

**FIRST ISSUES PAPER FOR MEMBERS OF THE  
LEGAL WORKING GROUP (LWG)**

**THE CONSTITUTIONAL ISSUES –  
CUSTOMARY LAND IS INALIENABLE**

*Issues Paper No. 1 – August 2014*

*Background*

1. Since 2005 the Asian Development Bank (ADB) has provided technical assistance (TA) to the government to consider issues and options in the context of making economic use of customary land. The Phase I Report (March 2006) endorsed the option of permitting leases of customary land to be mortgaged and made various recommendations to implement such arrangements. Phase II of the ADB support resulted in the establishment of the Customary Land Advisory Commission (CLAC) to oversee future reforms in this context. And now Phase III focuses on the legal issues and necessary legal reforms to finally bring the years of deliberation and consultation to fruition.

2. The ADB TA in Phase III is tasked with the following core objectives:
- (a) To establish a functional Legal Working Group (LWG) which will liaise with the Bankers' Association and other key stakeholders; and
  - (b) To establish a leasing framework (including registration processes for security interests over customary land leases; protection of security interests; publicising security interests affecting leases of the customary land; and processes for repossessing or reselling leases in the event of a default under the mortgage).

*Core objectives*

3. The involvement of the LWG in the TA is aimed at ensuring that all of the following are achieved:
- (a) that all issues relevant to the leasing of customary land are considered, and that any problems are identified and addressed;
  - (b) that a reformed leasing framework will be devised which will enhance the processes for leasing customary lands, and facilitate the securing of such leases by way of mortgage;
  - (c) that the fundamental rights of customary landowners are respected and protected whenever their lands are leased, and/or secured by way of mortgage over the lease-hold interest. These rights should be no less than those ordinarily enjoyed by any commercial lessor;
  - (d) that the interests of developers and lenders are protected whenever leasehold interests over customary lands are secured by way of mortgage. A full range of enforcement options should be considered and developed so that a mortgagee can take appropriate and clearly defined action in the event of a default under the mortgage;
  - (e) that lenders who choose to utilise the option of securing loans by way of mortgages over customary land are encouraged to assign a "real" value to such securities.

## The application of Article 102 of the Constitution

4. The Terms of Reference for the project alert us to a fundamental constitutional issue, and to differing opinions concerning the affect of this issue on the project objectives and outputs. The following is stated in the Terms of Reference:

“Section 15 of the CLAC Act allows the mortgage of customary land leases. However, despite their willingness to move into this area, commercial banks are yet to take advantage of this because of different legal interpretations of Section 102 of the Constitution of Samoa; Section 4 of the Alienation of Customary Land Act, 1965; and Section 15 of the CLAC Act, 2013. This is despite an independent legal opinion (sought by the Office of the Attorney General) that the mortgage of customary land leases is now possible. To discuss and resolve these differences, the TA is expected to provide the following outputs.

1. Output 1: A functional legal working group established...
2. Output 2: Leasing framework established.”

5. It is fundamentally important that the constitutional issue be understood, and that the differing opinions about its effect are fully considered. The TA has been given access to the independent legal opinion obtained by the Attorney General, and endorses its finding that the constitutional issue does not prevent the granting, registration and enforcement of mortgage securities over leasehold interests in customary land. The following briefly explains the nature of the issue, and the reasons why the TA endorses the findings of the independent legal opinion.

6. The relevant provision of the Constitution of the Independent State of Samoa is Article 102 which reads as follows:

**“102. No alienation of customary land** - It shall not be lawful or competent for any person to make any alienation or disposition of customary land or of any interest in customary land, whether by way of sale, mortgage or otherwise howsoever, nor shall customary land or any interest therein be capable of being taken in execution or be assets for the payment of the debts of any person on his decease or insolvency:

**PROVIDED THAT** an Act of Parliament may authorise: (a) The granting of a lease or licence of any customary land or of any interest therein; (b) The taking of any customary land or any interest therein for public purposes.”

7. A superficial consideration of Article 102 might suggest that the prohibition on the alienation or disposition of customary land or interests in customary land prevents the granting, registration and enforcement of mortgages over leasehold interests in such lands. Such leasehold interests are clearly permissible under the first exception stated in Article 102. However it is necessary to consider the entire provision in a balanced and reasoned manner, and to assess its effect in the light of basic principles of property law, and laws relating to securities over land and interests in land. This was done in the independent legal opinion obtained by the Attorney General, which made the following observations and conclusions:

- “6. In our view, the proper construction of proviso (a) to Article 102 of the Constitution **does** permit an Act of Parliament to authorise both:
- 6.1 the granting of leases and licences of customary land in Samoa; and
  - 6.2 the granting of mortgages over (or other interests in) leasehold interests in customary land.

7. The ACL Act (Alienation of Customary Land Act) empowers the Minister responsible for lands (Minister) to grant leases and licences of customary land. The ACL Act also sets out a reasonably detailed process for dealing with applications for leases and licences.
8. The ACL Act also empowers the Minister to grant an interest in a lease or licence of customary land, such as a mortgage of the lease or licence. However the ACL Act is largely silent on the process to be followed when considering an application for mortgage of a lease or licence.”

8. The independent opinion makes the following useful observations about the consideration of the issue of mortgaging customary land leases at the time that the Constitution of the Independent State of Samoa was developed and drafted:

- “24. There is also extrinsic evidence from the time when the Constitution was drafted to suggest that, from a policy perspective, Article 102 is not intended to prohibit the mortgaging of a lease of customary land, albeit that an Act of Parliament would be required to authorise the granting of mortgages. For example:
- 24.1 The Constitutional Advisor Professor J.W Davidson, during the proceedings of the Working Committee for Self-Government in 1959, explained that the mortgaging of leases of customary land is an option to secure loans; and
  - 24.2 Parliamentary debates regarding the Alienation of Customary Land Bill 1965...considered that leasehold interests of customary land could be used to secure loans.”

9. The TA endorses the reasoning applied in the independent opinion when reaching the conclusions noted above, and also supports the following recommendations made in the independent advice:

- “40. ...In the longer term, we can see value in an amendment to the ACL Act that clarifies the process to be followed when considering applications for mortgages of leases or licences. The opportunity could also be used to improve the process for lease and licence applications also.
41. In the interests of removing doubt and providing the sort of certainty much preferred by commercial organisations such as trading banks, we believe there would be a great deal of merit in Parliament amending the Act (or passing a new and separate piece of legislation) to expressly provide for an application process for mortgages of leases, and to update the process for granting leases.”

10. In this context, it is important to understand the historical and technical concepts of mortgage interests over land, and interests in land. Prior to the creation of land registers in English common law countries, and the enactment of laws to permit the registration of legal mortgages over land and interests in land, mortgages were created by the vesting of ownership of the secured land in the lender (mortgagee). The borrower (mortgagor) retained a legal right to require the re-conveyance of his or her interest in the land upon payment of the sum borrowed in accordance with the terms of the mortgage. Such “general law” mortgages constituted an alienation or disposition of the land to the mortgagee for the term of

the mortgage. This was fundamentally changed when mortgages were created by registration against the title to the land. Laws which establish such processes contain a provision which clarifies that the registration of the mortgage has effect only as a security and does not operate as a transfer of the mortgaged land<sup>1</sup>. The mortgage creates an interest in the land, but does not amount to an alienation or disposition of the land, as was the case with “general law” mortgages. A provision of this type appears in section 44 of the *Land Titles Registration Act 2008* of Samoa which reads as follows:

**“44. Lands under this Act: how mortgaged or encumbered-**(1) Whenever any land or estate or interest in land under the provisions of this Act is intended to be charged with, or made security for, the payment of a debt, the proprietor shall execute and cause to be registered a mortgage in the approved form.

(2) A mortgage under this Act has effect as a security but does not operate as a transfer of the land mortgaged.”

11. Section 44 of the *Land Titles Registration Act 2008* is in conflict with many provisions of the *Property Law Act 1952* of Samoa. Section 76 in particular reads as follows:

**“76. Form of mortgage -** (1) Mortgages of land may be made in the form in the Third Schedule, or by an ordinary conveyance by way of mortgage.

(2) Every mortgage in the said form shall be deemed to be a conveyance of land by way of mortgage, and may be registered accordingly.”

12. The registration of a mortgage under section 76 of the *Property Law Act 1952* is in fact a registration of a conveyance and clearly amounts to an alienation and disposition of the secured land, albeit only until the re-conveyance upon repayment of the secured debt, and therefore temporary in nature.

13. The above matters have important implications in the context of the constitutional issue. Article 102 specifically prohibits an alienation or disposition of customary land or any interest over customary land by way of mortgage. This prohibition would apply to a general law mortgage, and to a mortgage created under the *Property Law Act 1952*. It does not however affect the validity of a mortgage registered under the *Land Titles Registration Act 2008* as the registration does not alienate or dispose of any interest in the customary land. The act of registration only creates a security over the leasehold interest in the land.

### **Countering the misconceptions**

14. For some time prior to the commencement of this TA, public comments were being aired in opposition to the concept of mortgaging leasehold interests of customary land. To some degree this was inevitable. Predictably the criticism has raised the issue of constitutionality, and has suggested that ownership of customary land will be affected or even lost when action is taken to “re-possess” leased and mortgaged customary lands.

15. In an attempt to counter the public criticisms and to give a clear account of the way in which the CLAC intends to address these fundamental issues and concerns, the CLAC has endorsed the following fundamental precepts to underlie all of its work in this context:

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<sup>1</sup> See section 57 of the Real Property Act of New South Wales and section 74 of the Transfer of Land Act of Victoria.

“In relation to all work undertaken by the TA and on behalf of the CLAC to achieve the objectives noted above, the CLAC requires that the following fundamental precepts underlie all activities, tasks and outcomes:

- (a) There can be and will be no alienation or disposition of ownership of customary land, as specifically required by the Constitution;
- (b) All dealings in customary land by way of lease or licence (and the creation of mortgages over such leases and licences) must be strictly in accordance with procedures specified in legislation made in accordance with the proviso in Article 102(a) of the Constitution;
- (c) The rights of customary land owners must be recognised and enforced by the reforms so that they enjoy all of the rights usually vested in lessors, including:
  - (i) the right to approve or disallow the use of the lease as security;
  - (ii) the power to approve or disallow the assignment of the lease, whether as a result of a default by the mortgagor or otherwise; and
  - (iii) the right to receive lease payments strictly in accordance with the terms of the lease;
- (d) The interests of lenders as mortgagees for customary land leases are to be respected and protected, taking account of the underlying rights of the customary landowners as beneficial and perpetual owners.”

**Issues for consideration by the LWG**

16. The fundamental issue relating to the constitutionality of mortgaging customary land leases should not be regarded by members of the LWG as “settled” or concluded. Any views about these critical matters are invited from members of the LWG.

17. The matters noted above do support a limited or comprehensive review of the *Property Law Act 1952*, and views of the members of the LWG in this regard are also invited.

**Feedback from LWG members**

18. There is time for members of the LWG to fully consider the fundamental issues identified in this Paper. Feedback is invited from members and the table below may assist members to state their views. It is proposed to develop a comprehensive statement of policy to underlie the legislative reforms in support of the new leasing framework. The policies will be considered and approved by the CLAC Board before submission to Cabinet.

<p><b>Issue 1</b></p> <p>Do you agree that Article 102 of the Constitution does not prevent the granting of mortgage interests over leases of customary lands?</p>	<p>Yes / No</p>
<p><b>Issue 2</b></p> <p>Are there any other constitutional issues that should be considered in the context of leasing customary lands and using such leases as security for loan financing?</p>	

***Issue 3***

Are there any specific issues related to the current Property Law Act 1952 which should be considered in this context?