STRANGE BEDFELLOWS? CUSTOMARY SYSTEMS OF COMMUNAL LAND TENURE AND INDIGENOUS LAND RIGHTS IN NEW ZEALAND, FIJI, AND AUSTRALIA

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Impoverished and undereducated with inadequate access to health services many indigenous communities are regarded as perennial cases of failed social and economic development policy by dominant groups in society. Increasingly western nations use such failures to justify jettisoning development policy targeting indigenous and other marginalized minority groups to pursue worthier or more pressing policy priorities. In evaluating indigenous peoples' efforts to implement development policy, we find them straddling western ways of capitalism and nonwestern cultural traditions, aspirations, and metaphysics that constrain performance. Nowhere is this dilemma more evident than when we compare policies of government-sanctioned alienation and exploitation of native lands on indigenous systems of communal land tenure in the Pacific. This paper identifies and describes indigenous systems of communal land tenure, government approaches to native title and native land use, and the emergence and implementation of current land rights policy for indigenous peoples in New Zealand, Fiji, and Australia.

Introduction

In the aftermath of World War II, governments worldwide were pressured by Vatican Popes Pius XI and XII and the United Nations to recognize indigenous peoples' aspirations for self-determination, self-governance, and

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development by means of decolonization and social justice. Progressively, many western governments, in varying degree, recognized indigenous peoples' grievances, restored their rights and sovereignty over customary landholdings, compensated them for confiscated land, and sought to remedy systematic marginalization by implementing social policy to improve their social and economic well-being. Yet insufficient progress has been made in alleviating or reducing poverty and providing economic uplift in many indigenous communities. Still impoverished and undereducated with inadequate access to health services, even in the twenty-first century, many indigenous communities are regarded as perennial cases of failed social and economic development policy by the dominant groups in their respective societies. Increasingly, both conservative and liberal governments use such failures to justify jettisoning redistributive policy targeting indigenous and other marginalized minority peoples to pursue other policy priorities. In evaluating indigenous peoples' efforts to implement development policy, we find them simultaneously straddling western ways of capitalism and nonwestern cultural traditions, aspirations, and metaphysics that seriously constrain performance. Instead of exploiting land as the engine of economic development, indigenous peoples communally hold land as "sacred trust." Nowhere is this vexing dilemma more evident than in the case of land laws pertaining to indigenous peoples of the Pacific in New Zealand, Fiji, and Australia.

This paper compares processes of extinguishing native title and confiscating land and their impact on indigenous (Aboriginal) customary systems of land tenure in New Zealand, Fiji, and Australia—three cases that are similar but distinguishable resulting from varying British Crown recognition of indigenous peoples' rights to land (native title), treaty, and sovereignty. In addition to identifying and describing customary systems of communal land tenure, this paper examines government approaches to native title and land use and restoration of indigenous land rights. Central questions include the following: What processes do nations use to extinguish native title? What are the common attributes of customary systems of indigenous landholding? What mechanisms do indigenous peoples use to regain native title and restore land rights? What structures or mechanisms are established to accommodate indigenous landholding postrestoration of land rights? To address these questions, the focus of this analysis is on New Zealand's Foreshore and Seabed Act of 2004 and Marine and Coastal Area (Takutai Moana) Act 2011, Fiji's proposed Qoliqoli Bill, and Indigenous Land Claims Tribunal Bill of 2006 (pending), Australia's New South Wales (NSW) Aboriginal Land Rights Act 1983, and NSW Aboriginal Land Rights Amendments Act 2009. To these ends, this paper uses findings from several

rounds of field research conducted in New Zealand, Fiji, and Australia from 1994 to 2010 that included participant observation; interviews of public officials, scholars, and citizens; literature reviews; and the collection and analysis of archival data and documents.

Common Ground of Indigenous Notions of Land Tenure

Concepts of indigenous, sovereignty, and land tenure underpin this analysis. In 1960, hegemonic western nations acknowledged the rights of indigenous peoples by affirming the United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples and establishing a trusteeship to protect indigenous peoples in overseas territories. The U.N. Working Group on Indigenous Populations later defined indigenous peoples as "peoples who have a priority in time over the land, voluntarily perpetuate their cultural distinctiveness, self-identify as indigenous, and share a common experience of subjugation, marginalization, dispossession, exclusion, and discrimination by the dominant society." According to the Working Group, indigenousness does not require that a group be a numerical minority but rather that a group hold subordinate or marginal status in relation to other dominant groups within a society (UN DOC.E/CN.4 /Sub.2/AC.4, 1996/2).

It is also important to note that definitions of sovereignty and land tenure used in governance derive from conceptualizations of power and exchange relations based upon western democratic principles, practices, and goals that generally devalue indigenous ways of knowing, problem solving, and identity. Sovereignty is the power or authority that comprises the attributes of an ultimate arbitrage agent (a person or body of persons) entitled to make decisions and settle disputes within a political hierarchy with some degree of finality (Miller 1997, 492). Sovereignty does not necessarily rest in one person but can be vested among a plurality, including legislators in an assembly, branches of government, or states in federation while maintaining discretionary autonomy and final authority. However, sovereign authority is given only to allow those who govern (rule) to attain or conserve what is in the public interest (utility). On the other hand, customary practices of sovereignty and landholding—"the Pacific way"—emphasize reciprocal and hierarchical relations, privileges elders and customary chiefs, extols deference to authority, propriety, and order and enforces communal and multiple ownership of land that often impede economic development. For indigenous peoples, sovereignty is not limited to political relations but defines authority over the land, fisheries, forests, and other *taonga* (treasures). Although governments seek to promote indigenous economic development by recognizing native title and providing

compensation for land confiscation, Maori, Fijians, and Aborigines opt to exercise traditional systems of communal landholding rather than exploit private property rights over newly restored lands for economic benefit.

Unlike western notions of land tenure that regard land as a privately owned fee-simple asset, indigenous societies deem land tenure as both coterminous with group identity (thereby, valorizing indigenous culture) and as a sacred trust replete with fiduciary obligations. That is to say, for indigenous people, landholding is a sacred charge from the Creator(s) over which they not only exert stewardship but a communally held manifestation of the self, the collectivity, and the spiritual. Thus, communal land tenure is a fundamental characteristic of indigenous land ownership whereby the collective (group), holds land in common with other members of the group. Under communal land tenure, land is not fee-simple "private property" that can be bought and sold by individuals for personal gain and, thereby, has neither the advantages of individual title nor the resource degrading disadvantages accruing from open access. Under communal land tenure the group is the legitimate landholding unit. Thus, prior to colonization, land tenure in Pacific indigenous societies is distinguished from landholding in western societies by four fundamental features (Acquaye 1984, 17): (1) land ownership is recorded and legitimated by means of oral and usually public submission at ceremonial gatherings; (2) land tenure depends on the maintenance of smooth functioning and amicable relationships within the society; (3) land is availed to sparse populations for the purpose of subsistence farming; it was not treated as "private property" that could be bartered or exchanged for monetary benefit; and (4) land is communally (collectively) held by members of the group.

In practice, the head of the tribe, clan, or group (i.e., chiefs) has fiduciary responsibility over communally held lands, whereas land is allotted and used on an individual basis by a household or family. Individual rights to land use (not ownership) could be acquired by landholding members of a group via inheritance or by nonmembers of the group via usage or need. Family or household allotments and use rights would revert to the group when land was abandoned, when the subgroup died out, when group allegiance was renounced or rejected, or when a temporary right expired. Generally, the rights of males to land were superior to those of females; the rights of elder sibling were superior to younger ones, whereas the rights to land of residents were superior to those of absentees, and the rights of users were superior to nonusers. Nevertheless, absolute rights to land were not transferable in principle even though warfare, famine, migration, fear of sorcery, or other factors might lead to such transfers (Rakai, Ezigbalike, and Williamson 1995, 2). Consequently, communal land tenure poses challenges to using land for economic development or benefit because

"collective or multiple ownership" imposes restrictions on alienation of land by gift, sale, or long-term lease and requires approval and consent by all group members, beneficiaries, or participating parties.

Native Title, Treaty Rights, and Land Tenure in New Zealand

Maori are indigenous Polynesians; the *tangata whenua* (people of the land) whom legend says traveled to New Zealand by canoe using celestial navigation around 900 CE and remained the dominant ethnic group until 1858. After signing the Treaty of Waitangi in 1840, Maori-European relations deteriorated into land wars and land confiscation that jeopardized the viability and survival of the Maori until the 1930s. Maori peoples were dispossessed of their lands, fisheries, forests, and treasures and were reduced to less than 30,000 by 1898 (remaining at 6 percent of the total New Zealand population until 1956) resulting from introduction of European diseases and rampant poverty caused by the disruption of Maori culture, especially, social and economic life. The terms of the Treaty of Waitangi are as follows.

Article I. The Chiefs of the Confederation and all the Chiefs who have not joined that Confederation give absolutely to the Queen of England forever the complete government over their land (English translation of Maori text, Kawharu 1989).

Article II. The Queen of England agrees to protect the chiefs, the subtribes, and all the people of New Zealand in the unqualified exercise of their chieftainship over all their lands over their villages and over all their treasures. On the other hand, the Chiefs of the Confederation and all the Chiefs will sell land to the Queen at a price agreed to by the person owning it and by the person buying it (the latter being) appointed by the Queen as her purchase agent (English translation of Maori text).

Article III. In consideration thereof, Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects (English text and English translation of Maori text).

On February 6, 1840, New Zealand was established as a British Commonwealth colony through treaty cession achieved by means of the unilateral actions and declarations of William Hobson, Lieutenant Governor of the British Settlements. The Treaty was written in English and Maori. Forty-six Maori chiefs signed a Maori language translation of the treaty at Waitangi, which subsequently was taken around New Zealand and signed by approximately 500 additional Maori tribal representatives. Maori people understood the Treaty of Waitangi as a power sharing and governance

contract between two parties, Maori people and the Crown, whereby Maori people were equal parties with the British in the cultural, social, economic, and political life of New Zealand (Lashley 2000). In spite of the Treaty of Waitangi's guarantees and equivalent status conferred as signatory party, Maori political and economic position and interests were subordinate and marginal to the interests of Europeans. The Crown claimed ownership to all land subject to Maori customary rights and title. Consequently, the early experiences of Maori under British colonization were marred by wars over land settlement and sovereignty, abrogated treaty rights, and land confiscation.

The 1863 New Zealand Settlement Act was the first major legislation that sanctioned compulsory land confiscation. As punishment for the Maori wars against European settlement and colonization in the 1860s, approximately 3.5 million acres were taken from Maori as a prize of war. From 1905 onward, Maori Land Boards (comprised by non-Maori appointees) were authorized to compulsorily acquire land declared not required for actual occupation by Maori. Between 1865 and 1899, approximately 11 million acres of Maori land was transferred to European hands under the land laws, leaving approximately 8 million acres in Maori freehold ownership. Between 1900 and 1930, another 4.5 million acres of Maori land were alienated, and a further 3 million acres were leased. In a 1920 survey, it was estimated that Maori occupied 400,000 acres, and 800,000 acres were available for Maori use (Ward 1997). Although government decision makers slowed the pace of land confiscation by enacting the 1929 Native Land Amendment Act and Native Land Claims Act, the 1953 Maori Affairs Act reversed these acts. Under the 1953 Maori Affairs Act, any interested person could submit information to the Maori Land Court claiming that a particular parcel of land was unproductive (or had noxious weeds or unpaid rates) and the act empowered Maori trustees (non-Maori appointees), who could alienate Maori landholdings by leasing or selling these lands to non-Maori as they saw fit. The 1953 Town and Country Planning Act restricted the use of Maori-held lands via zoning laws. In 1960, there were 3,168 land leases covering 466,194 acres, and by 1965, leases increased to 3,481 covering 618,580 acres, and land sales escalated from 5,245 to 51,824 acres for this period (Schwimmer 1968, 24). By 1990, government-sanctioned land alienation had reduced Maori landholdings to only 5 percent of 60 million acres, most of which was under multiple ownership—tribally owned.

Restoration of Maori Land Rights and Types of Treaty Land Claims

In New Zealand, land is essential to Maori cultural identity as the tangata whenua and buttresses Maori economic development. In response to

renewed Maori activism beginning with the February 2, 1971 Waitangi Day protests, "Day of Mourning" for the loss of Maori land, followed by the historic 1975 Maori Land March, and the 1977 Bastion Point protest and subsequent occupation, three pivotal legislative acts were passed to redress Maori grievances. The 1975 Treaty of Waitangi Act reasserted the importance of the treaty as the founding document of New Zealand, created a standing Tribunal to hear Maori claims of breached treaty rights, and investigated all new legislation (from 1976 onward) for possible treaty breaches. The 1985 Treaty of Waitangi Amendment Act enlarged the tribunal's membership and scope, making its jurisdiction retroactive to 1840, the date of treaty cession. Further, passage of the Te Turi Whenua Maori Act in 1993 confirmed that ownership of Maori land would be retained in Maori hands and established schemes to promote Maori land development and occupation. This Act recognized Maori freehold land as a permanent and viable class of land tenure that was significantly different from fee-simple freehold land transfer.

Maori peoples practice two types of land tenure, communal (*iwi*, tribe) and freehold (*hapu* and *whanau*, clan and family/extended family), both of which are characterized by multiple ownership. Although the Land Court implemented a multiplicity of ad hoc and parallel systems of land tenure, it neglected serious legal issues of Maori freehold tenure arising from multiple ownership, succession (change in land use), and trusts against title (whereby tribal trusts or incorporations are able to make decisions concerning the administration of the land on behalf of the beneficial owners) and methods of recordation (title registration)—Maori land title is often based on customary practices including oral submissions of *whakapapa* (genealogy) made to the court. Maori land is controlled largely by absentee owner organizations (e.g., iwi and Tribal Trust Boards) and governed by legislation aimed at retaining areas of Maori land under Maori ownership. Therefore, Maori freehold land is often beset by serious limitations that can impede development and enterprise. The administrative requisites of multiple title and bilinear succession exponentially adds more owners; poor title and ownership records make it difficult to trace ownership, size, and precise location of land; unsurveyed blocks and irrational partitions make effective and legal land use difficult and lock land out of development even when it is adjacent to highly productive land; and fragmentation of land creates uneconomic shareholding and units that engender land abandonment (Robertson 2004, 6).

Claims of breached treaty rights were filed almost before the ink was dry on the Treaty of Waitangi. Although treaty-based appeals were made to the Crown by Maori chiefs as early as 1847, the landmark settlements

are caused by the Treaty of Waitangi Act of 1975 and Treaty of Waitangi Amendment Act of 1985. The Treaty of Waitangi is a legal obligation between individual iwi and hapu (tribes and subtribes) and the Crown. Claims are filed under Article II for wrongful alienation of collectively held (tribal) private assets, specifically, land, fisheries, forests and other treasures. In general, claimants seek public acknowledgment by the Crown for wrong doing, restoration of sovereignty over sacred sites and redress (compensation) for the illegal confiscation of private assets (or their restoration). According to the Minister of Justice and Minister in Charge of Treaty of Waitangi Negotiations, Doug Graham (1991–1999), the treaty settlements process is not intended to adjudicate matters of social justice or equity but to provide fair compensation for lands, fisheries, forests, and other tangible assets unjustly confiscated by the Crown. "Any or all Maori can bring a claim against the Treaty of Waitangi but they must demonstrate prior ownership of tangible assets" (Interview: D. Graham 1994).

Iwi-Based Claims

Government has pursued the settlement of both iwi-based claims and complex claims on behalf of and affecting all Maori (pan tribal claims). Given the Treaty of Waitangi's status as a founding document of New Zealand that stipulates obligations between individual iwi and the Crown, treaty settlements are provided as direct redress by means of tribal mechanisms—Maori culture. Therefore, treaty settlements are negotiated and implemented by individual iwi. Treaty settlements are collectively held tribal assets that are administered by individual iwi. New Zealand Government established Tribal Trusts Boards by special legislation as mechanisms to administer and distribute treaty settlement assets to tribal collectives. The first Tribal Trust Board was established for Arawa in 1923 followed by Tuwharetoa in 1924, which distributed benefits as small farming and community development assistance. Tribal Trust Boards also maintain official registers of iwi ancestry, kinship networks, and membership. Assets and benefits from treaty settlement are accessed by individuals through active iwi membership, active affiliation, and strong attachment to Maori culture through the *Marae*. The Marae is the cornerstone of Maori culture and provides spiritual, economic, social, and political organization as well as literally, [venerated] tribal meeting house. When and where restored land rights and treaty settlements (and other targeted policies, e.g., affirmative action, biculturalism, language preschools, and economic development initiatives) have been most effective and successful, they have been implemented and accessed by means of the Marae structure as iwi-sponsored

activities. For example, the Tainui Trust Board and the Ngai Tahu Trust Board use the Marae to promote land development and related economic development ventures as well as to provide social services directly to Maori.

Old, Gifted, Crown Purchase, and Confiscation Claims

To some extent, both the ability to prove unencumbered ownership of tangible assets and the ability to exact settlements are products of historical accident because they also turn on the process by which land and other assets were alienated and the level of acceptance by particular iwi in partnership with the Crown. In the main, land was alienated by means of purchase, gifting, and confiscation. (Crown purchase describes a process for alienating Maori lands whereby the British Crown purchased Maori lands in blocks, then partitioned them into smaller blocks owned by the Crown and Maori and then further partitioned them until no portions of the blocks remained under Maori ownership.) Consequently, it is possible to file several types of claims of breached treaty rights: as old, gifted, crown purchase (pre- and post-1865) or confiscation (*raupatu*) claims. Old claims are filed for land alienated prior to British sovereignty (OTS 1996). Gifted claims are filed for land made available for "temporary purchase," which was to be returned when the original purchasers left, died, or no longer used it for the purposes of the original gift. Raupatu claims are filed for land wrongfully confiscated as punishment of Maori tribes who rebelled.

Foremost, the 1975 and 1985 Treaty of Waitangi Acts and the 1993 Te Turi Whenua Act led to the restoration of Maori rights as treaty partners, implementation of a process for adjudicating treaty breaches, and treaty settlements that provided Maori with substantial economic and cultural benefits. Since 1993, vast tracts of Crown lands that remained in public and industrial use were transferred back to Maori title because of unlawful confiscation, and the Crown was ordered to pay royalty fees to tribal owners. By June 2005, 1,236 claims of breached treaty rights had been registered under the Treaty of Waitangi Amendment Act. Of the 1,102 claims deemed subject to inquiry, 268 claims were adjudicated (settled, dismissed, or withdrawn), and the tribunal had issued full reports on 154 claims. Of the adjudicated claims, settlements of significant economic development benefit included the pan tribal commercial fisheries claim and separate sets of claims by the Waikato-Tainui tribes and by the Ngai Tahu tribes. The fisheries claim was settled in September 1992 and provided a fishing quota of thirty percent and NZ$150 million to promote Maori commercial fishing. A Deed of Settlement was also reached with the Tainui tribe in May 1995.

This agreement provided compensation of NZ$170 million, a public apology to Waikato Maori from the Queen (Crown), the return of 14,164 hectares of land valued at NZ$100 million, and NZ$65 million trust fund. A Deed of Settlement was achieved in the Ngai Tahu claim in November 1997. This settlement included a formal apology by the Crown, $170 million plus interest, transfer of ownership of Crown-owned *pounamu* land (greenstone), up to $2.5 million to settle more than thirty small ancillary land claims, and restoration of ownership and title to Mount Aoraki (Mt. Cook) that was subsequently gifted back to the nation by Maori. However, the largest settlement achieved thus far was the 2008 Central North Island Forests Land Collective Settlement, the "Treelords deal" that covered 176,000 hectares of Crown forest land valued at $195.7 million, an additional $223 million in rental fees accrued since 1989, providing an annual income stream of $13 million to seven iwi representing more than 100,000 Maori people. As of June 30, 2008, signed Deeds of Settlement were achieved in twenty-three treaty claims at a total cost of NZ$952,082,645.

Foreshore and Seabed Act of 2004

Despite the progress made in restoring land to Maori, globalization pressures for increased New Zealand economic growth have renewed debates over native land tenure and Maori customary rights over prime real estate ripe for commercial exploitation. For example in 2004, the Government of New Zealand enacted highly controversial legislation that redefined and greatly constrained Maori customary rights over coastline and coastal waters. The Foreshores and Seabed Act of 2004 (1) vested foreshore and seabed in the Crown as absolute property; (2) provided some recognition of specific Maori customary rights identified by the Maori Land Court; and (3) provided public rights of navigation and access in the "public interests" (e.g., marinas, recreation, tourism, etc.). By vesting foreshore and seabed ownership in the Crown, this act extinguished Maori customary title and left compensation to the discretion of the government after consulting with Maori. Moreover, it denied South Island tribes their day in court to establish customary title to foreshore and seabed that eight iwi and hapu won the right to claim under Marlborough Sounds ruling on the legal status and extinguishment of Maori customary landholding (*Ngati Apa v Attorney General*, NZ Court of Appeal, June 19, 2003). Most important, it allowed the Crown to convert Maori customary title to freehold title for commercial development and monetary gain (e.g., foreign owned mining and mining exploration, the Continental Shelf Project [that would extend New Zealand's exclusive economic zone], commercial fishing and tourism, and private

property development). The Foreshore and Seabed Act proved to be yet another instance of an allegedly Maori friendly government (e.g., Prime Minister Helen Clark), pursuing national economic growth fueled by globalization with adverse impact on indigenous rights and New Zealand race relations.[1]

The Foreshore and Seabed Act met with concerted and strident opposition not only from Maori peoples and a broad cross-section of New Zealand society but also international criticism. In response to significant and mounting opposition, government agreed to an independent review of the act that was completed in 2009. Pursuant to the recommendations of the review panel, government conducted public consultations with Maori and other stakeholders that recommended repeal and replacement of the act with a new model for the foreshore and seabed, the common marine and coastal area. The Marine and Coastal Area (Takutai Moana) Act 2011 (MCAA) "explicitly continues rights of public access in, on, over and across the common marine and coastal area," whereas it protects and continues customary interests as well as the interests of all New Zealanders, including subsistence, recreation, commerce, and conservation (MCAA, 3). Essentially, the MCAA (1) provides for management of the common marine and coastal area; (2) divests and incorporates local authorities into the common marine and coastal area; (3) recognizes existing interests and makes new leases, licenses, and permits available after current ones expire and retains Crown ownership of petroleum, gold, silver, and uranium; (4) continues existing ownership of structures and roads in the coastal area; and (5) vests land reclaimed from the common marine and coastal area in the Crown and permits application for a fee-simple title by the reclaimer.

More important, the MCAA recognizes Maori customary interests in the marine and coastal area in three ways. First, it acknowledges the *mana* (respect)-based relationship of iwi and hapu and thereby, can participate in statutory conservation processes including the establishment of reserves. Second, the Act defines a process whereby customary rights (i.e., launching a *waka* [dugout canoe] and gathering *hangi* stones [used for cooking in the ground]) that were exercised in 1840 and that also are continued today, can be given legal effect and the future exercise of such rights can be protected. Third, the Act gives Maori the right to seek customary marine title to a specific part of the common marine and coastal area if it has been used and occupied by a group according to *tikanga* (custom) and to the exclusion of others without substantial interruption from 1840 to the present. Following Maoris' lead, Laisenia Qarase, then Prime Minister of the Fiji Islands would extrapolate from New Zealand's Waitangi Tribunal process and Foreshore and Seabed Act to address long-standing land issues involving restoration of native title and compensation for fraudulently or

unjustly acquired freehold lands and vesting management and use of customary fishing grounds and seabed back into Fijian hands.

Native Title, Sovereignty, and Land Tenure in Fiji

The Fiji Islands' earliest inhabitants are said to date back 3,500 years ago to the Lapita Polynesian peoples. Based on current archeological evidence, *itaukei* (indigenous Fijians) arrived at Vuda in Nadi in four migratory waves via large war canoes. Prior to cession, customary culture was shaped by Polynesian, Micronesian, and Melanesian Papuan influences, and the Fiji Islands were organized into several loose and warring confederacies.[2] Although the Dutch explorer Abel Tasman first sighted the Fiji islands in 1643, it was not until the 1820s that European intrusions began in earnest. Traders, missionaries, and British naval officers and administrators found a Fijian society governed by rival, well-organized feudal chiefdoms. Fijian society was centered in the *mataqali* (Fijian lineages and clans) and headed by hereditary chiefs who began to demarcate the confederacies, as we know them today. Chiefs were of differing rank with some chiefs traditionally subordinate to other chiefs. Ownership of land was collective and *lewenivanua* (commoners, tillers of the land) owed the first fruits of the harvest to the chiefs as *lala* (obligatory gift). This practice symbolized a tacit division of labor and responsibility among the itaukei and cemented bonds of trust and faith between the *turaga* (village chiefs) and *lewenivanua* (MacNaught 1982; Ravuvu 1992).

Colonization and the first waves of mass settlement in Fiji were launched in the 1860s by a boom in cotton prices caused by the American Civil War and by competing interests of foreign governments in securing hegemony in the Pacific. Similar to patterns of settlement and colonization of New Zealand, disputes over land and sovereignty within and between European and indigenous Fijian communities and problems with "black-birding" labor kidnapped from other Pacific islands led to violent confrontations and tribal instability. By 1873, European resident settlers and adventurers in Fiji exceeded 1,800, many of whom conspired to erode Fijian governance, alienate land from Fijian hands, and annex Fiji to the British Empire. Under pressure from British Navy Commodore J.G. Goodenough and Consul E. Layad and the American government's imposition of a burdensome bogus debt,[3] the ruling chiefs of Bau, Rewa and Lau confederacies acquiesced to British annexation in exchange for British protection of Fijian interests as paramount and payment of outstanding debts. On September 28, 1874, Ratu Cakobau and other chiefs in the north and east confederacies proclaimed, "We give Fiji unreservedly to the Queen of Britain, may she rule us justly and affectionately, and that we may live in peace and

prosperity." The Act of Cession effectively consolidated Bau dominance over western Fiji, stemmed violent conflict among rival chiefs, halted alienation of Fijian land, slowed the pace of massive settlement, and thwarted further violence from European and American settlers opposed to Fijian rule. On March 12, 1874, Commodore Goodenough formally responded to the offer of cession, "It is clear to me that you are not ceding the land itself or your people" (MacNaught, 30).

In Fiji, the Crown sought to avoid mistakes encountered in the colonization and settlement of New Zealand that caused the protracted Maori land wars by recognizing the rights of Fijians as sovereign itaukei and ensuring that land ownership was retained in Fijian hands by banning further sales of Fijian land (Lashley 2010). After the Act of Cession, the Fijian populace was consigned to either eking out a living via subsistence farming in undeveloped rural villages on tiny plots or working Australian-owned sugar plantations at extremely low wages. Locking Fijians into the economy by means of village-based subsistence agriculture rendered them marginal, subordinate, and impoverished within their own nation. Thus, Europeans secured political and economic power and control by controlling the indigenous power structures.

In 1875, the Crown established three classes of land tenure: native land, Crown land, and freehold land. Native land is managed by the Native Land Trust Board on behalf of Fijians and for their benefit. Native land cannot be alienated from the landholding mataqali and is used for village subsistence. Native land accounts for eighty-two percent of Fiji's total land area, and much of this land (fifty percent) is unsuited for agriculture. However, thirty-one percent of native land (twenty-five percent of Fiji's total land area) is highly accessible and well suited to agriculture, and this land is leased primarily to nonindigenous Fijians for commercial use. Seven percent of the land inventory is Crown land, owned by the Crown for state and other public purposes. The remaining eleven percent is freehold land. Freehold land is land voluntarily and involuntarily alienated and transferred to Europeans and others prior to the Crown's prohibition on land sales in 1875. Anyone can own freehold land, which can be sold or used as collateral for loans at the behest of the owner, whereas native land is a tribal asset held communally; it is not private property and cannot be sold or used as security for a loan. Although Crown lands and freehold lands account for only 16 percent of Fiji's total land endowment, they comprise the best lands for urban, commercial, industrial, and agricultural usage. Most Fijians enjoy landholding via their *mataqali*, but increasingly some Fijians are losing access to land because they are members of land-poor mataqali—caused by the shift from flexible land boundaries for reconciling population change in precolonial times to fixed boundaries after colonization.

In 1877, Governor General Arthur Gordon codified the Native Regulations, rules for managing Fijians that co-opted Fijian social organization, institutions, and norms into a new local system of colonial administration. Fijians were governed through a system of indirect colonial rule loosely based on the traditional political structure of Fijian paramountcy, the "Council of Chiefs" that derived its authority by hereditary right through the mataqali. However, prior to colonization no standing body of paramount chiefs had existed as a Council of Chiefs or "Great Council of Chiefs," although chiefs would convene as a collective when strategically necessary. Governor Gordon created a new permanent supra-institution, the "Great Chiefly Council," *Bose Vakaturaga* that was largely comprised by Fijian provincial officials and administrators, district officers and government-appointed (nonhereditary) chiefs, and to which he also appointed a few most senior hereditary paramount chiefs. This Council of Chiefs' primary function was to advise the governor general and the legislature and to assist in formulating and executing native regulations. In concert with the new Council of Chiefs, in 1877 Auditor-General John Bates Thurston devised and implemented the Native Tax Scheme—fashioned from the Fijian lala system—and the Native Lands Commission to assess settler land claims, determine the structure of indigenous landholding, and stipulate the terms for commercial use of native lands via mandatory long-term lease agreements.

Volatile Mix: Fijian Land, Australian Capital and Girmit

To ensure Fiji Islands' productivity and viability, Gordon and Thurston sought to identify reliable mechanisms for sustaining economic growth and securing revenue for administering the new colony. After trying a variety of crops, Gordon decided to expand sugar production for commodity export. Thurston vetted the sugar expansion plan in Sydney where he succeeded in persuading the Colonial Sugar Refining Company (CSR) and several other Australian companies to establish sugar plantations, mills, and refineries in Fiji. To alleviate labor shortages caused by the onerous and burdensome Native Tax scheme (levied exclusively on Fijians that caused them to refuse plantation work), Governor Gordon negotiated an agreement with the government of India for supplying immigrant Indian laborers indentured for five-year terms to provide manpower for commercial agriculture—*girmit* system. Five hundred twenty-two Indians from Calcutta were introduced to Fiji as indentured laborers on May 15, 1879. Shipping records show eighty-seven vessels transferred thousands of indentured Indian laborers from Calcutta to Fiji between 1879 and 1884. By 1891,

there were 7,468 Indians, each responsible for cutting 3 tons of sugar cane at the rate of 1 shilling per day (Knapman 1987, 12). By 1882, CSR had ruthlessly monopolized the Fijian sugar industry, and indentured Indians became the preferred and predominant suppliers of labor for sugar plantations and processing mills. CSR not only compelled the Gordon, Thurston, and successive governments to accelerate the pace of girmit but also to subsidize the costs of both introducing and repatriating Indian labor. Colonial governments used current revenue, largely accrued from the Native Tax Scheme to finance the steady pace of labor immigration, large-scale plantation development, and sugar mill construction. Ultimately, Governors Gordon and Thurston established the Crown Colony of Fiji as an enclave economy for Australian capital (Lashley 2010).

After the system of indentured labor was halted in 1916, colonial administrators subdivided plantations into smaller 10-acre plots which were then leased to more than 95,000 formerly indentured Indians who had been induced to remain in Fiji. These nominally independent farmers remained completely dependent upon the Colonial Sugar Refining Company of Australia that aggressively extended its control and dominance over sugar production as the exclusive purchaser of Fiji's raw sugar crops. In 1940, the Parliament of Fiji established the Native Land Trust Board and enacted the Agricultural Landlord and Tenant Act (ALTA). The Native Land Trust Board mandates, negotiates, and administers leaseholds over tribally owned lands. ALTA was the instrument used to lease prime mataqali land to non-Fijian farmers for up to thirty years at extremely low rates. The Native Land Trust Board and ALTA effectively indentured Fijian land in lieu of indentured Indian labor by compelling Fijians to lease their lands at bargain basement rates. Rental rates for these lands are roughly equivalent to 2.4 percent of the value of the annual crop, whereas agricultural rent in other countries is 10 percent or more (World Bank 1991; Davies and Gallimore 2000; Lal, Lim-Applegate, and Reddy 2001; Naidu and Reddy 2002). Taken collectively, the indentured laborers agreement, the Native Land Trust Board, ALTA, and the guest labor program further served to exclude Fijians from effective economic participation in their homeland. Protectionism in agriculture policy exempted income tax on cane farmers, advanced Fiji Indian commercial farming by ensuring the availability of cheap land leased for long periods, and kept wages low thereby minimizing competition.

Furthermore, Ratu Lala Sukuna, the first Fijian to be appointed Speaker of the Legislative Council (1954), greatly enlarged the power of paramount chiefs and their grip over Fijian livelihood by enshrining the British system of land ownership in Fiji Islands' law. Ratu Sukuna proposed denomination

of the mataqali as the basic unit of landholding, oversaw commissions to ascertain lineage and claims to such land, and promulgated new legal statutes based on Fijian feudal cultural practices designating paramount chiefs as exclusive owners of all lands and resources. Ratu Sukuna's alterations to the Fijian system of communal landholding allowed the state to lease Fijian lands "in the national interests" and contributed to substantial land loss among particular mataqali, further fueling accusations of giving land leases to Indians against the wishes of the people.

Although Fijians retained communal ownership to 82.5 percent of their lands and near shore fishing grounds, the Native Land Trust Board leased most of the prime communal land for agricultural production under the ALTA. In July 2000, more than 103,473.57 hectares were leased for sugar production at an average rent per hectare of F$66.21, and more than 328,977.10 hectares were leased for noncane agricultural production at an average rent of F$7.40 per hectare (Davies and Gallimore 2000, 10; Lal, Lim-Applegate, and Reddy 2001).[4] More important, landowners were lucky if they actually received fifty percent of the annual rents owed them. When and if the nominal rents are paid, the Native Land Trust Board (mostly Fijian elites) keeps twenty-five percent of the rent (for administration and development), pays twenty-five percent to tribal chiefs and distributes the remainder to tribal clan members (Lal, Lim-Applegate, and Reddy 2001, 9). In practice and despite their value, a substantial percentage of the agriculture leasehold rents are never paid, whereas Fijians fare even worse on urban and beachfront land leased for property development. Despite the investment value and return, hotel and other property development land rents at substantially lower rates than land used for agricultural production. Should Fijian landowners opt out of renewing a lease for any reason, including nonpayment of rents, they can recover this land for their own use only after compensating leaseholders for economic improvements to the leased lands. Given the extremely low rents, the value of construction, and the economic position of Fijians generally, such compensation is clearly improbable.[5] Many Fijians shun leaseholds for property or hotel development because they lose access to the land just as decisively as if it was sold but without the corresponding material advantages of selling at market rates (Davies and Gallimore 2000).

In short, indigenous Fijians retained native title to the land but lost customary usage of the land by means of long-term low-rent leaseholds mandated by government via the ALTA and implemented by Native Land Trust Board in which the paramount chiefs are fiduciaries. Given the feudal nature of Fijian social organization, "the Fijian way" of landholding via the mataqali and deference to authority, monetary benefits from these

leaseholds largely accrue to chiefs and their retainers. Land and chiefly hegemony over an increasingly urbanized Fijian populace are central catalysts of Fiji's four coups d'état. Successive governments adhere to the colonial mindset that native land lying idle should be developed in the national interest, thereby justifying how sugar cane lands and lands for state development are administered by the state to date. Aside from implementing affirmative action in the public sector and poorly financed badly managed agricultural land production schemes that largely benefit Fijian elites via the NLTB, the Fijian and Fiji Indian masses remain marginal to meaningful economic participation. Fijians believed that political control of the state would lead to fuller economic participation and benefits, but despite the cautious transition to independence and four coups, the eastern chiefly aristocracy remains entrenched.

Coups, Indigenous Paramountcy, and Fijian Land Rights

The Republic of the Fiji Islands' political system is grounded in two seemingly contradictory principles: democratic governance and indigenous paramountcy—Fijian sovereign rights as itaukei. Indigenous paramountcy is defined as a political system in which the interests, rights, and well-being of indigenous peoples are guaranteed, by virtue of their priority over the land and, thereby, have primacy in legislative decision making and are protected in the process of governance. The seeds of indigenous paramountcy were sown at cession and later confirmed in the 1963 Wakaya Letter.[6] Postindependence political instability in the Republic of Fiji is caused by ethnic conflict that arises from indigenous peoples exercising newly articulated sovereign rights in a rigid ethnically structured society with an externally controlled economy. Although often described racial, the conflict is not racial but ethnic; and the sovereign rights of indigenous Fijians and land are at the heart of these issues. For example, Fijians control the government and run the military, but Australians and New Zealanders control and run the economy, whereas Fiji Indians, primarily Gujaratis, control local business and retail sectors and dominate the professions and paid workforce (Lashley 2010; Lal 1992, 1997). Although Fiji Indians are differentiated by religion (Hindu and Muslim) and class, and the masses are poor, nevertheless the highest three Fiji Indian income deciles earned four-fifths of Fiji's total income in 1997 and more than half in 2009 (Lashley 2010, 181).

Fijians regained sovereignty of their Islands in stages and, in large part, because of global pressures for decolonization and through coercion—coups d'état. At independence in 1970, the Fiji Islands adopted the British

colonial version of governance for the islands whereby (1) the electorate was segmented into three separate electoral rolls (Fijian, Fiji Indian, and general electorate of all other citizens); and (2) the traditional Fijian way of life, rights, and interests were preserved through two primary institutional arrangements, the Native Land Trust Board and the Great Council of Chiefs. Although Fijians have been subjected to four coups since independence—most recently in December 2006—ostensibly in the interests of promoting indigenous rights as Fijian paramountcy and economic uplift via land rights, coup perpetrators and postcoups governments subsequently re-aligned with the Great Council of Chiefs that continued to enrich itself while the masses remained impoverished. Championing globalization as the engine of Fiji Islands economic growth on the one hand and adherence to Fijian traditions on the other, the Fiji government has pursued policies of direct foreign investment and land use that affords very little monetary benefit that trickles down to the Fijian masses—commoner members of the mataqali.

The Fiji Islands was re-established as the Republic of the Fiji Islands after the 1987 coup d'état. In 1990, the leader of Fiji's second coup d'état (1987), then Lieutenant Colonel Sitiveni Rabuka implemented constitutional reforms that sought to permanently institutionalize indigenous paramountcy and locate sovereignty securely in Fijian hands. In addition to reserving the greatest number of parliamentary seats for Fijians, the 1990 constitution reserved the office of president for Fijians by appointment from the Great Council of Chiefs membership (usually its chairman). Fiji Islands' most progressive constitution was promulgated in 1997, again under Rabuka's leadership, instituted proportional representation, and first passed the post-voting and revised parliamentary representation. Foremost, the 1997 constitution reasserted and sustained the preeminent role of the Great Council of Chiefs in all matters of Fiji Island land rights via the NLTB.

Land Rights and Ethnic Politics

In the May 1999 general election, voters chose a Fiji Indian and leader of the Fiji Labour Party Mahendra Chaudhry, as Prime Minister who assumed leadership at a very critical time in Fiji Islands' history, at the expiration of agricultural land leases. Prime Minister Chaudhry inherited this issue from the Rabuka government that had not sought to promulgate a new land lease policy as agricultural land leases began to expire in 1997. When Chaudhry assumed office, he was expected to address the concerns of Fiji Indian farmers anxious to resolve the land lease issue because they feared further

evictions from their farms when leases were not renewed. Increasing numbers of Fiji Indians were evicted from leased agriculture lands, and many cane laborers were reduced to squatters. Homesteads that could not be sold were dismantled brick by brick leaving only their foundations—and some were torched—dotting the landscape from Nadi to Suva. In 1999, more than 1,177 (sixty-four percent) of 1,839 expiring leases were not renewed to sitting tenants (Lashley 2010, 180).

Fijians were wary of renegotiating their agricultural leaseholds under a Fiji Indian Prime Minister. Even though eighty-three percent of the land is protected and cannot be sold, Fiji Indians and others sympathetic to their interests lobbied for extending the leases to fifty- or ninety-nine-year terms. In response to Prime Minister Chaudhry's nomination of more Fiji Indians to the Senate than Fijians, and his campaign to remove Fijians and appoint more Fiji Indians to the Housing Authority and Airports Fiji Ltd., Fijians believed he also would drastically alter the ALTA. If Chaudhry could make Fiji Indians feel more secure by availing them of land, Fijians feared he would extend the leases for periods far longer than thirty years mandated under the expiring lease agreement. Chaudhry's support base was in the cane fields, and after his election he wrote off the Rabuka government's loans of $F8000 to individual cane farmers and established a $F20 million resettlement scheme. If evicted farmers refused resettlement, they were offered cash compensation of $F28,000. In response to the Fijian outcry that followed, the Chaudhry government offered $F10,000 to Fijian landowners who wanted to reclaim and farm their own land. However, none of these promised payments were delivered (Fraenkel 2000, 300). The Chaudhry government's mishandling of the leasehold problem perturbed and frightened Fijian masses, whereas Fiji Island residents from all ethnic groups grew increasingly wary of Prime Minister Chaudhry's leadership. In the void created by political inertia in revising ALTA policy, increasingly Mataqali negotiated directly with the Sugar Cane Growers Council to renew leases without demanding goodwill payments and to ensure that their lands would not go to waste while Fiji Indian farmers, in growing numbers, independently negotiated with Fijian landowners to renew individual leaseholds.

In March 2000, some 10,000 Fijians protested in the streets of Suva and voiced opposition to Chaudhry's decision making on Fijian land issues. Protesters called for the Chaudhry government to halt decision making on two key matters: rejection of the higher bid in the mahogany trees export deal[7] and renewal of the agricultural land leases. However, it was George Speight (a long-time resident of Australia, of European and Fijian ethnicity), acting allegedly in the name of indigenous Fijians who ended Chaudhry's

government and further marked Fiji as a coup-prone state. On May 19, 2000, one year after Chaudhry was elected, Speight and his followers executed a civilian coup as 20,000 landowners marched through Suva's streets with some destroying Fiji Indian-run businesses in their wake. Speight and seven armed Fijian businessmen held the Prime Minister, several cabinet ministers, and others (thirty-one Fijians and Fiji Indians) hostage for fifty-six days inside the parliament building. Although some Fijians were sympathetic to land issues, Speight did not inspire the masses and secure chiefly support as Rabuka had done in the 1987 coup. As the siege wore on, rioting and other forms of civil unrest increased and intensified, culminating in the shooting to death of a police officer and prompted military involvement. On May 28, 2000, President Ratu Mara resigned, and Military Commander Voreqe Bainimarama declared martial law and assumed executive authority over the Fiji Islands. After weeks of negotiations, Speight released the hostages and stood down. Unlike Sitiveni Rabuka, Speight and his coconspirators were arrested, subsequently tried and convicted of treason. On September 13, 2001, elections were held, and subsequently Laisenia Qarase, an hereditary paramount chief, was sworn as Prime Minister.

The return to democracy following the 2001 national elections saw Prime Minister Qarase's newly formed party, the Soqosoqo Duavata ni Lewenivanua (SDL), also marred by intransigence in the agricultural lands lease issue and tarred by scandal and policy missteps. Mataqali leaders openly promoted and expanded the nascent informal and burgeoning system of independently negotiating lease agreements directly with farmers, whereas the NLTB praised these leasehold renewals as "the result of close cooperation between all stakeholders" (*Fiji Times* 2005). "The agricultural scam" involved the Qarase government's use of public funds to provide soft loans and grants to indigenous Fijians for agricultural purposes to win votes for the SDL party. The scandal was aggravated by the complicit involvement of Fiji Indian-owned hardware companies that obtained greatest benefit from the sale of agricultural equipment costing government an estimated 13–30 million USD from September 2000 to August 2001. The agricultural scam was followed by Qarase's submission of a Reconciliation, Tolerance, and Unity Bill to placate his SDL supporters and secure re-election in April 2005 that offered restorative justice to 2000 coup d'état victims and amnesty to the perpetrators. The Unity Bill met with strong criticism from all quarters and particularly Fiji Indians as government-sanctioned law breaking. In 2006, Prime Minister Qarase lost further public support by pushing the Qoliqoli Bill and Indigenous Land Claims Tribunal Bill that promised to further enrich the chiefs. Fijians

interest in revising *qoliqoli* (fishing grounds) policy is longstanding, dating back to 1874 and primarily concerns compensation denied by commercial fisheries to customary owners and conservation of Fiji's fish stock for customary use in perpetuity.

The 2006 Qoliqoli Bill proposed to transfer proprietary rights to traditional fishing grounds, lagoons, and reefs from Fiji Islands Government (the state) back to the qoliqoli customary owners and to establish the Qoliqoli Commission to license commercial fisheries operations in qoliqoli areas and to otherwise regulate and manage fisheries resources. However, this bill further required that legal ownership be vested in and held by the Native Land Trust Board for the benefit of customary owners. The NLTB would create Qoliqoli Trust Funds for each qoliqoli area received as qoliqoli income from licensing fees, monies paid as compensation for use or damages, and all monies payable for nonfisheries commercial operations within qoliqoli areas. It also stipulated that no legal interest in respect of any land in the seabed within customary areas may be alienated or dealt with by owners without the approval of the Board (Qoliqoli Bill 2006 Part 2, 4: 1–5). Thus enactment of the Qoliqoli Bill would have restored coastline, beachfront, and traditional fishing grounds to indigenous Fijian ownership and customary use but also would have appointed the chiefs as fiduciaries, thereby incurring the same fiduciary problems Fijians currently experience under NLTB in its regulation and management of ALTA leases and administration of ALTA trust fund accounts. More important, the Qoliqoli Bill did not identify a process or mechanisms for addressing ongoing conservation issues and progressive depletion of Fiji Islands' fishing inventory caused by overfishing by foreign-owned commercial fisheries.

The related and attendant Indigenous Land Claims Tribunal Bill, loosely based on New Zealand's Waitangi Tribunal, also proposed to establish a government unit to address Fijian landowners' longstanding grievance that part of their native lands were acquired fraudulently in fee-simple or as freehold by early settlers and the British Crown.[8] However, Fijians and Fiji Indians as well as foreign investors expressed misgivings with both bills. Given the feudal nature of Fijian landholding, many Fijians regarded the Tribunal Bill as yet another instance of the chiefly paramountcy converting state-owned lands to freehold and availing them to foreign investment, real estate development, and tourism for the benefit of Fijian elites—not the masses. Fiji Indian entrepreneurs were wary of the bill's implications and possible negative impact on their commercial and retail ventures and investments. Prime Minister Qarase's persistence in pursuing passage of both the Qoliqoli and Indigenous Lands Claims Tribunal Bills also jeopardized foreign direct investment in Fiji Islands by tourism, hotel and recreation,

energy, and mining as well as commercial fishing industries and further destabilized the Qarase government. Instead of reassuring foreign investors, however, these proposed bills only increased investor uncertainty in the financial, tourism, and commercial fisheries sectors and Mataqali wariness of Fijian elites because both bills would vest ownership of newly freehold lands and foreshore in the NLTB.

For example, consider the Yaqara Studio City project. In general, Fijian masses were skeptical of the project's benefits to them, whereas Fijian elites and nascent middle class as well as international investors were excited by the project and its potential economic benefits. In October 2000, the NLTB agreed to a memorandum of understanding with Australian filmmaker and businessman Phil Gerlach (and Yaqara Group Limited) for establishing an audio visual industry in Fiji anchored by development of a new "city" with hotels and premier accommodation, sports, marina, and other facilities: private residences and educational institutions on 5,500 acres of land and foreshore absent the necessary consent by rightful Mataqali owners. Because of allegations of irregularities in leasing three Yaqara land parcels (Nabuta, Qeledrada, and Naqara), Yaqara Mataqali landholders' calls for redress, parliamentary debate in the senate (December 15, 2004), and formal inquiry by the Fiji Independent Commission Against Corruption in February 2008; the development of Yaqara Studio City languished for several years—costing investors more than F$6.7 million in losses and finally was jettisoned in February 2009.

In the end, opposition to these bills combined with Prime Minister Qarase's failed actions to remove Commodore Bainimarama while the Commodore was in Iraq inspecting Fijian peacekeeping troops on October 31, 2006, set in motion the chain of events that culminated in ouster of the Qarase Government on December 5, 2006. Although the Qoliqoli and Indigenous Claims Tribunal Bills have not been withdrawn, however, no further legislative action has been taken. According to current Prime Minister and Minister for Indigenous Affairs, Commander Voreqe Bainimarama, "the 1974 Qoliqoli Compensation Policy is outdated, and it also does not adequately address emerging issues namely the misinterpretation of the customary fishing rights; the absence of marine resource inventory to determine value of compensation; rights of compensation; restriction of compensation to foreshore development; lack of consultations between chiefs and members of the *yavusa*; processing of fishing licenses and foreshore applications; and environmental issues. . . . Likewise, investors are showing their frustrations in the delay in processing of applications for foreshore development and continual interference from Qoliqoli rights' owners once formal approval had been obtained from relevant authorities"

(Fiji Islands Ministry of Information, Cabinet Release, November 10, 2009). Given the Fiji Islands government's need for further consolidating and maintaining popular support among the Fijian and Fiji Indian masses and settlers and the need to retain and increase foreign direct investment, it is unlikely that Prime Minister Bainimarama will seek to enact the Qoliqoli and Indigenous Lands Claims Tribunal Bills as proposed by former Prime Minister Qarase and read in Parliament. Thus far, Bainimarama has merely authorized a review of 1974 Qoliqoli Compensation policy.

Native Title and Aboriginal Land Rights in Australia

Unlike New Zealand and Fiji, the British Crown and European occupiers of Australia recognized the Aboriginal communities they dispossessed as neither having human rights nor exhibiting any necessary attributes that could be construed in such a way as to avail these indigenous inhabitants to claims of native title to property rights, treaty rights, or citizenship rights as required under international law. Not a small state in the Pacific with a unitary government, Australia is a vast continent governed under a federal system comprised of the sovereign states of New South Wales, Victoria, Tasmania (1855), South Australia (1856), Queensland (1859), and Western Australia (1890). Given the sheer size of Australia as well as the diversity and complexity of Commonwealth-state-Aboriginal relations, this paper necessarily only highlights the evolution of pivotal policy decisions in indigenous affairs and limits discussion of indigenous land rights to the New South Wales (NSW) Aboriginal Land Rights Act 1983 and the NSW Aboriginal Land Rights Amendment Act 2009.[9]

Aboriginal encounter, occupation and settlement in Australia are contested terrain. Not an empty land, twentieth-century archeological evidence dates Aboriginal habitation of Australia to at least 60,000 years ago, whereas prehistorians suggest Aboriginal people traveled to Australia from Southeast Asia thousands of years earlier (Mulvaney and Kamminga 1999). Seventeenth century contact with British explorers greatly facilitated total usurpation of this vast continent from indigenous control because it defined indigenous Australians as "savages" first by William Dampier in 1688, later "noble savages" by Captain James Cook in 1770 (Broome 2001). Even population estimates of indigenous peoples inhabiting the continent at encounter in 1788 are disputed. Many adhere to estimates by earlier anthropologists (i.e. Radcliffe-Brown [1930]) that Europeans found approximately 300,000 Aboriginal inhabitants, whereas Noel Butlin (1983) and later demographers estimate their number at over a million (Bourke 1994). Early British officials, surveyors, and settlers reported small nomadic clusters of indigenous

inhabitants absent visible leadership or settlements. Other scholars maintain that early European settlers encountered Aboriginal peoples living in coastal and desert areas as seminomadic hunter-gathers organized as distinct clans or tribes governed by communal laws, who foraged for food and farmed seasonally across well-defined territories evidenced then, and now, by Aboriginal place names (e.g., Yarra Yarra, Wagga Wagga, Walpiri, and Wamba Wamba, etc. [Bourke 1994; Broome 2001; Mulvaney and Kamminga 1999]).

On January 26, 1788, the Gamaraigal people witnessed the landing of British ships that dispatched occupiers—290 seamen, soldiers, and government officials and 717 convicts—for the purpose of establishing a penal colony at what would become Port Jackson near Sydney. Deeming them "primitive black men" without laws or sovereign and later a "dying race," British soldiers, settlers, and missionaries in progressive waves of state-sanctioned invasion and occupation, used brutal force, terrorism, massacre, and writ to wrest and remove Aboriginal and Torres Strait Islander peoples from their customary lands and marine areas (Bourke 1994, Broome 2001, Elder 1994, Goodall 1996, Davenport, Johnson, and Yuwali 2005). Rather than recount the gruesome campaigns and horrific events in detail here, suffice it to say that under current conventions and standards of human rights Aboriginal Australians were subjected to ongoing genocide from contact well into the late twentieth century.

Nevertheless Aboriginal Australians prevailed by successively resisting European efforts at annihilation, subjugation, and marginalization since encounter, which culminated in the extension of rights to suffrage, citizenship, native title, and land. Although Aboriginal Australians held voting rights in New South Wales, Victoria, Tasmania, and South Australia when the Commonwealth of Australia was established in 1901, prior to 1962 Commonwealth voting rights extended only to Aboriginal Australians who held the right to vote in their state elections. Suffrage was not extended to all Aboriginal Australians until the state of Queensland finally granted Aborigines voting rights in 1965, and the furtherance of citizenship was accorded by the 1967 referendum question on Aboriginals. This referendum amended the constitution section 51 (xxvi) that authorized the Commonwealth to make laws with respect to the people of any race, other than Aborigines, by deleting the words "other than the Aboriginal race in any State," meaning that the federal government could over rule state governments on matters of Aboriginal Affairs. The referendum also repealed section 127 (excluding Aboriginal peoples from the census): "In reckoning the numbers of the people of the Commonwealth, aboriginal natives shall not be counted."

Shortly after establishing the Australian Commonwealth, both settler and Aboriginal organizations advocated for central government responsibility and control in Aboriginal affairs. In 1910, the Australian Board of Missions and, in 1913, the Committee on Aborigines Welfare of the Australian Association for Advancement of Science urged that "the aboriginal problem" be addressed as a "National responsibility and cared for in a National way" (Attwood and Marcus 2007). In 1928, the Association for Protection of Native Races called for a Royal Commission on the Constitution to consider amending the constitution and giving Commonwealth Government national control over Aboriginal policy. However, this Royal Commission steadfastly refused to endorse any amendment that would transfer states' responsibilities to the Commonwealth and empower parliament to make laws in Aboriginal matters and instead held that states were better equipped for controlling Aborigines than the Commonwealth (Royal Commission on the Constitution 1929, vol. 2, p. 303). Aboriginal Australians also formed advocacy organizations; most notably the Australian Aborigines' League and the Aborigines Progressive Association organized and led the "Aboriginal Day of Mourning" in 1938 that coincided with Australia's sesquicentennial celebrations in Sydney to protest the authority of states over Aboriginal policy and to demand both national policy for Aboriginal peoples and national control over all Aboriginal Affairs. By 1944, then Attorney General H.V. Evatt declared the responsibility for Aboriginal Affairs resided in the Commonwealth government, and in the postwar period Australia must live up to this responsibility when it assumed special responsibilities toward native peoples in the southwest Pacific including New Guinea to further humanitarian development consistent with the principles of the Atlantic Charter (Attwood and Markus 2007, 11). By the 1960s, the Aborigines Progressive Association, Australian Aborigines Leagues and Council for Aboriginal Rights fomented national pressure to repeal Australian state laws that contravened the United Nations Declaration of Human Rights.

To date, the Commonwealth government has not overruled states by enacting any national policy on Aboriginal Affairs or social justice to restore or compensate Aboriginal peoples for the expropriation of land, denial of citizenship, or systematic marginalization since contact.[10] Instead, two pivotal decisions by the High Court of Australia, *Mabo v Queensland* 1992 [No. 2] and *Wik Peoples v Queensland* 1996 often publicly criticized as rare yet momentous acts of judicial activism, provided the bases for restoring native title to Aboriginal Australians.[11] In Justice Brennan's judgment, indigenous peoples' rights and interests in land under their own law and custom survived acquisition of sovereignty by the Crown; the Crown's

radical title is burdened by those interests; those rights and interests are recognized and protected by common law through the doctrine of native title; and native title is susceptible to extinguishment by the Crown (Strelein 2006, 131). Foremost, the High Court decision in favor of Eddie Mabo, that the plaintiffs had never relinquished title over the Murray Islands, not only upheld Mr. Mabo's claim but also challenged Australia's common law doctrine of *terra nullius*—that the country was devoid of "inhabitants engaged in socially organized settlement" as the basis for claiming possession and extinguishing property rights of the indigenous inhabitants—and, in effect, opened the door to the recognition of native title and consideration of Aboriginal land rights in Australia. In *Wik Peoples v Queensland*, the Wik and Thayorre people of the Cape York Peninsula filed a claim for native title, damages, and relief from extinguishment of native title over land, foreshore, and sea along the Gulf of Carpentaria that included parcels of land held under pastoral leases. The *Wik* decision held that pastoral leases issued under the 1910 and 1962 Queensland Lands Acts did not necessarily extinguish native title. This ruling also stipulated that "where an inconsistency arises between the rights enjoyed by the native titleholders and the rights conferred upon the lessee, native title rights must yield to the extent of the inconsistency of the rights of the lessee" (*Wik Peoples v Queensland* 1996, p. 195). In short, the *Wik* decision recognized that native title could coexist with the interests of other parties in particular land but, to the extent of any inconsistency, the rights of pastoralists prevailed.

Aboriginal Land Rights in New South Wales

The *Mabo* and *Wik* decisions apply to matters of native title and fall under the purview of the Commonwealth government, whereas Aboriginal land rights are determined by each state. This fragmentation creates two separate and distinct legal frameworks to adjudicate and remedy Aboriginal land claims: the Native Title Act (1993) and Native Title Tribunal established by federal government and the Aboriginal Land Rights Acts enacted by each state. This paper will focus on the Aboriginal Land Rights Act of 1983 (ALRA), enacted by the Government of New South Wales (NSW), and the NSW Aboriginal Land Rights Amendments Act 2009. First and foremost, the ALRA is a political instrument. This act is not grounded in notions of indigenous sovereign rights but is enacted to establish a framework and mechanisms for restoring indigenous peoples' rights to land and delivering services to Aboriginal peoples in New South Wales. The ALRA 1983 established the New South Wales Aboriginal Land Council as a public authority and created a three-tiered system of Aboriginal Land Councils to

facilitate the adjudication of land claims as well as to administer, oversee, and control land claims assets via state, regional (now disestablished), and 121 Local Aboriginal Land Councils (LALCs). Most important, the ALRA 1983 acknowledges the dispossession of NSW Aboriginal peoples: (1) Land in the state of NSW was traditionally owned and occupied by Aborigines; (2) Land is of spiritual, social, cultural, and economic importance to Aborigines; (3) It is fitting to acknowledge the importance that land has for Aborigines and the need for Aborigines of land; and (4) It is accepted that as a result of past government decisions the amount of land set aside for Aborigines has been progressively reduced without compensation (Preamble, ALRA 1983, p. 11).

Initially, NSW government handed back 78,000 hectares valued at more than AUD500,000 million. Under NSW ALRA, claims are restricted to vacant claimable Crown lands although claimants are not required to prove any traditional association or previous tenure of the lands under claim. If claims are successful, lands are granted in freehold or leasehold in the Western Division to Local Aboriginal Land Councils exclusively (not individuals) for the benefit of members of particular Aboriginal communities in NSW. The purposes of ALRA are to (1) provide land rights to Aboriginal persons in NSW; (2) provide for representative Aboriginal Land Councils in NSW; (3) vest land in those councils; (4) provide for the acquisition of land, and the management of land and other assets and investments, by or for those Councils and the allocation of funds to and by those councils; and (5) provide community benefit schemes by, for, or on behalf of those councils (ALRA 1938, No. 42, p. 11). Thus, the Local Aboriginal Land Councils are statutorily mandated to execute the purposes of the ALRA under the regulatory authority and oversight of the New South Wales Aboriginal Land Council (NSWALC), a public authority.

ALRA further mandates that LALCs deliver services directly to Aboriginal peoples as community benefits schemes, and specifically, to provide funeral funds, education and training, scholarships, cultural heritage, child and aged care services, and housing. Although 121 Local Aboriginal Land Councils have been established, 119 remain in operation—which vary in number of staff, number of registered members, and operating budgets as well as expertise, vision, and planning capacity. Consequently, many LALCs funnel small grants to individuals to cover funeral costs, sponsor culture and recreation activities, and provide small education grants to students (AUD50–500). A few LALCs engaged in land dealings early on, substantially enlarging their asset portfolios and pursue entrepreneurial activities in tandem with delivering community services by partnering with nonprofit social service providers and private vendors. A small number of

LALCs pursued housing development and management ventures financed by land dealings (e.g., subdividing and selling off landholdings to provide housing and housing services to Aboriginal peoples). Some LALCs were inexperienced, ill equipped, or ill advised and pursued housing development or other capital investment activities incurring substantial indebtedness or failing in the process. A few LALCs sold off highly valuable coastal properties far below fair market value (e.g., Darkinjung LALC land sale to Magenta Shores Resort for a mere AUD42 million), whereas a few others tried to transfer LALC landholdings and other assets to immediate family members as private assets and trust funds (e.g., Koompathoo LALC was dissolved after protracted court proceedings arising from allegations of fraud brought by other tribal members).

Therefore, NSWALC redefined LALC management and administrative procedures by proposing changes to ALRA 1983 as the NSW Aboriginal Land Rights Amendments Act 2009 No. 54 and adding more rules by introducing the NSW Aboriginal Land Rights Regulation 2002. The NSW Aboriginal Land Rights Amendment Act 2009 primarily alters and constrains LALCs in land dealings and establishing community funds and it also imposes a tax levy on LALC profits from community development.[12] In addition to new rules governing land dealings and imposing a new tax on LALCs as dutiable transactions, NSWALC also amended the 2003 Financial Records Code mandating and stipulating increased financial reporting requirements, procedures and timetables that Local Aboriginal Land Councils must satisfy and also expanded LALC reporting structures and procedures by amending the 2002 Aboriginal Land Rights Regulation.

The amended 2002 Aboriginal Land Rights Regulation, 2009 Aboriginal Land Rights Act Amendment, and revised Financial Records Code (2003) together significantly diminished and constrained both the authority and the discretionary autonomy of Local Aboriginal Land Councils by mandating increased and more burdensome sets of rules, standards, and operating procedures that must be followed in compliance to New South Wales Aboriginal Land Council's enhanced regulatory and taxation authority. Although these regulations seek to avoid or curtail any possible fraud, malfeasance, or other derelictions of authority by LALCs and to tax profitable use and investment of land council assets, these amendments not only statutorily require considerably greater compliance, transparency, and oversight of LALCs but also require that LALCs expend more, already scarce revenues, on compliance procedures and strategic planning and that LALCs develop and implement Community Land and Business Plans (CLBP). Consequently, NSWALC's progressive micromanagement imposes severe

limitations on LALC effectiveness because most LALCs are very small (most staffed by fewer than five persons including volunteers) with limited financial resources. For the majority of LALCs, their sole source of revenue derives from the standard grant AUD130,000 that each LALC is eligible to receive from NSWALC for operating expenses. However, thirty-four of the 121 LALCs were under conditional or cessation funding in 2009 with nineteen of these receiving less than the standard amount, whereas fifteen received no funding and two were dissolved: Koompathoo LALC and Wamba Wamba LALC (NSW Annual Report 2009, Bentley Report).

Aboriginal Land Rights Acts Neglect Fundamental Questions on the Rights of Aboriginal Peoples

In spite of their comprehensiveness, the amendments do not clarify four fundamental problems inherent in the 1983 Aboriginal Land Rights Act and actually exacerbate them. Unlike the New Zealand government, the government of New South Wales did not convene public forums or conduct consultations with Aboriginal communities or peoples to define and codify:

- The status of Aboriginal peoples as citizens
- The powers of Local Aboriginal Land Councils as bodies corporate
- LALC representation in NSWALC
- NSWALC's fiduciary obligations to LALCs and Aboriginal peoples

First, central to the substantial diminution of Local Aboriginal Land Council autonomy is the apparent confounding of Aboriginal peoples' land rights with their citizenship rights. Under NSW ALRA and subsequent amendments, LALCs increasingly are mandated by statute to provide social services as community benefits, thereby obviating or supplanting government's responsibility to provide the benefits and privileges of citizenship to all citizens. Although NSWALC is a statutory public authority for certain purposes (see Part 14 Miscellaneous, 248 p. 140), the corporate standing and powers of LALCs are less clear, giving rise to the following questions.[13] Should Local Aboriginal Land Councils be primarily responsible for providing social welfare services to Aboriginal peoples via restoration of land rights or should state government be responsible for providing social policy to Aboriginal peoples as citizens, as it does for all other Australian citizens of NSW? If LALCs are nonprofit entities, can or should they be taxed (under the Community Development Levy or any other levy) on profits that are disbursed as community benefits? To whom and what are the

fiduciary obligations of LALCs as distinct collectives, whose land rights were restored and, as a consequence, own rights to private property and income and other assets from that property but are mandated by ALRA to use those assets to provide community benefits?

Second, neither the NSW government nor the Commonwealth government have convened forums for policymakers and Aboriginal peoples to engage in public discourse and debate on the following essential questions. Should lands restored to a specific Aboriginal group and their attached assets and income be used as a "public" mechanism for providing social justice and redress to all Aboriginal peoples? Given LALCs peculiar nonprofit status (as overly regulated and tax liable subsidiaries of NSWALC), should LALCs be reclassified as either profit-taking or public entities? If land claim assets are legally treated as freehold property, hence LALC private (and taxable) assets, albeit communally held, shouldn't they be used at the exclusive discretion and control of the particular Local Aboriginal Land Council? Are restored land rights government compensation for confiscation of specific tangible private assets (i.e., land), or are they redress for breached rights to the benefits and privileges of citizenship? More simply stated, are these assets reparative or redistributive instruments of social justice? These questions highlight the confusion between collective redress for breaching the rights and benefits of Aboriginal peoples as citizens of Australia (thus entitled to social policy) and compensation for land confiscated from specific groups of Aboriginal peoples.

When similar struggles by indigenous peoples elsewhere are looked at, it is apparent that these critical questions were debated publicly and addressed early on. In New Zealand, for example, after prolonged vigorous debate it was generally agreed that land claims and treaty settlement assets or income represent private property that is communally held, not any kind of state or public funds. Foremost, Maori iwi and hapu concurred that settlement assets were not expected to pay for the costs of state programs or the duties of the state toward its citizens under welfare legislation or other social policy. In the past, governments diverted the property of others to serve government's purposes, usually against the interests and desires of the true owners (see Lashley 2000). Then by extrapolation, one could conclude that providing social justice is the responsibility of a government to its citizens, the state of NSW, not the responsibility of Local Aboriginal Land Councils.

A third set of questions intrinsic to the amendments arises out of the LALCs' relationship to the NSWALC in regard to LALC authority, decision-making independence, and representation. Although NSWALC seeks to restrain LALCs from defrauding registered members, the

proposed amendments overregulate the LALCs to such an extent that in its efforts to deter fraud and abuse, NSWALC also deters LALCs from exercising the type of independent decision making to pursue commercial activities that bodies corporate are legally authorized to pursue.[14] Given LALCs' statutory mandate to comply with NSWALC regulations and NSWALC's organizational and representative structure, increasingly LALCs are required to function solely as public entities and this engenders even more questions. For example, what are the fiduciary obligations of the NSWALC to LALCs given NSWALC's status as a Public Authority that both regulates and taxes LALCs and, at the same time, directly and independently engages in commercial activities as a body corporate? As the State Aboriginal Land Council replete with extensive landholdings and more than AUD600 million in assets, then NSWALC not only competes with other LALCs but at a minimum, also operates at cross-purposes such that, the LALC-NSWALC relationship, in effect, poses possible conflicts of interests.

Finally, ALRA and the proposed amendments illuminate a fourth fundamental question to be addressed. Should discretion over the administration, management, and disbursement of land assets secured via restoration of Aboriginal land rights remain principally with Local Aboriginal Land Councils and NSWALC and its elected representatives? NSWALC was initially established in 1977 as a nonstatutory Aboriginal lobby for land rights and reestablished as a statutory public authority in 1983 comprised by an appointed Chief Executive Officer and elected Aboriginal Councilors (representatives). Since 1983, NSWALC has expanded its authority, scope of action, lands, and financial assets substantially. Because NSWALC Councilors are elected by popular vote, NSWALC does not guarantee representation or necessarily promote the interests of LALCs. Any Aboriginal person registered as a voting member of any LALC located in the regional area can self-nominate and get elected without being an active member of the particular LALC where he/she is a registered member or have any knowledge of that LALC's mission, vision, or strategic initiatives. Therefore, the extant process of electing councilors does not promote or ensure representation of the Local Aboriginal Land Councils' interests because under the ALRAs, councilors have no mandated accountability to the Local Aboriginal Land Councils. Instead, councilor representatives not only may act independent of the Local Aboriginal Land Councils' interests but also may act independent of any identifiable Aboriginal constituent base and, thereby, are inclined to pursue narrow self-interests. In the absence of statutory LALC representation requirements in NSWALC, the CEO and councilors impose increasingly burdensome mandates, standards and

operating procedures that diminish, constrain and usurp the authority and discretionary autonomy of the Local Aboriginal Land Councils.

Conclusion

This paper compared processes of extinguishing and restoring indigenous land rights and their impact on customary systems of land tenure in New Zealand, Fiji, and Australia. To this end, the paper identified and addressed the following central questions: What are common features of indigenous landholding? What processes are used to extinguish native title? What mechanisms do indigenous peoples use to regain land rights? And what structures and mechanisms are established to accommodate indigenous landholding after land rights are restored? Essentially, we find that the British Crown adapted its approaches over time to reduce the costs of territorial expansion. In New Zealand, the Crown recognized Maori native title and negotiated the Treaty of Waitangi, whereby Maori tribes allegedly ceded their sovereignty. Native title was not extinguished but Maori lands were seized and settled illegally, thus abrogating the treaty and causing protracted land wars and compulsory alienation of Maori lands. Seeking to avoid repeating its New Zealand experience in the Fiji Islands, the Crown not only recognized native title but also established mechanisms that protected indigenous landholding and accommodated chiefly sovereignty. The Crown recognized Fijian customary land tenure but redefined the legal structures (laws) and types of landholding and co-opted the Fijian political system to establish a new system of governance. In Australia, however, the Crown recognized neither native title nor sovereignty but imposed the doctrine of terra nullius. Instead of recognizing Aboriginal society, soldiers, settlers, and missionaries simply invaded Australia, forcibly occupied native lands, and removed Aboriginal inhabitants—often massacring them in their wake.

In examining customary systems of indigenous landholding in New Zealand, Fiji, and Australia, several common features and understandings shared by Maori, Fijians, and Aborigines can be found. Foremost, under communal land tenure, land is not fee-simple "private property" that can be bought and sold by individuals for personal gain and has neither the advantages of individual title nor the resource degrading disadvantages accruing from open access. Rather, land is communally held as sacred trust and is coterminous with group identity. Under communal land tenure, the group is the legitimate landholding unit. Chiefs have fiduciary responsibility over communally held lands while land is allotted and used on an individual basis by a household or family. Individual rights to use land could be

acquired by land-owning members of a group via inheritance or by nonmembers of the group via usage or need. Individual rights reverted to the group when land was abandoned, when the subgroup died out, when group allegiance was renounced or rejected or when temporary right expired.

In response to extinguishment of native title and alienation of native lands, the indigenous people of New Zealand and Australia actively resisted occupation and alienation of their lands at contact. Both Maori and Aboriginal Australians greeted British occupation with war and later engaged in protest and civil disobedience and used political advocacy and the law to regain native title and customary land rights. In New Zealand, Maori appealed to the Privy Council, and the Treaty of Waitangi was ruled a legal nullity in 1877, but it would take renewed mass protest, civil disobedience, and appeals to the High Court in the late twentieth century to regain native title and secure compensation for confiscated lands. For Aboriginal Australians, the road to redress was more arduous and prolonged. In addition to public demonstrations, such as the national "Aboriginal Day of Mourning" in 1938, Aboriginal peoples used political advocacy, protest, and resistance for more than a century before national suffrage was extended in 1965 and citizenship was acknowledged via passage of the 1967 Constitutional Referendum. Despite these political gains, it was Aboriginal peoples' erection of a Tent Embassy on parliament grounds in Canberra that catapulted the land rights issue to the attention of the Australian public. Nevertheless, it would require rulings by the High Courts of Australia and New Zealand before restoration of native title and land rights would be addressed, whereas indigenous Fijians secured independence by virtue of international pressures for decolonization.

Taken together, New Zealand's 1975 and 1985 Treaty of Waitangi Acts, 1993 Te Turi Whenua Act, and 2011 Marine and Coastal Area Act established a tribunal process to consider claims of breached treaty rights, provided mechanisms for restoring and retaining Maori title to tribally held lands, promoted Maori land development and occupation, and ensured Maori customary rights and use over coastline and coastal waters. Although the Fiji Islands was granted independence from Britain in 1970, political control was vested in the Fijian paramountcy (Great Council of Chiefs), whereas the indigenous Fijian masses remained marginalized economically and politically. Indigenous Fijians retained both native title and land rights under the Native Land Trust Board but lost usage of their best agricultural lands and coastline and seabed (qoliqoli) under the Agricultural Landlord and Tenant Act and Qoliqoli policy. Fundamental issues of customary land

rights fueled coups d'état, and in response, coup leaders enacted constitutional reforms that sought to bolster economic and political incorporation of the Fijian masses.

In conclusion, in Australia, High Court rulings in *Eddie Mabo v Queensland* (that overturned terra nullius doctrine) and 1996 *Wik Peoples v Queensland* (that pastoral leases did not necessarily extinguish native title) opened the door to native title and enactment of Aboriginal Land Rights legislation by the States (e.g., NSW ALRA 1983). The New South Wales Aboriginal Land Rights Act 1983 acknowledges prior ownership and occupation and institutes a land claims process by establishing Local Aboriginal Land Councils. However, ALRA does not recognize Aboriginal peoples as having prior sovereignty and does not promulgate the notion of land rights as a system of legal understandings or framework and, therefore, does not aim at restoration of treaty rights or customary land rights. Unlike Tribal Trust Boards in New Zealand or the Native Land Trust Board in the Fiji Islands, Local Aboriginal Lands Councils operate as public agencies of the state.

NOTES

1. Shortly after launching the "Development Decade" (social policies targeting Maori inequality), in 1984, the Labour government of Prime Minister David Lange enacted sweeping public sector reforms aimed at stabilizing the national economy and ending the monetary crisis. Lange's Minister of Finance, Roger Douglas, introduced macroeconomic policies of devolution, deregulation, structural adjustment, and free market capitalism that were continued and expanded by the national government of Jim Bolger. In 1992, Prime Minister Bolger de-established targeted Maori social policy, "mainstreaming" Maori into universal social programs and, in 1994, introduced Crown Settlement Proposals for a full and final compensation package for all outstanding treaty claims (Lashley 2000).

2. The Bau asserted their dominance over the western islands of the Koro Sea and the eastern parts of Viti Levu, whereas the Rewa were ascendant over some eastern and mostly southern parts of Viti Levu, and the Lau were dominant in the eastern islands and some parts of Vanua Levu. Often engaged in internecine warfare, Bau conquered the Rewans in the Rewa–Bau Wars and Verata in the Verata–Bau wars. It also vanquished and made subservient the peoples of Ra and even those of Bua in Vanua Levu—mainly using its canoe-based warfare and the use of guns introduced to Fiji by pirates and black-birders.

3. Ratu Seru Cakobau, as Tui Viti (king) of Fiji, was held liable by the American Consul John Williams for looting that occurred after Williams' house burned down during fireworks celebration of the Fourth of July. An initial debt of US$5,000 levied in 1849 swelled to US$43,000 in 1855. In September 1858, Cakobau agreed to cede 200,000 acres of Fiji land to Britain in return for Britain paying this debt and guaranteeing Cakobau's title as Tui Viti.

4. Lal, Lim-Applegate, and Reddy (2001) replicated Davies and Gallimore's (2000) study and obtained similar results that confirmed rent received by NLTB has been unfairly low.

5. Compensation to native landowners has been woefully inadequate in return for agricultural land use. Generally, native leasehold lands undergo poor custodianship and are severely eroded either causing river and reef damage or requiring greater use of fertilizer to be productive, which further degrades environmental quality

6. In 1963, the Fijian members of the Legislative Council issued the "Wakaya letter" that invoked the Act of Cession and reasserted Fijians' special status as preconditions for constitutional negotiations in preparation for independence.

7. Prime Minister Chaudhry favored the bid of $65 million offered by a British company with a track record in Fiji over the bid of $210 million offered by a Seattle-based real estate developer with ties to George Speight. According to Joseph Kahn, "Chaudhry needed the backing of Fiji's former colonial patron in negotiations with the European Union over export supports for sugar, Fiji's leading industry, and a business dominated by ethnic Indians." See "The Mahogany King's Brief Reign: Business Interests Lurked Behind Fiji's Haphazard Coup," *New York Times*, 14 September 2000, Section C, p. 8.

8. More than 4 million acres of Fijian land were alienated by fraudulent land dealings in Sigatoka, Rewa River Valley and coastal plains during the 1860s confiscation of the Colo Highlands as war booty, in 1876 104,000 acres under im Thurn's 1907 3rd Ordinance and 200,000 acres granted by Chief Cakobau at Cession.

9. The Commonwealth of Australia was established in 1901 as a federal system under the divided sovereignty of six strong self-governing states and a weak central (national) government that thwarted efforts to render social justice to its indigenous citizens—Aboriginal Australians as national policy.

10. At the national level, the Aboriginal and Torres Strait Islanders Commission was established in 1989 under Bob Hawke's Labour government to oversee and assist Aboriginal communities but was disestablished by John Howard's (Liberal-National Coalition) government in 2005.

11. *Mabo v Queensland* [No.2] (1992) 175 CLR 1; 107 ALR (HCA Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ) and *Wik Peoples v Queensland* (1996) 187 CLR 1 (HCA Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

12. NSW Aboriginal Land Rights Act of 1983, Part 2, Division 4 with respect to "Land Dealings by Aboriginal Land Councils" sections 41–42P (p. 12–25, p. 33) and Division 4A "Community Development Levy" sections 42Q-42X (p. 36–38); Part 6, Regions Division 2, section 106A, "Powers of the New South Wales ALC with Respect to property" (p. 53); and Part 8, Division 11, section 149A "NSW Aboriginal Land Council Community Fund" (p. 69).

13. Statutory corporations are created by either state or national parliaments via statute. These corporations are established as separate entities from normal government

operations to ensure profitability and discretionary autonomy (independence) from the State or national government and to ensure that decisions are made on a commercial basis with less or no political interference. For example, Australia Post, the Australian Rail Track Corporation, and the Australian Egg Corporation are statutory corporations. However, a significant number of statutory corporations are private commercial operations—some were privatized, in part or whole, after 1980. These include Qantas, Telstra, and the Commonwealth Bank of Australia. See ABR Glossary.

14. The term "body corporate" is considered to cover any artificial legal entity having a separate legal personality. These entities have perpetual succession. They have the power to act, hold property, enter into legal contracts, sue, and be sued in their own name, just as a natural person can. The types of entities falling into these categories are broad and include trading and nontrading; profit and nonprofit-making organizations; government-controlled entities; and other entities with less or no government control or involvement (ABR Definition of Body Corporate).

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