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Climate Change and the Legal Framework for Settlement Relocation in the South Pacific

Daniel Fitzpatrick[*]
Rebecca Monson[**]

The Intergovernmental Panel on Climate Change's (IPCC) fourth assessment report (AR4) concludes that, under business-as-usual conditions, global average sea level rise could range between 18cm and 59cm above 1990 levels by 2100 (IPCC 2007: 45). Climate change is also likely to increase the number of intense cyclones (Mimura et al 2007). In the South Pacific, where half the population is estimated to live within 1.5 kilometres of the sea, many tens of thousands of people could be displaced by a combination of higher sea levels and increased intensity of weather events (Oxfam 2009: 15). While there is an emerging literature on international legal frameworks relating to climate change and transnational population movements, relatively little has been written on national legal frameworks for relocation and displacement, even though the front-line adaptive response to sea level rise will involve local rather than transnational settlement movements.

This paper considers the legal framework for persons displaced by rising sea levels to secure rights to land in the South Pacific. The paper argues that population movements caused by climate change will exacerbate existing tensions and challenges in South Pacific systems of land law and administration. The paper focuses on legal issues arising from two potential methods of relocation: agreements with customary landholders, and acquisition followed by grant of land by the state. The paper concludes with a discussion of potential land law reforms to support sustainable relocations of climate change-affected settlements in local coastal districts of the South Pacific.

Customary Land and the South Pacific

Most land in the South Pacific is classified in legal terms as customary land. Very little, if any, customary land is not subject to customary claim. South Pacific states rarely exercise powers of compulsory acquisition in relation to customary land. The reasons include weaknesses in the enforcement capacity of the state, and the likelihood of resistance by customary landholders due to a range of factors including the memory of colonial land acquisition and the significance of land to livelihoods and social organisation. It follows that agreements will be the primary mechanism for persons displaced by climate change to obtain rights to land. Generally speaking, these agreements will take three forms: arrangements among individuals who have ties of family or friendship, agreements between groups negotiated by leaders or representatives of the groups, and agreements to alienate land to the state for distribution to relocated persons.

[*] Professor, ANU College of Law, Australian National University. Please email comments and feedback to Daniel.Fitzpatrick@anu.edu.au.
[**] Lecturer, ANU College of Law, Australian National University.

For agreements between individuals and groups there are cultural pathways that will affect the nature and likelihood of agreement, and the sustainability of any subsequent relocation. Typically, these cultural pathways involve histories of inter-marriage or trade that provide patterns of reciprocity, familiarity and obligation conducive both to agreement and to the resolution of conflicts arising from the agreement. Inter-marriage, in particular, provides familial ties that assist members of a customary group to relocate as a family or individual through agreement with a relative, or as a group through agreement with a related group. It is important not to view the challenges of sea-level rises, and relocation negotiations across customary groups, as novel or sui generis in nature. Adaptations to human mobility are features of customary social structures in the Pacific (Sidle et al 2004:181). Long-standing mechanisms for managing mobility should be the first step basis for all policy efforts to promote sustainable relocations arising from the effects of climate change.

There are also a number of limits to the effectiveness of custom as a mechanism for providing land to individuals or groups requiring relocation. In the South Pacific there are examples of groups that lack long-standing family or linguistic affiliations with neighbouring groups because historically they had moved from other areas to their current place of habitation. The historical drivers of mobility include war, missionisation, disasters, cash employment, colonial resettlement or the pursuit of trade or mobile marine resources. While individuals or groups in this category will have modes of integration with their local area, they will also have historical backgrounds that provide a pathway for others to construct their status as "outsiders". One such pathway is control over genealogical information by senior (and often male) members of landholding groups. The strategic mobilisation of genealogical or historical information provides a way to exclude classes of categories of persons requiring relocation. The interpretation of "custom" for situational advantage is a well-established phenomenon, particularly in contexts where custom provides pathways for property inclusion and exclusion (eg McDougall, 2005; Scott, 2007; Bainton, 2009).

Customary narratives of place and genealogical origin often serve to support claims of precedence to land, particularly in a context where historical episodes of inter-group warfare create long-standing competing claims to land. Agreements with other groups provide a mechanism to support claims of customary "ownership", and an opportunity to confirm or enhance the authority of the leader of the group. This is particularly the case in circumstances of interaction with state officials or international climate change actors, as implicit recognition by outside actors may enhance claims to precedence and authority. Attempts by a group to negotiate relocation agreements may also crystallise submerged conflicts with other groups, either as to boundaries or claims of "ownership", or with individuals that claim positions of authority within the group. Rights to land are embedded in nested and interconnected lineages that trace social precedence through narratives of conquest, settlement and ancestral agreement. There may be claims of affiliation or obligation to other lineages with historical connections to the land. There may be no clear demarcation of boundaries between groups, particularly where there are areas of relatively unused land. Alternatively, where there is demarcation in the form of rivers or ridge-lines, there may be contestation over the histories of war and agreement that purport to establish those boundary lines.

Historically, “customary” agreements with other groups have often been a product of trade interactions, co-operation in warfare, or exogamous marriage requirements. While agreements for individual or group relocation may build on existing patterns of exchange or obligation, the notion of irreversible group relocation to the customary land of another group, as a result of the inundation or other effects on climate change, may be novel and may not be amenable to customary modes of conflict-management. As a general rule, agreements within or between customary groups must have self-enforcing qualities where there is little prospect of third-party enforcement through the state. The literature on self-enforcing agreements highlights that circumstances of repeat close-knit interaction is essential to the maintenance of cooperative interactions in the absence of third-party enforcement. Relocation agreements may lack or lose self-enforcing qualities where the relocated group does not engage in a sufficient degree of reciprocal interaction with the host community. This is particularly the case where population growth and generational change undermines initial conditions of interaction that facilitate the agreement in the first place. There are numerous examples of ex post contestation over agreements among customary groups in the Pacific.

The Potential Role for Law

The obstacles to relocation agreements may include the desire of affected individuals and groups not to relocate, the reluctance of host individuals or community to agree to relocation, the collective nature of consent for agreements involving groups, uncertainty as to the nature and scope of representative authority to negotiate agreements on behalf of the group, and the breadth and significance of social, economic and spiritual issues involved in the process of relocation itself. There is a potential role for law to facilitate the negotiation of agreements, and manage conflicts arising from the agreement, so long as law supplements cultural mechanisms for managing the movement of peoples and settlements. As a general proposition, the role of law is to reduce the transaction costs of agreement, manage conflict arising from agreement, and protect against inequity or discrimination as a result of agreement. The list of matters that may require legal attention include the authority of agents negotiating agreements; the identification of parties to the agreement, the determination of consent by persons adversely affected by agreement; the provision of standard, default or implied terms of agreement; the recording of the agreement or the rights set out in the agreement; and the provision of remedies either for breach of the agreement or infringement of rights established by agreement. Notably, these matters for potential legal regulation involve the private law of contract and the public law of land administration.

In the South Pacific the role of law must take into account issues of supply as well as demand. Where there is a role for law, it must be appropriately formulated in the light of the capacity constraints of state agencies, and the informational distance between citizens and the state. The reach of the state is limited in many parts of the South Pacific. Land administration agencies face significant challenges managing record-keeping in relation to alienated land, let alone extending land administration services to areas of customary land. There are historical sources of distrust relating to state land administration, primarily as a result of acts of acquisition and alienation by colonial regimes. There are incentives for influential actors both at local and state scales to resist or manipulate intervention by law, particularly where law constrains their discretionary powers over the allocation and use of land. Legal changes with a high degree of

monetary cost, or technical or operational complexity, are more likely not to be implemented, or to be partially implemented. Legal intervention may also have unintended consequences where it creates opportunities for agents to accrue new forms of authority and assert new relationships of control or influence over resources (eg McDougall, 2005).

Land Law in the South Pacific

This section provides an overview of land law in the South Pacific in order to assess its potential application to agreements for relocation. Approximately 80% of all land in the South Pacific falls under the legal classification of "customary land". The following table provides a basic breakdown of the legal categories of land in the South Pacific.

Table 1: Categories of Land in the South Pacific

	Public [a]	Freehold [b]	Customary
Cook Islands	Some	Little	95%
East Timor [c]	Some	Some	Most
Fiji	4%	8%	88%
Federated States of Micronesia	35%	<1%	65%
Kiribati	50%	<5%	>45%
Marshall Islands	<1%	0%	>99%
Nauru	<10%	0%	>90%
Niue	1.5%	0%	98.5%
Palau	Most	Some	Some
Papua New Guinea	2.5%	0.5%	97%
Samoa	15%	4%	81%
Solomon Islands	8%	5%	87%
Tokelau	1%	1%	98%
Tonga	100%	0%	0%
Tuvalu	5%	<0.1%	95%
Vanuatu	2%	0%	98%

Source: AusAID, Making Land Work: Reconciling Customary Land and Development

In general terms, rights to land defined as customary are not granted by the state, and are not registrable as rights without conversion into a statutory interest. In the former British

colonies of the Pacific the acquisition, incidents and transfer of rights to land are generally governed by custom rather than the common law. While some jurisdictions have statutory mechanisms for determining custom, and all have judicial precedents on the nature of various aspects of custom, there has been a general reluctance on the part of the state to regulate or define the application of custom to dealings in customary land. In legal terms there remains a substantive dualist divide between land alienated to the Crown and land classified as customary.

There were sales of customary land to non-indigenous individuals and corporations in the early years of European colonisation in the Pacific. Subsequently, most colonial administrations imposed prohibitions on alienation to "non-natives" – in part to protect against landlessness and the abuse of power by traditional leaders. In formal terms the prohibition on alienation did not apply to "natives", including members of other customary groups, because of an assumption that alienation of "ownership" was either rare or non-existent, and could properly be left to regulation through "custom". In some jurisdictions such as Papua New Guinea and Solomon Islands there are also legal prohibitions on the grant of leases over customary land unless there is a process of incorporation as an Incorporated Land Group (PNG), or a process of acquisition by the state to grant as a statutory lease (Solomon Islands). In all cases, the legal status of customary agreements to transfer rights to land, including transfers with characteristics of sale or leasehold, remained governed by custom unless they infringed statutory prohibitions or statutory processes for the approval of certain transfers of rights to customary land.

At least in the former British colonies of the Pacific, including the special case of Vanuatu, the legal products of colonialism continue to influence the legal regulation of relocation as a result of climate change. In particular, the dualist nature of colonial land law affects the two basic methods for provision of customary land to groups requiring relocation, namely direct agreement with another customary group or acquisition by the state followed by grant to the relocated group. The governing legal regime for direct agreements with a customary group is custom. In most Pacific jurisdictions there is not a great deal of legislative or judicial guidance as to the content of custom as it applies to dealings in customary land. In contrast, the governing law for acquisition followed by grant by the state is the common law as modified by statute. In formal terms, there is a great deal more legal certainty for processes of state acquisition and grant of land. Statutory provisions provide mechanisms for the demarcation and publication of boundaries, and the registration and classification of rights to land. The common-law supplies the private law of contract, the legal incidents of proprietary interests in land, and the general law obligations of holders of rights to land. In theory at least, the courts and police provide a mechanism of third-party enforcement that supplements any self-enforcing characteristics of the agreement in question.

The formal legal advantages to state acquisition and grant should not obscure the considerable practical disadvantages of state intermediary involvement in private dealings over customary land. The state is not a benign actor in matters relating to land. State actors do not engage in calculations of the private costs and benefits of agreement for the respective parties to the agreement. Their incentives include garnering votes, satisfying constituency interests and accruing private rents from their positions of power…

The Legal Regulation of Customary Land Transactions in the Solomon Islands

In the Solomon Islands there are a number of gaps or complexities in the law relating to land agreements involving customary landholder groups. The Constitution of the Solomon Islands provides that only "Solomon Islanders" may hold a perpetual interest in land.[1] Although provision was made for the recording of communal interests in 1994,[2] in 2002, some estimates are that only 12% of customary land had been registered.[3] "Customary land" is defined by the *Land and Titles Act* (Cap. 133) as any land that is lawfully owned, used or occupied by a person or community in accordance with current customary usage, and which is not registered as anything other than customary land.[4] Current customary usage is defined in a circular fashion as the practice of Solomon Islanders relating to the matter in question, at the time when that question arises, regardless of whether that usage has existed from time immemorial or for any lesser period.[5] Non-Solomon Islanders are generally prohibited from holding or enjoying an interest in customary land.[6] Exceptions to this general rule include the acquisition of an interest through marriage to a Solomon Islander, or by inheritance.[7]

While customary groups own customary land, they require the intervention of the state to grant leases or other forms of statutory rights to land. Technically, rights to customary land may be transferred to another customary group, or members of that group, if the transaction is valid according to current customary usage (see e.g. *Land and Titles Act* [Cap 133], s. 2). However, should a transferee desire a statutory right, the state must acquire the land and grant a title to registered trustees of the customary group (*Land and Titles Act* [Cap 133], ss. 60-70). Part V, Division 1 of the *Land and Titles Act* [Cap 133] provides that the Commissioner of Lands may acquire customary land (through lease or purchase) after a public acquisition hearing, at which the "owners" of the land are identified. The land is then transferred back to the owners through a process of registration. Land may be registered in the name of up to five "duly authorised representatives" on behalf of the landholding group, who are joint owners on a statutory trust.[8]

The process of acquisition by the state followed by grant to trustees, who may enter into agreements with groups or individuals requiring relocation, requires the delineation of boundaries on the ground, and between the groups that occupy the subject land and surrounding areas (Monson, 2012: 237ff). Often the process causes long-term conflict

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[1] Constitution of Solomon Islands, s.110.

[2] Under the *Customary Land Records Act 1994,* land can be registered in name of the tribe, clan, line, community or group that is entitled to own or exercise primary rights over it (s 2). Groups holding secondary rights are also registered (s 11).

[3] Pacific Islands Forum Secretariat (2002) *Mechanisms Used to Address Land Issues,* Session 3 Paper for Forum Economic Ministers Meeting, Port Vila, Vanuatu, 3-4 July 2002. Available at???

[4] *Land and Titles Act* [Cap 113], s.2.

[5] Ibid s 2(1).

[6] *Land and Titles Act* [Cap 113], s.241(1).

[7] *Land and Titles Act* [Cap 113], s.241(2)

[8] *Land and Titles Act 1996* [Cap 133], s 195(1)

rather than increased tenurial certainty. Decisions of the Land Acquisition Officer may be appealed to the Magistrates Court, with a final right of appeal to the High Court.[9] These courts regularly refer matters of custom back to the chiefs, and decisions of the chiefs may be appealed to the Local Court and then to the Customary Land Appeal Court, with a final right of appeal to the High Court on a question of law.[10] As a result, disputes often 'cycle endlessly through the courts, with questions of law being appealed to the highest court, only to be referred back down to the chiefs' (Monson, 2012: 238).

The trustee method of recognising customary rights to land, and allowing private dealings in customary land, is also often a source of uncertainty and abuse of power because trustees may not always be trusted to act in the interests of their group. It is well-establish that traditional forms of obligation, based on ties of kinship and ritual, may not prevent the abuse of power when new external elements — such as money or formal legal authority — are offered to a customary group leader (see, for example, Burton, 1997: 117, 132). The common law duties of trustees, and the provision of remedies for breach of trust, are ex post methods of restraining trustees. Rather than requiring ex ante procedures for collective decision-making, and transparency in decision-making, the law of trusts provides remedies against trustees only once a breach of trust has taken place. In that event, the remedies of beneficiaries under the trust may be limited to personal action in damages against the trustees only, rather than remedies to restore property that has been transferred to bona fides third parties in breach of trust.

Potential Options for Reform: Land Law and Relocation in the South Pacific

The following section provides a brief discussion of potential options for reform in relation to four key legal aspects of agreements for relocation: recording agreements, providing standard terms for agreement, the governing law of agreements and regulating the authority of representatives that negotiate agreements.

Recording Agreements for Relocation

Generally speaking, the options in relation to recording dealings in customary land include: (1) making no provision for the recording of dealings; (2) allowing optional recording of dealings with the proviso that (in the absence of fraud or notice) registered dealings take priority over unregistered dealings; and (3) requiring compulsory recording of dealings, perhaps with a requirement that this is necessary to give legal effect to the transaction itself. As in so many matters involving customary tenure, choosing the most appropriate option turns on a careful assessment of the circumstances. No provision for recording dealings may be appropriate in situations where dealings are rare and customary authority is strong, or where customary methods of recording transactions are providing sufficient certainty for actual and prospective land users. Optional registration of dealings may be appropriate where dealings have increased to the point where some form of enhanced formal certainty is necessary but compulsory registration is impractical due to institutional or funding constraints. Compulsory registration of dealings is the ideal as it maintains the accuracy of the register. By definition, however, it assumes a sufficient degree of institutional funding and capacity,

[9] *Land and Titles Act* [Cap 133], s 66.
[10] *Local Courts Act* [Cap 19], ss 12-14, 28; *Land and Titles Act* [Cap 133], ss 254-255.

and a situation where confidence in the register is such that local titleholders will in fact seek to record their transactions.

A useful example of a law that envisages registration of group-based dealings in land is the 1987 Land Act and Customary Land Registration Act in the East Sepik province of Papua New Guinea. In combination, these Acts allow customary groups to register their collective ownership rights to identified lands. Where this registration has occurred systematically in priority Customary Land Registration (CLR) areas, it operates as conclusive evidence of the facts stated in the registration instrument (that is, as to boundaries, definition of landholding group and so forth). Outside CLR areas, the fact of registration only operates as prima facie evidence of the facts stated in the registration instrument, and therefore may be defeated by any valid concurrent claim based on custom. In either case the registered ownership rights may then be sold, leased or charged subject to (and conditional upon) approval by relevant administrative agencies. Importantly, the resulting interests may themselves be registered and, where they fall within a CLR area, the registered instrument also operates as conclusive evidence of the facts contained therein. In this way, a customary group may grant a lease or charge which if registered will be free of any concurrent claim based on custom, without having to pursue the relatively complex and expensive group incorporation processes discussed above (see Fingleton, 1991: 197–218).

The recording of dealings in customary land need not require a prior process of registering customary titles to. Recording dealings as an alternative to registering titles is an attractive policy option in circumstances where a titles registration procedure is likely to involve conflict or unsustainable levels of funding. Knetsch and Trebilcock (1981: 62–5) argue, in the context of customary tenure systems in Papua New Guinea, that a system of registered dealings would produce many of the benefits of registered titles without incurring the conflicts engendered by adjudication processes. In particular, they suggest that dealings in customary land to which outsiders are a party, or which take a form not contemplated by customary law, may be recorded by a local Magistrate who must first review the dealing in order to ensure its fairness. A recorded dealing would take priority over an unrecorded one, in the absence of issues of fraud or lack of good faith. The form of the recorded dealing would also be sufficiently standardized so as to yield useful information both in a decentralized registry, and in duplicate in a centralized filing system. A potential weakness of this recommendation is that a number of dealings in customary land is subject to allegations of fraud, and there can be perceptions of partiality undermining confidence in the acts of local Magistrates.

Standard Terms of Relocation Agreements

An important potential policy option for relocation agreements is the use of standard form documentation, both as a measure to facilitate recording and a way of minimizing the potential for contractual disputes (McAuslan, 2000: 83). Standard form documentation calls the attention of the parties to contingencies that could cause conflict (Cooter, 1989: 4). In relation to relocation agreements, standard clauses could (1) provide for agreement not only on areas of land for transfer but also in relation to rights of access to water supplies, bush gardens, marine resources, or local infrastructure and services; (2) provide an agreed means for re-negotiating terms, particularly so as to reduce the likelihood of future conflict-based attempts at strategic renegotiation; and (3)

establish a series of agreed responses to foreseeable contingencies, such as population growth in the host and relocated community. As discussed in Part I, any form of standard documentation must supplement customary mechanisms for managing human mobility and ensuring cooperative interactions among individuals and groups over land. Moreover, the use of standard documentation must be sensitive to issues of literacy, and the potential for all formal instruments to be used as instruments of power and localised context.

Governing Law

Once rights or transactions are registered, what system should govern their nature and content: custom or the formal legal order? At one extreme, the recording of agreements could simply involve a form of 'social mapping', in which traditional rights, transactions and procedures are recorded without changing their nature or content, and without necessarily attributing legal force to the recording itself (Burton, 1991). In Africa examples of this approach may be found in Benin, Ghana, and Guinea (Lavigne-Delville, 2000: 110; McAuslan, 2000: 89; Toulmin et al., 2002: 16–7). At the other extreme registration could automatically convert the customary interest into a creature of statute and general law. Both Papua New Guinea and the Solomon Islands provide examples of this latter approach.

Which is the best option for regulating the nature and status of agreements for relocation on customary land? Social mapping exercises, in which transactions are recorded without changing their nature and content, may be useful in circumstances where land dealings are relatively uncommon, the capacity of state agencies is relatively weak, and the self-enforcing mechanisms of customary agreements are based on secure foundations of long-term interaction among the contracting parties. Conversely, the application of formal law to relocation agreements may be valuable where there are an emerging number of agreements, and localised mechanisms face challenges in minimizing conflict relating to their nature or operation. An additional thread in this legal policy dilemma is that laws and procedures must harmonize with community practices if official land registers are to maintain their accuracy over time. This, as McAuslan (2000: 83) has pointed out, is one of the fundamental lessons to be derived from land registration experiences in post-colonial Africa. It is critical in relation to legal responses to climate change in the Pacific. In other words, even where unitary rules and procedures are applied to registered customary interests, those rules and procedures must be adapted in order to facilitate community acceptance. In brief, this would mean that relatively simple forms of transfer documentation should be developed for the purposes of reducing conflict and increasing security, and that rules relating to the creation of interests, and the modalities of their transfer, should be as consistent as possible with local community norms (Lavigne-Delville, 2000: 115). The extent to which this process would require codification of customary rules, and the advantages and disadvantages of such an approach, lies beyond the scope of this article (but see Cousins, 2002: 72–5).

Agency Authority and the Law

Trustee arrangements provide inadequate mechanisms to prevent abuses of power by traditional leaders that negotiate agreements to relocate. An alternative option is to require process of lead group incorporation as in Papua New Guinea. Corporate

structure grants formal legal identity to a traditional group, which allows it — should it so wish — to enter into legally secure transactions with outside investors. Because any such agreement is between two formal legal entities, any subsequent dispute between group members remains internal to the group and in legal terms does not affect the formal validity of the agreement itself. In practical terms, of course, there may still be contestation and localised acts of resistance, sabotage or violence relating to the agreement. Recent conflicts in Solomon Islands and Bougainville, as well as smaller violent conflicts across the region, underscore the potential gravity of this risk. Subject to this risk, which arises from all potential legal responses to abuses of agency power, a corporate structure allows for certain constitutional provisions, particularly relating to fairness of decision-making and distribution of benefits, to be made mandatory; and in this sense it goes at least some way to helping prevent internal abuses of power. In particular, any decision by the management board of the incorporated group could be void or subject to challenge if it failed to follow mandatory provisions relating to disclosure of information, member approval of certain important transactions, and the manner of distribution of benefits.

Papua New Guinea's Land Group Incorporation Act 1974 allows a customary group to incorporate as a formal legal entity with the capacity to hold, manage and deal with land in its own right. In order to incorporate, the group must prepare a written constitution which sets out the qualifications for membership, the nature of its controlling body, the nature of its dispute-settlement authority, the way in which the corporation will act and the manner in which those acts will be evidenced (s 8[1]). Internal disputes are to be resolved in the first instance by the stipulated dispute-settlement authority (ss 21, 23), which must act generally in accordance with custom, and must also seek to do 'substantial justice' to the claims of the disputants (ss 8[1], 24). Highly limited rights of appeal are available to local Village Courts in cases where the dispute-settlement authority considers that it cannot settle the dispute satisfactorily, and that a Court may be able to do so (s 23). The governing law of the appeal will also be 'custom', which is to be evidenced through procedures established under the Customs Recognition Act (see the Village Courts Act, s 57). Outsiders are not subject to the jurisdiction of the dispute-settlement authority unless they have agreed to be bound by its decisions (s 20).

In terms of external relations, outsiders may enter into land-related dealings with the incorporated group, and generally speaking that dealing will be valid where there has been compliance with relevant provisions in the group's constitution (ss 8[2], 13[2], 14). In other words, where there has been compliance with the constitution, the owner is entitled to assume that the agreement has been entered into with sufficient legal authority. Under applicable principles of general law, that assumption will not be available where there has been fraud or lack of good faith on the part of the outsider. Because of the social significance of land sales, it is also excluded by the statute in relation to the sale of customary land to outsiders (s 8[2]). One weakness in relying on the incorporated land group model of PNG is the proliferation of competing land groups, all purporting to represent the legitimate claims of customary landowners, when there are proposals for resource or infrastructure projects on customary land.

A different approach for managing agency authority is to establish a decentralized system of Land Boards. In the Pacific the best-known example is the Native Lands Trust Board of Fiji. Native Land Trust Act, Cap 134 vests the control and management of customary land in the Native Land Trust Board. While NTLB powers to grant leases to outside interests has contributed significantly to the economic development of Fiji, there are ongoing criticisms that the Native Land Trust Act does not do enough to ensure that the NTLB acts in the interests of the customary landowners. Other than the chiefs landowners have no representatives on the NTLB (s. 3). The NTLB is not required to consult with landowners and is only obliged to ensure that the owners have sufficient land for their use, maintenance and support (s. 9).

The Land Board structure may be adapted to facilitate agreements to relocate on customary land while also providing legislative mechanisms to reduce the risks of abuse of agency power. An example is Botswana, where authority over traditional land was transferred from tribal chiefs to district and sub-district Land Boards by the Tribal Land Act 1968. These Land Boards hold the 'right and title of the chiefs and tribes on trust for the benefit and advantage of the tribesmen of that area and for the purpose of promoting economic and social development of all the peoples of Botswana' (s 10[i]). The primary duties of each Land Board are to allocate land within its jurisdiction, adjudicate disputes, implement policies for land use and planning, and collect leasehold rents (ss 13, 15). Although originally membership included the tribal chief or his deputy in an ex officio capacity, it now consists of five elected members, and up to seven members appointed from various government departments (Quan, 2000: 200).

One advantage of the Botswana system is its potential to grant tenure security to members of customary groups and persons requiring relocation. Thus, land may be allocated by the Land Boards for residential, agricultural, grazing, industrial and commercial use. Such allocations may be made on application to a local land occupier, in which case security is theoretically provided by demarcation of the site and either the issue of a certificate of 'customary land grant' or, increasingly, the grant of a statutory lease (ss 16, 20; Quan, 2000: 199). Importantly, allocations may also be made to outsiders and, where the allocation has a commercial purpose, it will take the form of a statutory lease and its holder must pay rents (s 20). In theory, of course, this grants State-sanctioned security of tenure to outsiders whilst avoiding the transaction costs of direct dealings with customary groups.

Conclusion

In this paper we have identified the central role for customary mechanisms to act as the first step response to the movement of peoples arising from the effects of climate change in the South Pacific. We have also identified areas in which there may be a need for law and law reform. But we are very conscious of the fact that the supply of law in the South Pacific will be affected by constraints on state capacity, political resistance by interest groups at national and local levels, and the informational distance between citizens and the state in many parts of the region. Our final focus on potential areas for law reform, therefore, should be understood in the light of these constraints, and is intended to serve as a basis for future discussion.

Bibliography

Bainton, Nicholas A., 'Keeping the Network out of view: Mining, Distinctions and Exclusion in Melanesia' (2009) 79(1) *Oceania* 18.

Burton, J. (1991) 'Social Mapping', in P. Larmour (ed.) Customary Land Tenure: Registration and Decentralization in Papua New Guinea, pp. 197–218. Monograph No 29. Boroko, PNG: National Research Institute.

Chand, S. and R. Duncan (1997) 'Resolving Property Issues as a Precondition for Growth: Access to Land in the Pacific Islands', in P. Larmour (ed.) The Governance of Common Property in the Pacific Region, pp. 33–47. Canberra: National Centre for Development Studies; Canberra: Resource Management in Asia-Pacific.

Cooter, R. D. (1989) 'Issues in Customary Land Law'. Institute of National Affairs Discussion Paper 39. Port Moresby, PNG: Institute of National Affairs.

Cousins, B. (2002) 'Legislating Negotiability: Tenure Reform in Post-Apartheid South Africa', in K. Juul and C. Lund (eds) Negotiating Property in Africa, pp. 67–107. Portsmouth, NJ: Heinemann.

Fingleton, J. (1981) 'Policy-Making on Lands', in J. A. Ballard (ed.) Policy-Making in a New State: Papua New Guinea 1972–77, pp. 212–37. St Lucia: University of Queensland Press.

Fingleton, J. (1991) 'The East Sepik Land Legislation', in P. Larmour (ed.) Customary Land Tenure: Registration and Decentralisation in Papua New Guinea, pp. 197–218. Monograph No 29. Boroko, PNG: National Research Institute.

Fingleton, J. (1998) 'Legal Recognition of Indigenous Groups'. FAO Legal Papers Online. Available at: www.fao.org.

Knetsch, J. and M. Trebilcock (1981) 'Land Policy and Economic Development in Papua New Guinea'. Institute of National Affairs Discussion Paper No 6. Port Moresby, PNG: Institute of National Affairs.

Juul, K. and C. Lund (eds) (2002) Negotiating Property in Africa. Portsmouth, NJ: Heinemann.

Larmour, P. (1986) Customary Land Registration in Papua New Guinea, Solomon Islands and Vanuatu. Waigani, PNG: University of Papua New Guinea.

McAuslan, P. (1998) 'Making Law Work: Restructuring Land Relations in Africa', Development and Change 29(3): 525–52.

McAuslan, P. (2000) 'Only the Name of the Country Changes: The Diaspora of European Land Law in Commonwealth Africa', in C. Toulmin and J. Quan (eds) Evolving Land Rights, Policy and Tenure in Africa, pp. 75–96. London: DFID/IIED/NRI.

McDougall, Debra 'The Unintended Consequences of Clarification: Development, Disputing and the Dynamics of Community in Ranongga, Solomon Islands' (2005) 52 *Ethnohistory* 81-109

Monson, Rebecca '*Hu nao save tok*? Women, men and land: negotiating property and authority in Solomon Islands' (ANU College of Law, Australian National University, 2012).

Scott, Michael W., 'Neither "New Melanesian History" nor "New Melanesian Ethnography": Recovering Emplaced Matrilineages in Southeast Solomon Islands' (2007) 77(3) *Oceania* 337

Ward, R. G. (1997) 'Changing Forms of Communal Tenure', in P. Larmour (ed.) The Governance of Common Property in the Pacific Region, pp. 19–32. Canberra: National

Centre for Development Studies and Resource Management in Asia-Pacific, Research School of Pacific and Asian Studies, The Australian National University.