Private Lands Conservation in the Solomon Islands

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PRIVATE LANDS CONSERVATION IN THE
SOLOMON ISLANDS

A Country Report by the Natural Resources Law Center,
University of Colorado School of Law

September 2004

Sponsored by The Nature Conservancy

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BRIEF QUESTIONS

1. What legal tools are in place for the purpose of achieving private lands conservation in Solomon Islands?

The Solomon Islands has few legal tools specifically designed for private lands conservation. There is no comprehensive environmental legislation at the national level, although some provinces have passed legislation to regulate environmental matters. At the national level, there is a National Parks Act and a Wild Birds Protection Act, but little is known of their utility for protecting private lands. Furthermore, the one national park and the bird sanctuaries that have been created are said to exist in name only. The Forest Resources and Timber Utilisation Act is a national law that regulates the licensing of logging companies and provides for the creation of ‘forest reserves’ on private lands. These reserves are created to protect rain catchment areas by restricting cutting. Forest reserves, can only be declared by the Minister of Forestry.

Provincial Legislation

A few provincial laws are designed for private lands conservation. For example, the Guadalcanal Province Wildlife Management Area Ordinance of 1990 gives the Provincial Executive the power, after consulting with landowners, to declare any area as a Wildlife Management Area. The landowners are given broad authority to mark the boundaries of the area and develop the management rules for the area. Under the Makira Province Preservation of Culture and Wildlife Ordinance of 1984, the Makira Provincial Executive can declare an area to

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be protected in which the “soil, any vegetation, or other remains” is already protected.\(^2\) The Ordinance also prohibits the importation of toads, the killing of any wild duck, the killing of any fish by diving with a spear or spear-gun, and the killing of eagles. Where local landowners consent to it, the Temotu Province Executive may declare any area used by a “Protected Species” as habitat or breeding ground to be a “Protected Place” pursuant to the Temotu Province Environmental Protection Ordinance of 1989. Any activity found to adversely affect the Protected Species is prohibited. The Simbo Megapode Management Ordinance of 1990 provided for delineation of an area and access restriction to protect megapode birds. Regulations regarding the area have been enacted and successfully enforced at law in Simbo.

2. **What legal tools are recognized by the Solomon Islands legal system that are capable of being used for private lands conservation?**

The Solomon Islands Parliament has provided in the Land and Titles Act for the use of affirmative or negative easements appurtenant, profits held as an appurtenance or in gross, and restrictive covenants. All of these tools could be used for private land conservation, but their permitted use varies according to the type of land (customary or non-customary) and whether the owner of both the benefited and burdened land or the holder of the interest (if the interest is held in gross) is a Solomon Islander or a foreigner. In addition, the application of these tool to customary land may vary from place to place as action affecting customary land is restricted to current customary usage of the specific land. The rules for customary land are particularly important as approximately ninety percent of the total land area of Solomon Islands is customary land. The remainder is primarily held by the government with a small amount being leased by foreigners.

\(^2\) It is not clear, exactly, under what vehicle these items would be ‘already protected.’ Nor is it clear, to what extent soil, vegetation or other remains are already protected in Makira Province. It is likely that the areas are ‘tambu’ or customary sacred burial grounds.
3. Given the legal authorities governing land tenure, what novel legal tools could be introduced to achieve private land conservation goals in Solomon Islands?

There are several possibilities at both the national and local levels for new legal tool for private lands conservation. At the national level, it might be possible to enact a conservation easement act. Alternatively, the negative, appurtenant easements that are already provided for in the Land and Titles Act could be made more effective for conservation efforts by extending them so that the negative easements could be held ‘in gross.’ Given the current political situation in Solomon Islands, this ‘half-step’ amendment of the existing legislation may be a more realistic goal than a comprehensive conservation easement act. The result (a negative easement that could be held ‘in gross’) would be essentially the same as a conservation easement without the ‘conservation’ designation.

Also at the national level, efforts to modify the Forest Resources and Timber Utilisation Act to give customary landowners more power to determine the manner in which areas will be logged would be very beneficial. This Act governs the process of licensing logging companies to operate in Solomon Islands. It includes provisions for the local governments to participate in licensing decisions and to regulate logging ventures. Assisting provincial governments in drafting environmental regulations for logging could be very effective for conservation.

Given the political climate following the coup of 2000 and the call for further decentralization of governmental power, efforts at the provincial or local level may be even more effective than national efforts. Efforts might include promoting ordinances similar to those already in existence in Guadalcanal, Makira, Temotu, and Simbo provinces described above.

Great improvement could also be made to the land tenure system if, on the provincial level, legislation is enacted codifying the customary law of each area. Additionally, registration of the interests held in customary land would be very helpful. These would be monumental
undertakings but would provide the basis needed for people to protect their rights in customary land from developers. Customary landowners have difficulty controlling the development of customary land because they cannot effectively prove, by evidence, either the system of customary law appropriate for the area or their claims of rights in the land. Codifying the customary law and registering the interests held in customary land would help solve these problems.

It must be noted here that ninety percent of Solomon Islands is customary land. Where any action is to be taken that will affect customary land, the rights of the people with interests in the land must be ascertained and the boundaries of that land must be determined. As customary land is held communally and the rights to the land are split between ownership rights and use rights based on ancestral heritage, with little or no written record of that heritage, ascertaining the rights held in the land to be protected and the boundaries of that land, can be very difficult. This conundrum lies at the heart of most of the difficulties with land tenure in Solomon Islands. For this reason, it appears likely that the best level at which to attempt preservation of customary land is at the provincial level where the decision-makers are more in tune with the local situation.
INTRODUCTION

Solomon Islands is a double chain of twenty-six large islands and, perhaps as many as nine hundred smaller islets in the southwestern Pacific Ocean one thousand miles from Australia. Located within a sea area of over 1.3 million square kilometers, the islands together consist of thirty thousand square kilometers of land area and support a population of approximately four hundred thousand people. Each island is culturally distinct from the other islands and further distinctions exist between different areas of specific islands. At least eighty different dialectic variations are spoken and custom and traditional practices can vary widely among the different groups. The geographic and demographic circumstances present great challenges and conflicts in the government of the country and in land administration. At the core of many of these conflicts are disputes over land and land tenure.

Formerly a British Protectorate, Solomon Islands achieved independence and joined the British Commonwealth in 1978. Since before independence, disputes over customary land have been settled according to the principles of customary law. The Constitution adopted in 1978 continued recognition of custom as a source of law where it is not inconsistent with the Constitution or Acts of the Solomon Islands Parliament and customary law is still the primary source of law for resolving customary land disputes. Customary land is defined in the Land and

4 Corrin Care, Jennifer, *Courts in Solomon Islands* ( LAWASIA – Law Association for Asia and the Western Pacific, 1999) (hereinafter Corrin Care, 1999 LAWASIA 98) at 98.
6 Corrin Care, 1999 LAWASIA 98. The closest to a ‘common’ language that exists is ‘pidgin’ English which is spoken widely.
7 Alan at 62.
8 Corrin Care, 1999 LAWASIA 98.
9 Kritzer at 1471.
10 Id. at 1472.
11 Constitution of Solomon Islands (hereinafter SI Const.), Schedule 3, Para. 3(2).
Titles Act of Solomon Islands to be “any land lawfully owned, used or occupied by a person or community in accordance with current customary usage.”¹²

This report provides a basic description of the legal instruments, processes and institutions relevant to private lands conservation currently in place in Solomon Islands. Section I provides relevant background information on the land and its people, the governmental structure and historical events, particularly the recent coup. Section II is an overview of the legal authorities applicable in Solomon Islands. Section III explains customary land tenure and describes the process for settling customary land disputes. Section IV details the land registration process and the limits on transfers of land. Section V is an overview of the rights and restrictions pertaining to private lands including an explanation of easements, profits, and restrictive covenants that are allowed by law and an explanation of the Forest Resources and Timber Utilisation Act as it applies to customary land. Section VI provides recommendations of actions that could be taken to conserve private lands with particular emphasis on community-based efforts.

I. RELEVANT BACKGROUND

A. Overview of the Land Demographics and Related Issues

1. Land Area and Land Use Patterns

Solomon Islands is made up of twenty-six islands and hundreds of small islets numbering from two hundred to “thousands” (depending on the source) and forming a double chain within a sea area of over one million square kilometers.¹³ Of the islands, only 347 are inhabited.¹⁴ The

¹² Land and Titles Act, Cap. 133, Part I, sect. 2(1).
¹³ Corrin Care, 1999 LAWASIA Journal 98
¹⁴ Norwegian Refugee Council website; www.idpproject.org “General Characteristics of the Solomon Islands”
total land area of the islands is approximately 11,500 square miles or 7,360,000 acres. The islands spread from the southernmost part of Papua New Guinea to just northwest of Vanuatu.\textsuperscript{15} The largest islands are: Choiseul (1140 square miles), New Georgia, Santa Isabel, Guadalcanal (2000 square miles), Malaita, and San Cristobal.\textsuperscript{16} Other islands and islets range in size from a few square yards to the 250 square mile Vella Lavella.

There are five major categories of land:

1. Flat Narrow Coastal Belt – linked to these areas are the flat coral lagoon islands and atolls covered with light vegetation such as coconut trees, secondary growth, forest in transition, and on larger land masses, small stands of primary forest.

2. Fresh and Saltwater Swamp lands – these are covered with mangrove, swamp forests and ivory nut trees.

3. Dry Coastal Plains – covered with grass, ferns and scattered forest clumps

4. Foothills and Mountain Ranges below three thousand feet – these are covered with dense primary forests and are the areas hardest hit by logging companies.

5. Precipitous Mountains – ranges above three thousand feet – covered with mid-mountain forest, and on the higher mountains of Guadalcanal (4,000 – 8,000 feet), moss forest.

Ninety percent of the land mass is made up of foothills and mountains covered in rain forests.\textsuperscript{17} Forests in the mountains are reported to be mostly intact, whereas large areas of the forest below about 1200 feet have been logged by commercial interests and much of the coastal area on many of the islands has been converted to coconut plantations.\textsuperscript{18} One percent of the land is considered arable, one percent is in permanent crops and one percent is in permanent pasture.\textsuperscript{19}

\textsuperscript{15} Kritzer at 1471.
\textsuperscript{16} Alan at 1.
\textsuperscript{17} Id. at 2.
\textsuperscript{18} Birdlife International website, Bird Life EBA Factsheet for the “Solomon Group EBA”, http://www.birdlife.net/datazone/search
\textsuperscript{19} Boydell, Spike, \textit{Land Tenure and Land Conflict in the South Pacific} – \textit{Consultancy Report for the Food and Agriculture Organization of the United Nations} (University of the South Pacific, September, 2001) (hereinafter, Boydell) Appendix 1, at 5.
2. **Population**

Consisting primarily of Melanesian peoples (93.4%), the population of almost 400,000 also includes Polynesian (4%), Micronesian (1.4%), European (.7%), and Chinese (.2%) people. Solomon Islands has experienced one of the fastest growth rates in the world recently at almost three percent per year. Malaita has the highest population at 122,620 followed by Guadalcanal with 60,275 concentrated primarily in the capital of Honiara (49,107).

Although more than eighty different vernaculars are spoken on the islands, the official language is reported to be English and Solomon Islands pidgin. Pidgin is used for all transactions between people of different islands and when correctly spoken is considered to be an effective language. In courts where residents of different islands are present, the proceedings are translated into pidgin. However, the lack of one language is cited as a major impediment to the development of a land tenure system based on codification of native custom.

3. **Non-Customary Lands**

When Solomon Islands became a protectorate of the British government, sales of perpetual ownership of land to non-islanders were allowed for some time, subject to government approval. In 1977, though, all perpetual estates in land were converted automatically to fixed-term estates of seventy-five years.

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20 Kritzer at 1471.
21 Callick at 61.
22 City Populations website - http://www.citypopulation.de/Solomon.html#Land.
24 Kritzer at 1471.
25 Alan at 15.
years.\textsuperscript{27} The perpetual ownership of these converted lands is held by the Commissioner of Lands for the Government of Solomon Islands.\textsuperscript{28}

Exceptions to the prohibition against non-Islanders holding perpetual estates include: a person holding such estate on trust for a Solomon Islander subject to the filing of a statutory declaration to this effect with the Registrar; and a company registered in Solomon Islands where at least sixty percent of the equity is held beneficially by persons who are Solomon Islanders.\textsuperscript{29}

Today, approximately nine percent of the total land area is held by the government and two percent is leased by foreigners.\textsuperscript{30}

4. Customary Land

Land lawfully owned, used, or occupied by a person or community in accordance with current customary usage is ‘customary land.’\textsuperscript{31} All questions relating to the manner of holding, occupying, using, enjoying and disposing of customary land shall be determined by the current customary usage of the area.\textsuperscript{32} Figures of the amount of land held in customary ownership vary from 85\% to 90\%. It has been suggested that the best and most accessible land (i.e. coastal land) was alienated in the early days of British administration\textsuperscript{33} and that the figures of non-customary land amounts are skewed as they do not indicate the percentage of coastal land that was alienated.\textsuperscript{34} It can be assumed, then, that most of the land held in customary ownership is in the low foothills and mountainous regions of the islands. These land areas are mostly covered with dense rainforest.

\textsuperscript{27} Land and Titles Act, Cap 133, sect. 100(1).
\textsuperscript{28} Id. Cap 133, sect. 102.
\textsuperscript{29} Id. Cap 133, sect. 112(4).
\textsuperscript{30} Norwegian Refugee Council website; www.idpproject.org.
\textsuperscript{31} Land and Titles Act, Cap 133, sect 2(1).
\textsuperscript{32} Id. Cap 133, sect 239(1).
\textsuperscript{33} Norwegian Refugee Council website; www.idpproject.org article entitled, “87 Percent of the Land is in Customary Ownership.”
\textsuperscript{34} Larmour, Peter \textit{Alienated Land and Independence in Solomon Islands} (Melanesian Law Journal, 1984-85) (hereinafter Larmour), vol. 12 at 102.
B. Government

The 1978 Constitution provides the framework for the government of Solomon Islands consisting of executive, legislative and judicial branches.

I. The Executive

The executive function is divided between the Head of State, the Governor-General, and the Cabinet which is made up of the Prime Minister and other appointed Ministers. There are also an attorney general and a chief of police.

The Head of State of Solomon Islands is the Queen of England.35 The Queen is represented in Solomon Islands by a Governor-General who is appointed by Her Majesty on the advice of Parliament for up to five years.36 The Governor-General must be a citizen of Solomon Islands.37

The cabinet is made up of the Prime Minister a Deputy Prime Minister and other Ministers which fill the roles of Ministers of the Government. The Prime Minister is usually the leader of the majority party or leader of a majority coalition elected by members of Parliament following legislative elections.38 The Deputy Prime Minister is appointed by the Governor-General on the advice of the Prime Minister as are the other Ministers of Government.39 The Prime Minister is to keep the Governor-General informed of the general conduct of the government of Solomon Islands. The Ministers, as members of the Cabinet, are assigned

35 SI Const., Chapter I, Para. 1(2).
36 Id. Chapter IV, Sect. 27(1)
37 Id. Chapter IV, Sect. 27(2)
39 SI Const., Chapter V, Sect. 33(2).
responsibilities for the conduct of certain business of the government including responsibility for
the administration of departments of the government.\footnote{Id. Chapter V, Sect. 37.}

Appointed by the Judicial and Legal Service Commission on the advice of the Prime
Minister, the Attorney-General is the head of the legal profession of Solomon Islands and the
principal legal adviser to the government.\footnote{Kritzer at 1475.} The Judicial and Legal Service Commission is made
up of the Chief Justice of the High Court, the Attorney-General, and the chief of the Public
Service Commission.

2. **The Legislative**

The National Parliament of Solomon Islands is a unicameral body made up of forty-seven
members including the Prime Minister.\footnote{Id. at 1473; SI Const., Chapter VI, Para. 54.} Parliament is charged by the Constitution with making
laws\footnote{Id. Chapter VI, Sect. 59(1).} and with the duty of making provision for the “application of laws, including customary
laws…having particular regard for the customs, values and aspirations of the people of Solomon
Islands.”\footnote{Id. Chapter VII, Sect. 75(1),(2).}

The process for making laws starts with the passage of a Bill that is then presented for
assent by the Governor-General on behalf of the Head of State.\footnote{Id. Chapter VI, Sect. 59(2).} With the assent of the
Governor-General, the Bill becomes law. Though it is considered law, it does not come into
operation until it is published in the Solomon Islands Gazette.\footnote{Id. Chapter VI, Sect. 59(3). The Gazette is an official newspaper of the Solomon Islands government in which Acts of Parliament and other legal matters are reported.} Thus, the Parliament may pass a
law, then delay the effective date of that law for any amount of time.

\footnote{Id. Chapter V, Sect. 37.}

\footnote{Kritzer at 1475.}

\footnote{Id. at 1473; SI Const., Chapter VI, Para. 54.}

\footnote{Id. Chapter VI, Sect. 59(1).}

\footnote{Id. Chapter VII, Sect. 75(1),(2).}

\footnote{Id. Chapter VI, Sect. 59(2).}

\footnote{Id. Chapter VI, Sect. 59(3).}
Act of 2000 which would have a big impact on customary law\textsuperscript{47} is one such act that has been passed but has not been published and, therefore, has not come into force.\textsuperscript{48}

3. **The Judiciary**

The court system of Solomon Islands follows a standard hierarchical model of inferior court (Magistrate Courts), superior court (the High Court), and appeal court (the Court of Appeals).\textsuperscript{49} Separate courts, called Local Courts have been created to deal with minor disputes and disputes on customary land. Separate appeals courts, the Customary Land Appeal Courts, handles appeals on customary land matters. Though the Local Courts and Customary Land Appeal Courts are considered independent of the ‘formal’ court system, appeals from those courts are allowed to the courts of the ‘formal’ court system.

\textit{a. Local Courts}

Authorized by Parliament through the Local Courts Act and established by warrant from the Chief Justice, the Local Courts are to administer the law and custom prevailing in the area of the jurisdiction of the court subject to modifications by Parliamentary Act.\textsuperscript{50} Local Courts generally have jurisdiction over all matters in which the parties are both Solomon Islanders or where matters regarding customary land within the jurisdiction of the court are at issue. Exercise of jurisdiction by the Local Courts, though, can only occur after the parties have attempted to resolve the dispute by traditional means. Any disputes arising out of conservation efforts on customary lands, then, if they are not settled by traditional means, will be heard by the Local Courts.

\textsuperscript{47} The Act states in part, “…custom shall be recognized and enforced by, and may be plead in, all Courts except…” where the Court believes it is not in the public interest or where the custom is inconsistent with the Solomon Islands Constitution or an Act of Parliament. Corrin Care, 21 UQLJ at 167, 169.

\textsuperscript{48} Id. at 169; e-mail correspondence from Professor Dan Paterson University of South Pacific School of Law, July 18, 2004.

\textsuperscript{49} Corrin Care, et.al. at 304.

\textsuperscript{50} Local Courts Act, Cap 19, sect. 16.
The Local Courts were authorized by Parliament through the Local Courts Act and are established by a warrant from the Chief Justice of the High Court.\(^{51}\) In 2002, there were thirty-three established Local Courts.\(^{52}\) The constitution of the court is specified by the Chief Justice in the warrant creating the court. Usually, a Local Court consists of a President, one or more Vice-Presidents, and two or more Justices.\(^{53}\) A quorum of three justices must be present for the court to hear a case.\(^{54}\) Sometimes, in the case of a customary land dispute, it can be difficult to find a quorum of justices who are not in some way related to the litigants.\(^{55}\) In that situation, a different Local Court can be petitioned to hear the case. Customary land disputes are defined to be, “…dispute[s] in connection with the ownership of, or, of any interest in, customary land or the nature or extent of such ownership.”\(^{56}\)

The jurisdiction of the Local Courts has been conferred by Parliament through the Local Courts Act and is specifically outlined by the Chief Justice in the warrant that creates the court. The Local Courts have exclusive original jurisdiction over customary land disputes, though not over the determination of whether or not land is customary land.\(^{57}\) The Local Courts also have jurisdiction over matters in which all parties are Islanders\(^{58}\) resident or present in the area over which the court presides.\(^{59}\) In cases involving customary land, the land must be within the jurisdiction of the court.\(^{60}\) Appeals from decisions of Local Courts over matters concerning

\(^{51}\) Id. Cap 19.
\(^{52}\) Kritzer at 1474.
\(^{53}\) Local Courts Act, Cap 19 sect. 3; Corrin Care, 1999 LAWASIA 102.
\(^{54}\) Local Courts Act, Cap 19, sect. 2, “Warrants Establishing Local Courts.”
\(^{55}\) Smiley, Philip, Settling Land Disputes in Solomon Islands from the book Pacific Perspective, (South Pacific Social Sciences Association, 1981), (hereinafter, Smiley) Vol. 9, no. 2 at 27.
\(^{56}\) Local Courts Act, Cap 19, sect. 11.
\(^{57}\) Land and Title Act, Cap. 133, Sect. 254(1)(b).
\(^{58}\) Islander is not defined in the act, but is governed by the Interpretations Act, Cap 85, sect. 17(1) – “(a) any person both of whose parents are or were members of a group, tribe, or line indigenous to Solomon Islands; or (b) any other person at least one of whose parents or ancestors was a member of a race, group, tribe or line indigenous to any island in Melanesia, Micronesia or Polynesia and who is living in Solomon Islands in the customary mode of life of any such race, group, tribe or line.”
\(^{59}\) Local Courts Act, Cap. 19, sect. 6.
\(^{60}\) Id. Cap. 19, sect. 8(1).
customary land are heard by the Customary Land Appeals Court and appeals from other rulings of the Local Courts (not concerning customary land) are heard by the Magistrates’ Courts.\textsuperscript{61}

Before exercising its jurisdiction over any matter, the Local Court must ascertain that resolution has not been possible through customary methods. The parties must have referred the dispute to the local chiefs, and attempted all traditional means of resolving the dispute. The local court must conclude that “no decision wholly acceptable to both parties has been made by the chiefs.”\textsuperscript{62} This requirement demonstrates the desire to have ownership of customary land decided in a customary way. The procedure, though, comes with difficulties which illustrate generally the challenges inherent in trying to use a ‘formal’ court system to substantiate customary law.\textsuperscript{63}

Often the parties are unwilling to abide by the chief’s decision\textsuperscript{64} and, in some areas, the nature of chiefly authority and who, exactly, are the “Chiefs,” is not easily determined.\textsuperscript{65} Additionally, determining the content of the customary law is often a challenge.\textsuperscript{66} Customary law is not a homogenous body of law as customs and traditional practices differ from island to island and from village to village. The Constitution gave the duty of clarifying this issue to Parliament and, in the year 2000, Parliament attempted to fulfill that duty through passage of the previously mentioned Customs Recognition Act which has not come into force.

Disputes arising in connection with conservation efforts on customary lands would first undergo traditional dispute resolution. If that fails, the Local Court will handle the dispute as the Local Courts administer the law and custom of the area of their jurisdiction and have original jurisdiction over customary land disputes.

\textsuperscript{61} Land and Titles Act, Cap 133, sect. 256(3); and Local Courts Act Cap 19, sect. 28.
\textsuperscript{62} Id. Cap. 19, sect. 12(1)(a),(b),(c).
\textsuperscript{63} Corrin Care, 1999 LAWASIA 98 at 110.
\textsuperscript{64} Id.
\textsuperscript{65} Allan at 62.
\textsuperscript{66} Corrin Care, Jennifer, 21 UQLJ 167 at 174.
\textsuperscript{67} SI Const. Schedule 3, sect. 3.
**b. Customary Land Appeal Court**

The Customary Land Appeal Courts are created by warrant from the Chief Justice as authorized by Parliament through the Land and Titles Act. A Customary Land Appeal Court hears appeals from the Local Court of decisions concerning customary land, including decisions made regarding timber agreements affecting customary land (see below Section V. F. 2). Appeal from decisions of the Customary Land Appeal Court take disputes into the ‘formal’ court system at the High Court.

Introduced in 1972, the Chief Justice establishes one Customary Land Appeal Court for each province. The Chief Justice appoints the members of the court: a President, Vice President, and at least three other members. One of these three other members must be a Magistrate. The members of the court are usually the most highly respected leaders of the community who have knowledge and experience in customary matters. The Customary Land Appeal Court handles matters of customary law, but it follows formal court procedures. Legal practitioners are not allowed to appear before a Customary Land Appeal Court.

The jurisdiction of the Customary Land Appeal Court is not limited to hearing appeals from Local Courts exercising jurisdiction over customary land disputes. The court also has jurisdiction to hear appeals from decisions of Area Councils made under the Forest Resources and Timber Utilisation Act when determining the rights held in customary land. The decision

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68 Kritzer at 1474.
69 Land and Titles Act, Cap 133, sect. 256(3).
70 Id. Cap 133, sect. 255(1).
71 Id. Cap 133, sect. 255(2).
72 Smiley at 27.
73 Corrin Care, 1999 LAWASIA 98 at 101; citing Liufai fusoa v. Malaita Customary Land Appeal Court, [1989] SILR 70 at 73.
74 Land and Titles Act, Cap. 133, sect. 255(6).
75 Forest Resources and Timber Utilisation Act, Cap 40, sect. 10(1).
by the court in an appeal of this type is considered final and can be questioned in no other proceeding.\footnote{76}{Id. Cap 40, sect. 10(2).}

Other rulings by the Customary Land Appeal Court, though, can be appealed to the High Court. These appeals can only be made on points of law, other than customary law, or for failure to comply with procedural requirements of any written law.\footnote{77}{Land and Titles Act, Cap 133, sect. 256(3).} The High Court’s decision on such appeals is final.\footnote{78}{Id. Cap 133, sect. 256(4).} Smiley reported in 1981, that the restriction on appeals of this type to points of law other than customary law were widely disregarded. Accordingly, most of the decisions of the Customary Land Appeals Court were appealed to the High Court.\footnote{79}{Smiley at 25.} Regardless of the number of appeals, the High Court adheres strictly to restrictions on its jurisdiction. For instance, the Chief Justice of the High Court, in 1986, noted his inability to consider the merits of a case on appeal as it would involve consideration of customary law.\footnote{80}{Corrin Care, 1999 LAWASIA 98 at 105; citing Teika v. Maui, [1985/6] SILR 91.} Where the High Court does uphold an appeal on a point of law other than customary law, it usually sends the case back to the Local or Customary Land Appeal Court for re-hearing on that point.

Part of the ‘separate’ court system, the Customary Land Appeal Courts hear appeals from decisions by the Local Court in cases concerning customary land. Appeals from decisions by the Customary Land Appeal Court take cases back into the ‘formal’ system to the High Court.

\textit{c. Magistrates’ Courts}

The Magistrates’ Courts were established by the Magistrates’ Courts Act.\footnote{81}{Magistrates’ Courts Act, Cap 20} They are essentially middle courts with jurisdiction over civil cases where the amount in controversy is relatively low and in criminal cases where the maximum penalty is relatively low. Where amounts in controversy or penalties are higher, the case goes to the High Court.

\footnotesize{\begin{itemize}
\item Id. Cap 40, sect. 10(2).
\item Land and Titles Act, Cap 133, sect. 256(3).
\item Id. Cap 133, sect. 256(4).
\item Smiley at 25.
\item Corrin Care, 1999 LAWASIA 98 at 105; citing Teika v. Maui, [1985/6] SILR 91.
\item Magistrates’ Courts Act, Cap 20
\end{itemize}}
Subordinate to the High Court, the Magistrates’ Courts are divided into Principal Magistrates’ Courts and Magistrates’ Courts of the First Class or of the Second Class. Each court consists of one Magistrate. While the First and Second Class Magistrates’ Courts’ area of jurisdiction is limited to the district in which they sit, the Principal Magistrates’ Courts have jurisdiction throughout Solomon Islands. The Magistrates hear appeals of right from rulings by Local Courts except in cases concerning customary land. Magistrates’ Courts do not have jurisdiction to preside over actions where the title to land or ownership of land is disputed, except where the parties consent. Appeals from rulings by the Magistrates’ Courts go to the High Court.

d. The High Court

Established by the Solomon Islands Constitution, the High Court is made up of a Chief Justice and two or three puisne (pyoo-nee) judges all of whom (the Chief Justice included) are appointed by the Governor-General upon the advice of the Judicial and Legal Service Commission. In 1999, there were a Chief Justice and three puisne judges.

The High Court has unlimited original jurisdiction to hear and determine any civil or criminal case under any law in Solomon Islands. The High Court also hears appeals from decisions of the Magistrates’ Courts and from the Customary Land Appeal Courts. The High Court also hears appeals of rulings in Registration proceedings.

82 Id. Cap 20, sect. 3(1).
83 Id. Cap 20, sect. 7.
84 Id. Cap 20, sect. 4.
85 Local Courts Act, Cap 19, sect. 28.
86 Land and Titles Act, Cap 133, sect. 256(1).
87 Magistrates’ Courts Act, Cap 20, sect. 19(6).
88 Id. Cap 20, sect. 41.
89 SI Const. sect. 77, 47(2); Prescription of Judges Act, Cap 90,
90 Corrin Care, 1999 LAWASIA 98 at 100.
91 SI Const sect 77(1).
92 Magistrates’ Courts Act, Cap 20, sect. 41.
93 Land and Titles Act Cap 133, sect. 256(3).
e. The Court of Appeal

The Court of Appeal, created by the Constitution, is the highest court in Solomon Islands.\(^94\) It consists of a President, Justices of Appeal appointed by the Governor-General, and the Chief Justice puisne judges of the High Court.\(^95\) Appointed Justices of Appeal must hold or have held high judicial office in a Commonwealth country or a country outside of the Commonwealth as prescribed by Parliament.\(^96\) Usually, the appointees are from Papua New Guinea, Australia, or New Zealand.\(^97\)

The Court of Appeal’s jurisdiction includes appeals as of right from any High Court decision in which the High Court sat at first instance and (on question of law only) from any decision of the High Court exercising appellate jurisdiction except where appeal is prohibited by statute\(^98\) such as in the case of customary land disputes.\(^99\) As appeals lie from decisions of the High Court and the members of the High Court are also considered members of the Court of Appeal, no High Court judge may preside over a case at the Court of Appeal on which he has previously delivered a decision.\(^100\)

4. Provincial Government

The Constitution mandates that power should be devolved to the provinces to decentralize the power of the government and to insure the participation of the people in government.\(^101\) Parliament passed the Provincial Government Act in 1981 establishing seven

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\(^{94}\) SI Const. sect. 85.

\(^{95}\) Id. at sect. 86.

\(^{96}\) Id. at sect. 86(3), 78(3)(a).

\(^{97}\) Corrin Care, 1999 LAWASIA 98 at100.

\(^{98}\) Court of Appeal Act, Cap 6, sect. 11(1)(a)(b)(c).

\(^{99}\) Land and Titles Act, Cap 133, sect. 256(4).

\(^{100}\) SI Const. sect. 86(4)(a).

\(^{101}\) Id. Preamble (e).
provinces (since increased to nine). The Act provides for the election of Provincial Assemblies with power to legislate, the formation of Provincial Executives to provide services, and the establishment of a Provincial Fund to fund these activities.

a. Provincial Assemblies

Each province is to have an elected provincial assembly with the power to enact Ordinances to regulate provincial matters. Provinces are divided into electoral wards from which representatives are elected to the Assembly by registered voters over the age of eighteen for four year terms.

The Ordinance of the Assembly makes laws for the province subject to review and assent by the Minister of the Cabinet in charge of provincial affairs. The Minister can withhold assent if the law would “…conflict with Government policy for Solomon Islands as a whole.” Parliament reviews the opinion of the Minister and if Parliament does not agree, the Minister must assent to the Ordinance and it will be considered law in the province. The power of the Provincial Assembly to legislate for the province does not relieve Parliament of its ability to legislate for the province. This has been a source of frustration for some Islanders who feel the provinces should have more independent control over local matters and was cited as an aggravating factor leading to the year 2000 coup. The Townsville Peace Agreement which ended those hostilities provided for formation of nine ‘state’ governments with more

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102 The provinces are: Western Provincial Assembly, Santa Isabel Provincial Assembly, Central Islands Provincial Assembly, Guadalcanal Provincial Assembly, Malaita Provincial Assembly, Makira Ulawa Provincial Assembly, Eastern Islands Provincial Assembly, Choiseul Provincial Assembly, Rennell and Bellona Provincial Assembly.
103 Provincial Government Act 1997, sect. 7(1).
104 Id. sect. 9(1).
105 Id. sect. 30(1).
106 Id. sect. 30(2).
107 Id. sect. 32(1)(b).
108 Id. sect. 32(2).
109 Id.
110 Id. sect. 30(6).
independence than current provisional governments. Those state governments have not yet been formed.

Areas over which Provincial Assemblies have the power to legislate which would affect conservation efforts are:

- Local licensing of professions, trades, and businesses;
- Protection of wild creatures;
- Raising of revenue property tax or other means approved by the Minister;
- Protection, improvement, and maintenance of fresh-water and reef fisheries;
- Codification and amendment of existing customary law about land, registration of customary rights in respect of land including customary fishing rights;
- Creation of Area Assemblies made up of area councilors, and the process by which such assemblies make by-laws (Area Assemblies are governed by the Local Government Act, an Act which was not available for this research.)
  - Such by-laws do not take affect until they are approved by the Provincial Assembly.
  - By-laws only affect the area for which the assembly was formed.
- Control and use of river waters;
- Acquisition of land for public purposes;
- Participation of the provincial government in logging ventures on customary land;
- Licensing of Timber Mills;
- Make regulations that would affect the approving of timber agreements on customary land and licensing mills; and
- Appropriations of money from the Provincial Fund subject to review by the Minister.

A conservation organization could, thus, work with the local groups to encourage the Provincial Assemblies to pass Ordinances promoting conservation practices on customary land.
World Wildlife Fund has been successful in using this strategy on Simbo island.\footnote{Information can be found at the World Wildlife Fund website http://www.wwfpacific.org} A description of that program is given below (see Section VI. D. 1).

\textit{b. Provincial Executive}

Each province has a Provincial Executive which consists of a Premier, Deputy Premier, and Provincial Ministers.\footnote{Provincial Government Act 1997, sect. 19(1).} Members of the Provincial Assembly elect the Premier by secret ballot. The national Minister appoints the Deputy Premier and the Provincial Ministers on the advice of the elected Premier.\footnote{\textit{Id.} sect. 20.} The Provincial Assembly can remove the Premier by a vote of no confidence, but only after he has performed for one year after his election.\footnote{\textit{Id.} sect. 19(5)(a).}

The functions of the executive include providing services for the province in certain areas the most important of which, for our purposes, are: conservation of the environment, agriculture, fishing, and forestry.\footnote{\textit{Id.} sect. 33(3)(b).} In providing these services the executive “…may do anything (whether or not involving the acquisition or disposal of any property) calculated to facilitate…” provision of such service for the province.\footnote{\textit{Id.} sect. 39.} Additionally, the money that is collected based on the taxes, fees, and charges implemented by the Provincial Assembly are accounted for and deposited into the Provincial Fund by the executive.\footnote{\textit{Id.} sect. 20.}

It would seem, then, that a provincial government can acquire lands for conservation purposes. This is a possibility, but any acquisition of customary land by a provincial government is subject to the determination of boundaries and rights to the land, a process which is very difficult and sometimes unsuccessful. When the rights cannot be determined, the acquisition fails.
C. Relevant History

Discovered in the sixteenth century, Solomon Islands became a British Protectorate in 1893 and gained independence in 1978. Recent violence in the year 2000 caused by land disputes and ethnic tensions on Guadalcanal ended with the signing of the Townsville Peace Agreement. The instability devastated the economy, though, and threw the government into a tailspin prompting a call, in 2003, to Australia for help. In 2004, the country is secure in terms of violence, but economically unstable. Suggestions for solving the problems include an overhaul of the system of land tenure. The assistance of non-governmental organizations (NGOs) is recognized as a valuable and economically efficient tool for supporting stability.

Solomon Islands was first reported to have been sighted and named by the Spanish explorer Alvaro de Mandana de Neira in 1568, though there is evidence of native settlement as far back as 1300 BC. The development of trade in natural resources such as coconut oil and copra brought about increased interest in settlement around 1880. At that time, some lands were ‘purchased’ from indigenous owners but most of the indigenous peoples did not understand that these transactions were final and that the buyer would have no further obligation to the seller as this was an entirely foreign concept. Most of the alienated lands have been returned to the former owners or to the government.

In 1893, the British government declared Solomon Islands a British Protectorate and extended governmental control to the indigenous people. A protectorate differs from a colony in that the alien power taking control is one of benevolence acting in accord with the wishes of the people whereas, in a colony the people and resources are bent to the will of the colonizing

133 Kritzer at 1471.
134 Alan at 32.
135 Id at 35, 36.
136 Kritzer at 1471.
power for the colonizer’s sole interest. During World War II, in 1942 the islands were occupied by the Japanese and, after intense fighting on the island of Guadalcanal, were re-occupied by the Allies in 1943. After World War II, the capital was moved from Tulagi to Honiara on the island of Guadalcanal, a move which set the stage for the recent coup.

Solomon Islands joined the Commonwealth as an independent nation in 1978 and adopted the Constitution of Solomon Islands. From 1978 to 1998, Solomon Islands people integrated at a very rapid rate as they struggled with the concept of one nation of so many diverse groups. The government had purchased land on Guadalcanal from indigenous owners for the capital (Honiara) and for palm oil and other developments. Many people moved to the new capital, most of them from the overcrowded island province of Malaita (a province of Solomon Islands to the northeast of Guadalcanal). Frustration and tension began to grow when, because of the growth of the city and the migration of people, land values increased and the former owners felt they were entitled to the increased value. Also, the Malaitans who migrated to Guadalcanal leased some land from the government and acquired other lands through agreements with local groups. Tensions mounted when Malaitans were seen to be prospering at, what some considered, the expense of the local people, and disagreements broke out over the exact rights that Malaitans had acquired.

The reluctance of the government to protect the land transactions that had occurred is considered now to have been a key factor in escalating tension. As a result, approximately twenty thousand Malaitans were forcefully evicted from Guadalcanal in April of 1998.

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137 Alan at 56.
138 Anere, et.al. at 32.
139 Kritzer at 1471.
141 Anere, et.al. at 32.
142 Kritzer at 1472.
January of 2000, Malaitans took up arms and retaliated. In June of that year, after joining with members of the police force and prison service on Guadalcanal, the Malaitans took control of the government armory and forced the Prime Minister to resign. Elections were quickly held, a new Prime Minister was elected, and a new government was formed. By August, a cease-fire agreement had been negotiated and in October of 2000, all parties signed the Townsville Peace Agreement.

The Townsville Peace Agreement provided for the demilitarization of the country, called for further devolution of power to Guadalcanal and Malaita provinces from the national government, established a Peace Monitoring Council to enforce the terms of the agreement, and a Constitutional Council to re-write parts of the Constitution\textsuperscript{143} including the Land and Titles Act.\textsuperscript{144} The Agreement provides for a commission of enquiry to examine land acquisitions in Guadalcanal and placed a moratorium on further transactions concerning land on Guadalcanal.\textsuperscript{145} Whether or not these steps were taken and whether they were successful is not known.

However, in June of 2003, Solomon Islands Prime Minister Allan Kemakeza requested urgent help from Australian Prime Minister John Howard because his government was unable to deliver services and provide security for its people.\textsuperscript{146} The Regional Assistance Mission to Solomon Islands (RAMSI) was deployed consisting of military troops and police and one year later the country is deemed to be free from militia violence although unstable economically. RAMSI has also provided $200 million in aid since deployment. Looking to the future, it is certain that aid will continue to be needed, but this is a tricky proposition when trying to initiate

\textsuperscript{143} Kritzer at 1473.
\textsuperscript{144} Boydell at 41.
\textsuperscript{145} Kritzer at 1473.
private economic growth. “RAMSI risks creating a situation in which the locals will say: ‘If foreigners will fix it, why worry?’”

The coup had a devastating effect on the economy. Between 1999 and 2002: export value fell by 19% per year; government debt increased by 40%; per capita gross domestic product fell by 18% in 2000; and the Solomon Islands dollar lost half its value compared to the U.S. dollar. At the same time the population growth rate is almost 3% per year – one of the highest growth rates in the world. The news is not all bad, though. In 2003, gross domestic product grew by almost 5 percent, exports of cocoa increased and inflation fell. Yet, foreign investors are still wary and new foreign investment seen as integral to re-building the economy, remains low.

A number of people have studied the issue and many reports have been written containing suggestions for solutions. Consistent in these reports is the suggestion to create a workable land tenure system through facilitating land registration and survey, formalizing land boundaries, streamlining land dispute settlement processes, and codifying the customary laws by Area or Provincial Assemblies. Critics have also suggested review and consideration of terminating the leases held by logging companies that are illegally ignoring environmental conditions of their leases. Further, there are calls to devolve governmental control from the national capital to the provinces – an integral part of the Peace Agreement. Some scholars warn, though, that decentralization of governmental power, in the long run, may weaken security by fragmenting an already weak government and weak economy.

147 Id.
148 Callick at 61.
149 Anere, et.al. at 32.
150 Callick at 61.
152 Anere, et.al. at 36. The Townsville accord contained agreements to create 9 state governments with 1 federal government.
153 Callick at 62.
During the coup and the tense times that followed, non-governmental organizations (NGOs) helped to make positive changes. While many of the suggestions for the future must be implemented on a national scale, valuable economically efficient efforts can be made by NGOs at the community level.

II. OVERVIEW OF THE LEGAL CONTEXT

The hierarchy of laws in Solomon Islands is: the Solomon Islands Constitution; Acts of the National Parliament of Solomon Islands; United Kingdom Acts of general application that were in force on January 1, 1961 which apply in the absence of local legislation on point; Customary Law; and the principles of common law and equity, insofar as they are appropriate under the circumstances of Solomon Islands.

A. The Constitution

Section two of the Constitution states that the Solomon Islands Constitution is the supreme law of the land and no other law inconsistent with the Constitution will be valid. Though the Constitution is the supreme law of the land, where it has come into conflict with customary law, interesting results have appeared in the judicial opinions. The Court of Appeal has held that the customary duty to kill in retaliation is inconsistent with the right to life protected by the Constitution. At the same time, the High Court has made an effort to reduce incentive to use the introduced laws to circumvent custom. Where a villager pleaded for relief based on Constitutional guarantees of the right of freedom of movement, the Chief Justice dismissed the claim because the claimant had not shown that he truly had been banished by the Chiefs of his village – there was no banishment order so the claimant did not have a proper case.

154 Anere, et.al. at 35.
155 Kritzer at 1473.
156 Corrin Care, 21 UQLJ 167 at 170, citing R v. Loumia and others, [1984] SILR 51.
The Chief Justice went on to state, in dictum, “…this case is a classic example of an attempt to use the Constitution to circumvent the lawful application of custom, a course of action that may well engender disharmony in society.” Therefore, it can be argued that citing the Solomon Islands Constitution will not always prevail in the courts where it conflicts with custom.

B. **Acts of Solomon Islands Parliament**

Land disputes on customary land have been settled by customary law since before the time of colonization by the British. Yet, customary land is also impacted heavily by Acts of the Solomon Islands Parliament including, the Land and Titles Act, Cap 133; the Forest Resources and Timber Utilisation Act, Cap 40; the Mines and Minerals Act, Cap 42; the North New Georgia Timber Corporation Act, Cap 43; the Customary Land Records Act, Cap 132; and the Mamara-Tasivarongo-Mavo Development Act of 1997. Acts of Parliament take precedence over customary law in the courts.158

C. **United Kingdom Acts**

The Constitution provides that “…Acts of Parliament of the United Kingdom of general application and in force on 1st January 1961 shall have effect as part of the law of Solomon Islands…” Where the National Parliament of Solomon Islands has enacted legislation covering certain issues, UK Acts covering those same issues will not apply. In addition, where UK Acts are in conflict with customary law, the customary law will be applied especially where the question relates to strictly customary matters such as customary land or customary title.160

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157 *Id.* at 171, citing *Remisio Pusi v. James Leni and Others*, unreported, High Court, Solomon Islands, cc218/1995.
158 Corrin Care, et.al. at 247. The authors describe a case (*Tovua v. Meki*, [1988-89] SILR 74) in which the secondary rights owners to land sold the logging rights and left the primary rights owners with a ‘wasteland.’ The High Court ruled that, although the outcome was unfortunate, it was the “way the law was written.” The Justice was referring to the Forest Resources and Timber Utilisation Act, Cap 40 and was upholding the Act where it conflicted with custom.
159 SI Const., Schedule 3, para. 1.
160 Corrin Care, 21 UQLJ 167 at 172.
opinion, the High Court stated, “…this is a case in which customary land is under discussion and rights to customary land should, on the basis of common sense, be dealt with in accordance with the customary traditions. To try to impose a received law (United Kingdom Act)…is…unsatisfactory.”

Apparently, though, where the custom to be applied to a matter that is not strictly customary (such as custody of children) is not clear, the UK Act will prevail.

D. Customary Law

The Constitution provides that “…customary law shall have effect as part of the law of Solomon Islands.” Additionally, the Land and Titles Act states that all questions relating to customary land issues shall be determined according to applicable current customary usage. Since approximately ninety percent of the land in Solomon Islands is customary land, for our purposes, customary law is of great importance.

Because the principles of customary law vary from island to island and village to village, it is difficult to know what that law is and when it applies. Though the Constitution states that customary law is a part of the law of the Solomon Islands, it is treated in the courts as a question of fact requiring proof by evidence. The High Court has stated that courts should strive to apply custom law, but only where evidence has been “…given by unbiased persons knowledgeable in custom law or extracted from authentic works on custom.” The Land and Titles Act provides that in ascertaining current customary usage, courts may refer to any books,

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161 Id. at 173 citing Igolo v. Ita, [1983] SILR 56 at 58.
162 Id. citing K v T and KU, [1985/86] SILR 56 where the custom regarding custody of children in the event of divorce or death of a parent was not clearly presented and the court decided the case based on the Guardianship of Infants Act 1886 (UK).
163 SI Const., Sced. 3, Para. 3(1).
164 Land and Titles Act, Cap. 133, sect. 239(1).
165 Website for the Food and Agriculture Organization of the United Nations, www.fao.org
166 Corrin Care, 21 UQLJ 167 at 176.
167 Sukutaona v Houanihou, [1982] SILR 12
treatises, reports, or “other works of reference” as prima facie evidence until the contrary is proved. Unfortunately, the courts have admitted to making mistakes in this area.

Courts have struggled with the application of customary law, especially where it comes into conflict with other laws, sometimes holding custom to prevail and sometimes holding introduced law to trump customary law. In general, where custom is inconsistent with the Constitution or Acts of Parliament, the court will decide the case based on the introduced law. In a case involving timber rights, the High Court upheld the transfer of timber rights by a group who held the ‘secondary rights’ to customary land even though they did not hold the ‘ownership’ or primary rights. Recognizing that custom traditionally allowed holders of secondary rights to enter lands and take trees for the building of canoes or homes, the Chief Justice stated, “To suggest that these secondary rights may now allow people who do not own the land to enter into agreements with logging companies to extract the most valuable commodity on the land, take the royalties for themselves and leave the land owners with a wasteland, is really taking the matter too far…” but with the way the law is written, it must be allowed. Customary law, then, is the source of law that rules customary land, but only to the extent that it is not inconsistent with the Constitution or Acts of Parliament and courts have maintained this distinction.

It can also be difficult for courts to determine exactly what custom applies in one area and mistakes have been made causing reversals of some decisions. In a 1975 case, the High Court sustained the holdings of lower courts that the rules of descent for a certain part of Makira Island provided for patrilineal succession. In 1982, a Local Court and a Customary Land Appeal

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168 Land and Titles Act, Cap 133, sect. 239(2).
169 Corrin Care, et. al. at 240.
170 Id. at 247.
Court held that the earlier decision was in error and that succession in that area followed matrilineal lines. The High Court sustained this reversal.\footnote{Id. at 240, citing Maerua v Kahanatarau [1983] SILR 95}

Customary law, then, is a valid and strong source of law in Solomon Islands where it is not inconsistent with the Constitution or Acts of Solomon Islands Parliament. Application of customary law in a formal court, especially where it conflicts with other sources of law, is challenging. Because customary law can be different from place to place and, because people, even within a tribe, often disagree on the proper customary law for the area, courts have been particularly challenged in resolving disputes over which custom to apply and have admitted to making mistakes. One possible solution to this problem would be to codify customary law.

E.  Common Law and Equity

The Constitution provides that common law and equity are to have effect in Solomon Islands courts.\footnote{SI Const. Sched. 3, Para. 2(1).} The Court of Appeals has determined that this applies to the common law of England and not of other Commonwealth nations.\footnote{Corrin Care, Jennifer, Democratic Fundamentals in Solomon Islands: Guadalcanal Provincial Assembly v The Speaker of National Parliament (Victoria University of Wellington Law Review, 1997) (hereinafter Corrin Care, 27 VUWLR 501) vol. 27 at 507, citing Cheung v Tanda, [1984] SILR at 108.} The courts have also held that principles of common law, if they are to be applied, must be proven in court by evidence.\footnote{Corrin Care, Jennifer, Cultures in Conflict: The Role of the Common Law in the South Pacific (Journal of South Pacific Law, 2002) (hereinafter Corrin Care, 9(1) Journal of S. Pac. Law 2002) vol. 9, at 10, citing High Court Cheung v Tanda, [1983] SILR at 193.}

This said, application of common law principles is subject to a number of Constitutional qualifications. According to the Constitution, common law cannot be applied where it is inconsistent with the Constitution, where it is inapplicable or inappropriate in the circumstances in Solomon Islands, or where it is inconsistent with applicable customary law.\footnote{SI Const. Sched. 3, para.2(1)(a)(b)(c).} Thus, customary law ‘trumps’ common law and equity in cases regarding customary land. Thus, if
common law tools such as equitable servitudes conflict with customary law, they will not apply to customary lands unless they are made applicable by an Act of Parliament. While easements, profits, and restrictive covenants are provided for by the Land and Titles Act, they may be limited on customary lands by the provision limiting the use of customary land to the customary usage applicable.

The Constitution also creates a cut-off date after which common law developments are not binding on Solomon Islands courts. The Constitution states that decisions of any foreign court from after July 7, 1978 shall not be binding on courts in Solomon Islands. However, where a post cut-off date decision from England declares or clarifies what the law actually was before the cut-off date, that ruling is binding in Solomon Islands. Other post cut-off rulings are considered persuasive in Solomon Islands. The circumstances in England, though, are so different than they are in Solomon Islands that many modern decisions are not appropriate in Solomon Islands and, thus, will not apply.

Notwithstanding that customary law is to take precedence in customary land disputes, common law terms have been applied to elements of customary land dealings creating confusion for courts. The terms, ‘trustee’ and ‘beneficiary’ are often used to describe the relationship between signatories to timber rights agreements and customary landowners. Also, the terms ‘primary rights’ and ‘secondary rights’ are used to describe the distinction between those who have rights most akin to ownership (primary) and those who merely have rights of use (secondary) of the land. As early as 1915, scholars were warning against this practice: “…[I]t is necessary to be extremely careful not to project our own ideas and associations into native life

177 SI Const. Sched. 3, para. 4(1).
179 Corrin Care, 27 VUWL 501 at 507.
180 SI Const., Sched. 3, para. 2(1)(b).
and thought. One must consider how far our terms...are applicable to native conditions. To use these terms in the strict sense...would be an obvious mistake."\textsuperscript{181} High Court Justices have also expressed their frustration with the mixture of common law and customary concepts: “...how can one express customary concepts in the English language?...[Some] concepts of received law have not developed a customary law meaning..."\textsuperscript{182} High Court Justice Palmer, though, has taken a more pragmatic approach, saying that so long as the proponent clarifies exactly what rights or obligations he is referring to, the terminology should not get in the way.\textsuperscript{183}

In short, common law and equity are, in Solomon Islands courts, subject to a number of limitations. Care should be taken, however, when attempting to analogize customary practices to common law tools not to assume that they will be treated the same in court.

III. CUSTOMARY LAND TENURE

The references to customary usage in the legal sources suggest a permanence and certainty in customary land tenure. In reality, though, customs and traditions do not lend themselves to permanence and certainty.\textsuperscript{184} Conditions of life for indigenous peoples were characteristically unsettled and disturbed and some communities were constantly on the move. It was difficult for settled patterns of ownership and occupation to develop and rules showing patterns of ownership did not develop. Boundaries often were not delineated at all or, where they were delineated, they were natural or man-made features that moved or disappeared. For these

\textsuperscript{184} Corrin Care, et. al. at 234.
reasons, some disputes over rights of ownership to and boundaries of customary lands still have not been resolved.\textsuperscript{185}

There is also uncertainty as to the status of customary lands – at least in terms of modern estates and interests.\textsuperscript{186} In the Land and Titles Act, “customary land” is defined as land … lawfully owned, used or occupied by a person or community in accordance with current customary usage ….\textsuperscript{187} Customary land can be registered,\textsuperscript{188} and indigenous persons are not barred by any written law from acquiring permanent interests in customary land.\textsuperscript{189} It can also be bought and leased by the Commissioner of Land and Provincial Assemblies.\textsuperscript{190} After these purchases and leases, the customary land is vested as a perpetual estate in either the Commissioner or Assembly (in the case of a purchase) or in the lessors.\textsuperscript{191} On the other hand, country experts indicate that customary land is not treated as an estate.\textsuperscript{192} Because of these seeming inconsistencies, some of the issues discussed in Section V on potential for various parties holding interests in customary land for conservation purposes are not fully resolved.

Despite these uncertainties, certain customs regarding ‘ownership’ of land, transfer of ownership, and secondary rights to use land are discernible, however, and generally apply to all customary landholding groups.

\textsuperscript{185} Id. at 236.  
\textsuperscript{186} The uncertainty may be mainly in the minds of this author and others of the Natural Resources Law Center, but they could not be resolved during the preparation of this report.  
\textsuperscript{187} Land and Titles Act, Cap. 133, sect. 2(1).  
\textsuperscript{188} Id. Cap. 133, Part III and sect. 21 (3)(b).  
\textsuperscript{189} Corrin Care, et. al. at 248.  
\textsuperscript{190} Land and Titles Act, Cap. 133, sect. 60.  
\textsuperscript{191} Id. Cap. 133, sect 69.  
\textsuperscript{192} E-mail communication from Don Paterson, professor at University of South Pacific Law School – “The power given under the Land and Titles Act of Solomon Islands to create easements can only be exercised over an estate, i.e. freehold, perpetual or fixed term estate, or a registered lease. An estate is clearly not customary land, but a lease may be given over customary land, and, if it is, then the easement will apply to that leasehold interest, but not to the customary land itself.” (hereinafter Paterson customary land email)
A. Ownership of Customary Land

“A person in a village may point to a large area of land and say, “This is our land.” He cannot, however, say how many other persons have rights and interests in the land. Neither can he exactly say where the actual boundaries are.” \(^{193}\)

Ownership rights are commonly referred to as ‘primary rights.’ Those holding primary rights have a joint and equal interest in the actual soil of the land. \(^{194}\) Ownership of customary land is by group or community. Members of the community own joint undivided interests in the area where the community is located. \(^{195}\) Members with ownership interests in the community are linked by a blood relationship referred to as a line, clan, or tribe and often trace their descent from a common ancestor. \(^{196}\) Often, that link to the common ancestor is what confers primary rights on a person. Names of ‘tribes’ might refer to a village or a wider geographical area as opposed to referring to a distinct group of people, but the ownership interests are still determined by the link to the common ancestor. Chiefs often have control of use of customary land which should not be confused with ownership rights as they are actually rights to approve or veto the use of customary land by members of their tribe. \(^{197}\)

B. Transfer of Ownership

Originally, ownership of land was determined by discovery and occupation. Today, ownership is acquired by inheritance, through land transfers which were recognized historically by native Solomon Islanders, and by statutorily recognized transfers.
Originally, the individual or group who first worked the land and occupied it established ownership rights to the land.\textsuperscript{198} Today, the primary means of acquiring ownership rights is by inheritance as successor in the line to the original discoverer and occupier of the land.\textsuperscript{199} Variation exists, though, between the different groups, as to who, exactly, is entitled to succeed to ownership. Some groups recognize the children’s right to succeed to their father’s interests (patrilineal), some to the mother’s interests (matrilineal), and some to both the father and mother (bilineal), though bilineal succession is rare. Distinction also exists based on preferences for different children – preference to male or female, natural or adopted, legitimate or illegitimate. As noted in the section on ‘Customary Law’ (section III.D), courts have struggled with determining the method of succession for a particular group.

One can succeed to ownership rights of the land without occupying the land as the rights to the soil of the land pass automatically to a person and do not have to be earned by occupying and working the land. A 1984 case decided by the High Court awarded ownership rights of an island to a group that had not lived on the island for nearly a century.\textsuperscript{200} Hence, ownership rights in Solomon Islands cannot necessarily be acquired by lengthy occupation.

Succession to the original occupiers, however, is not the only method of acquiring ownership rights to customary land. Rights can be acquired by voluntary or involuntary transfer, or ‘alienation.’ Warring among native groups was common before colonization and the lands of the conquered would often be seized and appropriated for use by the conquerors. Additionally, land could be voluntarily granted as a form of apology or atonement for wrongs or involuntarily granted as payment ordered by a chief for compensation or as punishment.\textsuperscript{201} The Malaita

\textsuperscript{198} Alan at 129.
\textsuperscript{199} Corrin Care, et. al. at 239.
\textsuperscript{200} Id. at 240, citing Uma v Registrar of Titles, [1984] SILR 265.
\textsuperscript{201} Corrin Care, et. al. at 242.
Customary Land Appeal Court has held that traditional customary ownership could be based on:
“…original discovery,…gift of land by male line to female line,…compensation following murder or other atrocity,…reward for bravery or other notable service,…[or] custom purchase from true land owners.”

Thus, the statement made by some anthropologists that customary land was traditionally inalienable was in error. Many of these transactions were even irredeemable, or permanent.

The Land and Titles Act suggests two other methods of acquisition of customary land. First, the Act notes that even non-Solomon Islanders might acquire customary land through marriage or inheritance if it is in accord with current customary usage. And finally, the Act provides for purchase of customary land by the Commissioner of Land and Provincial Assemblies.

C. Secondary Interests

Whereas ownership rights are referred to as ‘primary’ rights, rights to enter customary land and use it for certain purposes are referred to as ‘secondary’ interests. Secondary interests are acquired by birth into secondary kinship relationship to members of the line or tribe, by asking for and receiving permission to plant crops on a parcel of land, by inheritance, or by customary grant. Secondary interests never rise to ownership interest in the actual soil.

Neighbors may have the right to cross the land over which a person holds primary rights, to gather nuts and fruit, take water and salt, and to cut trees and leaves for homes. These

202 Id. citing Buga v Ganifiri, [1982] SILR 119.
203 Alan at 174.
204 Land Title Act, Cap 133, sect. 241 (2).
205 Id. Cap 133, sect. 60.
206 Thus, if your father is a member of a line that follows patrilineal descent, you inherit primary interests and ownership rights in the communal land. But, if your father married into the line that follows patrilineal descent, you have a secondary kinship relationship to the members of the line and acquire use rights (secondary interests) only.
207 Alan at 84.
arrangements were necessary for a subsistence-based communal lifestyle. Kept within certain limits, they were very effective. Once those secondary interests, such as the right to cut timber, gained commercial value, problems arose. It is possible, now, for those with secondary rights in land to lease to logging companies the right to take timber and leave those with the primary/ownership rights powerless to control the logging of their land.208

D. The Customary Land Recording Act

In 1957, Colin Allan, Commissioner of Lands, wrote that there was little certainty of title in respect to customary land and cited a situation where the British government gave up land it had held since 1915 when it was discovered that the indigenous seller had not had the right to sell the land.209 Thirty-one years later, in 1998, Andrew Nori said, “In relation to customary land, our biggest problem is the uncertainty surrounding ownership.”210 In 1994, the Solomon Islands Parliament passed the Customary Land Recording Act to attempt to remedy this problem.211

1. The Process

Any person or group holding customary land may apply to the provincial Land Record Office to record primary rights and the boundaries of the land.212 Primary rights are defined in the Act as, “the right to carry out any act on the land concerned without reference to any other person.”213 Following application to the Land Record Office to record the primary rights and the boundaries of certain customary land, the Recording Officer will publish notice that the recording will occur and the dates and times for meetings to collect data and to walk the

208 Corrin Care, et. al. at 246, 247 citing Tovua v Meki, [1988-89] SILR 78.
209 Alan at 57.
210 Nori at 3.
211 Customary Land Records Act, Cap 132.
212 Id. Cap 132, sect. 9(1).
213 Id. Cap 132, sect. 2.
boundary of the land in question.\textsuperscript{214} The notice also requires groups or individuals claiming secondary rights to be present to claim their rights.\textsuperscript{215} The interests held in the land and the identities of those who hold the interests are determined at the meeting. Survey is then made of the boundaries and the interests are recorded on a surveyor’s plat of the land.

As a result of the meetings, the Recorder records: the name of the customary land holding group claiming the primary rights; the genealogy of the group; the method for granting membership in the group to others; the name of the person or persons who are to represent the group and give effect to any dealing made in respect to the land; the method that such representative is to be appointed, dismissed, and substituted; and the names of the groups and persons claiming secondary rights and the extent of the rights claimed.\textsuperscript{216} Where a decision of the court has determined any of these items prior to the recording process, the court’s decision prevails.\textsuperscript{217} The survey staff then record the boundaries of the land and the primary and secondary rights claimed to the land and the Surveyor General creates a map of the land.\textsuperscript{218} Once recorded, the rights can be registered with the Registrar of Lands.

While the Customary Land Recording Act is designed to provide certainty in ownership, conflict has arisen over the process. For example, there are cases where customary rights were recorded and the person appointed to represent the group’s interests in dealings that affect the land has, for personal gain, misrepresented the interests of the group and transferred the rights to develop the land. Amending this part of the Act so that a council would represent the interests of the group would help alleviate this problem and reduce the suspicion customary groups now have of formally registering the interests in customary land.

\textsuperscript{214} Id. Cap 132, sect. 10(1),(2).
\textsuperscript{215} Id. Cap 132, sect. 10(1),(2)(c).
\textsuperscript{216} Id. Cap 132, sect. 11(1)(a),(b),(c),(d),(e),(f).
\textsuperscript{217} Id. Cap 132, sect. 11(2).
\textsuperscript{218} Id. Cap 132, sect. 11(4)(a), sect. (12).
The process for recording rights in customary land, then, starts with application to the Recorder’s office and is followed by notice, a meeting to determine the rights in the land and the boundaries, survey of the land, and recording of the rights on a surveyor’s map.

2. Disputes During Recording

Rarely are the primary or ‘ownership’ rights disputed. It is almost always accepted that a certain line holds the primary rights to the land. Most often, disputes surround genealogical membership of certain individuals in the line and land boundaries. The Customary Land Recording Act outlines a process for settlement of the disputes by traditional methods. This settlement process is the first step in dispute resolution – the traditional process that must occur before the Local Court will exercise its jurisdiction over customary land disputes (Section I .B. 3, “Local Courts”). The Local Courts Act and the Land and Titles Act vests ultimate power to resolve these disputes in the Local Courts.

When a dispute arises with respect to boundaries, they can be resolved by discussion and negotiation between the leaders of the groups in dispute. If settlement is reached between the leaders, the parties mark the boundaries and hold a customary ceremony in the presence of the Recording Officer and the rights, interests, and boundaries are recorded. Once recorded, the customary land holding group may apply to the Registrar of Titles to have the rights registered. The customary land holding group then has the rights to use, occupy, enjoy and dispose of such land in accordance with “current customary usage.” If the leaders of the groups cannot agree,

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219 Nori at 7.
220 Id.
221 Customary Land Records Act, Cap 132, sect. 13(1).
222 Id. Cap 132, sect. 13(3).
223 Id. Cap 132, sect. 19(1).
224 Id. Cap 132, sect. 20.
the matter is referred to the traditional chiefs. If one of the parties does not agree with the finding of the chiefs, the Local Court then can exercise its jurisdiction to hear the case.\textsuperscript{225}

E. Difficulties in Settling Customary Land Disputes

As pressures to extract resources from the rural areas of Solomon Islands has grown and the values of those resources have become obvious to the indigenous people living there, more and more individual and tribal claims to ownership of land or use-rights on lands have been made and many disputes have arisen. Most often the disputes are over use-rights to lands being developed or about to be developed.\textsuperscript{226} The Local Courts, as mentioned above, have jurisdiction to hear customary land disputes only after traditional methods have been exhausted without agreement. If one party is not satisfied with the ruling of the Local Court, that party can appeal to the Customary Land Appeal Court and rulings from there are appealed to the High Court. Settling these disputes is difficult as, often, evidence is lacking or the evidence that exists does not prove the claim and the justices are left to the nearly impossible task of determining which party’s evidence is the most credible.

1. The Local Court

Where the dispute cannot be settled by traditional means, one of the parties will approach the Local Court to hear the case. The clerk of the court summons both parties by ‘Notice to Attend Court.’ A quorum of three justices (the President or Vice President and two others) must be available to hear a case.\textsuperscript{227} The justices walk the land in question accompanied by the parties to the dispute before hearing the evidence. The plaintiffs and defendant are allowed to speak and to call an unlimited number of witnesses who can be cross-examined. The entire proceeding is

\textsuperscript{225} Land and Title Act, Cap. 133, Sect. 254(1).
\textsuperscript{226} Smiley at 24.
\textsuperscript{227} Local Courts Act, Cap 19, Warrants Establishing the Courts.
conducted in the local language and translated into English for the record. Once the President and members of the court have reached a decision, judgment is announced in open court. At that time, the President of the court advises the parties that they have three months to appeal.

2. **The Customary Land Appeal Court**

The party aggrieved by the decision of the Local Court can appeal to the Customary Land Appeal Court of the province.228 The court consists of five members headed by the President or Vice President of the court.229 The District Magistrate attends as a member of the court and as the clerk. Proceedings are conducted in the local language again, translated into pidgin for those from other islands and recorded simultaneously in English. Generally, both parties speak, as in the Local Court, and can call and cross-examine witnesses, but the court makes clear that it does not want to re-hear evidence given in the lower court and available in the court records. Again, once the members of the court come to a decision, the judgment is announced in open court and the parties are notified of their opportunity to appeal to the High Court.

3. **The High Court**

Appeals to the High Court can only be based on the ground that the decision was erroneous in point of law (not including customary law) or where procedural requirements of any written law have not been followed to the prejudice of one of the parties.230 If the High Court upholds the appeal, usually the case is remanded to the Local Court or the Customary Land Appeal Court for re-hearing on certain points. There is no further right of appeal from the High Court.

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228 Land and Titles Act, Cap 133, sect. 256(1).
229 Smiley at 24.
230 Land and Titles Act, Cap 133 sect. 256(3).
4. Evidence

Concrete evidence of the claims to rights or interests in lands may be impossible for parties to find. Where evidence such as genealogies, sacred places, or properties do exist, they are rarely probative of the claim and are easily disputed by the other party. Often, even though witnesses are ‘testifying’ under oath, “blatantly contradictory” evidence is given by opposing parties.

a. Genealogies

To prove primary or secondary interests in land, claimants produce genealogies to prove descent from the common ancestor of the line or land group who ‘owned’ the land in dispute. Colin Alan noted, “To the ordinary land litigant, no court proceeding would be a “true court” unless he had been allowed to recite, sing or enter his “generation” or genealogy.” The evidence may be considered irrefutable by the party offering the evidence, but few claimants can actually ‘connect’ their genealogy to the history of the land at issue. Also, genealogies as evidence, because there is no official written record, are easily contradicted. Dispute often arises as to the existence of earlier names in a genealogy, yet it is virtually impossible to prove that an ancestor did or did not exist or that the land in question was actually his.

b. Tambu or Sacred Places

Another way to show ownership of land is to show that the ancestors of the party making the claim were buried there and that the party subsequently worshipped those ancestors at such a place making sacrifices to them. Unfortunately, many of these places have been destroyed or their legitimate purpose can be questioned – in one case, the party opposing the tambu claim asserted that the area was actually a toilet. The most common response by opposing parties is

\(^{231}\) Alan at 91.  
\(^{232}\) Smiley at 25.
that the person claiming the sacred place (or their ancestors) were only given permission to create the sacred place on the land and, thus, no ‘right’ was held.

c. Properties

When a member of a group discovers the seedling of a tree of value and clears the underbrush away from that tree or plants a tree and cultivates it, that person has the right to claim the tree and the fruit that it bears. Often, properties such as this are offered as proof of ownership of land or rights to the land. Many times, these trees are hundreds of years old and proving who planted or nurtured them is nearly impossible. Again, the opponent counters by claiming that permission was given to cultivate the tree or to ‘discover’ trees in an area.233

Evidence of other kinds are offered, but because parties are trying to prove things that occurred long ago in the absence of written records, the probative value of the evidence is very low and is easily rebutted by opponents. It is very difficult to prove ownership of customary land in the face of an equally strong claim. Courts are faced with the challenge of determining what evidence is the most credible. Further complicating matters, it is not always clear what custom is to be applied in a particular area, another issue that must be settled by evidence which can be hard to find.

5. Solutions

Some have argued for a return to traditional methods for resolving disputes over customary land. Historically, though, the traditional method of dispute resolution often resulted in warfare or other violence. Also, the circumstances of the modern day involve values of the land and possibilities for economic gain that were never contemplated when traditional dispute resolution methods were forming. The likelihood of bias is great, especially where the chiefs

233 Almost all of the material on evidence was gleaned from Smiley at 24.
have a personal stake in the outcome of the dispute.\textsuperscript{234} It is also difficult, in some areas at least, to determine who are the chiefs with the authority to make these determinations.\textsuperscript{235}

Another suggestion for solution is to codify the customary law and work to record the customary lands and the genealogies related to those lands.\textsuperscript{236} As traditional practices of customary land holding groups can be likened to a ‘common law’ of the Solomon Islands, the practices could be codified by Provincial governments as bylaws or ordinances to settle the question of what customary law to follow in the courts and remove one major issue requiring proof in court cases. Recording the genealogies that relate to the lands would remove the difficult questions about who belongs to the line or land group that has primary or secondary rights to the land.

IV. Private Land Administration

The Commissioner of Lands is authorized to administer the law relating to land tenure, the acquisition of land, and the registration of interests in land.\textsuperscript{237} The Commissioner of Lands is assisted by the Registrar of Titles, the Surveyor General, and Title Examiners.

A. Registration of Lands

The registration of lands in Solomon Islands has been cited as one of the major steps necessary to re-stabilize the country and grow the economy. The registration process is provided in the Land and Titles Act, Cap 133. Only about twelve percent of the land is registered.\textsuperscript{238}

\textsuperscript{234} Corrin Care, et. al. at 250.
\textsuperscript{235} Alan at 62.
\textsuperscript{236} Nori at 10.
\textsuperscript{237} Land and Titles Act, Cap 133, sect. 3.
\textsuperscript{238} Website for the High Commission of the Solomon Islands “Guide to Investment” http://www.solomon.emb.gov.au/invest_1.html
held by the government is registered to the Office of the Commissioner of Lands.\textsuperscript{239} The Act provides for both registration of individual lands and entire settlement areas.

1. \textit{The Process}

Upon application to the Registrar of Titles and upon providing the required survey information, any owner of a freehold or leasehold interest in land may have that interest registered.\textsuperscript{240} Any time an interest in land is acquired by transfer, the interest transferred must be registered before the transfer will have effect.\textsuperscript{241} Where joint owners of the interest are involved, any one of the owners may apply for registration of the interest.\textsuperscript{242}

The Registrar, after receiving the application for registration, accepts and inspects the evidence of ownership offered by the applicant, inspects the land to be registered, advertises and publishes notice of the intent of the applicant to register the land eliciting responses from opponents to the registration.\textsuperscript{243} Where the Registrar is unable to determine from the evidence offered and the responses received that the land in fact should be registered to the applicant, he may refer matters to an Adjudication Officer that he appoints.\textsuperscript{244}

2. \textit{Adjudication Officer}

The Adjudication Officer adopts the procedure that “appears to him to be appropriate” for deciding the question.\textsuperscript{245} Parties affected by the decision are served copies of the written decision and have three months to appeal the decision on the ground that it is erroneous in point of law or

\begin{itemize}
\item \textsuperscript{239} Land and Titles Act, Cap 133, sect. 10(4).
\item \textsuperscript{240} Id. Cap 133, sect. 10.
\item \textsuperscript{241} Id. Cap 133, sect. 12.
\item \textsuperscript{242} Id. Cap 133, sect. 16.
\item \textsuperscript{243} Id. Cap 133, sect. 18(2).
\item \textsuperscript{244} Id. Cap 133, sect. 19(1).
\item \textsuperscript{245} Id. Cap 133, sect. 19(2).
\end{itemize}
procedure to the High Court.  Unlike appeals to the High Court from the Customary Land Appeal Court, appeals of decisions by the Adjudication Officer can, by statute, include points of customary law. Upon finding that the decision is erroneous in point of law or that the appellant’s interests were prejudiced by the failure of the Adjudication Officer to follow procedural requirements, the High Court may substitute its own ruling.

3. **Land Settlement Area**

The Minister (the Minister of the National Cabinet appointed at the time to oversee land matters) may designate any area as a land settlement area in which all interests in the land will be ascertained and recorded. A Settlement Officer is appointed and given the authority to require all who have claims of interests to any land within the settlement area (upon their receiving notice of the manner in which claims are to be made), to mark the boundaries of their land or the land in which they have interests, and to make their claims at a specified time and place. Anyone who fails to make a claim will be excluded from the settlement proceeding. Once the boundaries have been marked by the claimants a survey will be made of all of the parcels within the area. The Settlement Officer is charged with settling disputes over boundaries, determining who has what rights to what parcels of land and determining the division of ownership rights when more than one person, by custom, has exercised primary interests in parcels. Record of all interests is made on the ‘plat’ or demarcation plan. Land over which it is impossible to determine the rights, is to be registered as ‘customary land.’

246 Id. Cap 133, sect. 19(4).
247 Id. Cap 133, sect. 19(5).
248 Id. Cap 133, sect. 31.
249 Id. Cap 133, sect. 36(1)(b).
250 Id. Cap 133, sect. 36(d).
251 Id. Cap 133, sect. 37(3).
252 Id. Cap 133, sect. 42.
253 Id. Cap 133, sect. 46.
254 Id. Cap 133, sect. 47.
Appeals go to the High Court in the same manner outlined above for appeals of decisions by an Adjudication Officer in a voluntary registration proceeding.

Thus, even where a person has not voluntarily applied to have land registered, the government can take steps to ensure the registering of the land by declaring an area to be a Land Settlement Area. Again, the success of any registration is dependent on successfully determining the boundaries and the rights held to the land.

B. Transfers

Owners may transfer estates or registered leases to any person subject to the provision that perpetual estates and leasehold interests for terms over seventy-five years can only be transferred to Solomon Islanders. Owners must obtain the consent of the Commissioner to transfer any land to aliens.

Transfers of interests cannot be conditioned on the happening of some event or on the limitation that the transferee (the person receiving the interest) not be allowed to also transfer the interest. Upon receipt and registration of the interest in the name of the transferee, the transferee is protected from unpaid rents by warranty of the transferor and the transferor is, likewise protected by covenant of the transferee that all payments will continue to be made. These protections do not have to be expressed in the transfer agreement, they are implied in every transfer. All transfers are registered by registering the transferee as the new holder of the interest and filing the instrument (contract) that created the transfer. All transfers must be registered to have legal effect.

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255 Id. Cap 133, sect. 172.
256 Id. Cap 133, sect. 172(2).
257 Id. Cap 133, sect. 176(5) and (6).
258 Id. Cap 133, sect. 173.
259 Id. Cap 133, sect. 172(7).
V. **Rights and Restrictions Pertaining to Private Land**

A. **Estates in Land**

The Land and Titles Act defines ‘perpetual estate’ as the right to occupy, use and enjoy land and its produce in perpetuity.\(^{260}\) Perpetual estates are generally held only by Solomon Islanders.\(^ {261}\) The following can also own and register a perpetual estate:

- A person holding an estate in trust for a Solomon Islander subject to the filing of a statutory declaration to this effect with the Registrar;\(^ {262}\)
- The Commissioner of Lands (for government lands) or a Provincial Assembly;\(^ {263}\)
- A Solomon Islands registered company which is at least sixty percent owned by Solomon Islanders;\(^ {264}\) and
- Statutory bodies incorporated by any written law of Solomon Islands.\(^ {265}\)

As mentioned in Section III, it is not completely clear whether or in what circumstances perpetual estates can be held in customary lands.\(^ {266}\) But apparently, at least the Commissioner and Provincial Assemblies can purchase and then hold perpetual interests in customary land.\(^ {267}\)

A “fixed-term estate” in land is the right to occupy, use and enjoy for a period of time fixed and known at the time of the grant.\(^ {268}\) Fixed-term estates can be held by foreigners, but they are limited to a term of not more than seventy-five years.\(^ {269}\) On government lands, the Commissioner can set conditions for the development of fixed-estate lands if the owner of that

\(^{260}\) Id. Cap 133, sect. 112 (1).
\(^{261}\) Id. Cap 133, sect. 112 (3).
\(^{262}\) Id. Cap 133, sect. 112 (4)(a).
\(^{263}\) Id. Cap 133, sect. 112 (4)(d) and (f); and sect. 60; The Commissioner of Lands or a Provincial Assembly may purchase or lease customary land, the process for which is outlined in the next section.
\(^{264}\) Id. Cap 133, sect. 112 (4)(e).
\(^{265}\) Id. Cap 133, sect. 112 (4)(i).
\(^{266}\) Paterson customary land email.
\(^{267}\) Id. Cap. 133, sect. 69.
\(^{268}\) Id. Cap 133, sect. 113 (1).
\(^{269}\) Id. Cap 133, sect. 101 (2).
estate fails to submit plans for development.\textsuperscript{270} Where the Commissioner imposes such conditions and the holder of an estate fails to comply with the conditions for development, the estate is forfeited. Therefore, an NGO wanting to acquire a fixed-term estate in government lands, may be required to submit plans for the development of that land. This would block efforts to preserve land without any development, but may allow some sort of ‘sustainable’ development plan.

### B. Leases

Both non-customary and customary land can be leased in Solomon Islands, but it is not completely clear who can hold those leases.

In general, the owner of an estate, other than the Commissioner of Land, can lease all or part of that estate to “anyone” under one of two conditions:

- The lessee must be eligible to hold a perpetual interest in land (i.e., generally not a foreigner), or
- The lease must be approved in writing by the Commissioner.\textsuperscript{271}

To consent to the lease, the Commissioner must be satisfied that the lessee is of “good repute” and is capable of using, maintaining and, where appropriate, developing the land to promote the public benefit.\textsuperscript{272} Presumably, then, foreign individuals, companies, or NGOs could, at a minimum, lease non-customary land with the consent of the Commissioner. Leases of more than two years must be registered with the Registrar in the name of the holder and as an encumbrance on the lessor’s estate.\textsuperscript{273}

Whether the Land and Titles Act (section 143) provisions on leases apply to customary land depends, in part, on whether customary land can be considered an “estate” which, according

\textsuperscript{270} \textit{Id.} Cap 133, sect. 103.
\textsuperscript{271} \textit{Id.} Cap 133, sect. 143.
\textsuperscript{272} \textit{Id.} Cap 133, sect. 144 (1).
\textsuperscript{273} \textit{Id.} Cap 133, sect. 146.
to Paterson, it is not.\textsuperscript{274} But regardless of whether or not this specific statutory section on leases applies to customary land, there is an indication in the statutes that customary land can be leased.\textsuperscript{275} The Land and Title Act provides for registration of customary land leased prior to 1963,\textsuperscript{276} and special provisions for lease of customary land to the Commissioner and Provincial Assemblies are detailed in the Act.\textsuperscript{277} The lease of customary land to non-governmental individuals or groups is, however, subject to the provision that “[e]very transaction or disposition of or affecting interests in customary land shall be made or effected according to the current customary usage applicable to the land concerned.”\textsuperscript{278} Consequently, leases of customary land to non-government entities may depend on the specific customary usage.

Special provisions apply to lease (and purchase) of land by the government. The Commissioner of Lands and the Provincial Assemblies can purchase or lease customary land without regard to (i.e., “notwithstanding”) any customary usage prohibiting or restricting that kind of transaction.\textsuperscript{279} For these purchases or leases, an Acquisition Officer is appointed by the Commissioner or the Assembly to determine and demarcate the boundaries of the land and to write an agreement for the purchase or lease of the land. Notice of the intent of the Commissioner or Assembly, of the agreement written by the Acquisition Officer, and of the arrangements for a meeting to be held between all interested parties is then published.\textsuperscript{280} At the meeting it is to be determined who has the right to sell or lease the property.\textsuperscript{281} The determination of the Acquisition Officer is then made known to the interested parties and recorded with the

\begin{itemize}
  \item \textsuperscript{274} Paterson customary land email.
  \item \textsuperscript{275} \textit{Id.}
  \item \textsuperscript{276} Land and Title Act, Cap 133, sect. 21 (3).
  \item \textsuperscript{277} \textit{Id.} Cap 133, sect. 60.
  \item \textsuperscript{278} \textit{Id.} Cap 133, sect. 240.
  \item \textsuperscript{279} \textit{Id.} Cap 133, sect. 60.
  \item \textsuperscript{280} \textit{Id.} Cap 133, sect. 62, 63.
  \item \textsuperscript{281} \textit{Id.} Cap 133, sect. 64.
\end{itemize}
Commissioner of Lands.\footnote{Id. Cap 133, sect. 65.} Appeals of this determination go to the Magistrates’ Court and appeals of the Magistrates’ decision go to the High Court.\footnote{Id. Cap 133, sect. 66.} The High Court can review the decision on the grounds that it is erroneous in point of law or procedure has not been followed to the prejudice of a party. If the High Court upholds the appeal, it may make such order it considers just.\footnote{Interestingly, the grounds on which an appeal of the Magistrates’ opinion can be taken do not, facially at least, exclude questions of customary law.}

The recorded agreement takes effect, in the case of a purchase, by the Commissioner or Assembly paying the seller the purchase price; or, in the case of a lease, by the Commissioner making an order vesting the perpetual estate in the lessor, causing a lease to be written, paying the rent payable, and taking possession (or allowing the Provincial Assembly to take possession) of the land.\footnote{Id. Cap 133, sect. 69.} The perpetual estate is then registered in the name of the purchaser (Commissioner or Assembly) or the lessor.\footnote{Id. Cap 133, sect. 70.}

In summary, Governments may lease customary lands and it is likely that Solomon Islander individuals and companies\footnote{Id. Cap 133, sect. 112 (4) (a company as a class of “persons”).} can lease customary lands. It is very unlikely that foreigners can lease customary land as no person other than a Solomon Islander may hold any interest whatsoever in or affecting customary land except where expressly provided for in the Land and Titles Act.\footnote{Id. Cap 133, sect. 241(1). No express provision for foreign ownership appears to exist in the Act except for ownership through marriage or inheritance. Id. Cap 133, sect. 241(2).}
C. Easements

The classic easement is an affirmative easement, for example for a right-of-way. This classic easement benefits another parcel of land (an appurtenant easement). The classic conservation easement is a negative easement held ‘in gross.’ A negative easement is a restrictive easement – it denies someone the right to do something, e.g., to develop their property. An easement is held ‘in gross’ when there is no parcel of land to which it attaches as an appurtenance; it is just ‘held’ by a person or a group. In the case of a conservation easement, the easement is commonly held by a land trust. The easement holder then has the right to enforce a restriction against some activity on the burdened parcel of land. For example, the conservation easement could bar the current owner and all future owners from developing the land. Were anyone to begin to develop the land, the land trust holding the easement could enforce the restriction and block the development.

The Land and Titles Act of Solomon Islands authorizes the use of affirmative or negative easements for the benefit of “any other land.” Easements are defined in the Land and Titles Act as “…a right attached to a parcel of land either to use other land in a particular manner or to restrict its use to a particular extent…” The owner of the easement (and, hence, the benefited estate) can restrict the activities on the burdened estate to the extent set out by the easement.

Easements can arise in two ways – easements can be granted by the owner of an estate in land to burden his own land or may be created during the transfer, grant or lease of an estate. In

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289 For instance, if there is no road access to A’s parcel of land, B can grant to A, for the benefit of A’s parcel, an easement over his (B’s) land. The easement gives A the right to cross B’s parcel to access his own land. This easement, once registered, ‘attaches’ to A’s parcel as an ‘appurtenance’ and passes to each successive owner of A’s land. B’s land is then referred to as the burdened parcel as it is burdened with the obligation of allowing others to cross it. A’s land is the benefited parcel. This is an affirmative easement that is held as an appurtenance. It attaches to land as an appurtenance, and it ‘affirms’ the right of someone to do something or to take action, in this case, the right of A to cross B’s land.

290 Land and Title Act, Cap 133, sect. 179(1).

291 id. Cap 133, sect. 2(1).
the first case, the Land and Titles Act allows an owner of a registered estate, including leases, to grant an easement over his own land for the benefit of another parcel.\textsuperscript{292} This agreement to allow some activity by others or to restrict activity on the property would attach to the land held by the person or group receiving the easement. The length of time that the easement can be maintained depends on both the burdened and the benefited estate. For the burdened property:

- If the person granting the easement owns the burdened property in perpetuity, the easement would bind all future owners.

- Where the person granting the easement holds a fixed-term estate, the easement only binds for the term of the estate.

- An easement that burdens customary land can only be for the term of a lease as an easement only applies to an “estate” and the only estate that can be held in customary land is a leasehold.\textsuperscript{293}

Similarly, for the benefited property:

- If a Solomon Islander owns the benefited property, the easement could be in perpetuity.

- A foreigner could only hold the benefited property, and consequently the easement, for a 75 year term.

An owner of an estate or registered lease can also create an easement in the transfer, grant or lease of his/her interest. The parcel benefited can be either the parcel transferred or the parcel retained.\textsuperscript{294} Consequently, an NGO could lease a large property then sub-lease a portion of that property to someone else retaining a restrictive easement over the portion sub-leased (burdening that portion) and benefiting the portion held. Again, as the easement would be for a lease of land, it would only last for the term of the lease.

\textsuperscript{292} Id. Cap 133, sect. 179(1),(2)(a)(b)(c).
\textsuperscript{293} Paterson customary land email.
\textsuperscript{294} Land and Title Act, Cap 133, sect. 179(2)(a) and (b).
As there is no provision expressly stating that easements can be granted to foreigners for customary land, it is likely that only Solomon Islanders can grant an easement on customary land or hold land benefited by an easement that in any way burdens customary land. The easement would last only for the term of the leases involved.

Easements could be used, then, by a conservation group in Solomon Islands to preserve private lands. The easement would have to be held by the conservation group as an appurtenance to an estate in land that could include a lease held by the group. Only where they burden registered lands will easements be recognized, and only when the contract or instrument creating the easement specifies clearly the nature of the easement and the description of the land burdened and the land benefited.

D. Profits

The Land and Titles Act authorizes the use of profits which may be a useful tool for private lands conservation in Solomon Islands. A profit might be obtained for land with no intention of taking resources from the land but only with the intention of blocking anyone else from taking resources or controlling the way resources are taken.

According to the Land and Titles Act, a profit is “…a right to go on the land of another to take a particular substance from that land, whether the soil or the products of the soil, and includes the taking of wild animals.” Owners of estates or registered leases may grant a profit to others. Unlike easements, the Land and Titles Act provides that profits may be held appurtenant to another parcel of land or in gross. Thus, the owner of an estate in land may

295 Id. Cap 133, sect. 241(1).
296 Id. Cap 133, sect. 179(5).
297 Id. Cap 133, sect. 179(3),(4).
298 Id. Cap 133, sect. 2(1).
299 Id. Cap 133, sect. 181(1).
300 Id. Cap 133, sect. 181(2)(a).
grant rights as profits to another person or group without that person holding any other land. To be completed, the grant of the profit must be registered as an encumbrance on the title of the land,\textsuperscript{301} therefore, profits can only be granted for land that is registered. Profits are treated as an estate when they are not appurtenant to land.\textsuperscript{302} Profits held by foreigners must be for a fixed term and, for the reasons discussed above for leases and easements, it is unlikely that profits can be held by foreigners over customary land.

A conservation organization could encourage the use of ‘profits’ to help limit the activity on, and preserve land. Profits could be granted to conservation groups or individuals who have no intention of taking anything from the property but who, by obtaining the ‘profit,’ have the right to exclude others from taking resources from the property. Foreigners could be granted a ‘fixed-term’ profit for a period up to seventy-five years on non-customary land. Solomon Islanders could be encouraged to acquire ‘profits’ on customary land (or on the lease of customary land, as described above for easements).

Because of the threat to forests in Solomon Islands, the profit for timber rights might be the most critical profit to use for conservation efforts. However, to gain the right to take timber requires a timber license obtained through the process mandated by the Forest Resources and Timber Utilisation Act. That process entails applying first to the Commissioner of Lands. Given the importance of timber to the country’s economy and to government revenues, it is questionable whether the Commissioner would grant a timber license to a group who does not have the intention of cutting timber. An NGO might also gain a profit to take wild animals in order to protect habitat. If someone destroys the habitat, the NGO could claim that that person

\textsuperscript{301} Id. Cap 133, sect. 181(3).
\textsuperscript{302} Id. Cap 133, sect. 181(4).
has interfered with the profit held and has ‘taken’ wild animals without the right to do so. It is not known how this strategy would be treated by the courts in Solomon Islands.

Profits, then, could be valuable tools for conservation of private lands if they could be obtained with the intent of controlling or entirely blocking others from taking resources from property.

E. Restrictive Covenants

The Land and Titles Act authorizes placing of restrictive covenants on registered land. While they have some potential for private land conservation, statutory restrictions severely limit their potential.

By placing a restrictive covenant on his or her property, the owner covenants or promises to restrict the uses of the property. Like a conservation easement, the covenant has to be restrictive or negative – it cannot be an affirmative promise to do something. The burdened parcels has to be registered and the covenant cannot be contained in a lease. Once registered, the covenant passes with the title to the land and binds all successors to the title (future owners), but upon the passing of the restricted parcel, the restriction only runs for ten years from the date of registration of the transfer, unless extension the owner of the benefited parcel applies for an extension. The instrument creating the covenant must make the restrictions clear and must show that the restriction is for the benefit of another parcel of land. Thus, the beneficiary of the covenant must have an estate in land.

303 Id. Cap 133, sect. 191.
304 Id. Cap 133, sect. 192(2)(a).
305 Id. Cap 133, sect. 191.
306 Id. Cap 133, sect. 194.
307 Id. Cap 133, sect. 192(1).
A conservation organization could work to help landowners to place restrictive covenants on their land for the benefit of other parcels. It appears that non-customary land, held by locals or foreigners, could be both benefited and burdened by a restrictive covenant, subject to the restrictions discussed in previous sections. It may also be possible to burden registered, customary land with a restrictive covenant as the statute does not specify that the affected land be an “estate.” A restrictive covenant on customary land would, however, be subject to the provision that the use and transactions affecting it be in accordance with the “current customary usage” applicable to it.  

F. Forest Resources and Timber Utilisation Act

Control of logging is controversial as logging is recognized as having had drastic environmental consequences but, at the same time, provides up to fifteen percent of all governmental revenue. It is predicted that if logging continues at present rates, the timber resource will be completely depleted by 2015 or earlier.

The Solomon Islands legislature passed the Forest Resources and Timber Utilisation Act as an attempt to regulate the industry allowing local control of the permitting process. According to the Act, any cutting of trees on any land in Solomon Islands is presumed to be for the purpose of selling the timber, and no cutting for sale is allowed without a license obtained from the Commissioner of Forest Resources.
1. Application

The first step in the process is to submit an application to the Commissioner of Forest Resources. The Commissioner will grant or deny the license based on his satisfaction that: foreign applicants have complied with provisions of all foreign investment laws; the applicant has obtained the agreement necessary for customary land; the applicant agrees to comply with logging methods, to take conservation measures, and to undertake re-forestation efforts; and that the applicant has proper plans for the necessary infrastructure and for post-logging land use.

2. Timber Agreements Affecting Customary Land

To obtain ‘timber rights’ on customary land, an applicant must first apply to the Commissioner for permission to negotiate with the provincial government, the area council and the customary owners of the land. Timber rights include all rights necessary for logging: inspection and survey; access to extract timber with or without machinery; the right to take any timber into possession or ownership (subject to regulations set out by the Minister of Forestry or Provincial Assembly); the right to construct all necessary infrastructure and to withdraw water or quarry stone necessary for that construction.

The Commissioner notifies the affected Area Council of the pending application and the Area Council arranges a meeting between the owners of the land, the applicant, the members of the Area Council, and the members of the Provincial Assembly. At this meeting a number of crucial factors will be discussed and determined:

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312 Id. Cap 40, sect. 5.
313 Id. Cap 40, sect. 5(2).
314 Id. Cap 40, sect. 7.
315 Id. Cap 40, sect. 44(1)(e). The Provincial Government Act provides for the Provincial Assembly to pass Ordinances for the powers provided to the Minister in the Timber Utilisation Act where those powers affect Timber Agreements Affecting Customary Land.
316 Id. Cap 40, sect. 6.
317 Id. Cap 40, sect. 8(1).
• Whether the landowners want to negotiate for the disposal of timber rights to the applicant.

• If the people proposing to grant the rights are lawfully entitled to grant such rights and if they represent all of the people who could grant the rights.

• If it is determined that those proposing to grant the rights are not entitled to grant the rights, it will be determined who does have that authority.

• The nature and extent of the rights to be granted.

• The amount of sharing of the profits in the venture with the landowners.

• The participation of the provincial government in the venture. (The Provincial Assembly is given the authority through the Provincial Government Act to pass Ordinances in any area the Forest Resources and Timber Utilisation Act gives the Minister the power to regulate.)

Where agreement is reached from this meeting, the agreement is put into writing and submitted to the Commissioner with particular emphasis on the split of profit sharing, if any, and the participation, if any, of the provincial government. The applicant then surveys the area to determine the nature and extent of the resource available and to identify areas that should be excluded on environmental or social grounds. If no agreement can be reached between the applicant and the landowners, the Area Council must recommend to the Commissioner that the application be rejected. The decision of the Area Council is made public and aggrieved parties are given opportunity to appeal directly to the Customary Land Appeal Court. If there are no appeals or if appeals have been disposed of by the court, the Commissioner then recommends to the provincial government to grant approval of the agreement. With this approval, the Commissioner will issue the license to the applicant.

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318 Provincial Government Act of 1997, sect. 31(3) and Schedule 4.
319 Forest Resources and Timber Utilisation Act, Cap 40, sect. 8(4).
320 Id. Cap 40, sect. 8(5).
321 Id. Cap 40, sect. 9(1).
322 Id. Cap 40, sect. 10(1).
323 Id. Cap 40, sect. 11.
3. Regulations

The Commissioner of Forest Resources retains the authority to revoke the license of any licensee for not complying with the provisions of the Act or the agreement reached with provincial governments provided the licensee is given notice and an opportunity to be heard.\textsuperscript{324} The Minister has the authority to regulate certain parts of the Agreement Affecting Timber Rights on Customary Land and shares this authority with the Provincial Assembly. Independently, the Minister has the authority to regulate other areas of the logging industry including declaring areas to be ‘state forests’ or ‘forest reserves.’

The Minister of Forestry Resources and the Provincial Assembly share the authority to create certain regulations in regard to timber rights on customary land.\textsuperscript{325} Ordinances can be passed regulating:

- Rates of royalty payments;
- Disposal of waste products and the protection of the environment;
- The manner and nature of re-forestation; and
- Prohibition or regulation of the taking of any specified kind of timber\textsuperscript{326}

The Minister (but, not the Provincial Assembly) has further powers to regulate the timber industry. The Minister may impose levies on the export of un-milled timber. These levies can differ depending on the company, the type of trees, place of extraction, or other circumstances.\textsuperscript{327} On government land the Minister can declare areas to be ‘state forests’ on which cutting is

\textsuperscript{324} Id. Cap 40, sect. 39.
\textsuperscript{325} Id. Cap 40, sect. 13.
\textsuperscript{326} Id. Cap 40, sect. 13(f)(g)(h)(i).
\textsuperscript{327} Id. Cap 40, sect. 19.
restricted and licensing or granting of interests is conditioned on assent by the Commissioner of Forest Resources.\textsuperscript{328}

For the purpose of protecting water resources, the Minister may create ‘forest reserves’ to protect the forest or vegetation in any rainfall catchment area on government or customary land.\textsuperscript{329} The Minister then specifies which rights are restricted and what rights may be exercised in the forest reserve. Generally, penalties are levied for clearing land for cultivating crops, building, grazing livestock, or cutting trees (except for domestic use) in forest reserves.\textsuperscript{330}

Where the declaration of an area as a reserve results in the diminution of any rights, the government is required to pay compensation.\textsuperscript{331} The order setting the amount of compensation can be appealed to the Magistrates’ Court of the area and appeal from the Magistrates’ decision can be taken on the ground that it is erroneous in point of law to the High Court.\textsuperscript{332} Interestingly, where compensation is offered for creation of forest reserves on customary land, the customary landowner may notify the Minister of a desire to obtain, in lieu of compensation, an estate in the land.\textsuperscript{333} The estate can be one of permanent ownership or a lease of up to ninety-nine years.\textsuperscript{334} It is not made explicit, but, it is likely that the estate granted must be limited by the regulations of the area as a forest reserve. The Minister may reject the grant of an estate to the customary owner at his discretion.\textsuperscript{335}

Logging, then, can be controlled through licensing by the Commissioner of Forestry. For logging on customary land, the company must also obtain the necessary agreement from the customary landholding group by a process set out in the Forest Resources and Timber Utilisation

\textsuperscript{328} Id. Cap 40, sect. 20, 21, 22.
\textsuperscript{329} Id. Cap 40, sect. 24.
\textsuperscript{330} Id. Cap 40, sect. 27.
\textsuperscript{331} Id. Cap 40, sect. 25.
\textsuperscript{332} Id. Cap 40, sect. 26.
\textsuperscript{333} Amendments to Cap 40, sect. 7; Land and Titles Act, Cap 133, sect. 84.
\textsuperscript{334} Land and Titles Act, Cap 133, sect. 132.
\textsuperscript{335} Id. Cap 133, sect. 84(2).
Act. The Act provides for involvement by the provincial government including the opportunity to pass regulations as Ordinances to regulate the logging activity. The Minister of Forestry can also protect areas by declaring them to be state forests or forest reserves.

VI. RECOMMENDATIONS

Four strategies hold the most promise for private lands conservation in Solomon Islands. Two (creating easements and profits) utilize existing law; two would require additional legislation.

A. Use the Existing Easement Statute

It may be possible to use the easement provisions in the Land and Titles Act to preserve land by restricting development on that land. The Land and Titles Act of Solomon Islands clearly states that an easement is allowed for the purpose of restricting activity on land. Accordingly, individuals or groups could create restrictive, appurtenant easements over estates in non-customary land and over customary lands held under a lease. As discussed in Section V, the customary land has to be held under a lease as the easements can only apply to estates in land and there are, normally, no estates in customary land, just primary rights and secondary rights. Though leases held by aliens are limited to seventy-five years, leases to Solomon Islanders can be longer.

B. Enact legislation authorizing the use of ‘in gross’ easements

One difficulty posed by the existing statute is that it requires the holder of the easement to own or lease land. If legislation could be enacted authorizing easements to be held ‘in gross,’ individuals or groups would not have to own or lease land before gaining easements on other

336 Id. Cap 133, sect. 2(1).
land. This legislation could make it possible for a foreign group to hold a restrictive easement over non-customary land for a fixed term. Or, a group of Solomon Islanders could be formed that could hold restrictive easements over customary or non-customary land.

On the national level, though, the government is being pushed by the International Monetary Fund and by the Asian Development Bank to improve development of natural resources to stabilize the economy. Accordingly, legislation furthering preservation of land may not have much support at this time. However, if it were crafted in a way that promoted ‘sustainable’ development, legislation might be more successful as people are realizing that Solomon Islands’ resources, especially the timber resource, are being rapidly depleted. Also, where customary land is concerned, easements might not be very attractive as they are a foreign concept. These considerations should be taken into account in any efforts to enact legislation.

The concept that is more well known to indigenous peoples is community-based improvement efforts. The stipulation in the Townsville Peace Agreement that government be decentralized to nine ‘state’ governments is evidence of the desire of the people to have more control over the course of future development.

C. **Encourage use of Profits**

A conservation organization could also encourage the use of ‘profits’ to help limit the activity on, and preserve land (See Section V. D). \(^{337}\) Profits might be granted to conservation groups or individuals who have no intention of taking anything from the property but, who by gaining the ‘profit’ have the right to exclude others from taking resources from the property. It may be possible to gain the profit of the right to take wild animals from the property then, if someone destroys the habitat, to claim that that person has interfered with the ‘profit’ held and

\(^{337}\) Id. Cap 133, sect. 2(1).
has ‘taken’ wild animals without the right to do so. Whether or not courts would find this argument valid is not known.

Profits are treated as estates in land and can be held ‘in gross.’ Thus, the restrictions that apply to foreigners not being able to hold ‘perpetual’ estates in land nor being able to hold any estate in customary land apply to profits. Foreigners could be granted a ‘fixed-term’ profit for a period up to seventy-five years on non-customary land. Solomon Islanders could be encouraged to acquire ‘profits’ on customary land.

D. Work to Enact Provincial Ordinances

Through the Provincial Government Act, the Provincial Assemblies are given authority to enact Ordinances over a number of areas which would benefit conservation efforts including: protection of wild creatures; protection, improvement and maintenance of fresh-water and reef fisheries; codification and amendment of existing customary law about land and registration of customary rights in respect of land including fishing rights; control and use of river waters; and regulation of timber agreements on customary land.338

1. Protection of Wild Creatures

Conservation groups can be successful at protecting private lands by working closely with communities and enacting legislation at the provincial level under the Provincial Assembly’s authority to legislate for the protection of wild creatures. The World Wildlife Fund (WWF), for example, has had success in Solomon Islands on the island of Simbo in encouraging the enactment of Ordinances that would preserve areas where megapodes live.339 The Islanders

339 The Melanesian megapode is a large quail-like bird that incubates its eggs in soil warmed by the Simbo volcanoes. Large and highly nutritious, the eggs are harvested by Simbo Islanders and eaten, sold, or traded for other goods.
formed the Simbo Megapode Management Committee and with the help of WWF introduced the Megapode Ordinance that was enacted by the Western Provincial Assembly regulating the harvest and management of the eggs.\textsuperscript{340} The law gives the management committee the power to prosecute anyone found to have breached the Ordinance\textsuperscript{341}

2. \textit{Codification of customary law and registration of rights to customary land}

Pressure is going to continue for Solomon Islands to further develop its natural resources as the economy of the country depends on it. Disputes will most likely continue over what customary practices are followed in certain areas and what rights are held by different individuals and groups. Because most of the land of Solomon Islands is customary land, it is important for conservation groups interested in private lands conservation to have confidence in the rights and interests held in the lands that they wish to protect. Consequently, the need to strengthen land administration in Solomon Islands is of paramount importance.\textsuperscript{342}

As mentioned earlier (Section III. E. 5) customary law is akin to a common law of the Solomon Islands. Were the system of customary usage for an area codified as Provincial Ordinances, the parties to a disagreement would not have to prove the customary law by evidence in the court (See Section II .D). The members of tribes, as well as conservation groups, could then have confidence in their rights regarding customary land and their ability to defend those rights. The rules regulating rights would not remain “…hidden in the minds of chiefs and

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\textsuperscript{340} When Islanders noticed a reduction in the egg harvest and number of birds, they sought help from the provincial government and the WWF. WWF provided technical assistance through biological surveys determining the needs of the species, then developed management plans and monitoring systems for the megapode area.

\textsuperscript{341} As a result, seven people were prosecuted in the Gizo Magistrate Court in 2000 for entering the megapode field and taking eggs out of season. The offenders were fined and the court issued a writ of execution to allow seizure of property in the event the fine is not paid. World Wildlife Fund websites; http://www.wwfpacific.org.fj/solomons_featurestories.htm; http://www.wwfpacific.org.fj/solomons_wetlands.htm

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traditional leaders…’ who are becoming unreliable sources of information. Courts, too, would have a much easier job in solving disputes over customary land. Registering the boundaries, genealogies, and rights of people to the customary land would greatly ease dispute settlement and facilitate future arrangements to wisely develop some areas and restrict development of other areas. Registration of the genealogies that are to be followed in an area would end the uncertainty of who is entitled to rights by succession.

The current process for registering interests in customary land could also be improved. The system currently allows one person to be appointed to represent the interests of the entire group holding the primary rights. Suspicion of the registration process has grown because some representatives have, for personal gain, abused their authority. Amendment of this section of the Customary Land Recording Act to better protect the interests of the primary rights holders is integral to the success of registering interests in customary land.

As the initial registration of these items is going to involve resolving a lot of disputes and as these are issues rooted deep in the culture of the indigenous people, acceptable solutions will, most likely, have to come from the community level rather than the national level. Thus, it is recommended that efforts to codify the customary usages be done area by area and started on the local level.

3. Regulations affecting approval of timber agreements on customary land

The Provincial Government Act gives the Provincial Assembly the authority to pass Ordinances that affect the approval of timber agreements on customary land. The Provincial

343 Nori at 10.
344 Anere, et. al. at 34. (noting that the unifying forces of common religious values and institutions, growing knowledge of the common language of Solomons Pidgin, and shared experiences of education, work and social activity that were evolving before the coup are key to solving problems in the future.)
Assembly has the authority to pass Ordinances to regulate: the rates of royalty payments from logging ventures; disposal of waste products and the protection of the environment, the manner and nature of reforestation; and prohibition or regulation of the taking of any kind of timber.\textsuperscript{345} Through these Ordinances provincial governments could have tighter control over logging on customary land and over the identification of areas to be excluded from cutting. Conservation groups could work to encourage regulations of logging companies in the same way that WWF worked for megapode management on Simbo Island.

Further, in the timber license approval process, as laid out by the Forest Resources and Timber Utilisation Act, the provincial government must specify the extent of the provincial government’s role in the venture. The provincial government could stipulate that it will participate in the required land survey and determination of areas that should be excluded from the venture for environmental or social reasons. Conservation NGOs could help identify these areas of exclusion in advance and the provincial governments could condition approval of licenses on exclusion of these areas.

Through enactment of Ordinances and involving itself more in the process regarding timber agreements on customary land, the provincial governments could, even with the existing legislation, have greater control over logging operations on customary land.

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