

THE LAND USE UNIT: A NEW LEASING REGIME FOR CUSTOMARY LAND IN FIJI

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INTRODUCTION

In Fiji, nothing is more important than land. Fiji has attempted to develop a land system that can meet the conflicting needs of a population that is ethnically divided approximately evenly between *iTaukei* (indigenous Fijians) and Indians. *iTaukei* hold 87 percent of the land in Fiji on inalienable customary title: for them, ownership of land is the core of their cultural identity and a guarantee of indigenous privilege. For Indians, the quest to obtain secure land rights is also a matter of identity: it goes to the heart of whether they belong, whether they are 'Fijians' or not. The inability of successive Fijian administrations to fashion a sustainable compromise on land policy has polarised the Fijian people, perpetuated a cycle of political instability and retarded Fiji's economic development.

Because *iTaukei* land cannot be sold, the solution to the problem of access to land for non-*iTaukei* has been leasing. Because control of *iTaukei* land is such a sensitive issue, the process for leasing it is heavily regulated. At the centre of the statutory leasing regime is the *iTaukei* Land Trust Board (TLTB), which until 2010 held a monopoly on the power to lease *iTaukei* land. Since the most recent 2006 coup, the Bainimarama administration has, refreshingly, made a real effort to tackle Fiji's *bête noire* of land reform by introducing a competing leasing regime called the Land Use Unit (LUU). This means that *iTaukei* landowners now have a choice of regimes for leasing their land. For landowners and prospective lessees to make an informed choice about how they lease *iTaukei* land, they need to understand the precise legal implications of the new leasing regime.

This article closely analyses the legal features of the LUU regime and highlight relevant enforcement and accountability mechanisms for landowners. It offers a brief assessment of the LUU through the lens of *iTaukei* customary objectives before finally exploring the long-term implications that the LUU regime might have on the development of land policy in Fiji. This article also rejects Prime Minister Bainimarama's assertion that 'the only difference' between the familiar TLTB regime and new LUU regime is that 'with the TLTB there is a 15% deduction from your lease payment' for administration costs. In fact, the procedure of designating land and head-leasing it to the State severs the connection between *iTaukei* and *vanua* (land) to an even greater extent than the TLTB regime because there is no residual customary control over areas designated but not yet leased. Worse still, extensive privative clauses make it nearly impossible for landowners to enforce their rights against the State. The much-heralded increased economic returns from leasing via the LUU are likely to be illusory in most circumstances because investors recognise the diminished value of unenforceable property rights.

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THE MECHANICS OF THE LAND USE UNIT REGIME

The sixth pillar of the interim government's 'Twelve Pillars of Reform' since 2008 has been a focus on 'making more land available'.¹ To this end, the *Land Use Decree* was signed into law in July 2010. It establishes the Land Use Unit of the Ministry of Lands, a new regime for leasing customary land and a competitor to the TLTB.

Although the LUU has the power to lease state land (the term is used interchangeably with 'crown land' in the decree),² this article will focus on the powers of the LUU³ to lease *iTaukei* land.⁴ It is interesting to note that while the object of the *Land Use Decree* is to utilise *iTaukei* land in the 'best interest of the [*iTaukei*] land owners',⁵ s 3(2) declares that it achieves that objective by leasing land on 'longer tenure' with the 'purpose of providing a livelihood for all parties concerned'.⁶ Quite frequently, one would expect those measures to clash with the interests of *iTaukei* landowners: they may well not want to lease for long periods of time and 'providing a livelihood for all parties' diminishes the interests of landowners. The mandatory considerations posed when considering a leasing proposal are both 'the best interest of landowners *and* the overall wellbeing of the economy'.⁷ What this demonstrates is that the paradigm through which the LUU facilitates leasing is as an agent of compromise for benefit of the State, rather than as a partisan agent for landowners.

Designation of land and relinquishment of control

The first step in the process of leasing *iTaukei* land under the LUU regime is that the land in question be 'designated' before lessees can apply to lease it.⁸ A precondition to designation is that the land 'be free of all encumbrances',⁹ including any existing licences.¹⁰ A Landowning Unit (LOU) is deemed to consent to designation if 60 per cent of qualifying members¹¹ (who must be permanent residents of Fiji over 18 years of age)¹² give their written consent on the approved form.¹³ Upon receipt of the form, the Minister of Lands and Resources must refer the land to the Prime Minister, who has broad discretion to approve the designation of that land.¹⁴ If the Prime Minister approves, the land is then entered onto a register known as the Land Use Bank.¹⁵ This ousts the TLTB's powers to lease the land.¹⁶ Land remains designated indefinitely, but the trustees of the land designated may request that the designation be revoked no earlier than five years after it was first made.¹⁷ So long as the land is not leased at

¹ Voreqe Bainimarama and Petero Mataca, *Fiji Peoples Charter for Change, Peace & Progress* (2008) 27.

² *Land Use Decree 2010* (Fiji) s 2.

³ *Land Use Regulations 2011* (Fiji) s 8(b).

⁴ *Ibid* s 2, definition of 'Land'.

⁵ *Land Use Decree 2010* (Fiji) s 3(1)(b).

⁶ *Ibid* s 3(2)(c).

⁷ *Ibid* s 11.

⁸ *Land Use Regulations 2011* (Fiji) reg 3, 9(1).

⁹ *Land Use Decree 2010* (Fiji) s 4.

¹⁰ Ministry of Lands and Mineral Resources, 'PM [designates] first parcel of Land' (2011) <http://www.lands.gov.fj/index.php/medias/news/3-pm-designate-first-land>.

¹¹ *Land Use Regulations 2011* (Fiji) reg 4(1).

¹² *Ibid* reg 2, definition of 'Qualifying Member'.

¹³ *Ibid* reg 4(3).

¹⁴ *Land Use Decree 2010* (Fiji) s 6(2).

¹⁵ *Ibid* s 7.

¹⁶ *Ibid* ss 9(1), 'This Decree has effect notwithstanding any provision of the Native Land Trust Act', and 8(b), which makes the LUU responsible for 'issuance and renewal of lease' of designated land.

¹⁷ *Land Use Regulations 2011* (Fiji) reg 6(2).

the time and 'in the opinion of the Prime Minister' will not be leased within 12 months, the Prime Minister is obliged to revoke the designation.¹⁸

Once designated, the LOU has no say in how the land is used. The LOU has effectively granted the Director of Lands *carte blanche* to lease their land. There is no requirement that the LOU consent to a specific lease. There is no duty of consultation, although it might be possible to fashion one out of the mandatory consideration that all leases 'take into consideration ... the best interest of the land owners'.¹⁹ For reasons that will be discussed later, such a duty would be largely worthless because it is unenforceable. The LOU is also unable to exercise any legal rights to use or occupy the land while designated because it must be 'free of all encumbrances'.²⁰ In practice, landowners may find their use of land that is not yet leased is tolerated but their position will not be secure.

Retention of ownership

It is important to note that contrary to popular speculation, the ownership of designated land does not change. The description of the register of designated lands as the 'Land Bank' is somewhat misleading, as it is neither a bank (it is not a lending institution), nor is it similar to the land bank system for indigenous land in Sarawak, Malaysia (where small blocks of land are alienated to the government and conglomerated into huge plantations).²¹

Instead, ownership of *iTaukei* land remains with the LOU 'until such time [as] the land is no longer required under the Decree'.²² This is unfortunate wording, because strictly speaking it does not explain what happens to ownership of the land after its designation is revoked. The Ministry of Lands has glossed over this flaw in the drafting and interpreted s 5 to mean 'land will be returned to [LOUs] on expiry of the lease'.²³ Even if this provision does not strictly prohibit the conversion of designated land to state land upon the expiry of a lease, consent of the TLTB would still be required to legally transfer an estate in *iTaukei* land.²⁴ The *Land Use Decree* does not exclude the operation of this rule under the parallel legislation, because the *Decree* only prevails where it is inconsistent with the *iTaukei Land Trust Board Act*.²⁵ The fact that the *Decree* does not contain an express prohibition on acquisition of land upon reversion is not an inconsistency. Therefore the ownership by *iTaukei* of their lands under the LUU regime is secure.

Trustee appointment and duties

One of the new features of the LUU regime is that individual LOUs must appoint some of their members to be trustees of the land. After designation each LOU must elect between one and five trustees.²⁶ No precise method of election is specified but the LOU must 'preside

¹⁸ Ibid reg 6(3).

¹⁹ *Land Use Decree 2010* (Fiji) s 11.

²⁰ Ibid s 4.

²¹ Ramy Bulan, 'Native Customary Land: The Trust as a Device for Land Development in Sarawak' in Fadzilah Majid Cooke (ed), *State, Communities and Forests in Contemporary Borneo* (2006) 52.

²² *Land Use Decree 2010* (Fiji) s 5.

²³ Filipe Rokovasa, 'Land Reform in Fiji' (Paper presented at the Commonwealth Heads of Valuation Agencies Conference, Sydney Australia 2012) 3.

²⁴ *iTaukei Land Trust Act* [Cap 134] (Fiji) s 5(2).

²⁵ *Land Use Decree 2010* (Fiji) s 9(1).

²⁶ *Land Use Regulations 2011* (Fiji) reg 5(1).

over' the trustees and ensure that a deed of trust is prepared.²⁷ When read consistently with the requirement that 60 per cent of qualifying members consent before changing a trustee,²⁸ the implication is that 60 per cent of all qualifying members must democratically elect the trustees and ratify the deed of trust.²⁹ The names of those elected are submitted to the Prime Minister who has a discretionary power to accept or refuse their appointment.³⁰ Trustees must be re-elected yearly.³¹ The Prime Minister may appoint interim trustees³² and may remove any trustee if the Prime Minister is 'of the opinion that the Trustee is not adequately discharging his or her responsibilities under the Regulations'.³³ This gives the Prime Minister a substantial degree of control over individual LOU trusts.

Head-lease and sub-lease

Once designated, applications for lease are invited.³⁴ The Director of Lands may approve or refuse any application without providing reasons³⁵ and may negotiate any lease terms and conditions.³⁶ Two leases then come into existence: a head lease and a sub-lease. At the time that the sub-lease by the Director (on behalf of the State) to the lessor is executed, a head lease by the trustees (on behalf of the LOU) of the land to the Director is deemed to exist³⁷ for the duration of the sub-lease plus one day.³⁸ The LOU is paid rent directly by the State as head lessee regardless of whether the sub-lessee pays its rent.³⁹ The head lease is very restrictive on the LOU: they must continue to pay rates and taxes,⁴⁰ and they may not terminate or assign the lease,⁴¹ but the State may unilaterally 'vary, and in all respects deal with' the head lease or sub-lease.⁴² The sub-lessee must register the lease, giving it an indefeasible interest in the land.⁴³ The net effect is that the State guarantees an unimpeachable interest in the relevant block of *iTaukei* land for the duration of the sub-lease. In return for rent, the LOU surrenders all rights except a bare right of reversion.

State ownership of improvements upon reversion

The LUU regime has clearly delineated rights of reversion. During the lease and upon reversion, buildings and improvements upon the land vest in the head lessee (the State),⁴⁴ unless the lease conditions state otherwise. The standard lease conditions allow the lessee (within three months after the lease expires, and subject to a one-month notice period) to

²⁷ Ibid reg 5(3)(a).

²⁸ Ibid reg 5(10).

²⁹ Ibid reg 5(3)(a) and (b).

³⁰ Ibid reg 5(2).

³¹ Ibid reg 5(8).

³² Ibid reg 5(6).

³³ Ibid reg 5(5).

³⁴ Ibid reg 7(1).

³⁵ Ibid reg 10(1).

³⁶ Ibid reg 11(2).

³⁷ Ibid reg 14.

³⁸ Ibid sch 2, form 4, cl 1, definition of 'Term'.

³⁹ Ibid sch 2, form 4, cl 3(a).

⁴⁰ Ibid sch 2, form 4, cl 4(a).

⁴¹ Ibid sch 2, form 4, cl 5(c), 5(d)(i).

⁴² Ibid sch 2, form 4, cl 5(c).

⁴³ Ibid reg 16.

⁴⁴ *Land Use Regulations 2011* (Fiji) reg 14(2)(b).

remove any building or improvement it has erected.⁴⁵ This power is subject to the right of the State to elect to purchase any building for 'fair value'.⁴⁶

THE LIMITS OF LEASEHOLD

If the LOU initially has a property right of exclusive possession of an area of land, but after designation and leasing has no currently enforceable rights over that property, the question might properly be asked: is the interest granted a lease or an outright alienation? The answer comes down to whether the LOU retains a bare right of reversion. A useful tool is Simpson's 'bundle of rights' analysis, in which each right over land is a single stick. Ownership of the land is not a stick itself, but rather a container held by the person who 'has the right to give out sticks'.⁴⁷ Different land systems contain different bundles of rights, as do different types of tenure. After land has been designated and leased under the LUU, the LOU has transferred all of its sticks to the State and sub-lessee. But despite having 'no presently exercisable rights', the LOU retains *proptietas nuda* or bare ownership because, at some point, each stick must revert to the container of the bundle.⁴⁸

One could argue that enforcing that right of reversion is impossible and therefore the LOU has completely alienated its ownership of the land. A demand for reversion requires the owner to demonstrate that the lease has expired. If the State disagreed, the LOU would have to 'question the terms and condition of the lease' in court, which the privative clause in s 15(1)(c) of the *Land Use Decree* expressly forbids. While it is true that the State could almost indefinitely delay any court action through the certificate of termination process, the right of reversion (and, by extension, ownership) endures regardless. There remains the possibility that in future the privative clause will be repealed, or otherwise rendered ineffective, at which point the LOU would be able to enforce its dormant right.

While this might seem to be disconnected from reality, in regards to a right of reversion, the common law is comfortable with rights that appear to be more theoretical than real, allowing leases of 999 years or more.⁴⁹ The fact that the property interest granted is a properly formed lease does not mean it is consistent with the 1997 *Constitution's* declaration of inalienability.⁵⁰ The quasi-ownership rights⁵¹ granted to the State over designated land might, for instance, be of great significance if any future constitution of Fiji entrenches the inalienability of *iTaukei* land.

ENFORCEMENT AND ACCOUNTABILITY

Trustee accountability

Members of LOUs should be aware that becoming a trustee imposes serious obligations on those elected. As well as their general duty to act in the best interests of the beneficiaries of the trust (the members of the LOU), there are substantial statutory duties of accountability imposed on them. The trustees must produce an annual financial statement of accounts

⁴⁵ Ibid sch 2, annexure B, cl 14.

⁴⁶ Ibid sch 2, annexure B, cl 14(a)(b).

⁴⁷ SR Simpson *Land Law and Registration* (Surveyor's Publications, London, 1976) at 6.

⁴⁸ Ibid 6.

⁴⁹ Scottish Law Commission, *Conversion of Long Leases*, Report 204 (2006) [1.5], [1.6].

⁵⁰ Constitution of Fiji 1997, s 6(b).

⁵¹ Scottish Law Commission, above n 49, [1.6].

audited by the Auditor-General⁵² and have them endorsed at an annual general meeting.⁵³ Copies of the minutes of the meeting and audited accounts must be sent to the Director and Permanent Secretary for Lands.⁵⁴ The trustees' rights are limited to requesting that designation of the land be revoked, receiving rent money⁵⁵ and dealing with it according to the Deed of Trust. Because the individual members of the LOU are all beneficiaries of the trust, they are entitled to legally enforce their rights under the deed of trust.

Enforcement of LOU rights against the State

The LUU regime all but extinguishes the ability of the LOU to legally enforce its rights against the State or sub-lessor. A private law action that purports to 'challenge or question' almost any matter under the *Land Use Decree* (including the decisions of officials, the terms and conditions of a lease or the cancellation of a lease) must fail because of the extensive privative clause in s 15(1) of the *Decree*.⁵⁶ Any proceeding brought in breach of s 15(1) must be immediately referred to the Chief Registrar, who must issue a certificate terminating the proceedings and vacating any orders made.⁵⁷ The courts have taken a broad interpretation of a similar 'certificate of termination' clause in the *Mahogany Industry Development Decree 2010*⁵⁸ and immediately referred the proceeding to the Chief Registrar for a certificate of termination.⁵⁹

A public law action for judicial review of State decision-making under the LUU regime stands a very slim chance of success. Generally, the Fijian courts take the *Anisminic*⁶⁰ approach of allowing judicial review for jurisdictional error despite the existence of a 'widely drawn privative clause'.⁶¹ Jurisdictional errors might include a decision by the Prime Minister to designate land before consent had been given or the Director executing a lease in excess of his or her powers under the *Decree*. However, before an application for review gets to the stage of a hearing, the court's duty to terminate proceedings and the Chief Registrar's duty to issue a certificate to that effect kick in.⁶² An additional privative clause that prevents the Chief Registrar's decision from being challenged forms a second layer of protection for the State.⁶³

It might be possible to attack the jurisdiction of the Chief Registrar to issue the certificate by arguing that the application for review in question was not a claim 'in respect of any of the subject matters [in s 15(1)]'.⁶⁴ This approach is unlikely to succeed because to do so would 'challenge ... any decision of ... any State official ... made under this Decree',⁶⁵ which again warrants a certificate of termination. The loop of challenges and certificates of termination could continue *ad infinitum* without ever dealing with the hearing of substance. It is also

⁵² *Land Use Regulations 2011* (Fiji) reg 5(7).

⁵³ *Ibid* reg 5(8).

⁵⁴ *Ibid* reg 5(9).

⁵⁵ *Ibid* reg 17(c).

⁵⁶ *Land Use Decree 2010* (Fiji) s 15(1).

⁵⁷ *Ibid* s 15(2), 15(3).

⁵⁸ *Mahogany Industry Development Decree 2010* (Fiji) sch 4, s 5.

⁵⁹ *Fiji Hardwood Corporation Ltd v Lumber Processors (Fiji) Ltd* [2012] FJMC 182.

⁶⁰ *Anisminic Ltd v Foreign Compensation Commission* [1969] 1 All ER 208.

⁶¹ *Venkatamma v Ferrier-Watson* [1995] FJSC 7, [1995] 41 FLR 258 at 265.

⁶² *Land Use Decree 2010* (Fiji) s 15(2), 15(3).

⁶³ *Ibid* s 15(5).

⁶⁴ *Ibid* s 15(2).

⁶⁵ *Ibid* s 15(1)(b).

significant to note that both the English Law Society Charity⁶⁶ and former Fiji Justice of Appeal William Marshall⁶⁷ have issued extensive reports highlighting the collapse of the rule of law and interference by the executive in judicial decision-making in Fiji. This climate is not conducive to successful court proceedings against the State.

The privative clauses in the *Land Use Decree* appear to be ironclad. The consequence is that neither the LOU nor the sub-lessees have access to the courts to enforce their legal rights in regards to the leases they have entered into under the LUU regime. The State holds all the power in the lease relationships: it has a vast array of powers and can exercise these with impunity because there is no judicial oversight. If the courts continue to enforce these privative clauses, the LOU will have, in practical terms, alienated its land as it cannot enforce its rights of reversion. The sub-lessee is effectively in the position of a tenant-at-will because the State could simply elect to terminate because, despite having a registered lease, enforcing it would require questioning the ‘validity of the cancellation’.⁶⁸ The rights of the LOU and the sub-lessor are not enforceable property rights in the ordinary sense of the term.

COMPATIBILITY WITH CUSTOMARY INTERESTS

While it is true that the introduction of the LUU regime has given LOUs a choice of how they lease their land, it is not a panacea. What it does do is allow an entrepreneurial LOU to make a functionally irrevocable decision that a particular portion of their land should be available for lease. To the extent that this power symbolises that control over land use rests with the LOU, and allows *iTaukei* to be agents of their own change, it is consistent with the customary objective of inalienability. But scratch the surface and a different conclusion emerges. Designation precludes any legal customary use of the land, even if it is lying idle and unleased. This clearly inhibits the continuation of a close physical connection with the land. Worse still, the LOU does not even retain a right of consultation as to how its land will be leased, nor are there any effective enforcement mechanisms available for the LOU to resume possession of the land. The LUU regime fundamentally transforms the ‘umbilical cord’ connecting *iTaukei* with the *vanua* into a unidirectional conduit for lease money. Any lease necessarily reduces the connection of *iTaukei* with their land, but the double barrier of designation and leasing under the LUU regime diminishes LOU rights to an extent that is repugnant to the customary objective of inalienability.

Increased accountability

Within the LOU, the imposition of a trust over the proceeds of the lease promotes accountability in regards to the distribution of lease money. Despite the fact that trustees have been introduced to the TLTB regime too, the *Land Use Decree* imposes a form of trust that is more compatible with custom. Unlike the TLTB, equal distribution of rent money is not mandatory. Instead the majority of the members of the LOU may specify how income is to be distributed in their deed of trust. This approach is much more compatible with the variable and flexible nature of custom because it encourages the adoption of a solution that best suits the circumstances of the LOU. The statutory requirements for audit and yearly election of trustees reinforce the dynamism of an LUU trust and allows the members of the LOU to

⁶⁶ Nigel Dodds, *Fiji: The Rule of Law Lost* (2012).

⁶⁷ William Marshall, ‘The Petition’ <https://sites.google.com/site/justicewilliammarshall/petition> (Accessed 11 April 2013). His petition runs to over 140 pages (plus hundreds more pages of supporting judgments) and details outrageous political interference with the judiciary from 2009 onwards.

⁶⁸ *Land Use Decree 2010* (Fiji) s 15(1)(d).

define their own customs as to how the wealth of the land should be managed—a truly customary approach.

Poor economic performance

Inalienability has to be balanced with the value of increased material prosperity and the greater ability of the land to sustain the LOU when leased. The *quid pro quo* under the LUU is that the LOU surrenders the right to be consulted, and the State may grant leases on relatively favourable conditions to lessees, but in return the LOU can expect more rent than from the TLTB because of reduced administration costs and a market valuation process. The State as head lessor also guarantees rent payment regardless of the financial solvency of lessee. Some of these features are excellent for maximising returns to sustain the LOU. For example, rents frequently adjusted to market value (with some room for negotiation) ensure land is more likely to be efficiently allocated to those who value it most. But a workable market in property rights requires that they be enforceable. Perversely, by hermetically sealing the courts out of the LUU's sphere of operation in a misguided effort to deliver certainty of tenure to sub-lessees, the State has crippled the enforceability and therefore value of LUU leases. Some lessees with substantial diplomatic or political clout may value the certainty of a state-guaranteed lease: for example, the Chinese mining company Xinfu that has taken an LUU lease in Bua. It seems more likely that a commercial enterprise would recognise that their property interest, being unenforceable in court, is extremely vulnerable to the fickle winds of politics that displace governments with alarming regularity in Fiji, and would reduce the consideration offered accordingly.

IMPLICATIONS FOR CONSTITUTIONAL CHANGE

The Fiji Constitution Commission is currently undertaking consultations around Fiji towards the drafting of a new constitution to be implemented before elections scheduled for 2014.⁶⁹ Whether the consultations will have any substantial effect on the outcome of the process is another matter. Judging by Prime Minister Bainimarama's decision to declare a list of constitutional non-negotiables,⁷⁰ including entrenched immunity for his regime,⁷¹ the content of the new constitution is likely to be highly influenced by the current military regime.

Land issues have been canvassed in 95 per cent of submissions to the Commission,⁷² which makes it highly likely that the new constitution will address the status of *iTaukei* land and leasing. The LUU regime offers some clues as to what those constitutional provisions might look like. That regime is one piece in the jigsaw that is Attorney-General Aiyaz Sayed-Khaiyum's plan to build a united national identity in Fiji.⁷³ Having abolished the Great Council of Chiefs and reformed the TLTB to deprive the *iTaukei* elite of their main source of funding and status, the LUU is designed to further undermine cultural autonomy by creating a powerful 'neutral' institution that can lease and control both State and *iTaukei* land.

⁶⁹ *Fiji Constitutional Process (Constitution Commission) Decree 2012* (Fiji) sch 1.

⁷⁰ *Ibid* s 3(e).

⁷¹ *Fiji Constitutional Process (Constituent Assembly and Adoption of Constitution) Decree 2012* (Fiji) s 8(3).

⁷² Nanise Loanakadavu, '95pc submissions highlight land issue' *Fiji Times* (online ed, Suva, Fiji) 14 August 2012.

⁷³ Aiyaz Sayed-Khaiyum, *Cultural Autonomy: Its implications for the nation-state* (LLM thesis, University of Hong Kong, 2002) 57, 69.

What this signals is that the new constitution is likely to further emphasise the State's control over the leasing of *iTaukei* land and diminish the role of the TLTB. The LUU regime, despite its flaws, is likely to remain in force. This is significant because these leases will continue to be a feature of Fijian land leasing well into the next century if they go full term. There are unlikely to be any concessions made to increase consultation with landowners, although increased accountability measures may well be entrenched as a consequence of the current emphasis on 'the removal of systemic corruption'.⁷⁴

CONCLUSION

The Bainimarama administration is guilty of much wrongdoing, but it deserves credit for tackling head-on Fiji's most intractable issues around land that have defied resolution by democratic means. Unfortunately, it is going about it in the wrong way. That is of little help to many *iTaukei* landowners who do not have the luxury of deciding if they should lease, but must decide which regime to entrust with their land. Should they stick with the TLTB system or vote to designate with the LUU? This article argues against designation with the LUU because from a landowner's point of view it is simply too risky. It puts a huge amount of faith in an unstable government and is incompatible with customary values. The bonanza promised as a consequence of designation may be more illusory than real.

⁷⁴ *Fiji Constitutional Process (Constitution Commission) Decree 2012* (Fiji) s 3(e)(iii).