land rental debate and people’s fear of political dominance for many years. For example, the SDL-led Government has often highlighted the opinion that lease payments under ALTA are the lowest in the world and have therefore systematically impoverished Fijian landowners. Observers have also pointed to the politicisation of these issues by the Taukei Movement as underlying the demonstrations in Suva and consequent coup in 1987. In 2000, the same perceptions were mobilised by various indigenous Fijian leaders as a reaction to land reform proposals by the Chaudhry-led Government.

*Source: (Kabutaulaka and Rokolekutu 2007: Fiji Case Study; Wilson 2007: Fiji Case Study)*

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The role played by the mobilisation of perceptions in the escalation of large scale land-related conflict suggests that it is important to counter such perceptions by the provision of accessible and accurate information on matters pertaining to land in Forum Island countries, as well as specific awareness raising initiatives to counter the mobilisation of such perceptions.
**Difficulty of responding to escalating conflict**

The escalation scenarios of the conflicts on Bougainville and in Solomon Islands show that, once conflict related to land begins to escalate, it can be challenging for Government to find responses to such escalation, both from police forces and through customary means. For example, the response by the Papua New Guinea security forces to the initial unrest started by Francis Ona’s group on Bougainville has been cited as being partially responsible for the escalation of this conflict, which was mainly about the Panguna mine, into a wider conflict which came to incorporate calls for secession. Instances of human rights abuse and the fact that many Defence Force personnel were from the Papua New Guinea Highlands, added to the ethnic character of the conflict and rallied support behind Ona (Regan 1998).

In Solomon Islands, early efforts to halt the eviction of settlers from the Guadalcanal plains culminated in a public reconciliation held in May 1999 at the cultural village in Honiara. Village elders from Malaita and Guadalcanal exchanged customary gifts. But they each spoke in different local languages, and it was the Government that provided the cheques that were handed over by both sides. Customarily, the exchange of gifts provided by each side is a fundamental to customary conflict resolution practices (Fraenkel 2004).

The multiplicity of causes of the escalation of large-scale conflicts and the difficulty of responding to the escalation of conflicts, suggests the strengthening of wider responses to escalating conflict is better placed within a broader framework for conflict prevention.

**Concluding remarks**

Prevention of large-scale land-related conflict entails two aspects: the more effective resolution of local-level land-related conflict, and the prevention of escalation itself.

A spectrum of interventions exist to resolve local-level land-related conflict, ranging from communication and facilitation processes between the actors involved in such conflicts, to customary forms of conflict resolution, to introduced (court-based) conflict resolution mechanisms.
The escalation scenarios of large-scale land-related conflict are multi-causal. Inequalities, inter-group differences and alienated youth are some of the factors that play a role in such escalation. Therefore, efforts to prevent such escalation need to take into account a broader set of issues than land only and are better placed within a broader framework for conflict prevention. Similarly, the difficulties of responding to the escalation of conflict suggest the importance of strengthening responses to escalating conflict. This is a broader issue than land only and is therefore better placed within a broader framework for conflict prevention.

**Key lessons**

- The prevalence of deflection away from the underlying issues in local-level land-related conflict points to the importance of investigation into the root causes of these conflicts.

- The differences between Forum Island countries in respect of land tenure and customary forms of land-related conflict resolution precludes one-size-fits all responses about the most effective and efficient conflict resolution mechanisms.

- The balance between impartiality and contextual knowledge, and win-win and win-lose solutions, needs to be carefully thought through when considering the design of land-related conflict resolution mechanisms. These questions, in turn, need to be balanced with considerations of cost and accessibility.

- The constant state of change of Pacific societies implies that land-related conflict resolution mechanisms may need to be revised at various points in time.

- Alternative dispute resolution techniques, integrated with customary approaches to conflict resolution, could help to alleviate backlogs in Forum Island Countries’ courts, including for land-related conflict.

- The role played by the mobilisation of long-standing land-related grievances in the escalation of large scale land-related conflict suggests that it is important to counter such grievances before they have a chance to escalate. The mobilisation of long-standing land-
related grievances could be countered by the raising of awareness as to how this has occurred in the past, so as to prevent its occurrence in future.

- The role played by the mobilisation of perceptions in the escalation of large scale land-related conflict suggests that it is important to counter such perceptions by the provision of accessible and accurate information on matters pertaining to land in Forum Island countries, as well as specific awareness raising initiatives to counter the mobilisation of such perceptions.
Chapter 7: Strengthening Administration of Customary Land

A necessary condition for increasing access to customary land for economic purposes, and minimising local-level conflicts, is an effective and sustainable land administration mechanism that is based on customary land tenure systems strengthened to meet commercial requirements and linked with the formal land administration systems managed by the State.

As discussed in chapters 3, 4 and 5, there are significant areas of customary land and formal land administration systems that need particular attention. Governments have a major role to play in addressing these challenges by identifying the broader vision and policy on customary land use and management and strengthening the land administration system, linking customary and introduced systems supported by robust legislation, and ensuring appropriate information is available about customary land, land dealings and market information. Targeted capacity development of landowners, investors, and Government agencies is an integral aspect of strengthening the administration of customary land, as discussed below.

National land policy

The strengthening of customary land administration must occur in the context of broader national development and be guided by a national customary land policy. In the past, often externally funded aid projects have tackled land issues on an ad hoc and piecemeal basis, without tackling the core issues surrounding customary land in a systematic manner. At the same time, some adjustments have occurred through informal, extra-legal agreements at local-level (accessUTS 2007). It could be that sensitivities surrounding customary land, particularly because land has often been at the core of politics in the region, have discouraged governments and politicians to address customary land matters systematically through the development of new customary land policies. To overcome such sensitivities over land, consultative and inclusive processes are an important step towards a common understanding of issues and concerns, and towards the agreement of a framework for reforms in land administration.
The development of a national land policy would ideally precede any improvements made to the land administration systems. Governments, through their land policy, would indicate the broad outcomes expected from their reforms of the customary land administration in the context of national development goals. It is at this stage that the dual objective of improving access to land for economic development and conflict minimisation would be emphasised. The national land policy, linked to national development goals, would also guide strengthening of the land administration in a systematic manner.

**Strengthening the role of Government**

Governments play other roles in support of land use and land management, which need to be improved and strengthened. In most countries, responsibilities for land administration (Box 7.1) and land management are spread across a number of different Government agencies, supported by different pieces of legislation, but often operating independently without much coordination or harmonisation.

**Box 7.1: Government’s traditional role in land administration**

Provide a national land development and management framework

- Record and register customary land and maintain and update Register of Land Titles.
- Formulate and implement land use plans to guide development.
- Land valuation and land taxes.
- Land survey and mapping.
- Execute formal land lease and related consent process requirements, and enforcement of lease conditions.
- Maintain Register of leases.
- Provide for land dispute resolution, including through mediation, arbitration, courts
- Maintain robust land information system.

*Source: Adapted from (Lunnay et al. 2007): Attachment 7*
In Samoa, for example, there are at least four pieces of legislation that deal directly with land registration, alienation or taking of land, and adjudication of disputes over titles, not to mention at least two others that mainly deal with land use and environmental management. In Vanuatu, there are 11 different pieces of legislation, and five different departments are organised under two ministries that deal with land administration and land management. In addition, there is a provision in the Constitution for the National Council of Chiefs (Malvatumauri) to play a role through its ‘general competence to discuss all matters relating to custom and tradition’, and the 2006 National Council of Chiefs Act identified the Council’s role to include registering of Island and Urban Councils of Chiefs, chiefs being the main dispute settlement authorities under the 2001 Customary Land Tribunals Act (Lunnay et al. 2007).

Overlapping responsibilities and/or uncertainties over the roles of different institutions present major problems for rational, fair and sustainable land administration (Fingleton et al. 2007(draft)) and (Council of Regional Organisations (CROP) 2005). With such a distribution of responsibilities across agencies, there is, as noted by (Lunnay et al. 2007), ‘a need for clear demarcation of responsibilities, and clearly defined administrative procedures, without which there will be confusion and a high probability that administrative arrangements and enforcement activities will not be undertaken’.

There are other key administrative and institutional concerns raised in the Pacific, as summarised in Box 7.2, which must also be addressed when strengthening customary land administration.

**Box 7.2 Key administrative and institutional constraints to effective administration of customary land for efficient economic development**

- Overlapping roles and responsibilities across Government agencies.
- Lack of clearly defined responsibilities for numerous administrative activities and structures.
- Limited capacity in Government land administration systems.
- Ineffective regulation of land dealings and or non-existent enforcement of regulations.
- Inaccurate interpretation of Government legislation.
• Failure of Government to protect interests of customary owners and the public at large.
• Too much Government Ministerial discretion.
• Limited capacity to quickly resolve disputes over land titles, customary land, including through legal mechanisms such as Land Courts.

Source: (Lunnay et al. 2007); (Pacific Islands Forum Secretariat 2001); (Government of Vanuatu 2007); (National Research Institute 2006); (Council of Regional Organisations (CROP) 2005)

On a practical level, Government agencies are, as discussed earlier, heavily constrained by limited numbers of appropriately trained staff to deal with customary land tenure. At times, good legislative mechanisms may be in place but without appropriate financial and human resources available to Government agencies implementing those instruments. As a result little progress can be made, as was experienced in Papua New Guinea with the ILG Act. Limited financial and human resources meant Government officials could not reach out to the many landowners, who had poor education and in many cases were also illiterate. Thus the impact of the ILG Act was far from what had been expected (Power and Sullivan 2007 (draft):19).

In the past, efforts to strengthen natural resource management, including land, have been attempted on a piecemeal and somewhat ad hoc basis (Council of Regional Organisations (CROP) 2005). Such projects have included training of Government officials, strengthening existing information systems, or reviewing legislation related to customary land. While such efforts have had some impacts, they have not produced the level and scale of results that could be achieved if they had been implemented in a coordinated and appropriately sequenced manner, and explicitly linked with customary land tenure arrangements. At the same time, it is recognised that such reforms cannot all be undertaken simultaneously. Thus there is a need for countries to identify the overall national land policy and then map out strategy/strategies to achieve the overarching goal of land reform, and identify prioritised programmes of initiatives to implement those strategies.

Before attempting the strengthening of land administration systems there is a need to identify key strengths and weaknesses of current customary and formal land administration arrangements and gaps/areas that need strengthening. It is also important to undertake a technical assessment of previous land reform efforts to establish what has worked and what has not, and why.
Strengthening conflict resolution institutions

Recognising the importance of customary dispute resolution mechanisms, it is important to nurture customary processes and to treat customary dispute resolution processes and introduced conflict resolution mechanisms as a continuum (Corrin 2007(draft); Oliver and Fingleton 2007(draft)). Creating a legal space for customary processes will also help provide continuity and link the customary system with the introduced system, ensuring that key stakeholder groups, including women representatives are also part of the process, as has been done in Samoa (Corrin 2007(draft):14). It could also help encourage cases to be resolved amicably at the local-level and reduce the number of cases that are taken to the court system, which often is costly, time consuming and produces ‘win-lose’ outcomes.

Key elements of institutional strengthening that may be pursued are: clearly specifying the types of conflicts that must be taken to customary resolution processes before the formal court system could be accessed; creating a specialist unit or institution within the Government with specialised expertise in customary land matters to support an inquisitorial approach to conflict resolution that seeks win-win solutions; providing access to information on customary land conflict situations and past dispute resolution decisions and outcomes; and providing ongoing training and support for administrators and arbitrators. Before attempting to strengthen the system, it is important to understand the role customary and introduced processes play in land-related dispute resolution, their strengths and weaknesses and how the nexus between the two processes can be strengthened cost effectively.

Strengthening land information systems

Customary land use and management is significantly constrained by the presence of poor and often incomplete information. Overall, there is a lack of information about customary landowning groups and about formal rules and regulations pertaining to land. In many Pacific Island countries, there is a lack of access to such information in communities and among landholders. In the context of economic development of land, the presence of asymmetrical
information between landowners and the investors can result in landowners negotiating land lease arrangements that may not provide a fair return on their land. The presence of poor information can also lead to misunderstandings and miscommunications that can cause conflict. A lack of information causes issues of transparency that could play a role in causing divisions and possible tensions within landholder groups. In addition, as outlined in chapter 6, the manipulation of misinformation and associated land-related fears can play a major role in the escalation of larger-level conflict and crises.

**Strengthening and maintenance of customary land records**

As discussed earlier, recording of customary land groups and their areas of claim is critical if commercial use of customary land is to be facilitated. In addition, it was noted that recording efforts should also include the documentation of customary laws used to identify and define LOU membership, use rights, the authority to engage in commercial land dealings and other roles of LOU members, including women, in land dealings. Countries would need to create centralised customary land information that includes such details.

Recording and registration of customary land groups is important but its value can only be realised when the appropriate records are kept up to date, the integrity of the customary land register is maintained, including safe keeping, and the records are publicly available for consultation. In the Pacific, records are often poorly kept and often hard copy files are found to go missing. In Papua New Guinea, for example, it is reported that the Registrar of Titles has little or no control over access to, and movement of, files; indeed at times files have been removed from the Government premises (National Research Institute 2006). Sometimes official record keeping may itself be unsafely maintained and exposed to high risks of getting damaged. At times customary land dealings are not maintained when transfers have occurred either through bequeathing or informal land leasing. In Fiji, for example, where a formal land registration and land administration system has been in place for over half a century, customary dealings in land are not recorded nor does the land information system include data about informal vakavanua type of land dealings with non-members.
Even where good information is available, this information has often been difficult to access for the general public. Misinformation can become subject to manipulation for personal agendas, as evidenced in the case of Fiji (Lal et al. 2001; Lal and Reddy 2003; Kabutaulaka and Rokolekutu 2007). Poor administrative arrangements can undermine respect and confidence in the Government’s ability to guarantee correct records of customary land records, and can also become a source of frustration for potential investors.

**Other types of customary land information**

An assessment of land information systems suggests that apart from gaps in customary land tenure data discussed above, there are significant gaps in other types of information regarding customary land (McIntyre 2007). Where land-related data does exist, it is sector focused and often scattered across several different agencies. Where there is useful environmental and biophysical information, much of it is in various forms, at various levels of detail or of questionable integrity.

Where good models of land information systems (LIS), such as Geographic Information System (GIS)-based land information systems have been established in Forum Island countries, these may not cover customary land. Many LIS systems concentrate on the small percentage of State lands and/or the small percentage of alienated private land.

Thus while information systems have been developed over time and may be consistent with global practices, these systems (e.g. land survey, registration and management) have not generally been applied to customary land and where applied, the geographical coverage was small. One of the reasons for this has been the difficulty in integrating Western notions of property rights and customary practices (McIntyre 2007). Also, while efforts have been made to develop country specific GIS, these have not fully reflected the different types of data or captured the needs of potential users (McIntyre (2007).

Even where the different LIS exist, different databases are scattered across different Government agencies and/or statutory bodies, and are not harmonised, linked or integrated. There is good information, for example, available in Fiji with the NLTB about customary landowning groups,
their land claims, as well as membership of each landowning group. The Lands Department holds cadastral information and the Ministry of Agriculture, Sugar and Land Resettlement maintains information about soils and land use suitability. The Fiji Sugar Corporation maintains farm level production data, while the Sugar Industry Tribunal maintains farmer and land lease information. However, none of these were harmonised until a recent ACIAR project that generated a Sugar-GIS Database, integrating geo-referenced social, economic, cadastral datasets and used in policy analysis and advice (see Lal and Rita 2005; Lal 2005). Having produced the integrated information system, its use has, however, been limited because of limited capacity to make effective use of the information in land lease negotiation or to address key land-related policy issues.

A good GIS has the potential to integrate different layers of information, including geo-referenced information about customary landowning groups and their land claims, based on social mapping, air photographs, satellite imagery and cadastral mapping. Such integrated information can assist in the reduction of transaction costs and reduce the scope for local-level land-related conflicts. Such information can also help to address many land use and management issues, including land rent negotiation, and help resolve local-level conflict between landowners and investors (Lal. et al. 2002). When combined with other types of biophysical and economic information, GIS-based customary land tenure information can also help land use planning, and increase effective and efficient use of limited natural resources.
Land use planning

Land use planning has an important role to play in guiding activities according to land use suitability assessments that reflect biophysical, social, environmental and economic characteristics. It also helps maximise economic benefits from limited resources by directing particular uses to those areas most suited to them. While land use zoning is generally the norm in urban land management to define areas for public, residential, light industrial or industrial use, detailed land use planning for rural land is not common.

In many countries, some broad ‘zoning’ of land into sectors such as agriculture, forestry and mining, largely based on biophysical characteristics, has been undertaken and in many cases, land administration efforts have focused on technical aspects specific to that sector (McIntyre 2007). Thus, in the forestry sector, the focus has been on approval of forest concessions and technical production and environmental aspects of forest management, with little attention being given to community/landowner based forestry development or policy dimensions to maximise and sustain economic benefits to the landowners (Council of Regional Organisations (CROP) 2005).

There is, however, a growing interest in developing land use policy in the region. Currently, only Fiji has produced a land use policy for its rural areas, essentially from a broad zoning perspective. There also has been some effort to adopt a community-based approach to help landowners undertake land use planning of their own lands, such as in the Drawa project in Fiji, implemented by the German Technical Cooperation (GTZ) and the Secretariat of the Pacific Community.

Among the lessons learnt from community based land use planning are: stakeholder involvement helps to ensure that policies, programmes and projects respect local cultural values and reflect needs identified by the landowners; participatory processes help generate a common understanding of the motivations and incentives of different stakeholders; and good biophysical information together with good customary landownership information is critical in supporting communities with their land use planning. The Drawa project also highlighted the need to have a community-based organisational structure that facilitates and safeguards the interests of
landowners in planning, and internal dispute resolution mechanisms built into the project design so that disputes can be addressed at early stages in the planning process (Manley 2007). It is recognised that while land use planning is desirable, a comprehensive nation-wide land use planning exercise is not practical. Instead it is important to adopt a pragmatic and systematic approach to land use planning and zoning of customary land in areas of high demand.

**Capacity development**

To increase equitable development of customary land and minimise local-level conflicts, targeted capacity development of customary landowners, outside investors, as well as Government agencies is important.

**Landowners**

Increased landowners’ understanding of issues such as the requirements for successful commercial use of customary land; roles, responsibilities and restrictions associated with leasehold arrangements and market rents; and the relationship between premiums, annual rent and returns to land, could help reduce transaction costs as well as minimise scope for conflicts. Absence of a clear understanding of customs and customary decision-making processes, property rights, roles and responsibilities, and formal and customary laws governing customary land, can also become a fertile ground for manipulation by different political interests.

Community education in all aspects of customary land tenure, land recording, registration as well as record keeping is critical if misinformation, deliberate or otherwise, and local-level conflicts are to be avoided. Other aspects of landowner training could also include training about transparency and accountability and other aspects of good governance, key aspects of financial management, and workings of a trust. Targeted training of local mediators in mediation skills can support customary level dispute resolution mechanisms.
**Investors**

Increased awareness among outside investors about customary land tenure and the decision-making processes involved can help appreciate the need to establish appropriate relationships with landowners when negotiating land dealings.

**Government officials**

It is well documented that land administration throughout the Pacific is constrained by a lack of appropriately trained people in technical subject areas – cadastral surveying and mapping, land valuation, land use planning, real estate and geomatics covering subjects such as remote sensing, GIS (Lunnay 2007 (draft)) and economics and policy analysis. Also needed are people trained in financial management of customary land, including institutional design of trusts to minimise rent seeking behaviour and principal agent problems. Strengthening of integrated policy analysis and land use planning and management at all levels, reflecting the integration of the three pillars of sustainable development, are also important. In addition to technical training, Government agencies also need to be trained in social aspect of customary land tenure. Land administrators, who are usually trained in the Western tradition of land administrators, are seldom trained in social and cultural aspects of customary land. Because social and cultural issues are paramount in customary land dealings in Pacific Island countries, the capacity of land administrators in social issues needs most urgent attention. Among such social issues are a better understanding of customary land rights vis-à-vis Western notion of property rights, and mediation skills.

Such capacity development activities could take several different forms, including professional technical training at undergraduate and postgraduate levels, short courses in key specialised areas and/or ‘hands on’ training provided in country as part of land administration project on institutional strengthening.
Concluding remarks

The strengthening and integration of customary land tenure systems and formal State-managed land administration systems, supported by a robust customary land information system, is necessary to improve access to customary land for economic use by landowners and outside investors, while also minimising the potential for local-level conflict.

Key lessons

National Land Policy

- Governments need to develop a stakeholder based national land policy linked to national development goals to provide a broader development context for customary land reforms. Consultation and active participation by all stakeholders in the negotiation of leases is crucial to ensure their acceptability, ownership and to minimise the opportunity for future disputes.

Strengthening the role of Government

- Strengthening of customary land administration must include clear demarcation of responsibilities between Government agencies and between Government and customary landowners and clear and streamlined land administration procedures for recording and registering of customary land, customary land lease negotiations and recording of lease arrangements.

- The nexus between customary and introduced decision-making processes and customary dispute resolution processes and introduced conflict resolution mechanisms must be strengthened if improved access to customary land is to be realised and local-level conflict minimised.
**Strengthening land information**

- It is important to establish and maintain a customary land information system that includes accurate and up to date information about the identity of landowner groups, their land claim, land use, local customs and decision-making processes to underpin land dealings.

- Governments must provide a national framework for the systematic development of robust Geographic Information Systems (GIS) based customary land information systems.

- Governments should make available robust and accurate customary land information, preferably in GIS, to end users, the landowners and other stakeholders in an appropriate form to support them in land dealing negotiations, and land use and management decisions, and conflict resolution.

- Governments should adopt a pragmatic and systematic approach to land use planning and zoning of customary land in areas of high demand.

**Capacity development**

- It is important to provide targeted training programmes for landowners in relation to customary land tenure, commercial use, and financial management.

- It is important to strengthen the understanding of potential investors of customary tenure systems, customary laws and decision-making processes and formal land leasing processes.

- It is important to strengthen the capacity of Government agencies in technical land administration and land management, policy analysis skills and tools as well as in social aspects of customary land tenure and mediation skills.

“There can be no peace without equitable development and there can be no development without sustainable management of the environment [land] in a democratic and peaceful space .... Without [also] good governance there can be no peace.”

- Prof Maathai, 2004 Nobel Peace Prize Winner.

Equitable economic development and social harmony are integrally dependent on each other in an increasingly globalised world. Land and oceanic resources are ‘owned’ by customary groups but individuals have use rights based on cultural relationships. Land defines people’s social, spiritual and cultural as well as political relationships. Traditional access to and use and management of land is closely tied to the social fabric of communities, and customary tenure defines not only the nature and scale of economic development but also social harmony.

Globally, there is a slow but gradual recognition of the close ties between use and management of land and social harmony. It is also acknowledged that land tenure reforms for the purpose of increasing economic growth cannot be achieved without simultaneously taking into account social and cultural aspects of land. The full involvement of all stakeholders in such processes is paramount. Similarly, peace and social harmony cannot be assured without understanding human needs and aspirations. An OECD workshop in 2004 noted that ‘to sustain peace, land reform must succeed both in terms of meeting claims and in enhancing agricultural growth’. (OECD 2004: 12).
This statement equally applies to the Forum Island countries. Putting together statements made by the Pacific Islands Forum Leaders and Ministers over the last decade and half, it is evident that to realise the Leaders vision for ‘a region of peace, harmony, security and economic prosperity….’ (Pacific Islands Forum Leaders Communiqué 2004) countries must recognise the centrality of indigenous rights and customs and the special relationship of indigenous people to their land and the usage of land (as was noted by the FEMM 1994).

The recognition of the dual focus on economic development and social harmony is even more important in rapidly changing environments in the Pacific, where processes of globalisation and modernisation are accompanied by changes in socio-cultural order, affecting individual values, goals, and social norms. Such changes are causing a fundamental shift from egalitarian and communal lifestyles, to lifestyles where there is a greater emphasis on individual economic wealth accumulation. These shifts are at the heart of land-related based conflict in the region.

Ignoring this context in land reform processes can seriously undermine land reform efforts. Recent experiences in the region have demonstrated that a focus on the registration of customary land alone cannot promote economic development. It can actually become a source of conflict unless attention is also paid to improving formal land administration systems, and the adaptation of, or harnessing of, customary rules, norms and decision making processes. Attention needs to also be paid to the issue of benefit sharing between landowners and investors, as well as among landowners themselves. It is also clear that land-related conflict cannot be minimised without also addressing the economic needs and aspirations of people. Finally, the importance of the availability of, and access to, accurate information by all stakeholders cannot be overemphasised.

In the light of growing concerns over constraints faced by customary landowners in using their land as collateral for raising loans for commercial uses, as well as the difficulties faced by investors when customary tenure and rules governing customary land are unclear, Forum Island countries have recognised the need to review their policies, customary practices and formal land administration and land management processes. Many countries have in recent years attempted to address land issues by focusing on either the economic or conflict related aspects of land, but rarely both. Given the sensitivities surrounding land, very few countries have taken steps to openly discuss these issues and to find a way forward that reflects such a dual focus.
The way forward

Evolutionary changes in customary land tenure and the strengthening of land administration and formal leasehold systems are, given the continued social importance of customary land, likely to be more acceptable than ‘revolutionary’ changes such as privatisation where group ownership is replaced by individual property rights.

Customary land issues are context-specific and reflect local and national social, economic, cultural and political circumstances and dynamics. As a result, there is no one model solution that can be applied across the region. However, although the specificity of land issues will differ between or even within countries, there are many similarities. Similar groups of actors and stakeholders are involved and there are common drivers of poor economic growth and conflict and there are some common core causes and processes through which economic and social effects are manifested. Thus, while specific solutions will be designed to suit specific social, cultural and political circumstances associated with particular land issues, countries face many common challenges which could be addressed using common approaches.

Challenges

A recapitulation of the key common challenges is provided below and guiding principles to address these challenges are identified.

Stakeholders and decision-makers

Stakeholders in land issues throughout the region include customary landowner groups, individual landowners, lessees, the State, and external investors, each with their own interests in land. The relationship of landowners with land, and with each other, is prescribed by custom and customary tenure and the relationship with investors is defined by the interaction between customary tenure and formal land administration. Both the customary land tenure and land administration systems are under pressure for reform to allow for increased wealth generation. Customary land reform is also the focus of attention because of concerns about equitable sharing.
between landowners and investors and between landowners within the LOU, increased transparency and accountability of decision made by authorised persons and minimised land-related conflict. Decisions that result in inequity (perceived or real) between landowners and investors, landowners and the State, or between landowners, can become sources of conflict, which when fuelled by political and other interests may escalate into national-level conflicts, which in turn further affect economic development.

**Clarity over customary land tenure, group ‘ownership’, membership and decision-making authority**

At the core of the poor economic use of customary land by landowners and external investors is the disjoint between the group ‘ownership’ of customary land and the individual property rights requirements for commercial use of land. In addition, there is a lack of clarity, and in some cases, uncertainty around the processes used to identify members of landowning groups, including those with representational and distributional authority. Further, cultural and formal rules are often not clear about members of landowning units accessing their own land on an informal basis, and informal arrangements may not be compatible with the requirements of commercial dealings.

**Leasehold conditions and inequity**

Leasehold arrangements, with clear specification of conditions, including market-based returns to landowners (land rent), duration, conditions for renewal, and compensation for improvements on expiry, can encourage optimal economic use of land. However, in the presence of asymmetric incomplete information, they can also become a source of inter-generational conflict among landowners. Landowners may not know the economic value of their land at the time of entering into a lease agreement, and among subsequent generations, this may become a source of conflict, which in turn may discourage other investors. Even where the State has acquired land for public purposes, inadequate compensation and lack of due process can be a source of conflicts.
Inequitable benefit sharing – group ‘ownership’ and decision-making authority

Inequitable sharing of returns among members of landowning groups can be traced to the nature of customary land tenure, and decision-making powers. Often in such traditional systems, the authority to make decisions rests with key individuals but they may not always make decisions in the group’s interests. Instead, with changing values and lifestyles, individual interests may override traditional group responsibility, which can become a source of contention among landowners. Local-level conflict may then arise.

Asymmetric information and benefit sharing between landowners and investors

Asymmetric information available to landowners within a LOU and between landowners and outside investors can result in the inequitable distribution of benefits from land development. If such inequity is allowed to persist, it can become a source of tension and local-level conflict. Local-level conflict, when manipulated for political or personal gain, may escalate into large-scale conflict.

Customary land tenure and disjoint with introduced land administration system

Such issues are further exacerbated by land administration systems that do not fully reflect key characteristics of customary land tenure systems. Efforts have made to improve land administration systems established during colonial periods, including recording and registration of customary land and land lease arrangements. However, often only incremental changes were introduced, and these have mostly not considered the relationship between introduced land administration systems and customary land tenure, or the nexus between economic development and land-related conflict. Also the role of Government may not be clear where dealings in customary land are concerned, which itself may become a source of tension and conflict. Where
governments play facilitating roles, this too needs further strengthening to reflect the customary land tenure system.

**Local-level conflicts and escalation into larger-scale conflict**

Most countries face challenges in resolving local-level land-related conflicts. The appropriateness of customary conflict resolution mechanisms is changing in an environment of modernisation, and there is an increase in the use of court-based processes, which can be costly and time consuming. No single conflict resolution mechanism can be applied across the region. Different combinations of customary and introduced conflict resolution mechanisms may be required, depending on local contexts.

**Strengthening the administration of customary land and conflict minimisation**

An effective and sustainable land administration mechanism linking customary land systems with formal land administration systems managed by the State is essential if improved access to customary land for economic purposes and minimisation of local-level conflicts are to be achieved. Similarly, mechanisms to resolve local-level land-related conflict can be strengthened by finding an appropriate balance between customary and introduced conflict resolution processes. Such improvements must reflect basic principles of accountability and transparency at all levels of Government and within landowning groups.

Key areas of customary land and formal land administration systems that need particular attention include recording and – where demands for land are high – registration of customary land; recording of customary laws, including inheritance rules, decision-making authority and processes to obtain group consensus; and the clear demarcation of the role of Government and customary landowners in land dealings. The availability of appropriate information needs to be improved to support customary landowners to effectively engage in land dealings and negotiate land lease arrangements that provide fair and equitable returns on their land, and to prevent the mobilisation of (mis)perceptions and (mis)information, which can lead to conflict escalation.
Specific solutions and institutional design pertaining to land issues will however need to be ‘home grown’, to reflect local aspects of customary land tenure. These aspects are different in each country, and can even vary within one country, depending on local and national social, economic, cultural and political conditions and dynamics. Some common key lessons from the region and abroad are summarised in Attachment 2.

**LMCM Guiding Principles**

The principles outlined below are intended to provide member countries with a framework within which to discuss country-specific matters of land reform. These principles are consistent with the principles set out in the Biketawa Declaration (Forum Leaders 2000) and the Forum Principles of Good Leadership (Forum Leaders 2003), and also build on the Forum’s Potential Guidelines for Good Land Policy (FEMM 2001).

The guiding principles when considered together with the implementation framework that follows, will guide the identification of strategies to bring about desired reforms in customary land administration and management.

The improvement in land-based economic development while minimising land-related conflict, entails the following two closely intertwined dimensions:

A. The improvement of customary land administration and land management to facilitate economic use of customary land while minimising local-level land-related conflict; and

B. The improvement of land-related conflict resolution mechanisms for local-level land-related conflict and the prevention of escalation of land-related grievances into large scale conflict.

In addition there are a set of principles that are applicable to both dimensions:

C. The role of Government, information and capacity development.
A. The improvement of customary land administration and management to facilitate economic use of customary land while minimising local-level land-related conflict

**Principle 1:** Customary land policy reforms should respect and protect customary ownership and individual use rights as defined by social relations and customary laws.

**Principle 2:** Customary land reform efforts should be placed in the broader context of national development goals, recognising that there can be no security without equitable development and that optimal economic development cannot be realised without an enabling social and political environment that also promotes democratic and peaceful existence.

**Principle 3:** Customary land reform efforts should be based on the recognition that Pacific societies are in a State of flux, with changing needs, values and aspirations of people as a result of modernisation, global integration and imperatives of the cash economy.

**Principle 4:** Active participation of customary landowners and other stakeholders in customary land management efforts is essential if nation-wide ownership of the process and outcomes is to be secured.

A nation-wide or incremental approach to customary land reforms should be guided by a stakeholder-based national land policy that articulates a clear national vision about the balance between customary laws and the formal systems of customary land administration and land management.

Consultation and active participation by all stakeholders in the negotiation of leases is crucial to ensure their acceptability and to minimise the opportunity for future disputes.

Consensus-based solutions should include the strengthening of customary and formal institutions and decision-making processes that suit local social, cultural (customary) and political
Principle 5: Customary land tenure can be strengthened by the clarification of its core elements.

The clarification of customary land tenure requires the recording of landowning groups and their membership, claimed land area, the rights of members residing on customary land, the rights of absentee members, representational and distributional authority, and the customary laws that are used to determine such rights and roles. These processes would be consistent with national commitments on equity, including gender equity where the country is signatory to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

Formal registration of landowning groups may be attempted as a second step but only in high demand areas where the need for more formalised land registration is essential.

Customary land reform processes adopted in a country should allow for diversity in customary laws found across landowner groups, and the recognition that communities differ in the strength of their traditional lifestyle and degree of individualism found in the group.

Principle 6: Dealings in land should be fair and reflect equitable returns to customary landowners, investors and lessees, based on the economic value of their inputs and market principles.

Leases should be secure and lease conditions should be clear about key factors including exclusivity, duration, renewal on expiry, compensation for any improvements at the time of expiry, amount of premium and annual rent, and conditions regarding sub-leasing or trading of leases.

Returns to landowners, in the form of land rent plus premium, and lessees must be based on market principles and be fair to the lessees’ investment and landowners’ superior interests.

Governments must follow due process of acquisition for public purposes and provide landowners a fair market-based compensation for land acquired. Alternatively, governments may consider
negotiating a long term leasing arrangement under ‘fair’ market rental conditions instead of outright acquisition.

Distribution of returns to land among current and future generations of members of landowning groups should be based on core principles of equity, taking into account agreed local customs. This distribution can be facilitated using landowning units (LOUs)/ village-level trusts or similar arrangements, combining elements of traditional systems and company structures and processes, and guided by good governance principles.

**B. The improvement of land-related conflict resolution mechanisms for local-level land-related conflict and prevention of escalation of land-related grievances into large scale conflict.**

**Principle 7:** Customary and formal resolution mechanisms should be treated as part of a continuum of the resolution of local-level land-related conflicts.

The improvement of land-related conflict resolution mechanisms should consider the balance between the need for impartiality and contextual knowledge pertaining to land, and the balance between the need for win-win and win-lose solutions. These questions, in turn, need to be balanced with considerations of cost and accessibility.

The improvement of land-related conflict resolution mechanisms should be based on the recognition that Pacific societies are in a state of flux, resulting in changes in customary authority and decision-making processes. This implies that land-related conflict resolution mechanisms may need to be revised at various points in time.

**Principle 8:** The prevention of large-scale land-related conflicts and crises requires the prevention of the mobilisation of land-related grievances and misperceptions.

For the prevention of the mobilisation of often long-standing grievances into large-scale conflicts, easily accessible, accurate and comprehensive information on different aspects of land
use is essential, including information about leasehold conditions and distribution of returns to
customary landowners.

For the prevention of the escalation of conflict, a whole of country approach is important to
ensure equitable economic development, mutual respect regardless of differences, and the rule
of, and respect for, law.

C. The role of Government, information and capacity development

**Principle 9:** Governments should play a supporting role in customary land dealings by creating
an enabling environment for recognising, protecting and enforcing customary land tenure,
encouraging and enforcing fair dealings in the fair use of land, as well as resolving conflicts over
land.

A clear legislative framework should provide for integrated customary institutions and formal
land administration systems, removing overlap and increasing clarity and coordination of
formalised land administration.

A clear legislative framework for dispute resolution should provide for the appropriate mix of
customary conflict resolution mechanisms and introduced conflict resolution processes and
mechanisms to suit local situations.

**Principle 10:** Governments should provide for a central geo-referenced information system of
landowning groups, their claims, customs and customary laws, and a registry of land dealings
and other selected land use and management related information.

Governments must adopt a national framework to support landowners documenting and
recording, and registering where relevant, their landowners’ groups, membership rules, customs
and customary laws about land, consistent with the national land information framework.
Customary land information should be made available to end users, the landowners and other stakeholders in an appropriate form to support them in land dealing negotiations, land use and management decisions, and conflict resolution.

Land use planning and zoning of customary land should be adopted in areas of high demand to systematically guide development.

**Principle 11:** Customary landowners and outside investors should have appropriate understanding about customary land tenure and introduced land leasing requirements to negotiate fair and equitable land leases and benefit sharing arrangements, minimising the scope for local-level conflict.

Potential investors should have a good understanding of customary tenure systems, including customary laws and decision-making processes, in addition to formal land leasing processes.

Customary landowners should have sufficient understanding regarding customary land tenure and its relation to commercial use, land lease arrangements and financial management to ensure land lease conditions provide fair and equitable returns to the landowners and equitable distribution within landowning groups.

**Principle 12:** Public land management institutions should be well resourced, competent and responsible.

Public land management institutions should have the necessary knowledge, skills and tools to implement customary land administration and management in a transparent and cost effective manner. Included in this set of knowledge, skills and tools are those related to social aspects of customary land tenure and mediation, in order to support customary land dealings and minimise the scope for conflict.

**Implementation Framework**

Experience in customary land reform efforts in the region over the last two to three decades suggests that for the implementation of the guiding principles, political commitment and a nationally-owned land reform process are critical. Further, given the sensitivities associated with
customary land, systematic and measured reform processes supported by robust information would help overcome misplaced perceptions and fears.

Member countries may take the following key steps to implement the LMCM Guiding Principles for improving access to their customary land and maintaining social harmony. These steps are based on the national sustainable development strategy processes that emphasise stakeholder-based national development planning, implementation and budgetary allocation (Dalal-Clayton and Bass 2002), as agreed to by member countries under the Pacific Plan Initiative 5.1. These steps can help countries to be in the driver’s seat of their own land reform process and better coordinate national efforts and resources with resources of development partners to address their high priority initiatives, consistent with the Pacific Principles of Aid Effectiveness.

**Step 1:** Obtain political commitment for a customary land reform process.

Political commitment is a critical step, since without broad-based political support customary land reform efforts are unlikely to gain traction.

Once there is commitment (acceptance by stakeholders) to rationalise land administration and land management institutional designs, the next step would include ‘walking the talk’ and developing and implementing a clear plan of action for the land reform process, as outlined in the next five steps.

**Step 2:** Adopt a stakeholder-based approach and hold nationwide discussions on land-related matters, to define the land reform agenda. This could be facilitated by (a) nationally respected champion(s), who could be politicians, community leaders or public officials.

**Stakeholder consultation**

Countries may choose from different forms of stakeholder dialogue. They could choose to take national land forum approaches, as followed recently by Papua New Guinea and Vanuatu (Manning 2007 (draft)), where land issues were addressed in a holistic manner. On the other
hand, they could hold consultations as part of a development land project, such as is the case in the ADB funded project in Samoa (Grant 2007).

Whatever pathway is chosen, it is critical that a nationally driven process is adopted that involves all the stakeholders in open and objective dialogue and discussions, which are supported by objective information about issues based on local experiences.

**Topics for discussion**

To focus stakeholder discussions, key user-friendly discussion papers prepared by various stakeholders, officials and professionals could help in the identification of relevant issues and a common understanding of the issues involved. Key issues for discussion may include the current status (based on practical examples), key constraints to any changes, root causes of disputes and conflicts, and areas that need strengthening as related to topics summarised in Attachment 3.

**Step 3:** Once a common understanding has been achieved, stakeholders together identify a national vision and national land policy framework for customary land reforms, which articulates expected outcomes, and key guiding principles to underpin land reforms.

**Step 4:** Obtain Government endorsement of the national land policy framework with clear land reform outcomes linked into national development goals.

**Step 5:** Government and key stakeholders decide on strategies to address the national land reform agenda focussing on the key outcomes desired, reflecting national land policy goals.

**Outcome focussed programme of strategies and initiatives**

Specific strategies identified by landowners and other stakeholders could then be packaged into programmes, outcome focussed strategies, and prioritised and appropriately sequenced for implementation in the short and long term, considering institutional capacity and resource availability.

Governments could adopt an area specific pilot project approach and implement a package of initiatives appropriately sequenced to collectively help achieve the desired outcome.
Such an outcomes-focused programmatic approach to land reforms, linked to National Sustainable Development Strategies, would assist in obtaining appropriate medium to longer term resource commitments for programmes of activities from national Government and development partners, as compared to the traditional piece meal input or project-based funding support.

**Step 6:** Obtain development partner support for priority outcomes-focused programmes of initiatives.

This programme of prioritised strategies and initiatives on land reforms, linked to the national development framework, could be used as a basis for discussions with donors. Such an approach could help countries to coordinate the use of their own and development partner support for customary land reform efforts, increasing the effectiveness of their own budgetary allocations as well as increasing aid effectiveness. Such an approach is consistent with the Paris Declaration of Aid Effectiveness and the Pacific Principles of Aid Effectiveness.
## Attachment 1: Land Management and Conflict Minimisation

Consultancy reports

<table>
<thead>
<tr>
<th>Topic</th>
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<td><strong>Sub project 1: Role of land in conflict escalation in recent conflict situations</strong></td>
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<tr>
<td>1.1: Review of conflict in the Pacific and the role of land in conflict and conflict escalation</td>
<td>Chris Wilson</td>
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<td><strong>Sub project 2: A review of sources and causes of land-related conflict</strong></td>
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<tr>
<td>2.1: Review of the historical context of current land management and conflict management situations in the Pacific</td>
<td>Ron May</td>
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<td>2.2: Review of social changes that impact on land in the Pacific</td>
<td>Paul Jones and Hartmut, Holznecht</td>
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<td>2.3: Review of communal property rights and formal and informal institutions for economic development and conflict minimisation</td>
<td>accessUTS</td>
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<tr>
<td>2.4: Review of environmental causes of land based conflict</td>
<td>Matt McIntyre</td>
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</table>
2.5: Review of the role and dynamics of land-related politics and political parties in conflict and conflict escalation in the Pacific

Tarcissus Kabutaula and Ponipate Rokolekutu, P.

2.6: Review of the gender dimensions of land based conflict in the Pacific

Gail Nelson

**Sub project 3: Current land management and conflict minimisation**

3.1: Review of financial management of customary and other land in the Pacific

accessUTS

3.2: Review of Land Information System for land administration, land use planning and management

Matt McIntyre

**Sub project 4: Conflict management process**

4.1: Review of conflict management processes, models, mechanisms and tools and their relevance to the management of land-related conflict in the Pacific

Australian Centre for Peace and Conflict Studies, University of Queensland
Attachment 2: Key LMCM Lessons

Experience from the region suggests that evolutionary changes to customary land administration are more acceptable than radical changes. In addition, changes which accept customary land tenure as a given are more desirable. Such changes must also recognise the relevance of improved commercial access to customary land for improvements in the economic well-being of landowners and the nation, while recognising the importance of maintaining social harmony.

General lessons

- Uncertainty and lack of clarity over aspects of customary land tenure such as the inheritance of rights to land, the land area of claims and decision-making rights, and their incompatibility with individual property rights requirements for commercial use underpins poor economic growth and local-level land-related conflicts.

- Customary land policy reforms should maintain and protect customary tenure of group ownership and individual use rights defined by social relations and customary laws.

- Customary land reform efforts and solutions should be based on the recognition that Pacific societies are in a state of flux, with changing needs, values and aspirations of people as a result of globalisation, modernisation and imperatives of the cash economy.

Customary landowners, their rights and roles

- For increased commercial access to customary land, increased clarity in customary land tenure, recognisable entities and authorised persons that can enter into land dealings, are critical.

- A distinction must be made between processes of land recording and land registration. Community-based recording of landowning groups and their land boundaries and customary laws is a necessary first step towards a more formalised land registration.
• To increase clarity over customary land while minimising land-related conflict, it is important to adopt a pragmatic approach and move towards land recording followed by land registration only in areas of demand.

• Recording and registration of customary land cannot be rushed, must be participatory and include all relevant stakeholders, and be undertaken at a pace that encourages confidence regarding recording processes.

• When recording customary land, it is important to identify what process is used to define inheritance, group membership rights, decision-making rights, and roles of landowning units’ members, including women.

• The recording of landowning groups needs to be clearly documented and supported by legislation that provides an enabling mechanism for, and consistency in, determining how customary landowners are identified.

**Informal and formal leasehold arrangements**

• Informal arrangements over customary land may help produce some economic wealth, particularly in circumstances where outside funding is not required. However, without proper legal backing, informal arrangements do not provide sufficient certainty for individuals to invest in longer term productive activities. Nor do they provide sufficient security for lending agencies.

• While it may provide some security, the legal recognition of customary land tenure may not be sufficient to encourage its use as a bankable asset if financial institutions are constrained in their ability to recover their funds when borrowers default.

• Secure formal leasehold arrangements can deliver the same national economic benefits as individualised private property rights but without the social costs associated with individualisation of customary land.
• Leases should be secure and lease conditions should provide for fair and market-based returns to landowners as superior right holders, and investors as lessees. Leasehold conditions should be clear about key factors, including market-based rent (including premium if any), exclusivity, duration, renewal on expiry and compensation for any improvements at the time of expiry.

• Appropriate land administration mechanisms need to be established that allow customary landowners, either as individuals or as groups represented by a commercial entity, to obtain bankable formal leases.

• To avoid conflict between landowners and Government, landowners should be free to engage in land dealings without undue interference from governments or others. Countries must clarify the role they expect their Government to play and the extent of discretionary powers a Minister and Government agencies should have over customary land dealings.

Information and landowner awareness

• Customary landowners must be supported by a robust land information system, and an awareness of the land administration system that links customary and introduced land systems. Increased landowners’ awareness about matters such as the difference between customary land tenure and the Western property rights system and fair and equitable land lease conditions, will improve their engagement in land dealings.

Fair dealings and lease conditions

• Returns to landowners and lessees must be based on market principles and be fair to the lessees’ investment and landowners’ superior interests.

• Administratively determined Unimproved Capital Value-based returns to customary land must be avoided. Although these may seem uncomplicated, they do not facilitate fair returns to landowners.
Noting potential increases in the value of leases over time, lease conditions should include conditions about the sharing of capital gains derived from such potential increases between landowners and lessees.

Governments must follow due process when acquiring land for public purposes and landowners must be given a fair market-based compensation for the acquired land. Alternatively, governments may consider negotiating a leasing arrangement under ‘fair’ market rental conditions instead of acquisition.

Distribution of returns to land among current and future generations of landowners should be based on core principles of fairness and equity, taking into account agreed local customs and regional commitments, including those related to gender equity.

Intra- and inter-generational equity could be facilitated using village level trusts or similar arrangements, combining elements of traditional systems and company structures. Such arrangements must be managed according to commercial and good governance principles.

Preventing escalation of land-related conflict

The prevalence of deflection away from the underlying issues in local-level land-related conflict points to the importance of investigation into the root causes of these conflicts.

The differences between Forum Island countries in respect of land tenure and customary forms of land-related conflict resolution preclude one-size-fits-all responses about the most effective and efficient conflict resolution mechanisms.

The balance between impartiality and contextual knowledge, and win-win and win-lose solutions, needs to be carefully thought through when considering the design of land-related conflict resolution mechanisms. These questions, in turn, need to be balanced with considerations of cost and accessibility.
• The constant state of change of Pacific societies implies that land-related conflict resolution mechanisms may need to be revised at various points over time.

• Alternative dispute resolution techniques, integrated with customary approaches to conflict resolution, could help to alleviate backlogs in Forum Island Countries’ courts, including for land-related conflict.

• The role played by the mobilisation of long-standing land-related grievances in the escalation of large-scale land-related conflict suggests that it is important to counter such grievances before they have a chance to escalate. The mobilisation of long-standing land-related grievances could be countered by the raising of awareness as to how this has occurred in the past, so as to prevent its occurrence in future.

• The role played by the mobilisation of perceptions in the escalation of large-scale land-related conflict suggests that it is important to counter such perceptions by the provision of accessible and accurate information on matters pertaining to land in Forum Island countries, as well as specific awareness raising initiatives to counter the mobilisation of such perceptions.

National land policy

• Governments need to develop a stakeholder based national land policy linked to national development goals to provide a broader development context for customary land reforms. Consultation and active participation by all stakeholders in the negotiation of leases is crucial to ensure their acceptability, ownership and to minimise the opportunity for future disputes

Strengthening the role of Government

• Strengthening of customary land administration must include clear demarcation of responsibilities between Government agencies and between Government and customary landowners and clear and streamlined land administration procedures for recording and
registering of customary land, customary land lease negotiations and recording of lease arrangements.

- The nexus between customary and introduced decision-making processes and customary dispute resolution processes and introduced conflict resolution mechanisms must be strengthened if improved access to customary land is to be realised and local-level conflict minimised.

**Strengthening land information**

- It is important to establish and maintain a customary land information system that includes accurate and up to date information about the identity of landowner groups, their land claim, land use, local customs and decision-making processes to underpin land dealings.

- Governments must provide a national framework for the systematic development of robust Geographic Information Systems (GIS) based customary land information systems.

- Governments should make available robust and accurate customary land information, preferably in GIS, to end users, the landowners and other stakeholders in an appropriate form to support them in land dealing negotiations, land use and management decisions, and conflict resolution.

- Governments should adopt a pragmatic and systematic approach to land use planning and zoning of customary land in areas of high demand.

**Capacity development**

- It is important to provide targeted training programmes for landowners in relation to customary land tenure, commercial use, and financial management.
• It is important to strengthen the understanding of potential investors of customary tenure systems, customary laws and decision-making processes and formal land leasing processes.

• It is important to strengthen the capacity of Government agencies in technical land administration and land management, policy analysis skills and tools as well as social aspects of customary land tenure and mediation skills.
Attachment 3: Topics for stakeholder consultation

- Clarity over customary land tenure, role of chiefs, big men, or other authorised representatives and women, decision-making processes and customary law.

- The formal land administration system and its compatibility with customary processes, including strengths and weaknesses of existing systems and areas for strengthening.

- Clarity and understanding of leasehold systems, their nexus with the customary decision-making processes, and processes for increasing access to customary land by customary owners and by other investors.

- Lease conditions – length, expiry and renewal, compensation for improvements on expiry, and benefit sharing conditions over capital gains in the sale of leases.

- Fair land dealings, equitable returns between landowners and investors, market-based land rent, and compensation.

- Intra- and inter-generational equity among landowning units.

- Transparent and accountable financial management of landowners’ interests.

- Customary land trusts, and other forms of landowner group-based financial management.

- Local-level land-related conflicts – causes and practical examples.

- Strengths and weaknesses of customary and formal conflict resolution mechanisms and their relevance for addressing different types of conflicts.

- Factors contributing to escalation of conflict into larger-level conflict and strategies to prevent escalation of land-related conflicts.

- Role of information, public awareness in increasing access and minimising conflict.
• Role of Government *vis-à-vis* customary landowners in land lease negotiations.

• Key areas of capacity development of landowners, Government officials and other stakeholders.
References


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Notes

1 Tonga is the only Forum island nation that was not colonised.
3 Children born to mothers married to non-Fijian men are not generally included in the *Vola ni Kava Bula*, unless the children have been adopted by people who are already registered as a Fijian.
4 For example, in Kiribati approved institutions include Housing Corporation and the National Loans Board; in FSC, it is the FSD Development Bank and housing authority.
5 Although the Solomon Islands legislation specifies 8% for restored freehold land, where the freehold title has been extinguished by the Constitution.
6 In PNG, for example it has been noted that the “Lands Department was dysfunctional with ‘essential records were kept in damp and waterlogged rooms and not computerised, documents were stolen and fraudulently forged, allegations of gross corruptions were constant and the lands Boards failed to meet’ Manning, M. (2007 (draft)). "Ownership of the land reform process", *Pacific Land Program Case Study 1*. AusAID, Canberra.