## INTRODUCTION

THIS COLLECTION OF PAPERS was inspired by and to an extent reflects papers presented at the 8th conference of the European Society for Oceanists held in St. Andrews, Scotland, in July 2010.

The conference theme was "Exchanging Knowledge in Oceania," and within this theme a number of the papers collected here—or the origins of them—were presented at a panel titled "Land, Laws and People in the Pacific."

This area of research was prompted by considerations of the influences of globalization and modernity, which are placing greater emphasis on individual economic wealth accumulation and the related pressures to derive economic benefits from customary land and its resources. As becomes evident from a number of the papers, forms of customary land tenure are seen as inimical to this form of development and economic advancement for Pacific island countries, especially where such tenure is only one of among several possible forms of land regulation in plural legal systems.

Although there is considerable rhetoric about "building bridges" between introduced law and customary law, maintaining and respecting a "dual" system of land tenure, or "harmonizing" the apparently disparate approaches to land in order to provide the appropriate environment for economic development, all too often the approach of policymakers and aid donors seems to be that customary land tenure should make way for or adapt to introduced forms of land tenure, such as leases, contractual licences, and freehold estates as well as freedom of succession, the incorporation of landholding bodies, and the ability to raise financial loans against the security of real estate.

The drive for commoditization of land and land reform is not, however, due only to external forces. Within Pacific island countries, changes in land tenure patterns and customs are taking place. Some of these changes are embraced voluntarily—if not by all, then by some—and others are imposed. Often, however, the impact of these changes on social organization, economic health, and the equitable distributions of access to and use of land is unconsidered. In particular, the potential for internal conflicts between indigenous people embracing different forms of land use and tenure is ignored, with the focus being invariably on the polarities of tradition and change, customary forms and laws, and introduced forms and laws, thereby failing to recognize the compromises, hybridization, and adaptations that may be taking place.

The collection of papers in this edition is directed not only at contributing to the body of information on land matters in the region and thereby exchanging knowledge but also, through interdisciplinary perspectives, at building a better understanding of customary forms of land tenure and land dispute resolution so that consideration might be given to how development might be informed by indigenous laws and customs rather than driven by Western-capitalist concepts and rules by drawing on some of the examples of adaptive mechanisms illustrated here and at the same time noting approaches that have been less successful.

There are a number of ways in which these papers could have been organized, just as there are a number of recurring themes and complementary topics, for example: the construction of indigeneity, customary land tenure, traditional and modern social organization and interaction, local and national politics and economics, the extent and limits of sovereignty, strategies of adaptation and resistance, and various influences of plural regulatory regimes. The rationale for the order I have chosen is explained below.

The opening paper by Marilyn Lashley draws attention to the historical background to contemporary issues of land tenure in three Pacific countries: New Zealand, Fiji, and Australia. Although in New Zealand and Australia indigenous people are a minority, whereas in Fiji, at least today, this is not the case (although at one stage it was so), the colonial legacy of land policy and land laws has continued to shape twenty-first-century issues pertaining to land.

Lashley examines in particular the tensions between policy to recognize indigenous land rights and the rights of indigenous people, the processes of making reparation for colonial policies of confiscation of land and extinguishment of title, and the continuing inequitable distribution of benefit arising from land and its resources. Lashley reminds us that although often

localized, issues relating to indigenous rights also take place against an international background of UN declarations, policy papers, and resolutions. Many of the papers that follow illustrate how far removed from localities this international discourse often is. She also draws attention to how land is perceived of differently in customary land tenure societies, highlighting the divergence of values that may exist between indigenous people in relation to land and Western perceptions of land. This will become a familiar theme but one that needs to be approached with caution insofar as not all indigenous people share the same perception of land, and even within localized groups of indigenous people, there may be conflicting perceptions of how land can be best used or utilized.

Lashley first turns her attention to native title in New Zealand, examining in some detail the purpose and effect of the Treaty of Waitangi of 1840 and the early misunderstandings it occasioned. She examines the policy of Maori land confiscation and the subsequent efforts to restore land to Maori and the procedural challenges presented trying to match traditional land rights with government-sanctioned processes. She highlights the continuing need to arrive at the accommodation of Maori land rights by focusing on the Foreshore and Seabed Act of 2004 and the Marine and Coastal Areas (Takutai Moana) Act of 2011. These legislative developments provide a link with Fiji, where the now deposed prime minister, Laisenia Qarase, sought to emulate what was happening in New Zealand with his own foreshore and seabed legislation, the Qoliqoli Bill and the Indigenous Land Claims Bill. Although the 2006 military coup has ousted any form of democratic lawmaking, the politics of land in Fiji owe much to early colonial intervention, as outlined by Lashley in her examination of the historical background to present-day Fiji. Early land wars as experienced in New Zealand were avoided in Fiji by early recognition of Fijian land tenure. However, as Lashley points out, this did not mean land wealth, as Fijians were locked into village-based subsistence agriculture on land that could not be alienated, while commercial profit was made out of leaseholds granted over native land, freeholds, and Crown (now state) land. Inequitable distribution of wealth (both perceived and real), the introduction of immigrant Indian laborers under the *Girmit* system, and the emergence of new political agendas—in part endorsed by the colonial interpretation of traditional forms of governance—established the foundations for postcolonial instability. Despite national sovereignty, the entrenchment of Fijian traditions and a considerable reduction in the Indian population of Fiji, many Fijians, as Lashley points out, derive little benefit from the land or land-based development.

Historically however, indigenous Fijians were not at badly treated as indigenous Australians. Lashley concludes her paper by looking at the history of land and Aboriginal land rights in Australia. The history of Australian Aboriginal people is very different from that of New Zealand Maori and Fijians, but it is not an isolated story, as will be seen in the case of Rapa Nui. For those not familiar with the story of Aboriginal dispossession of land, Lashley's paper provides critical insight into the background to present land issues in Australia and explains why the decisions in *Mabo* and *Wik* were so significant. The legacy of dispossession and then recognition has not, however, provided a miracle restoration of all traditional land rights in Australia. The complexities and challenges of the current system are evident in this part of the paper, as are the uncertainties that stem from processes designed to clarify rights.

The second paper by Katie Glaskin and Laurent Dousset keeps us in Australia. As pointed out by Lashley, there are two distinct domains in respect of Aboriginal land rights: native title, which is determined by the Commonwealth government, and Aboriginal land rights, which are determined at state level. Glaskin and Dousset examine the interpretation of "native title" and the interrelationship of laws and customs that inform and interpret the rights and interests subsumed under "native title" and the society that recognizes these laws and customs. The coauthors problematize what is meant by "recognition" when so much rests on this link between law, society, and native title. In particular, the paper examines the teleological interpretation that emerges as a process of adapting to meet the procedural demands of an introduced system. They point out that the recognition by the system may be different from Aboriginal traditional recognition but that Aboriginal people may re-cognize the relationship between laws and customs of society in order to achieve the formal recognition necessary to proceeding successfully with a claim. This consideration of shaping and reshaping tradition/custom or what is perceived as or held as customary is an adaptive mechanism encountered elsewhere, such as in Papua New Guinea.

Glaskin and Dousset also point out the problems of using terms such as "society," used frequently in anthropology, and, one might add, "land," which is used frequently in property law. While the law likes concepts and their labels to be bounded, anthropologists increasingly accept that they are not. This is a conceptual problem that is encountered time and again, whether one is referring to "rights," "incorporated land groups," "clans," "customs," or "laws." In order to claim native title, Aboriginal claimants have to establish that they were a "society" that existed at the time of colonization. To assume that this is a self-evident concept may be ethnocentric,

but as Glaskin and Dousset point out, if an Aboriginal claim is to succeed, then traditional perceptions may need to be reconstructed to meet the recognition of those making a determination.

Understanding the act of recognition, however, as Glaskin and Dousset indicate, is important not only in the context of native title in Australia but also for understanding the relationship between cultural minorities and the nation-state elsewhere, not least because it underscores the asymmetrical nature of recognition. It is, moreover, this failure to recognize, according to one's own recognition criteria, that marks the continuing gulf between Western perceptions of property and customary land tenure in much of the developing world that leads to aid withdrawal and the labeling of states as "failed" in terms of economic development—a point mentioned early on by Lashley.

The third paper in this collection takes us away from Australia to Rotuma. As with Lashley's paper, Alan Howard's paper provides a detailed insight into the history of land governance in Rotuma, especially attempts by the colonial government to impose its own version of what was best for Rotuma. Unlike the situation in Australia, however, British efforts to impose a Rotuma Land Act in 1959 were singularly unsuccessful. Rotuma's early history reflects that of many Pacific islands, in particular the impact of contact on traditional kinship structures and related to these landholding patterns. However, despite increasing focus on individual land rights and commercial agricultural development, Rotumans retained traditional bilineal principles of land tenure in the face of colonial proposals. Recently however, there have been demands for change although not complete abandonment of the bilineal system—the strengths and weaknesses of which Howard brings to our attention. As with other Pacific islands, Rotuma is facing demographic challenges as well as increasing realization of the commercial value of land for housing and tourism. International access to the island is also changing. Rotuma is therefore an island on the brink of change.

Rapu Nui is also an island hoping for change but, unlike Rotuma, did not successfully resist colonial land policy. Like the Aboriginal people of Australia, Rapanui were dispossessed of their land by the colonial power: Chile. Lorenz Gonschor's paper takes us to this island at the eastern tip of Polynesia, following first the early history of contact and land dispossession, military dictatorship and incarceration of Rapanui and the belated land restoration initiatives of the 1990s and more recent moves to confer new political status on the island. His paper then goes on to examine traditional and imposed forms of land tenure, including, as in Rotuma, a shift toward individual land titles. Unlike many Pacific island states, a large percentage

of the land in Rapa Nui continues to be state owned. While this means that there is land for distribution by the government, it also raises questions about entitlement and control, especially if Rapa Nui acquires some form of greater self-governance and particularly, as Gonschor points out, if there is a groundswell of informal land claims and occupation based on traditional claims and genealogies. Land disputes—as in Rotuma—are common not because of bilineal inheritance but because the very legitimacy of title grant is challenged by those seeking to escape the colonial past. This pluralism of legal title potentially inhibits future development, and its resolution is identified by Gonschor as being one of the most pressing needs of the island's land tenure system.

Rapa Nui is caught in the middle of wanting to assert precolonial claims to land while confronting the reality of many individual titles to land acquired under colonial administration. Rarotonga also experiences plural legal systems of land tenure as a result of the intervention of colonial administration in the form of the Native Land and Titles Court in the early twentieth century. Arno Pascht, in his paper, explores the ways in which people deal with plural legal systems. In particular, he focuses on notions of rights to land and ownership of land.

Following the pattern set by previous contributors, Pascht locates contemporary land issues in their historical context, looking at pre–European contact land tenure first. As in Australia, these narratives of early land rights continue to be significant for land claims.

However, in Rarotonga, this continuation of association has been modified by the intervention of court adjudication and process. In particular the registration of court decisions rigidified a system that was described as "fluid and flexible" (Campbell 2002: 237) and introduced a category of land that was neither native title to customary land nor introduced title but a hybrid: native freehold land. One consequence was the establishment of bilateral succession—seen as adverse to development because of the disputes it engendered in Rotuma, as well as equal rights of inheritance to all children, who in turn could register their ownership rights. While the law states that the "ancient customs and usages of the Natives of the Cook Islands" should be applied, there is clearly uncertainty as to how the courts arrive at the decisions they do. Pascht critically considers two cases to establish what ancient customs and usages are being relied on, drawing attention to the way in which litigants shape their arguments in the light of previously successful claims. Pascht's analysis suggests that, in many respects, Rarotongans are engaging in the recognition exercise considered by Glaskin and Dousset, particularly in their claims to land based on occupation.

The impact of formal dispute resolution and the legal framing of land tenure has also been experienced in the Solomon Islands. Pei-yi Guo's paper looks at land disputes among the Langalanga of the Solomon Islands, remarking on how they adapt and adopt legal discourse to articulate their claims in a country where most land has been returned to the indigenous population and almost all of it is held under "customary land tenure" and how the legalization of land claims has in turn influenced social relations. Like Pascht, Guo uses an actual land dispute as a vehicle to examine how the law is incorporated into the imagining of social relations, not as a separate and isolated form but as integrated into the landscape in which they situate themselves—which Guo refers to as "legalscape." Guo traces the colonial history of land policy in the Solomon Islands and also traditional patterns of land rights. Although the former tried in several respects to integrate the latter, the reification of binary rights to land within a hierarchical system of primary and secondary rights rigidified what had previously been a fairly flexible system, thereby structurally altering the imagining of kinship relations. Guo looks at how this introduced structure has influenced the way in which genealogies are presented in court and in turn how this reflects back on the form and content of genealogical knowledge. In particular, she notes the shift toward lineality, the priority given to the male line over the female line, the marginalization of latecomers/newcomers by incorporation into the group, and the increasing reliance on written records of lineage rather than oral recitation. As the case she examines demonstrates, the commercial potential of land changes the landscape for indigenous people, provoking land disputes and the framing of genealogies to support the contesting parties. Guo's paper also points out the endemic failure of introduced legal structures to resolve land disputes due to either the processes involved or the refusal of parties to accept court rulings, so that while legal discourse becomes part of the language of land, it is not necessarily the dominant one, nor does legalization solve problems of land disputes.

Guo has indicated how human–land relations become saturated by legal discourse. Similar trends are found in Vanuatu, where, although the gulf between introduced law and customary law remains considerable, it is evident that some indigenous people are adapting introduced modalities to fit their own needs, particularly because—as is the case in the Solomon Islands—land rights are continually being contested. As in the Solomon Islands, registration of customary title to land is nonexistent, but there is a legal requirement to register leases. Although this process is inefficient and often misunderstood, indigenous ni-Vanuatu, while critical of the rapid alienation of land under leasehold—which appears to undermine the

principle of returning all land to customary title holders at independence—are beginning to realize that this process can be used to their advantage. This paper presents contemporary land practices against the historical legacy of land alienation prior to independence and land restoration at independence. The plural land systems that have been noted elsewhere are also a feature of land tenure in Vanuatu, and, as experienced in the Solomon Islands, land disputes frequently go round and round the various dispute forums, with parties reluctant or unwilling to accept decisions. A consequence has been that ni-Vanuatu seeking to secure title to customary land and take advantage of development opportunities are using leases and registration in ways that were probably not envisaged originally. In the process, "custom" and local practices are being modified.

The collection concludes with four papers focusing on land issues in Papua New Guinea. As the largest and most diverse Melanesian country in the region, it is not surprising that a huge range of land issues are encountered in different localities. Like other Melanesian countries, most land in Papua New Guinea is held under customary forms of land tenure but unlike countries such as Vanuatu, Solomon Islands, and Fiji, Papua New Guinea has considerable resource wealth that is being exploited by foreign investors and that has led to a number of specific land issues and unique legal institutions. Colin Filer's paper looks at one of these, the lease–leaseback scheme and the growing acreage of land being brought under this scheme. James Leach considers the tension between retaining land in order to provide basic social and human needs and exploiting it for commercial benefit in the vicinity of the Ramu Nickel developments. Michael Goddard's work on the Motu-Koita finds some parallels with that of Guo in the Solomon Islands, while that of Richard Eves in New Ireland has some resonance with the findings in Vanuatu, namely, that indigenous people are implementing changes in land tenure on their own initiative.

Of all the countries considered in this collection, the lease–leaseback scheme is found only in Papua New Guinea. Colin Filer's paper explains the background to this legal device and its association with incorporated land groups and draws attention to its potential for misuse, especially where the land leased has commercial potential, for example, for logging, coffee, coconut, or palm oil production. Of particular concern is that land leased is leased back not to the customary owners making up the land incorporation group but rather to private companies, thereby effectively alienating land, at least for the period of production, from customary landholders. Using a variety of data, Filer highlights the rapid recent escalation of these leases and the use of agricultural development applications to conceal logging projects. While the legal framework allows for the clearance of

forestry for agricultural development—agroforestry—it is clear from Filer's paper that a number of the intended safeguards are not working or are being circumvented. In particular, many landowners are being left out of the processes and benefits of land development and land mobilization, a consequence that could, in the long run, lead to social unrest and civil disorder.

James Leach picks up this concern of land alienation in his study of people on the Rai Coast. The land here is environmentally fragile but also potentially valuable as a raw material for processing minerals from mining, and the Ramu Nickel processing plant is close by. Even if land in the vicinity is not in danger of being taken over by the government for the mining project, Leach points out the possible changes that could occur, in particular the threats posed to the constitutive interdependence of people and land triggered by the demand of nearby markets for food crops and the growing desire and need for money. However, as Leach indicates, at present growing and selling crops for money is optional; people still have their gardens to provide the bulk of their needs or to trade with neighbors because they still have land and forests to provide these things. If, however, engagement with the monetary economy is not bringing in supplemental income but becomes the basis of survival, then the whole underlying rationale of customary land tenure changes and, with it, the way in which land and people are associated. Leach creates for the reader a sense of the present inter-relatedness of people, time, and place through the use of visual images distinguishing it very clearly from development concepts of property ownership. If customary tenure is to remain central to land in Papua New Guinea, then Leach argues that it must be understood in its entirety and not simply reduced to forms of property rights.

Leach concludes his paper by suggesting that recognition of the power of customary landholders to alienate, exploit, and appropriate land may lead to a "drastic narrowing of value in land." Michael Goddard is also concerned with the commercialization of land. Focusing on the Motu-Koita, he explores the way in which preindependence recording of traditional land customs continues to influence the way in which land claims are framed when they become before the courts. This paper picks up themes found in those of Pascht and Guo, in particular how colonial intervention in the interpretation and recording of custom tended to promote patrilineality over and above other idioms that determined land rights. Goddard's paper underlines the difficulties confronting ethnologists and others in coming up with appropriate nomenclature—a challenge raised earlier in this collection by Glaskin and Dousset—and the abiding effect of the notes of Land Commissioner Bramell in the 1960s. Goddard's paper illustrates the very

pragmatic need of colonial administrators to be able to identify on their own terms a person or persons with whom they could negotiate land deals and the lasting effect of this on kinship structures and leadership roles in the context of formal land disputes. This narrowing of rules relating to land is in contrast to the nuanced idioms described by Goddard in relation to practice in the village of Pari not far from Port Moresby. The difference of approach, however, becomes crucial when land is litigated, as illustrated by the case chosen by Goddard. In examining the court's response to evidence, Goddard points to the gradual transformation of the patrilineal idiom adopted by colonial administrators into a rule of customary law under the influence of Western juridical principles. While this might be thought to rigidify customary land rights, the parallel existence of informal courts with a focus on negotiated, compromised settlement rather than judicial decision offers a more flexible alternative. How long this informal procedure will appeal to a younger generation of marginalized, landless, and litigious Motu-Koita remains to be seen.

Flexibility and adaptability are, however, characteristics of customary land tenure, patterns of kinship, and survival in much of Oceania. Richard Eves's paper is in many ways an optimistic note on which to conclude this collection. The people of Lelet, on whom he focuses, are seizing the initiative to deal with the limits of their traditional land tenure systems in order to engage with new opportunities. Eves starts his paper by locating his case study against the wider critique of customary land tenure versus development and the steps taken by colonial government to address the perceived shortcomings of traditional land systems. The Lelet, like other indigenous people considered in this collection, are confronted by competing land interests linked to kinship but, in the interests of progress, especially the profits to be derived from coffee planting, have decided to reduce the possible plurality of land claims by emphasizing unilineal descent and ownership rather than use rights. In order to understand the reforms with which the Lelet are engaging, Eves presents a detailed explanation of the relationship between kinship and land. As has been indicated in other papers, this is not simply a relationship based on jural concepts such as property or ownership. Changing existing land rights is not easy, but Eves's paper provides valuable insight into how villagers are taking steps to modify land claims so as to accommodate long-term crops. The extent to which they will succeed is not yet known, and it is unclear how inequalities in land distribution or issues of succession will be addressed. Conflicts may be inevitable, particularly as the changes proposed may not sufficiently encompass the many dimensions of customary land tenure emphasized by Leach.

As editor of this collection, I am extremely grateful to Phillip McArthur, who, besides delivering a very interesting paper at the Esfo conference—which he modestly declined to have included in the collection—readily agreed to a special edition of the journal for these papers. I am also very grateful to James Weiner, who with equal enthusiasm agreed to write what was originally envisaged as an afterword to the collection but has become the foreword, in which he brings together and draws out a number of the themes that resonate through the pages. I am pleased not only that the collection includes studies of diverse Oceanic countries, some of which have traditionally received rather less attention by researchers than others, but also that the collection represents the work of a range of contributors from seasoned experts in their fields to students engaged in their doctoral studies. I hope readers will find the contents herein as informative and stimulating as I have.

*Sue Farran*
*Professor of Laws*
*Northumbria University*
*England*
*August 2011*

## REFERENCES

Campbell, Matthew
2002 History in Prehistory: The Oral Traditions of the Rarotongan Land Court Records. *Journal of the Polynesian Society* 37 (2): 221–38.