Focus

LAND TITLING ISSUES

Land titling and socioeconomic development in the South Pacific

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The controversy over the relative merits of customary and individual land tenure in Papua New Guinea and other island states of the South Pacific continues unabated. Steven Gosarevski, Helen Hughes and Susan Windybank (2004b) (hereafter cited Hughes as the senior author) stirred up a hornet's nest by asserting 'communal ownership has not permitted any country to develop. In Papua New Guinea, where 90 per cent of people live on the land, it is the principal cause of poverty' (Hughes 2004b:137). Jim Fingleton answered with a collection of edited papers by Michael Bourke, Mark Mosko, Charles Lightfoot, and R.J. Fisher claiming to expose as 'demonstrably false the argument that customary land tenures are an impassable barrier to development' (2005:ix).

In this review of Fingleton's compilation we attempt to moderate the often extreme positions adopted by these rival scholars, and show a way forward that combines the best of both with positive policy proposals for accelerating equitable human and economic development in one of the world's most backward regions. A first step is to refine the rival interpretations of customary and individual titling. We believe that once one achieves clarity on this matter, one will be better able to deal with empirical issues relating both to the role of land titling in the process of economic development and to any implications of titling for equity and rent sharing. The second section of this paper sketches some of the evidence for and against the rival Hughes and Fingleton contentions that individual land titling is either a precondition or irrelevant for successful socioeconomic development. This evidence includes the natural experiment in Zimbabwe where the Mugabe government has abolished individual title and reverted to undocumented customary modes of land ownership. The third section concludes with suggestions for what may be needed to give effect to the synthesis we propose.

A false antithesis

Fingleton and Hughes—both right and both wrong

It is clear that Fingleton is correct when he asserts that Hughes is wrong to characterise all Melanesian land tenure as being 'communal' in the manner in which land was held in Europe before Romans adopted forms of land ownership fully compatible with

modern notions of individual freehold land tenure (Bethell 1998). For, whereas Julius Caesar noted that the Germans unlike his Romans had no separate estates or private boundaries, Melanesians generally have well defined individual homesteads and gardens. But at the same time the reality in the South Pacific island states today, just as in Europe before about 1800, is that while much land is in many practical respects other than alienability of ownership held individually, very large tracts, as much as 77 per cent in Papua New Guinea (and quite large areas in Solomon Islands, Fiji and Vanuata, see Table 1), are indeed held communally in the Hughes sense, namely 'land to which members of a community have open, undifferentiated access—something like "the commons" in England before the Agricultural Revolution' (Fingleton 2005:ix). It is of course a widely held perception that '97 per cent of land in Papua New Guinea is subject to customary tenure' (for example, Armitage 2001:Table 1.2), with the balance of barely 3 per cent land alienated during the colonial era. But that perception is nothing more than a myth, as clearly recognised by the PNG parliament when in 2005 it enacted amendments to the Forestry Act 1991, which had already curtailed putative customary claims to natural forest. The amendments formally recognised (see Appendix 1) that there was and is indeed no customary title over most of the natural forests that cover around 77 per cent of the country's total land area. Had there been any attempt to legislate away customary owners' rights over their own homes and gardens there would of course have been an uproar, but the Forestry Act amendments aroused very little opposition other than Amet's critical comments (see Appendix 1 below), precisely because they did not in fact touch on any customary rights.

Thus just as Hughes was wrong to ignore the individual usufructs enjoyed by rural Papua New Guineans in their homes and gardens, Fingleton equally wrongly overlooks the reality that most of the country's land is indeed available for 'undifferentiated access' by all and sundry, in the sense that no individuals have uncontestable rights of exclusive access. This lack of differentiable access does much to explain the relative ease with which foreign logging firms have been able to appropriate significant areas merely by playing one group of putative owners against another.[1]

Clearly there is a great deal of both linguistic and numerical confusion over this issue, as when Fingleton's authors themselves, by using the term 'customary' to differentiate forms of land ownership from the 'individual' model of land tenure

Table 1 **Natural forest area as proportion of total land area**

	Total area (million hectares)	Natural forests (million hectares)	Per cent
Papua New Guinea	46.9	36.40	77.61
Solomon Islands	2.8	2.40	85.71
Fiji	1.8	0.88	48.89
Vanuatu	1.2	0.43	35.83

Source: Mohamed, N. and Clark, K., 1996. *Forestry on Customary-owned Land: some experiences from the South Pacific*, Rural Development Forestry Network, Wellington.

recommended by Hughes, appear to imply a system in which land is *not* owned outright by the individual. However, Fingleton claims that this does not mean communal, collective or cooperative ownership. Evidently he believes Hughes is wrong in thinking that customary land tenure is the antithesis of individual ownership and therefore inimical to individual rights and he proposes that customary tenure should 'be seen as a balance between group and individual rights and obligations with land ownership being held at group level and land use being exercised at the individual or household level' (2005:ix).

On this view, customary land tenure is neither individual nor group holding but has elements of both. Yet many authors have extolled customary ownership precisely because it is not individual and because group ownership provides a safety net for all, whereas they believe the institution of individual title must lead to some few individuals buying out the many who will become landless peons in their own homeland.[2] But, just as Fingleton sees 'customary' tenure as combining group ownership with individual use-rights, so 'individual' tenure in all modern cities from New York to Shanghai, including Sydney and even Port Moresby, for the majority of residents usually combines individual 'strata title' ownership of dwellings in high-rise apartment blocks with group ownership of the building itself and its amenities in the form of the 'body corporate', of which unit owners are members and to which they pay charges for common services and maintenance. Unfortunately in most rural areas of Papua New Guinea, the group owning community land seldom requires contributions from its 'members' to develop common services and rarely if ever willingly provides land free of charge for health clinics and schools for the benefit of its members. That is an aspect of Fingleton's idealisation of customary ownership by groups that is often overlooked, although Mosko's Mekeo appear to be an exception (2005:19).

Western forms of private ownership in which people hold individual registered title to specific and defined holdings are often said to foster division and a community divided between the better and the less well off. The perceived evil of private ownership has been with us at least since Plato wrote the *Republic*. Thomas More in *Utopia* expresses the sentiment most forcefully

> …for where everyone tries to get clear title to whatever he can scrape together, then however abundant things are, a few men divide up everything among themselves leaving everyone else in poverty. And it usually happens that each sort deserves the lot of the other, since the one is rapacious, wicked and worthless, and the other is made of simple, modest men who by their daily labor contribute more to the common good than to themselves (More 2001:57).

More goes on to recommend the abolition of private property and the equal sharing of resources prevalent in the imagined state of Utopia. The dismantling of the Berlin Wall in 1989 put paid to that dream in the Soviet Union and eastern Europe, and the stunning reduction of poverty in China after private property was reinvented by Deng in the 1970s suggest that More be left on the shelf despite the sniping by his latter-day adherent, R.J. Fisher, at what he calls Hughes' 'endearing optimism about the capacity of the benefits of growth to trickle down to the poor' (see Fingleton 2005:29). Norberg (2005) provides ample evidence of the massive reduction in the numbers of the poor (defined as living on less than the equivalent of US$1 per day) across the world, with the most rapid growth and the fastest reductions in poverty across most of Asia especially after China and India liberalised their economies

from about 1980.[3] Only sub-Saharan Africa provides exceptions, most countries there having achieved neither growth nor reductions in poverty, despite what one might term their 'endearing' attachment to customary forms of non-individual land ownership.

The nature of customary land tenure

Agricultural land in the Pacific islands is 'allocated in accordance with a complex but flexible system of rights and obligations at individual, family, clan and tribal levels' (Fingleton 2005:ix). After showing that land ownership held at the group level is combined with usage exercised at the individual or household level, however, Fingleton concedes that even 'this simplified version is arguable'. Customary land tenures, we are told, have many differences within the alleged class.

It is unclear if the authors are simply celebrating diversity and plurality for their own sake or whether there is some essential group characteristic that runs through all forms of tenure that we label as customary. If it is the former then they are taking a position one would associate with the Canadian philosopher James Tully for whom what is wrong with modern forms of ownership is that they allegedly impose seamless uniformity that does not allow diversity to flourish. Tully (1996) argues that what he calls the ancient constitution tolerated and even respected custom. For example, customary forms of ownership, institutions and laws differed from locale and jurisdiction, yet were preserved within the blanket protection of the ancient constitution. But Tully's claim that the modern constitution refuses to accept varied local customs as it pushes to have communities and institutions homogenised and subsumed under uniform laws and subject to one national system of institutionalised legal and political authority is incorrect. Both Canada and the United States still have arrangements to accommodate indigenous landholdings, and Australia's capital city provides only leasehold tenure for residential housing while much of that country's northern region maintains the non-individual land titling system endorsed by the Fingleton team but notorious for the disastrous outcomes it provides for its aboriginal denizens (Hughes and Warin 2005).

Perhaps a way to unravel the issue is to start by considering what we mean by ownership in general. The right to property or the right to ownership under whichever regime or system of law is not a single simple right but a bundle of rights and liabilities. However, we can simplify and refer to three fundamental rights: the rights to use, exclude, and alienate (Harding 1973). Whether we are talking about individual private ownership or customary ownership, both forms grant to the individual the right to use and to some extent the right to exclude. Even pure group ownership must parcel out certain exclusive individual rights to personal possessions. At the same time this will also include or extend the right to exclude, for rights to exclusive use are not much use or self-contradictory if one does not have the right to exclude others. For example John Locke in the *Two Treatises* II: 35 states 'God, by commanding to subdue gave authority so far to appropriate. And the condition of Humane Life which requires Labour and Materials to work on, necessarily introduces private possessions'. Locke infers that one cannot effectively follow God's command, which requires preservation, if others attempt to use the same area on which we are working or if they prevent us from effectively labouring in other ways, for example, direct obstruction. In order to ensure survival we need exclusive use, which entails the right to exclude others. Moreover, the same applies to the fruits of our labour. We will not be able to utilise the products of our labour to ensure our survival if others constantly steal our apples.

It is really with respect to the third right, that of alienation, that we begin to see a significant difference between Western and customary forms of ownership. It is usually the case that customary tenure does not allow one to deal in land. Apart from a presumed ideology that does not contemplate the group alienating itself from its land, there are almost insurmountable transaction costs to overcome in order to get a group to agree to dispose any part or all of its land. It is obvious that individuals owning their own land need not consult their fellows and thus face fewer transaction costs when attempting to deal in it.

An even more important consideration that enhances the benefits of alienation is that the market or cash economy allows individual interests to be expressed in monetary values. For example, an individual who is said to have customary ownership rights to a particular tract of land in virtue of his/her membership in a particular group, cannot realise that value because it has no defined marketable monetary value. In contrast, an individual who has a share in a cooperative enterprise such as a corporation, which might hold valuable assets including land, can sell that share of ownership because it has a specific monetary value. Individual interest gained through customary group ownership, on the other hand, only gives one the right to use and this interest has no monetary definition. The monetary economy, therefore, allows our interests in cooperative enterprises to be given a monetary value that then allows for individual alienation of such interests if desired.

There is no doubt that Fingleton is correct in claiming that it is highly misleading to contrast customary and Western forms of tenure by overstating the distinction between group and individual ownership. There are many forms of group and cooperative ownership within an individualistic legal system, the most widespread and prominent is the corporation, the central form of economic organisation. One difference is that corporatised—unlike customary—forms of group ownership have a monetary valuation that allows for divisible interests that individuals can then sell, exchange or transform into ownership of other assets. None of the Incorporated Land Groups (there are over 10,000) that emerged from the PNG legislation drafted by Fingleton has ever achieved any negotiable value and many have been shown to have non-clan or non-group memberships, being no more than fronts for families or foreign companies with no provable claims to any land ownership (Lea 2002b). Registering groups without a mechanism either for determining customarily agreed ownership or sharing of net income has been a manifest failure. Another problem is that fully privatised or corporatised ownership needs to be 'contestable' (De Soto 2000), in the sense that failure and bankruptcy are possible so that others may then acquire the property. That the customary system insures against failure is not a virtue when it often leads to widespread sclerosis in the form of unutilised or under-utilised land, or of clinging to traditional types of crops and modes of production.

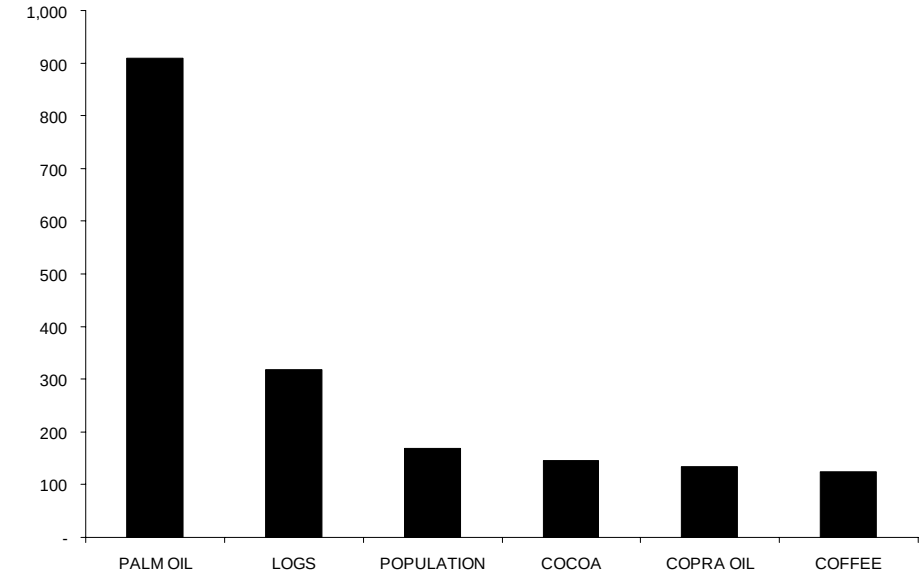
To be sure, many in Papua New Guinea have responded to new opportunities, as with the rapid adoption of coffee in the 1970s and vanilla for a few years from 2000, but the overall record is of slow growth at best, and in the case of coffee the yields are unimpressive. On that point, Fingleton's (2004, 2005) attempt to refute Hughes' claim that 'communal land ownership means low agricultural productivity and small incomes' (Gosarevsky 2004a:137) is wilfully misleading, presenting data from Bourke to show more rapid growth of cocoa, coffee and copra production since 1980 on smallholder plots than on plantations operating on

alienated land, but ignoring the government's policy of buying out estates in the 1980s and allowing them to revert to bush or mere subsistence production of food crops—a process that clearly reduces the apparent overall productivity of alienated land. The sole exception is oil palm, where large government equity holdings provided security against landowner invasions and enabled the only significant growth of any agricultural output since 1970 (Figure 1; Curtin 2003).

Fingleton's co-authors have other counter-arguments to Hughes' dismissal of economic merit in traditional land tenure. Michael Bourke (2005) mentions the lease–lease-back system that has emerged in some parts of Papua New Guinea. This allows customary landholders to lease their land to the government for onward subleasing to, say, plantation companies in exchange for rents and royalties paid to the customary owners.[4] This cumbersome system stems in part from the paternalistic frame of mind of both the Australian colonial regime before 1975 and the early post-independence governments, dominated as they were by expatriate advisers (including Fingleton), who felt that the customary landowners would not be able to hold their own in negotiations with commercial interests like plantation companies.[5]

Lightfoot (2005:22) admits that 'secure, transferable, individual, property rights are an essential characteristic of a modern developed economy' but argues that customary ownership can deliver everything needed to develop a modern economy while

Figure 1 **Growth of exports and population Papua New Guinea, 1980–2004**



Source: Bank of Papua New Guinea (various issues). *Quarterly Economic Bulletin*, Bank of Papua New Guinea, Port Moresby.

protecting land rights—a case of 'having your cake even after eating it'. He then cites the case of Fiji where, although land cannot be transferred as individual freehold, the customary ownership system allows for land to be leased: 'other things being equal, there is unlikely to be any significant difference between the economic values of land held either under lease or individualized freehold'. That is broadly correct if leases are as freely tradable as freehold—there is no significant difference in trends in median suburban house prices in freehold Sydney or leasehold Canberra—but in both Fiji and Papua New Guinea leases are not always freely transferable, and the role of the government in leasing creates opportunities for rent seeking by politicians and their officials. In any case, Fiji reverted from its leasehold traditions to outright customary non-individual land tenure in 2002 (Reddy and Lal 2002). It remains to be seen whether this will reverse the trend to rising poverty noted by Kumar and Prasad (2002) and MacWilliam (2002) contrary to Lightfoot's claim that Fiji had achieved the secure property rights needed for it to be a 'modern developed economy' despite its customary structures.

It is true so-called customary land can now be alienated at least in the form of a lease through certain non-customary institutions—in Papua New Guinea through a lease–lease-back arrangement with the government; in the case of Fiji through a lease mediated by the Native Land Trust Board. However, these Western style administrative bodies are far from being part of the customary landscape, and represent something that is as non-customary as individual freehold. Moreover it does not mean that customary ownership has been modified so that it now fully encompasses the right to alienate, given the time taken at Kimbe for New Britain Palm Oil, for example, to achieve its lease–lease-back arrangements.

Notwithstanding the possibility of long-term leases on customary land, customary ownership with its underlying group title is a cumbersome vehicle for the realisation of the right to alienate. Although usage, and to a certain extent exclusion, can be exercised at the individual level, with customary ownership alienation can only occur at the level of the group. In other words the group must reach a consensus on the question of granting a lease. That reality transforms simple land transactions into intense political negotiations with all the attendant woes. Forging a consensus on such a matter is difficult, as is clear in Hughes and Warin's (2004) vivid description of the situation in Australia's Northern Territory, where aboriginal communities have had their customary ownership enshrined in legislation such that few individuals are able to acquire the individual title needed for a mortgage for home building without the permission of Land Councils that rarely grant such permission except to their own members. However, the Howard government amended this legislation in 2005 to allow individual 100-year leases that should indeed be as good as freehold.

Fingleton (2005:ix) mentions Bronislaw Malinowski's remark denying the communal nature of customary tenure, comparing the organisation to a modern joint-stock venture. Some argue along these lines that corporate bodies could be instituted with legally enforceable fiduciary duties to manage landowners' property for their benefit, without disturbing the customary nature of land ownership. Once a duly constituted corporate body has assumed this responsibility, the management of the corporation as agents of the landowners, would not need to realise an unworkable landowner consensus for every decision contemplated.

The idea that collective customary ownership already embodies the salient

features of a corporate body is, however, quite misleading. Individual members of corporations have both explicit and implicit rights and their shareholdings in the corporate enterprise have a precise monetary value. This means that individual interests can be bought and sold without reference to the group or a group consensus, and importantly without disposing of corporate assets. It is worth pointing out that an earlier legal view of the corporation as a form of property that is subject to the ownership rights of the shareholders has given way to a contractual model, which sees the corporation as a nexus of contracts. This now widely accepted alternative model envisions the corporation as offering an umbrella that allows private parties to contract with one another more efficiently by limiting the transaction costs. As R.H. Coase (1937) famously argued, the law in effect offers a standardised form of contract or a set of default rules that facilitate private ordering. In the usual setting, this legal entity, which is actually a legal fiction, allows those with money and resources to contract with those of managerial skill but little money, to forge a mutually advantageous cooperative enterprise. The interests of non-shareholders such as employees, suppliers, bondholders, communities and customers are protected by contract, law, and regulation. Shareholders are entitled to the firm's residual cash flow, however the management's obligation to realise and promote this residual cash flow is only implicit because there is no set of specified actions that can be enforced to realise this objective. But, in order to give greater definition to the relationship that embodies this particular understanding, the legal system creates a fiduciary duty to maximise shareholder wealth. This fiduciary duty fills the gaps that arise in terms of the shareholders' so-called implicit contracts with management.

We agree that this corporate structure, in which landowners become the beneficiaries of managerial fiduciary duties, would be appropriate to realise the necessary economic and social 'advancement' (if we may use this term), but customary land tenure does not in any way possess this structure or allow for it. This also applies to ILGs and landowner companies. Communal ownership is not based on a 'nexus of contracts', it is based largely on kinship relations, which have not been contracted. However, why can not the customary landowners set up a corporation, distribute shares among themselves, hire managers to develop the land and impose the gap-filling fiduciary duties through the legal system? At this point in time there is no legal mechanism that allows them to do this in most South Pacific land tenure systems. This is because there is no mechanism for the distribution of the residual cash flow, as this would require that we define the individual shares. Since the only corporate asset is the land, one would have to define the land interest possessed by each individual. Since there are by definition no individual interests in customary communal ownership, other than usufructuary rights, appropriate shares cannot be assigned to individuals. If individual interests are not defined and the individuals that make up the group are identified through registration, there exists no mechanism for the distribution of residual cash flow, meaning that the inevitable disputes over the distribution of revenue will paralyse the system, as is now the case. The only way forward is to abandon informal customary land tenure and introduce individual interests in land, probably through some form of 'tenancy in common' in which individual interests are defined and of necessity registered (tenancy in common is different from so-called customary or communal tenure in so far as each owner has separate shares, say one-fourth in a property, and each owner may deal with his/her share as he/she pleases—the share may

be transferred or divided into smaller shares).

The point is that interests held in a corporate enterprise are alienable, which is not the case in customary tenure, in part because contractual relations are voluntary and one usually can also contract out of the relationship by selling shares. As we know, the introduction of the share market represented a significant breakthrough, which allowed for the uninterrupted flow of capital to the corporation. This also meant that the possibility of alienating one's shares efficiently significantly increased the value of the shares, because they became capable of being transacted and therefore assets with identifiable and meaningful economic value (De Soto 2000). The possibility of alienation also offers landowners the option of disposing of their interest in the land (that is, shares in the corporation) by selling their entitled share to the residual cash flow. Contrary to what one might think, this would offer customary landowners a significant degree of control over their land interest because they now have the option of either holding on to their interest in the hope that a future residual cash flow is realised or selling the interest for an immediate gain. In the latter instance they may decide to dispose of their interest rather than risk the possibility that the corporate exercise never realises a profit or that the profits are misappropriated by a self-interested management (not an uncommon occurrence everywhere in the world).

At this point, the critical reader will no doubt object and point out that this is the road to dispossession in which South Pacific landowners, like the Biblical Esau, sell their patrimony (the land) for a pottage of lentils. We are then treated to the usual dire mental pictures of starving landless citizens reduced to an impoverished mass, alienated from their traditional lands and huddling around garbage dumps in some huge future Melanesian Manila. But this is already happening around Port Moresby, Lae, and elsewhere, albeit on a proportionately smaller basis because of the relatively small population, despite continuing customary land tenure.

The introduction of a corporate entity, based on tenancy in common, to handle significant development projects that occur on so called customary land that demand a collective rather than individual enterprise, is a more positive way forward that need not entail landlessness. As R.G. Ward (1992) has pointed out, housing sites and gardens, constructed terraces, associated water reticulation systems, compost mounds for sweet potato production, raised beds for taro, drained swamps already possess the features of individual tenure and entitlement (and, we believe, can easily be converted to the fee simple). We would say that they should not be bundled into a tenancy in common and used as corporate assets for speculation and possible sources of future cash income. Papua New Guinea, like Solomon Islands and Fiji, has a relatively low population density and undeveloped land is sufficiently abundant that most development can be carried out while still leaving land that is 'enough and as good' for gardening, hunting and village sites. Most Pacific villages, as Ward (1992) points out, also claim ownership of a wider territory to which all have access and which is not claimed as gardens, home sites or developments by a particular family or individual. One has to see beyond the false dilemma which says one has to choose between private property rights accompanied by the loss of ancestral land or the security of the ancestral land secured through customary collective unregistered ownership. Of course a critic might argue that there is always the possibility that certain individuals may be determined to abandon the land and gamble all their patrimony and sell even their gardens and home sites to the corporate landowner developer (or foreigner) in

exchange for a greater share in some possible future residual cash flow. This is always a possibility, but at the same time hardly an overwhelming tragedy. People have to be given the option to make choices, even if these are the wrong choices according to someone else's point of view. In some areas, population density is becoming more critical and an obvious urban shift is already happening as individuals and families leave the land and perceive greater opportunities in the urban centres. Since this is already occurring, encouraging development through our recommendations may well help these people's plight through possible cash remuneration for their abandoned interests.

Individuals in a world of custom cannot act on their own if seeking to exercise rights of alienation. This in turn paralyses trade, commerce and development. Every land transaction, every decision to lease, must be percolated and strained through a tight mesh of individual, sub-group, and group interests. This means, among other things, that it is very difficult to achieve the economies of scale that can be realised on sufficiently large land holdings such as plantations. In this instance entrepreneurs will find it difficult to overcome transaction costs involved in acquiring sufficiently large areas to achieve these economies of scale. Additionally, long-term planning is threatened since the uncertainty surrounding the renewal of leases detracts from security of tenure. Despite Lightfoot's (2005) claim that a long-term lease is as good as freehold, the Fijian sugar industry has been in disarray over the last decade because of the failure to renew leases of customary land.

Individual land titling—a precondition or irrelevant for development?

Forests and pastures

We have already noted that Fingleton himself does not accept that most land in Papua New Guinea is indeed held communally in an even more primitive sense than the way the 'commons' were held in say Great Britain before completion of the enclosure movement around 1800. As noted above, almost all of Papua New Guinea's forest is 'owned' communally in exactly the sense used by Hughes, namely that, while everybody for miles around claims ownership of any given forest area, not a single individual has any individual usufruct rights, *that is, exclusive rights to ownership of any part of the produce of the primeval forested area*.[6] Thus Hughes is factually correct when asserting that *most* of Papua New Guinea is held 'communally' and not 'customarily' in the sense deployed by Fingleton. For example, the *Rural Development Handbook* (Hanson et al. 2001:51) states that over half of Papua New Guinea's Central Province (which hosts the capital district, Port Moresby) is 'unoccupied', and that much of the rest of the province has fewer than 20 persons per square kilometre. The unoccupied areas cannot be said to be subject to 'customary title', although any attempt by the national or provincial governments to construct any infrastructure, whether microwave repeater stations atop mountains as high as 4,000 metres, or water supply for Port Moresby, attracts claimants for 'compensation' from nearly the whole population of the province on the grounds that they all do indeed have title to the mountain peak or river in question. The development of the proposed Ramu nickel mine in Madang province is currently being delayed by an interminable litigation by over 200 groups of putative customary

'landowners' all claiming that they are the original 'owners' of all sites required by the mining company for mining, milling, and transportation of ores (*Post-Courier*, 12 October 2005).

Fingleton's volume does a grave disservice by its total neglect of the negative consequences of Papua New Guinea's compensation culture, based as it is on no more than the absence of documented individual title. That is what enables all and sundry to claim primeval ownership of the Ramu nickel mine. Errington and Gewertz (2004) have described a similar situation at the inland Ramu Sugar estate, which had been vacated by a clan who had chosen to relocate to the coast as much as 100 years before the estate was developed, and then returned to claim ownership from the current clan occupants (see Appendix 2).

As Curtin (2004, 2005) has noted, there seems almost to be a conspiracy amongst some of the contributors to Fingleton (2005) to avoid admitting that there are any forests in Papua New Guinea even though they extend over around 77 per cent of its total land area. Thus both the *Rural Development Handbook* (Hanson et al. 2001), which was co-authored by Michael Bourke, and other papers like Fingleton (2004) avoid *any* substantive mention of Papua New Guinea's forests, and imply that rural livelihoods are wholly dependent on agriculture and some cash tree-crop cultivation in the areas that account for only 23 per cent of the country's land area.

However the paper by R.J. Fisher (2005) in the Fingleton volume discusses the concept of 'common property' in forest and pasture areas in countries like Papua New Guinea, and cites various group arrangements which may have been quite effective in forest and pasture management in other countries. He says there is 'sometimes no viable alternative in cases where forests are large and remote from places where people live and where environmental conditions require pastoralists to be mobile and respond flexibly to local grazing conditions' (Fisher 2005:33). He points out that some tenure systems combine aspects of individual and group rights. Nomadic pastoralists in Kenya and Mongolia combine common rights to pastures with individual ownership of livestock, and cultivators in Southeast Asia manage the overall forest area as a group, but allocate cultivation rights to individual households.

Fisher's argument is that size and accessibility of forests often make management by individuals very difficult—but that is of course why they so often remain in non-individual ownership. The larger and more remote the forest, the more likely this is to be true, and Fisher contends that then some form of common property arrangement may be the only viable management choice. Fisher (2005) notes the registration in Nepal of 12,000 Forest User Groups, comprising one million households that manage a million hectares of forest. This could conceivably be a potential model for Papua New Guinea, but Fisher then tells us that the issues in Nepal are not those of group versus individual rights but of the government inhibiting development. He says that the formal devolution of rights to communities provided increased security of access and raised income from the sale of non-timber forest products, but Nepal's Forest Department has been reluctant to allow communities to harvest and sell timber from forests commercially even though many forests are suitable for this purpose. Thus the issue here is not the absence of individual rights but absence of devolution of decision-making to either individuals or groups.

Fisher then presents another example, from Shinyanga in Tanzania, of what he claims is 'community management' of a forest resource, but on closer inspection it appears the establishing of traditional *ngitili* (forest enclosures) has been based on 'a mix

of individual and community rights' (Fischer 2005:30). The result has been among other things increased cash income and the regeneration of the forests. A more recent study of 'privatisation' of pastoral land-holdings of the Samburu tribal group in Kenya shows that predictions of 'massive land sales' to non-Samburu have not materialised: 'consolidation of holdings is not occurring nor has landlessness become a problem' (Lesorogol 2005:1974). Instead, privatisation has encouraged cultivation as a supplement to cattle-raising that helps 'households to preserve their livestock wealth and thereby to better survive crises' (Lesorogol 2005:1974).

Fisher's comments on the role of the government in Nepal apply with perhaps even more force to the forestry industry in Papua New Guinea. Rod Taylor (1997) observes that the 1991 Forestry Act in effect largely nationalised the forestry industry by removing much of customary landowners' traditional role in managing the forest resource in the best interests of those most directly concerned. The further amendments of this Act in 2005 completed the excision of the landowners from any role in managing the forest, by repeal of Section 59 of the Act (see Appendix 1 below). As in Nepal, the government of Papua New Guinea has ensured an 'absence of devolution of decision making to either individuals or groups' (Taylor 1997:261). Contrary to claims by Fingleton in his earlier paper (2004) that the Land Groups Incorporation Act provided the basis for effective group management of common land resources in Papua New Guinea, despite its lack of other than self-determined land ownership rules, these new amendments to forestry legislation nullify that Act as well.

Land is a finite resource and there is never going to be sufficient land that is 'enough and as good for others' to use Locke's phrase, therefore neither system will satisfy both horticulturists and owners of livestock at the same time. It is clear that horticulturists would prefer exclusive access to discrete areas of land while the owners of livestock would desire more open space for grazing. The fact is that intensive livestock production adversely affects the carrying capacity of land and therefore there is need for greater space to avoid overgrazing. But, given that land is a finite resource, we ultimately need some mechanism to balance the needs of both horticulturists and owners of livestock by designating areas that can be used for the exclusive use of each group. Since land is a scarce or limited resource, the fact that a particular form of land tenure satisfies the interests of one group more than another is inconclusive and does not offer sufficient reason to support either system—one needs a system that can mediate between the interests of different groups. Non-customary individual freehold is better suited for this, because then market forces will determine the most appropriate allocation of land between the competing uses. For example, if livestock production were more profitable than horticulture, graziers would bid away land from competing cultivators; the converse would of course happen if relative prices were more favourable at the margin for crop growers.

In the Darfur region of western Sudan, a similar conflict of interest lies behind the current genocidal attacks by northern herders on southern cultivators. Unfortunately current attempts to resolve that conflict have failed, no doubt because of a refusal on all sides to contemplate establishment of defined ownership rights based on freehold tenure, even though that could accommodate both large-scale group holdings in grazing areas and smaller farms in the cropping areas, with the final outcome determinable by the market rather than brute force.

Land tenure and agricultural productivity

Michael Bourke's contribution to Fingleton (2005) disputes that economic benefits are greater from freehold than customary ownership by arguing that much of the plantation sector in Papua New Guinea, where production takes place on alienated and registered land, has performed poorly in recent decades, especially for coffee, cocoa, copra and rubber. Bourke then (2005:6–7) claims that domestically marketed food, betel nut, vanilla, coffee, cocoa, copra and rubber produced on customary land tenures have grown the fastest among agricultural production. Even so, his Table 2 shows that the growth rates of customary smallholders' production of export crops (chiefly coffee, cocoa and copra oil) are well below the population growth rate of about 2.5 per cent per annum in Papua New Guinea between 1980 and 2000. Only palm oil production, of which at least two-thirds takes place on the plantations' alienated land has grown more rapidly than the population. Yet, while Bourke also claims that 'all indications are that the volume of energy food is adequate...', he himself (in Allen et al. 2005:201) endorses Gibson's (2000:377) claim that in 1996 '40 per cent of Papua New Guineans [were] living in poverty', when that is defined as achieving food energy consumption of less than Gibson's minimum of 2,250 calories per day per person.[7]

However the declines in plantation production cited by Bourke are not a result of the alienated form of land tenure, as most of the owners were either bought out or expropriated (as in Bougainville in 1988). In addition the breakdown in law and order in the Highlands provinces of Papua New Guinea's mainland, which facilitated forcible takeovers of even nationally owned plantations and estates like Waghi Mek by disgruntled local 'landowners', contributed to a massive reduction in output from the plantation/estate sector. Bourke's increase in smallholder output of coffee and cocoa has barely made up the shortfall and at best has only just kept pace with population growth since 1980. In a Hobbesian world of chaos and violence it may indeed be far easier just to grow some simple things in one's own backyard, rather than participate in something more complex requiring investment of capital, sophisticated organisation and so forth. Also, despite the statistics and the bold claim that the agricultural sector has grown rapidly in recent decades, the immediate evidence for this is far from apparent. Contrary to Fingleton's claims, Papua New Guinea's only primary commodity exports to have increased more rapidly than the population are those based on either formal or informal alienation, namely oil palm and logs respectively, while customary landowners' production of cocoa, coffee and copra oil has expanded no faster than the population, as one would expect from the basically subsistence nature of customary ownership (see Figure 1). Thus, despite statements that productivity is showing some real gains in the rural sector, it remains true that Papua New Guinea has not matched the gains in real income per head so vividly evident over the last 30 years across most of East Asia, from South Korea, Taiwan, and China, to Thailand and Malaysia.

Aside from the difficulties in achieving the economies of scale necessary to make a significantly productive economy, opportunities for individuals to improve their own welfare are simply absent. It may be true that customary land ensures that individuals have access to land for their various needs and uses, but at the same time customary owners with interests in land cannot apply those interests and use them as capital. Under customary tenure, individual interests cannot be assigned a monetary value and traded, transferred or conveyed to purchase

something of equivalent value. Individual Papua New Guineans may have the security of knowing there is land available for their use but on the other hand, they are trapped because even if they wish to, they are precluded from using that interest and converting it into buying power. De Soto (2000) describes such people as living in a pre-capitalist world. They possess holdings and property but none of it can be assigned an economic value that would then allow them to participate meaningfully in the business of trade and commerce. This means that they are in effect shut out from the explosion of wealth-creating activities that is occurring almost everywhere to the north of Papua New Guinea.

Mark Mosko's (2005) contribution to the Fingleton volume 'Customary land tenure and agricultural success: the Mekeo case' argues strongly to the contrary, citing the successful production and marketing of the areca nut (betelnut) and pepperfruit in the Mekeo area. He shows that continued reliance on customary arrangements for land ownership and use has facilitated agricultural success, not impeded it. For the Mekeo, ownership consists in a complex allocation of rights and obligations such that there are several discernible categories of 'owners' and 'users' with corresponding different kinds of rights of ownership and use corresponding to responsibilities of custodianship. For example, there exists one chief who is the nominal owner of the land but who must consult with the chiefs and leaders of the other resident owning clans when major issues involving land arise (Mosko 2005:20).

One caveat one has to make with reference to Mosko's account is the danger of extrapolating and believing that this description of the tenure system dominates land relations throughout Papua New Guinea. Thus, in another part of the same province the father-in-law of one of this paper's authors seems to spend an inordinate amount of time asserting and defending his individual title to land in and around Kupiano station (Marshall Lagoon). He hoards documents both formal and informal to prove his entitlement and the local villagers recognise him as the personal owner of many of these plots, but reserve judgment on other areas that are under dispute. R.G. Ward (1995) wrote that there is dissonance between custom, existing law, and practice in many areas of the South Pacific. He demonstrated this view with reference to parts of Fiji in which so-called traditional land had been relatively recently sold to non-indigenous Fijian Indians despite the supposed prohibitions of both law and custom. Certainly from the perspective of 'practice' it appears that one may have individual title to a number of areas of land in Marshal Lagoon and still be able to transfer and sell this land to other clansmen without consultation, if so desired, including willing certain discrete areas to each of one's children contrary to *kustom*. It may well be that, as Ward intimates, practice is overtaking both custom and the law in the South Pacific to adapt to new exigencies and the cash economy. In other words, relying on what the elders say about the customary tradition or the state of law may not serve as a reliable guide as to how people perceive entitlements in practice, and the capacity to enter into land transactions. Practice may well be already countenancing a form of individual property rights in many parts of Papua New Guinea regardless of existing legislation and former *kustom*.

But be this as it may, all this complexity and the claimed 'flexibility' that Mosko attributes to Mekeo land tenure does not really enlighten us as to how customary arrangements have facilitated agricultural success over what would have happened had the Mekeo developed more clearly defined individual titles to their lands, since much of their success is due to the

exceptionally fertile alluvial soils they enjoy. However, Mosko does emphasise the flexibility of customary Mekeo land tenure as critical to the economic and social success of the people of the Maipa village and the other villages. All this supports Tully's (1996) argument that the diversity and flexibility of ancient constitutions are the key to local empowerment. Mosko (2005:21) explains that since the boundaries between lands owned and used by different people 'are never permanently fixed and claims to ownership and use are never completely exclusive, villagers have the capacity to allocate their land in accordance with prevailing social values of kinship and morality'. Each villager has guaranteed access to sufficient land for bush resources, houses, subsistence and cash cropping. Any villager, he claims, who needs more land for growing betel nut and pepperfruit will not be denied access, but Mosko fails to provide data showing trends in the total areas cultivated by the Mekeo. In reality, their productive domain is limited by the extent of arable land in the two flood plains they have occupied since time immemorial, about 400 square kilometres.

The evident success of the Mekeo in achieving real incomes well above the PNG norm seemingly counters our assertion that the high transaction costs associated with customary land make it extremely difficult to obtain sufficient land to realise the economies of scale necessary for significant trade and commerce. But Mosko does not consider the counter-factual of how much better even the Mekeo would have done had they had access to bank financing for further development of their homes and gardens. Moreover Mosko's account indicates the difficulties one would face if one wished to lease land from the Maipa village clansmen. Negotiations would have to begin with the head chief, who would then consult with the chiefs and leaders of the other resident owning clans. The advantage of Western forms of ownership lies in the fact that these sorts of transactions can proceed on a one-to-one basis without excessive consultation and political negotiation. One might argue that individual Mekeo clansmen would have no need to negotiate a lease if, as Mosko says, no impediments exist to deny them what they need for successful entrepreneurial activities.

However, such a fluid situation would only persist so long as one did not contemplate a large-scale development. Although, as we argued earlier, there would probably still be land that is 'enough and as good' for others due to the relatively sparse PNG population, there may well exist a level of inconvenience that will demand some form of compensation. For example, villagers may have to forgo certain garden sites required by the development and construct new gardens in another location. Even in a relatively sparsely populated country such as Papua New Guinea, there are still some areas in which an ambitious project would inconvenience some individuals or groups. In these circumstances, in order for the project to proceed some form of compensation arrangement would have to be worked out. But again the transaction procedures and lack of pricing under customary land tenure make this difficult. The advantage of non-customary Western tenure is that it clearly defines individual property interests, which can then be assigned a monetary value to be transacted, sold or transferred on an individual basis rather than worked out through some negotiated political compact which must receive consensus at the group level.

In the final analysis, however, both Hughes (2004a) and Fingleton (2005) agree that the issue is whether customary land tenure is compatible with rapid economic growth. On the one hand, Mosko's account of the Mekeo's success despite their customary title system does not explain the overall stagnation of agricultural production

across most of Papua New Guinea. On the other, equally questionable is Hughes' extraordinary claim that the country's oil palm industry has not grown as fast as it should and would have had there been sufficient increases in alienated land, given that the most suitable areas for oil palm had already been alienated for copra and cocoa plantations during the German colonial period. Oil palm is the only rural primary industrial production that has grown more rapidly than the population since 1966, leading Papua New Guinea to become one of the four largest producers in the world. The most successful estates, including those at Kimbe and Poliamba, are all based on alienated colonial-era plantations, but each has also fostered production by outgrowers, and at Kimbe there is a growing contribution from New Britain Palm Oil Ltd's 'lease–lease-back arrangements with customary groups.

Hughes is on much stronger ground when she joins Duncan (2002) in asserting that in general no country has achieved high economic growth rates without a substantial degree of alienable individual property rights. Certainly in the Southeast Asian tiger economies, all of which continue to outperform the rest of the Third World, secure property rights are clearly the *sine qua non*, while sub-Saharan Africa stands out for combining stubborn attachment to customary tenure with dismal economic performance. Lack of secure property rights seems to go hand in hand with generally deficient governance, high corruption, low education levels, and an appalling refusal to tackle the endemic diseases that have been eliminated only in the countries that have such rights (South Africa and Kenya; Zimbabwe was once in that group, but its health services have collapsed contemporaneously with its abolition of land titling). Mosko (2005) emphasises the need to eliminate corruption in Papua New Guinea without recognising that a root cause of the rent-seeking that is

Table 2 **Rural land apportionment in South Rhodesia, 1961**

Land types	Acres	European	African of total area	European per cent	European by type as per cent of total European	African by type as per cent of total African
I	1,515,000	1,235,000	280,300	81.52	2.27	0.70
II	18,144,700	13,987,000	4,157,700	77.09	25.72	10.40
III	16,638,600	10,970,000	5,893,600	65.93	20.17	14.75
IV	32,020,200	16,775,000	15,245,200	52.39	30.85	38.15
V	25,895,000	11,417,000	14,388,000	44.09	20.99	36.00
Total	94,213,500	54,384,000	39,964,800	57.72	100.00	100.00

Note: The areas indicated above include urban areas as 'white', although Africans could purchase houses in designated suburbs, and exclude the so-called Native Purchase Areas (3.7 million acres) where they could also buy farmland. The authors of this table have misleadingly included national parks in the European areas although these were open to all. Other sources indicate that, in total, exclusively African land areas were about the same as those areas reserved for whites, with the latter including as yet unalienated Crown land (Palmer 1977).
Source: Vicars, J.F.V., Hammond, J. and Swynnerton, R., 1962. Report of the Advisory Committee on the Development of the Economic Resources of Southern Rhodesia with Special Reference to the Role of African Agriculture, Advisory Committee on the Development of the Economic Resources of Southern Rhodesia, Harare (Salisbury):Table 36.

part and parcel of corruption is the lack of legitimate opportunities for amassing wealth when absent individual land titling prevents access to the leverage afforded by bank credit.

Yet Jim Fingleton (2004:111) has also described at length how land tenure and land use in Melanesia may be seen as striking a balance between group and individual rights and obligations. He is particularly critical of Hughes' uncompromising position that, because in their view 'communal land ownership means low productivity and small incomes…and underlies the struggles over benefits from mineral rights and the depredations of timber exporters' (2004b:137), countries like Papua New Guinea must establish individual property rights if they are to develop. Fingleton (2004) cites arguments supporting retention of customary tenure—it often provides a high sense of security to individual cultivators, and that it is compatible with gradual emergence of markets for land rights—but, while he cites De Soto (2000), Fingleton appears to have overlooked that author's stress on the importance of contestability: the high security enjoyed by individual landholders in Papua New Guinea also explains why so many do so little with their land, because there are in effect no penalties for failing to make full use of it.

Fingleton and his team fail to name any country that manages rapid growth without a broad measure of private land titling. They naturally refrain from mentioning Zimbabwe, even though that ought to be their star performer, having abrogated all individual farm land titles since 2000, first by force, and in 2005 by constitutional amendments. This has been widely supported (for example, Chaumba et al. 2003) because of the perception that expropriating white-owned commercial farms righted the colonial injustice whereby some 6,000 white farmers owned about half of the country's land area, allegedly comprising 100 per cent of the best agricultural land (see Table 2) .[8]

Such commentators ignore both the contribution of those few farmers in producing substantial food surpluses consumed by the cities as well as for export and almost all of the country's main export commodity, tobacco, and the failure of the black subsistence farmers in their now nearly 100 per cent of the country to produce any food surplus or crop exports. This lack of performance is not attributable *pace* Fingleton to anything more than the primitive customary land tenure prevailing in what used to be the 'tribal trust lands' and now in practice applicable to 100 per cent of the country's non-urban area.

Perhaps it is too soon to claim Zimbabwe fairly as a showcase for the benefits of extending customary undocumented titling, but the portents are not encouraging. Agricultural exports plunged from US$850 million in 2000 to around US$350 million in 2005 (according to International Monetary Fund 2005) and manufactured exports (mostly based on agriculture) also fell from US$850 million in 2001 to less than US$400 million in 2005. Annual inflation was nearly 600 per cent a year by December 2005; the exchange rate of the Zimbabwe dollar has fallen from Z$8=US$1 in 1999 to Z$150,000 and still falling at February 2006. Up to half of the population is stated by international aid agencies to be in urgent need of food aid. All this is in a country that until the invasions of commercial farms from 2000 was a net food exporter.

Zimbabwe is not the only African country where customary land tenure is manifestly unproductive. The brother of the President of South Africa, Moeletsi Mbeki, asks 'why are most Africans in Sub-Saharan Africa poor, and why are they getting poorer while most people in the rest of the world are becoming better off?' (2004:n.p.). He notes that in *Can African Claim the 21st Century?*,

the World Bank made the following observations about Sub-Saharan Africa

> despite gains in the second half of the 1990s, Sub-Saharan Africa enters the 21st century with many of the world's poorest countries. Average per capita income is lower than at the end of the 1960s. Incomes, assets, and access to essential services are unequally distributed. And the region contains a growing share of the world's absolute poor, who have little power to influence the allocation of resources (2000:1).

Only Kenya and South Africa now have any degree of individual land titling and they are amongst the very few exceptions to the World Bank's generalisation.[9] Mbeki adds

> …Marx had this to say about the powerlessness, and therefore vulnerability, of peasants: 'The smallholding peasants form a vast mass, the members of which live in similar conditions but without entering into manifold relations with one another. Their mode of production isolates them from one another instead of bringing them into a mutual intercourse…Each family is almost self-sufficient; it itself directly produces the major part of its consumption and thus acquires its means of life more through exchange with nature than in intercourse with society. A smallholding, a peasant and his family; alongside them another peasant and another family. A few score of these make up a village, and a few score of villages make up a department…In so far as millions of families live under economic conditions of existence that separate their mode of life, their interests and their culture from those of the other classes, and put them in a hostile position to the latter, they form a class. In so far as there is merely a local interconnection among these smallholding peasants, and the identity of their interests begets no community, no national bond and no political organisation among them, they do not form a class. They are consequently incapable of enforcing their class interests in their own name, whether through a parliament or through a convention. They cannot represent themselves, they must be represented.

But who represents the interests of the peasants in Africa today? The answer is nobody. The one African politician who claims to act in the interests of peasants, Zimbabwe's Robert Mugabe, has reduced the once-proud and almost self-sufficient Zimbabwean peasants to paupers who now have to be fed by the United Nations' World Food Programme.

Mbeki goes on to quote *The Economist* (17 July 2004), '[b]y law, all Ethiopian land is owned by the state. Farmers are loath to invest in improving productivity when they have no title to the land they till. Nor can they use land as collateral to raise credit' (Mbeki 2004:n.p.). Unlike Zimbabwe and Ethiopia, Zambia has recently been following a more pragmatic course, including welcoming some hundreds of the dispossessed white Zimbabwean farmers. A comparative study of alternative titling models amongst black smallholders in southern Zambia documents greater use of capital for farm development by those with secure titling, contradicting Fingleton's assertion (2004:113) that there is 'little empirical evidence that individual titling results in better access to credit'. For those Zambians aspiring to become modern farmers deploying labour-saving machinery and irrigation, loans appear to have been useful, and those making more use of credit enjoyed incomes twice as high as those on undocumented state and customary land. Such is also the belief of Papua New Guinea's

Sustainable Development Corporation with its promotion of micro-credit systems that do not require collateral in the form of negotiable land title, although there is as yet little evidence to show whether the lack of penalties for default has led to acceptable levels of repayment—the record of the government's own Rural Development Bank, which with its reluctance to enforce mortgage sales has an almost wholly non-performing loan portfolio, is not encouraging.

Summary and conclusions

This paper has shown that Helen Hughes' use of the term 'communal' to describe land tenure in Papua New Guinea strictly applies only to the natural forests that cover 77 per cent of the country's land area, and that Fingleton's use of the rival term 'customary tenure' strictly applies only to the 20 per cent taken up by rural homes and gardens where individual usufruct rights apply, and not at all to the natural forest, which is a commons open to undifferentiated access by all. Both communal and customary title have the inalienability that may well afford more social security and cohesion than fully alienable leases or freehold but at considerable opportunity cost in terms of lower incomes than could emerge from more efficient land use. The paper also exposes as a furphy Bourke's claim that the more rapid growth of export crop production on customary-held land than on alienated land in Papua New Guinea between 1980–2000 is evidence of the greater productivity of customary-held land. The buybacks and expropriations of most estates in the 1980s preclude any such conclusion. Moreover Bourke's data show clearly that smallholder production for export has not kept pace with population growth.

Nevertheless, once we institute well-defined individual property rights that allow for the transfer of interests without group supervision, the argument subsequently has to take on More's admonition against private ownership because that may lead to haves and have-nots. On the other hand, Locke made the point that, once there is no longer as good and enough for others, one must rely on trade and commerce, which becomes possible with the invention of money. The resulting cash economy allows for a level of trade and development that was not possible in traditional customary society. Realistically, in a more developed society one no longer relies on personally grown agricultural produce for basic survival. Indeed, in property-based economies a very significant number of individuals can survive comfortably with no access to land or access to land that is agriculturally insufficient for subsistence survival. This is because in a nation with a sufficiently large market with appropriate transportation and communication systems, individuals can specialise in varied non-agricultural ways, which allows for a diversity of products and services. These wealth-creating activities enrich society and move it to a level of development beyond that of a purely agriculturally based economy. Non-customary systems facilitate this process because they assign a monetary value to individual interests in land that can then be sold or exchanged to allow for the free movement of capital. In effect, individuals can decide to forgo their interest in land by selling that interest and using the proceeds to fund other entrepreneurial endeavours. Without this mechanism, land remains in a near feudal state in which individuals remain tied to the land without opportunity to utilise their interests to enable them to participate in other non-agrarian economic activities.

This level of development is only possible if we possess interests, including land interests, which can be assigned an economic value that allows for transactions and exchange. Naturally, transportation and

communications systems that can sustain and support high levels of trade and commerce are essential, as Mosko (2005) points out—it is pointless pursuing specialisation that generates a surplus of goods greater than necessary for personal use if that surplus cannot be transported to the areas of demand. That means land tenure reform is not the entire answer to insufficient economic development. The whole package must be there, including the roads and other forms of transportation that allow goods to reach their markets.

Finally, one needs to address the claim that deprivation and dispossession will occur if individually registered freehold is introduced. There is really no necessary connection between the two if all that is contemplated is the registration and alienability of existing customary titles. Anderson (2005) is amongst those who see registration as leading to instant dispossession, arguing that titleholders who choose to lease their land will be worse off than if they continued to farm on their own account, because typical rental values for rural land in Papua New Guinea are allegedly only K50 per hectare a year as compared with 'average' household subsistence income worth K17,600 per annum (Anderson 2005:Table 1). If those figures are correct it seems unlikely any householder would rush to lease his or her land unless some portion of their holding was surplus to their requirements and/or ability to work it. More than that, Anderson's data indicates that in reality the minimum rental payable to the titled householder currently earning an imputed income of K17,600 per annum from just one hectare would be at least that amount in cash plus a premium for both higher market prices of food previously self-produced and future potential output increases. Even more telling is Anderson's unawareness that his data indicates the minimum purchase price of the hectare of land in question would be K116,000 (that is, the net present value of an income of K17,600 per annum for 30 years at the standard company discount rate of 15 per cent). If it is believed that Papua New Guinean landowners would sell themselves short, which has not been the experience of the mining companies since 1989, then it would be possible to establish a Land Regulator to adjudicate on prices.

Registering existing rights does not force newly titled owners to sell or lease, but Anderson, like the Fingleton authors, downplays the value of security afforded by registered titling, and makes no mention of the endemic tribal wars in the country's highlands and elsewhere based on land disputes. The truth is that both in Papua New Guinea and worldwide there has been far more dispossession from lack of legally enforceable title than from its presence.

Such considerations explain why a country like Sweden, for example has individual freehold yet is on top of the human development index with a high degree of after-tax income equality. Although there are other countries, as in South America, that have had individual freehold and exhibit high levels of poverty and inequality, many of these also have large areas under customary tenure. In Brazil, customary owners' lack of empowerment through access to negotiable title has greatly facilitated seizure of much of the rainforest by cattle ranchers, for whom the forest was merely a commons, and thus up for grabs.

Instead of engaging in linguistic disputes with Helen Hughes, Jim Fingleton and his authors (Bourke, Mosko, Lightfoot, and Fisher) could make a more worthwhile contribution if they united to press the Australian government to provide the necessary funding to Papua New Guinea and Solomon Islands to enable their governments to undertake a comprehensive land survey and registration of all titles. Use of the Global Positioning System (GPS) would

speed up the surveying exercise, and consideration should be given to establishing a commercial Land Registrar self-funded by levying charges for registration and access to the register. The British and Kenyan governments undertook a similar exercise in Kenya so that by 1977 an area equivalent to 66 per cent of Papua New Guinea's total land area (of which, as noted above, at most half is occupied) had been surveyed and registered with title granted (Sorrenson 1967; Hazlewood 1979). Previously, the British colonial administration had surveyed and registered clan land holdings in Fiji that then became available for leasing to sugar farmers. The comments by Papua New Guinea's then Minister of lands in 2003 (see Appendix 3) are consistent with this approach.

Unfortunately the reluctance of advisers like Hughes and Fingleton and aid agencies like the World Bank and AusAID to engage in more detailed analysis of the true problem areas in Papua New Guinea, namely the largely unoccupied natural forests that comprise 77 per cent of the country and are a commons exactly in the sense defined by Fingleton, has resulted in the PNG government choosing to nationalise that area (see Appendix 1).[10]

A better option would have been for the government to allocate freehold title either to neighbouring villagers *pro rata* with their existing plots of cultivated land, which was the model used in the English Enclosure Acts of the 1770s, or after a tendering process by sale to corporate entities. Such sales would enable the country as a whole to share in the sale value.

In the last analysis much depends on the type of nation state that develops and the quality of government. Governments that exhibit little regard for the common good and which conspire with the wealthy to secure an oppressive domination of their own population will no doubt produce societies marked by an impoverished landless peasantry. Equity will be greater when those who progress do so by their own productive efforts rather than by the parasitism of politicians and other rent seekers, for in all too many third-world countries most individuals see the high road to wealth and fortune is in governments' malfeasance. So long as the economy fails to offer opportunities for successful entrepreneurial activities based on secure property rights, this will continue to be the case. The situation can only be rectified through implementation of the proper infrastructure and a more economically viable land tenure system than those still prevalent in the South Pacific.

Notes

1 It also explains that whilst tribal groups in some parts of Papua New Guinea, such as the Southern Highlands province, do lay claim to even 'rubbish land' as they term the deep forest, so that there is strictly no free-for-all common land, equally such claims were subject to contest by all and sundry as soon as the Kutubu oilfield was developed in that province (Koyama 2005).

2 The Hammonds (1911) adopted Marx's enduring mythology when they claimed that the enclosures of common land in England between 1500 and 1800 created a landless peasantry that could survive only by migrating to the towns and cities where they became an equally asset-poor industrial proletariat. This caricature has been shown to be almost wholly without foundation by modern scholars (for example, Mingay 1968), for it was by no means the case that the whole rural population had equal unrestricted access to the commons before the enclosures began, whilst those who did have customary grazing rights were not dispossessed but themselves gained shares of the enclosed commons (Curtin 2004). Whilst in parts of England the earlier medieval enclosures did result in dispossession of some former common access users, leading to Henry George's argument that the enclosing

landowners should have been required to pay rent to the former, our proposal below is for titling of all existing common access users as was the practice in southwestern England in the later eighteenth century.

[3] Norberg (2005) cites data showing that 85 per cent of the world's population had income per head of less than the equivalent in purchasing power of US$1 in 1820; by 1950 that figure had fallen to 50 per cent, by 1980 to 31 per cent, and to 13 per cent by 2002.

[4] The term of the lease is typically 20 years in the case of oil palm plantations or one cropping cycle, after which the landowners can choose to renew or not.

[5] In reality, Papua New Guinea does not lack examples of successful litigation in which customary landowning groups have taken their commercial clients to court for breach of contract and the like (see Curtin and Lea, forthcoming).

[6] There are parts of forested areas in Papua New Guinea (such as the Ramu Valley) where small groups live and cultivate sago with full usufruct rights over the output of these stands, but they have no exclusive individual rights over the 'indigenous' (that is, unplanted) timber surrounding these stands (pers. comm., P. Swadling, 2005).

[7] Fingleton (2005:vi) acknowledges Curtin's demonstration that Hughes' claim that Papua New Guinea should have been able to increase its oil palm production by 30 per cent a year indefinitely was improbable. Curtin (2004) also challenged Gibson's claim that as many as 40 per cent of Papua New Guineans live in poverty and suggested that land reform would put them on the road to becoming as rich as New Zealanders, Swedes, and Malaysians with their successful exploitation of their renewable timber resources. While Papua New Guineans enjoy a reasonably satisfactory (to them) subsistence standard of living, it is one that falls far short of what they could achieve if they had an intelligent land titling system, given their quite exceptional natural resource endowment.

[8] In reality individual white farmers owned much less than half of the total land area in 2000. First, after 1980 there were no restrictions on blacks acquiring any of the 6,000 white-owned farms, and about 2,000 did pass into black ownership, if not all on a completely willing-buyer willing-seller basis. Second, even before 1980 around half of all land available under freehold title had been acquired by companies both large and small, such that all timber, much of the beef cattle, and most sugar and horticulture were produced or undertaken by predominantly foreign corporate entities. Third, as shown in Table 2, it is not true that the 6,000 white farmers as of 1980 only farmed the best land; in reality 70 per cent of their holdings were in the relatively inferior zones III–V (poorer soils and lower rainfall). Yet, despite having most of their land in the same zones as the African customary holders, the white farmers accounted for virtually 100 per cent of agricultural exports and marketed food crops. The sad truth is that, as Mbeki notes, subsistence farmers rarely progress to production of surpluses however much land they own.

[9] Unfortunately the authors of this volume could not bring themselves to include land reform either as a necessary component of their 'business plan' for African agriculture in this century or to consider lack of titling as a major explanation for the failure of food production to keep pace with population growth, even though their data show that Africa's food production per capita was 13 per cent less in 1995 than it had been in 1961–64 (World Bank 2000:172).

[10] Papua New Guinea's Ombudsman in November 2005 filed in a submission to the Supreme Court that 'the Forestry (Amendment) Act 2005 contains provisions that are unconstitutional in that they operate in effect to deprive the landowners their constitutional right to have a say and participate in the development and management of their resources' (*The National*, 8 November 2005).

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Appendix 1

Comments on Amendments to the Forestry Act 1991
Sir Arnold Amet, Former Chief Justice of Papua New Guinea

The 'rights of the customary owners of a forest resource [are] not going to be fully recognised and respected in all transactions affecting the resource' as Section 46 [of the Forestry Act 1991] requires. Section 46 is the first section under Part III. It makes a very important underlying statement that 'the rights of the customary owners of a forest resource shall be fully recognised and respected in all transactions affecting the resource'.

The following provisions under Part III indicate the importance of the Forest Management Agreement. For instance, Section 55 states that only a forest industry participant may exercise timber rights on customary land where a Forest Management Agreement has been entered into between the customary owners and the Authority.

Section 56 states that the Authority may acquire timber rights from customary owners pursuant to a Forest Management Agreement between the customary owners and the Authority.

The heading of Section 57 provides for 'Obtaining consent of customary owners to Forest Management Agreement'. The existing provisions in Section 57 in the Principal Act make no provision for obtaining consent of customary owners to enter into a Forest Management Agreement. The proposed new Sub-section 57(3) partially makes provision

for 'consultation' with provincial governments and members of parliament only. It makes no provision for 'consultation' or the 'obtaining of consent' of customary owners as was the intention of Section 57 indicated by the heading.

It is so very important for all stake-holders to realise the omission, because you are being informed that the interests of 'customary owners', protected under Section 59, now proposed to be repealed, is being incorporated into this proposed new Sub-section 57(3).

These are the terms of the new proposed Sub-section 57(3): 'where the Authority intends to enter into a Forestry Management Agreement, the Board shall consult with

(a) the Provincial Government for the province and the Local-level Government in which the area covered by the Agreement is situated, and

(b) the member or members of Parliament for the Province and the electorate or electorates in which the area covered by the Agreement is situated, in relation to the intentions of the Board to enter into the proposed Forest Management Agreement'.

There is no provision for 'consultation with' or 'obtaining of consent of customary owners' in relation to the intentions of the Board to enter into a Forestry Management Agreement.

Arnold Amet, *The National*, 5 June 2005

Extracts from the Forestry Act 1991

57. Obtaining consent of customary owners to Forest Management Agreement

(1) Where it is proposed to enter into a Forest Management Agreement over customary land, the title of the customary owners to that land shall be—

(a) vested in a land group or land groups incorporated under the Land Groups Incorporation Act 1974; or

(b) registered under a law providing for the registration of title to customary land.

(2) Where it is impractical to give effect to the requirements of Subsection (1)(a) or (b), a Forest Management Agreement may be executed on behalf of customary groups who are customary owners in respect of the land covered by the Agreement, by agents of such groups, provided that—

a) such agents are authorized to so act in a manner which is consistent with the custom of the group they represent; and
b) 75 per cent of the adult members resident on the land of each such group give written consent to their group entering into the Agreement.

58. Forest Management Agreement

A Forest Management Agreement shall—

(a) be in writing; and

(b) specify the monetary and other benefits, if any, to be received by the customary owners in consideration for the rights granted; and

(c) specify the estimated volume or other measure of quantity of merchantable timber in the area covered by the Agreement; and

(d) specify a term of sufficient duration in order to allow for proper forest management measures to be carried out to completion; and

(e) be accompanied by a map showing clearly the boundaries of the area covered by the Agreement; and

(f) contain a certificate from the Provincial Forest Management Committee to the effect that it is satisfied as to—

i. the authenticity of the tenure of the customary land alleged by the persons or land group or groups claiming to be the customary owners; and

ii. the willingness of those customary owners to enter into the agreement.

Appendix 2

Ramu Sugar in shock land ruling

Ramu Sugar Limited has been paying land lease, cane, tonnage and quality bonuses and other payments due to customary landowners to the wrong people since the project started in the late 1970s. This is the effect of a local land court decision handed down in Madang two weeks ago. The local land court awarded the ownership of the customary land to the Dumuna Akiki clan of Naho Rawa, Raicoast in Madang. A large portion of the land is crown land, purchased from a company called NGI, which had earlier purchased it from the Mari clan of Usino Bundi.

The Mari people, the land court heard, were originally from the Leron area of Kaiapit, Morobe Province, who had settled in Ramu. From the start of the project, landowner benefits have been paid to the Mari clan. The court ruled that the Dumuna Akik clan is the 'true and rightful original customary owners of all the customary lands of Ramu Sugar estate'. 'The Dumuna Akiki clan, therefore, has exclusive rights of all interests of occupation, possession, usage and control over these lands', the court ruling said. It stated that the people of Mari did not have control over the land, but had rights to usage, occupation and possession.

The court ordered Ramu Sugar to terminate agreements it had entered with the Mari people and sign a new agreement with the Dumuna Akiki people. The two disputing parties have been ordered not to cause damage or any disturbance to the normal operation of Ramu Sugar.

Post-Courier, 2 January 2003.

Appendix 3

Bring back the plantations
Robert Kopaol, Minister for Lands and Physical Planning, 2003

Because of our relationship with land we, the landowners, must take the first step to find ways to address the problems associated with land. Our land cannot be left idle, but [should be] put to use for the benefit of our communities without disputes over ownership rights, user rights, occupational and other rights. With 97 per cent of our land still in customary hands there is a greater need for security of this tenure. This security can only come about by way of registration, thereby recording ownership, usage, occupation, and access, succession and other rights. There is also a need for us, the landowners, to understand the use of titles as collateral for loans from financial institutions. In Papua New Guinea there is existing legislation that assists landowners to secure their customary tenure and lease it to the State or developers for a specific period of time for whatever development they would want to have.

The legislation is the Land Groups Incorporation Act 1974 and the lease–lease-back system provided under section 60 of the Land Act 1996. The process encourages landowners to register their land as clan or lineage groups so that the title stays with the group. Registration records the ownership and other rights but does not change the

base tenure, which is customary tenure. The use of custom is suspended only for the duration of the lease. Once the lease expires, the land reverts to customary land.

Customary landowners, especially in the oil palm project areas in West New Britain, Milne Bay and Northern provinces, are into it. They now understand that registration of customary land under this process is not alienation of customary land by the State or developers like what many people perceive.

The squatter issue in Madang town has also resulted in customary owners asking for the registration of their customary land so that they can identify themselves with the land they own and subsequently enable them to negotiate directly with the State, the developers and genuine settlers for sub-lease arrangements. My department is fully supportive of this process. However, I would like to see that customary land is registered under customary tenure in the name of land groups. The titles must be in perpetuity and the land groups can lease it to whomever they may wish to for a specific period and for a specific purpose. The lease will contain the terms and conditions of the lease. In this manner, the land can never be taken away from the customary landowners.

