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FACILITATING PROPERTY DEVELOPMENTS IN THE FIJI ISLANDS: THE LEGAL MECHANISMS

A REVIEW OF ALTA AND NLTA: REFORMS

Land is at the core of most international investments and developments in real property, and to ensure the continuity of such developments in the present and future the Governments of the region have to address the issue of land tenure.

This paper explores the legal structure of Fiji's *Native Land Trust Act* (NLTA) in comparison with the *Agricultural Landlord and Tenant Act* to clarify whether NLTA indeed is the solution to Fiji's land tenure problems or is just another "elephant" in disguise.

For any property to be developed, the developer has to ensure that there is protection of his or her developments. Wherever there is lack of protection from the State there is a resultant lack of development. The amount of development that has taken place in the region is indicative of the importance of security of tenure to development. In Fiji one can explore the number of expiring leases and ask the question: Why is the State considering 'leases' as the answer to land access? Leases inevitably expire, and the land with improvements is restored back to its original owner. The time frame does not matter; 30 years of leases, 50 years of leases or 99 years of leases; it will expire and all developments made will be relinquished.

This paper offers an alternative method of land tenure, which would assist in the development of property for the mutual of all parties. A new system that is not anti-development and friendly towards international investment.

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INTRODUCTION

Land in Fiji can be categorised as being composed of three main types. These consist of *freehold land*, *state land* and *native land*. Out of these types, about 9% of the land is under freehold tenure in fee simple, about 3% is state land, and the remaining 88% of the land is Native land.

This paper is concerned with means of facilitating international developments, and in particular ways in which about 90% of Fiji's land can be utilised to its optimum. Within the scope of this the Agricultural Landlord and Tenant Act (ALTA) Cap 270 and the Native Land Trust Act (NLTA) Cap. 134 are examined.

These two Acts are the basis on which about 90% of Fiji's land is utilised. That is through agricultural leases under ALTA and NLTA. Although other types of leases do exist in Fiji, this paper will be solely concerned with Agricultural leases, which concern the bulk of the land.

One may ask the question as to why is 90% of the productive land being held by natives as stewards rather than being in the open market as in other forms of tenure. The policy behind this emerges from the times of Sir Arthur Gordon as Governor of the Fiji Islands.

Gordon's Policies on Land Ownership

Gordon had believed that the land of the Fijians should be preserved in order to avoid the risk of the bulk of them losing their land to cunning foreigners during the colonisation period. This had been highlighted by France in his book where he indicated the price for the occupation of a piece of unused land as an axe. ¹Other ways of earning an axe were to fill 160 gallon casks with beche-de-mer.

Gordon's fears were thus well founded that the generosity of the Fijians would leave them landless. Gordon had been aware of the New Zealand land wars and the social impact on the Maoris with the loss of their lands.² He had thus devised policies to prevent this from happening in the colonies.

The Legacy of Gordon's Policies

More than a century has elapsed since the Deed of Cession in 1874 was executed. Four decades are about to pass since Fiji became independent, and it seems that the Fijians still fear what Gordon had feared for them – *Landlessness*. This fear has let 90% of the land to lie undeveloped and be used in primary industries and agriculture thus hindering development and prosperity.

¹ France P; (1969) 'Men of Property' in *The Charter of the Land: Custom and Colonisation in Fiji*, Oxford University Press, Melbourne, pp. 46

The wealthiest of resources for a people is thus producing barely enough to sustain the very people who own it, or claim to do so. The only way of utilising these native lands is leasing, and its lack of profitability is causing political, social and economic problems.

Leasing in Fiji

According to Vesikula, (Ex-Minister for Lands, and member of NLTB Board) the Native Land Trust Board has some 29,000 leases, the Director of Lands has about 18,100 and the Housing Authority has about 18,579 leases.³ Out of these leases there are 13,140 NLTB agricultural leases and 8,145 agricultural leases by the Director of lands. The remaining leases are leases for purposes of housing.

For a small island country like Fiji the fear of non-renewal of leases poses a major threat to the tenants, who have no other way of obtaining land. This has resulted in high amounts of goodwill payments being asked for by the landlords for the renewal of leases, and a better rental.

Lease arrangements between the mataqali and tenants themselves are illegal according to

ALTA however these *vakavanua* leases do exist on an informal basis where there are no documents giving security to the tenant, and no contractual deed ensuring payment for the landlord Each party nonetheless reciprocates on good faith and economic necessities

Economic, Political and Social Impacts

Ward (1995) had described the potential political and social instability if land issues were not resolved as there is a major rift between land access by native fijians as opposed to indians, the two major races leaving in Fiji.⁴ The Fijians are the landlords and the indians are the tenants.

Land tenure in Fiji is not just about leases and expiry and non-renewal of leases, it also concerns the facts that the displaced tenants belong to a particular race, whenever a lease is not renewed. The first leases in Fiji expired in 1997, and since then there have been two Governments within the country. The country also had an interim government after the attempted coup of 2000 by Speight and his team. Yet land issues remain unsolved. This is the catastrophe of leases in Fiji.

Not only is access to 90% of land through leases alone, but there is no mechanism in place for the automatic renewal of leases. The tenant who wants to build a house fears for

² G Ward; E Kingdon (1995) *Land Custom & Practice in the South Pacific*, Cambridge University Press, Cambridge, p. 200.

³ T W Vesikula (2002) 'Land Tenure Conflict in Fiji' in the South Pacific Land Tenure Conflict Symposium, SUVA.

⁴ Ward G & Kingdon E; (1995) *Land Custom & Practice in the South Pacific*, Cambridge University Press, Cambridge, pp. 198.

the dismantling when the thirty years under ALTA expires. He knows that all the improvements will be relinquished with no compensation for improvements.

The question for international developments stands on whether there is security of tenure in a lease and what those securities are. In this paper I will explore the legal aspects that embody some security for the tenants, and for the land owners.

International Developments in Fiji

Most international developments in Fiji are by the tourist resorts located round the coasts of the main lands. These resorts are on leased land, but with a better return for the landlords, as rental is not based on UCV method alone but also on the turnover of the businesses. This however, does not entitle the lessees to security of land, and the illegal take over of some resorts by native owners⁵ is a testimony to the problems posed by leases where there are differences between the landlords and the tenants.

NLTB – The Real Owner of Native Land

The Native Land Trust Board is the key to leasing in Fiji as it is the legal owner of all native land in Fiji as the trustee. Native owners are not recognised as legal owners.⁶

⁵ The Fiji Times 12/07/2000, pp.3, The Fiji Times 04/10/2000, pp.1.

⁶ S Boydell, K Shah (2003) An Inquiry into the Nature of Land Ownership in Fiji, 7-9 Sep, Brisbane.

This characteristic of native ownership or stewardship rather is displayed in the cases of *Meli Kaliavu v NLTB*, *Timoci Bavadra v NLTB*, and *Naimisio Dikau v NLTB*.

Leasing under the Native Land Trust Act **(NLTA) Cap 134**

The Native Land Trust Act (NLTA) Cap 134 transfers all land rights from the mataqalis⁷ to the Native Land Trust Board. By virtue of section 4 of NLTA all native land is vested in the Board to be administered by the Board for the benefit of the Fijian owners. The Act clearly utilises the word ‘owner’ instead of steward, but the characteristics of mataqalis is more of stewardship than of owners.

The composition of the above Board has been clearly spelt out in section 3 of NLTA. The Governor General as *President* of the Board, the Minister of Fijian Affairs as the *Chairman*, Five Fijian members appointed by the Great Council of Chiefs (Bose Levu Vaka Turaga) Three Fijian members appointed by the Fijian Affairs Board, and two members of any race as appointed by the Governor General. In total there are twelve members of the Board who administer 90% of the lands for the benefit of the Fijians. The quorum of the Board is of five members out of who at least three should be Fijians, and anyone can preside if elected by the other members when the President or Minister for Fijian Affairs is unavailable.

Section 5 of the Native Land Trust Act (NLTA) seems to be one of the most powerful provisions as it *restricts the alienation of native land by Fijian owners*, even where all Fijian owners wish to do so. According to section 5 alienation in the form of disposal by native owners can only be done to the crown, and that is further subject to the consent of the Native Land Trust Board.⁷

Section 8 and section 9 of the Native Land Trust Act provide for the leasing or licensing of native land in Fiji. According to *section 9* the conditions for the creation of a lease are that the Board should be *satisfied that the proposed land to be subjected to a lease is not beneficially occupied by the Fijian owners* at the time of the lease. This is then subjected to a further condition that during the tenure of the lease the land would not be required by the Fijian owners for their use, maintenance or support.

The Board (NLTB) is lawfully authorised to grant leases of portions of native land, which are not included in the native reserves in accordance with *section 8* of the Act.⁸ The lease thus made has to be made in the name of the Board.

The reasoning seems to be the creation of a mechanism to avoid the ambiguities that would be created if one were to find the actual landowner, or land owning groups as stipulated in the VKB⁹. For purposes of practicality the Board is a custodian readily available as opposed to the landowner who may be residing in the interiors or mountains.

Dissatisfaction with NLTB – Do Native owners want NLTB as the Trustee, Do native owners have a choice?

One then would question on why is there great discontent amongst landowners and tenants on the conduct of NLTB. One of the reasons is the high costs which NLTB deducts by way of its operational costs. This cost used to be 25% when total earnings of leases were little in comparison to today, but the costs have been reduced lately firstly to 20% and then to 15%, but the remainder out of the 25% is invested for the benefit of the landowners rather than being handed out to them. So the landowner still receives what he received when NLTB deducted 25% as operational costs.

According to section 4 of the Native Land Trust Act (Cap 134) the customary owners have no choice as regards NLTB being the Legal owner (trustee) of their land. The

⁷ S. 5 of the Native Land Trust Act (Cap 134).

⁸ S. 8 of the Native Land Trust Act (Cap 134).

⁹ Crocombe R (1987) *Land Tenure in the Pacific*, University of the South Pacific, Suva, pp. 227.

courts have decided time and again that NLTB is the legal owner of all native land in Fiji, despite landowners acting as owners.

**Leasing under the Agricultural Landlord
and Tenant Act (ALTA) Cap 270**

The Agricultural Landlord and Tenant Act (ALTA) was enacted in 1966 to regularise the occupation of native land by Fijians and non-Fijians and to provide a basic set of guidelines implied in leases of agricultural land. ALTA provides for a presumed tenancy to be created when a person has been in possession and has been cultivating any agricultural holding for three years without the consent of the lawful landlord.¹⁰ (This includes NLTB).

The responsibility of eviction is of the landlord, and the landlord has to prove that he or she actually tried to evict the occupant in those three years. The onus is on the landlord to prove that the occupation was without consent, and if the landlord fails to do so then under ALTA the occupant can get a lease of thirty years.

It is important to clarify that according to section 3 of ALTA, it does not apply only to leases of native land but to **ALL** leases of agricultural land which are more than a

hectare.¹¹ These however exclude Native Reserve land or land belonging to a Registered Co-operative Society leasing to its members only. Thus even a freehold lessee is protected if he is holding the lease of a freehold land and the landowner wishes to end the lease prior to expiry.

**Rights of Land owners in Fiji against their
Trustee (NLTB)**

When one looks at the landowners in Fiji, the analogy that readily comes to mind is that of a toothless tiger as they are unable to control or manage their own land and lose a quarter of the proceeds for the management and control which they do not even always appreciate or agree to. Another quarter of rentals is lost by the distribution system where, 5%, 10% and 15% of the remaining 75% are distributed to the Turaga ni Taukei, Turaga ni Qali, and the Turage ni Mataqali. The mataqali member whose land is being leased receives only 52.5% of the total proceeds of his lease, coupled with problems like delay in rental payments, arrears by tenants, and delay by NLTB.

The customary owners do **NOT** have locus standi to bring a claim against NLTB as

¹⁰ S. 4 of the Agricultural Landlord and Tenant Act. Cap. 270

¹¹ S. 3 of the Agricultural Landlord and Tenant Act. Cap. 270

established in the cases of *Meli Kaliavu v NLTB*, *Timoci Bavadra v NLTB*, and *Naimisio Dikau v NLTB*.

The exception and confusion raised recently is in the decision of the *Vomo Island*¹² where the landowners successfully brought a claim against NLTB. This however does not mean that the courts have overridden the above cases.

This case before Gates J was unique with its own facts, which depicted a landowner of a freehold property bringing a claim against NLTB. It was without doubt that a freehold owner is the rightful person to bring a claim, and the court held that a mataqali could own a land in fee simple, and bring a claim. However this does not mean that a mataqali is the legal owner of native land as the case was confined to freehold land, and not native land.

The court clearly showed in this case that freehold tenure is the only type of land tenure where there is security of tenure, and Justice Gates made no error in deciding that a land in fee simple does not change its qualities or characteristics when its owners change. It is not a chameleon that would change its colour depending on whose grasp it is in.¹³ Freehold

¹² *Naulivou v The Native Land Trust Board* Civil Action No. HBC0069.94L (2003) High Court of the Fiji Islands

¹³ *Naulivou v The Native Land Trust Board* Civil Action No. HBC0069.94L (2003) High Court of the Fiji Islands, para. 31.

land remains freehold even if held by a mataqali, or a Company.

When one talks about ALTA or NLTA one cannot leave out section 185 of the 1997 Constitution of the Republic of Fiji Islands which provides for Group Rights. According to this section any amendments to ALTA or NLTA require to be read three times in both Houses, with motions in the second and third readings. In addition 9 out of the 14 members appointed by nominations of the Bose Levu Vakaturaga have to vote in favour of such amendments. This VETO powers makes any amendments to both ALTA and NLTA as difficult as possible.

Conclusion:

This paper concludes that international developments require security of tenure as do all major investments. Thirty-year leases are incompatible when it comes to security and development. Fiji has learnt his the hard way, when its sugar production is declining due to an unstable land tenure system. ALTA, NLTA in themselves do not have the solution to the problem of security of tenure. One has to move away from leases into freehold tenure in fee simple, and Customary Freehold land would be a step in the right direction.

Recommendations:

Short Term:

The Native Land Trust Board has to find ways of reducing arrears in rentals, which it collects on behalf of the landowners. This would ensure some satisfaction of the landlords, and not create an onerous burden on tenants at the last minutes.

Government has to legalise other forms of leasing customary land, as a loss of about 50% of lease rental is a major loss for the land owners.

Land owners need to be encouraged to lease out as much land as possible, in order to ensure that the government control of leasing is a viable venture. Current non-renewal of leases is not a good sign either for the Government or NLTB.

Long Term:

In the long term Fiji has to move away from thirty year leases which can not sustain international developments. It either has to adopt systems like the Perpetual leases in other countries where a landowner can acquire a new lease with a longer life (99 years) on each disposal or ensure that there is Government guaranteed system of land tenure for the international tenants.

Other possibilities include the conversion of Native land to Customary Freehold land, alienable to others apart from just the State as provided under the Native Land Trust Act. A further step would be to consider the possibility of converting ALL Native land into freehold tenure.

Gordon's fears for non-alienation were that the customary landowners would be fooled by the colonisers and outsiders in land dealings as they lacked education at the time of colonisation. Today the whole country is governed under Fijian leadership with a majority of Fijians in Government and in Parliament, thus the fears are no longer realistic or are they?

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