

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

**CURRENT LEASING ARRANGEMENTS
UNDER THE ALIENATION OF CUSTOMARY LAND ACT 1965**

Issues Paper No. 2 – 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 repossession or reselling leases in the event of a default under the mortgage).

Core objectives

3. The TA aims to support the CLAC to ensure 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; and
 - (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. Such actions must be consistent with the underlying rights of the owners of the leased customary land.

Leasing customary land under the current Act

4. The key provisions of the *Alienation of Customary Land Act 1965* (the “ACL Act”) relevant to the leasing of customary lands provide for the following:

3. Prohibiting some leases and licences – It is not lawful to lease or licence any customary land for any agricultural or pastoral purpose to any Samoan who is not a holder of a Matai title.

4. Power to grant lease or licence – The Minister can grant a lease or licence of customary land or interest therein as trustee for the owners, if the grant is in accordance with Samoan custom and usage, the desires and interests of the beneficial owners of the land, and the public interest.

The lease or licence is to be for an authorised purpose approved by the Minister.

If the authorised purpose is a hotel or industrial purpose, the lease or licence can be for a term not exceeding 30 years, with or without a right or rights of renewal for a term or terms not exceeding an additional 30 years in the aggregate, as is approved by the Minister.

If the authorised purpose is not a hotel or industrial purpose, the lease or licence can be for a term not exceeding 20 years with or without a right or rights of renewal for a term or terms not exceeding an additional 20 years in the aggregate, as is approved by the Minister.

The rent or other consideration approved by the Minister is payable to the CEO-MNRE.

All approved leases and licences are subject to such other covenants, conditions and stipulations as are approved by the Minister.

The process of registration and discharge of mortgages in the *Land Titles Registration Act 2008* applies to the registration and discharge of such mortgages.

Nothing in the ACL Act is to be construed or implied:

- (a) to permit the alienation or disposition of customary land in a manner prohibited by Article 102 of the Constitution; or
- (b) to permit or deem ownership in any customary land to vest in a person otherwise than as determined under any law dealing with the title to customary land.

5. Application to grant lease or licence – A Samoan who claims to be a beneficial owner of any customary land or of any interest can apply to the CEO for the Minister to grant a lease or licence over the land.

6. Form of application – An application must propose a beneficial owner or beneficial owners of the customary land or interest as the agent or agents of all beneficial owners, to whom the rent or consideration to be derived from the lease or licence will be accounted to.

An application must also state the full names, occupation and address of the proposed lessee or licensee, and what the applicant and the proposed lessee or licensee propose as to:

- (a) whether a lease or a licence is to be entered into;
- (b) the authorised purpose of the lease or licence;
- (c) the term of the lease or licence, and of any right of renewal thereof;
- (d) the rent or other consideration, when it is to be paid, and any rights of review thereof; and
- (e) any other covenants, conditions and stipulations.

7. Requiring survey – The CEO can require the applicant to provide or pay for a survey of such land or interest, and can refuse to proceed until such survey has been provided, or paid for.

8. Publishing of application – The CEO will publish in the Savali the main particulars of each application, including the names of the proposed agent or agents.

A notice must be published to fix a date or period (not being less than 3 months from the date of the publication), for written objections to the proposed leasing or licensing or to the proposed agent or agents to be lodged with the Registrar.

The above requirements do not apply if the applicant and the proposed agent or agents are held by the Land and Titles Court to be beneficial owners of the customary land or interest, or in some other limited circumstances.

9. Disposal of objections – The Registrar shall, as soon as convenient after receiving any objection, prepare, sign and file a petition to the Land and Titles Court for the purpose of having that objection heard and disposed of, and send a copy of the objection to the CEO, and another copy to the applicant.

10. Preparation and completion of lease or licence – Within 1 year of the above formalities being completed the applicant must have a draft of the lease or licence prepared by his or her solicitor at the cost of the proposed lessee or licensee, and this must be submitted to the proposed lessee or licensee and the CEO for perusal.

When the draft has been approved by the applicant, the proposed lessee or licensee and the CEO, the applicant must submit copies of the document for execution.

The applicant must then register the lease or licence with the Registrar of Land.

11. Payment of rent or other consideration – Every lease or licence operates as if it was a lease or licence as the case may be of public land, but the rent or other consideration is to be received by the CEO in trust for the beneficial owners of the land or interest.

It is unlawful for any lessee or licensee to pay any such rent or other consideration directly to any such beneficial owner.

The Public Finance Management Act 2001 applies to such rent or other consideration received by the CEO, except that no charge for the Financial Secretary's services can be deducted.

The Government is protected from liability in relation to any person who claims that he or she is a beneficial owner of the land or interest from which that rent or other consideration arose and has not received his or her share from the agent or agents, but this does not prevent such a person prosecuting a claim for his or her share against the agent or agents.

12. Fees and commission – The CEO can receive and take on behalf of the Ministry of Finance such fees and commission for or in respect of any act, matter or thing done by him or her under this Act as are specified in Schedule 1.

13. Prepayment of fees – Unless dispensed with all fees must be prepaid in cash by the proposed lessee or licensee, and the CEO can refuse to accept any application or objection or to take any action unless the fees have first been paid.

14. Dispensing with fees or commission – If it appears to the Minister that any person is unable, or ought not to be called upon, to pay or bear any fee or commission, the Minister can dispense with the payment (in whole or in part), or can authorise a refund out of the Treasury Fund as statutory expenditure, subject to such terms as the Minister thinks fit.

16. No distress for rent – Despite anything to the contrary in any Act, or in any rule of law, no lease or licence can contain a power to distrain for rent, and it is not lawful for any person to distrain for rent under the lease or licence.

17. Surrenders – The Minister can surrender a lease or licence of customary land or any interest in accordance with the desires and interests of the beneficial owners of that land or that interest.

18. New lease or licence – Nothing in section 4, on or before the surrender or the expiration of the term or last renewed term of a lease or licence, prevents the granting of a new lease or licence to the lessee or licensee under the expired lease or licence of the land or interest affected thereby, with or without any additional land or interest, subject to compliance by all parties with the provisions of this Act.

A summary of the current leasing arrangements

5. The above provisions of the ACL Act give rise to the following key concepts:
 - (a) Customary landowners are not able to act independently to create leases and licences over their lands.
 - (b) All leases and licences over customary lands can only be made by the Minister.
 - (c) The Minister acts as trustee for the beneficial landowners when lands are leased.
 - (d) The Government (through the Minister or the CEO) has control over fundamental matters including:
 - (i) determining matters of Samoan custom and usage, and the desires and interests of the beneficial owners of the land, and the public interest;
 - (ii) determining the authorised purpose of the lease or licence;
 - (iii) approving and applying other covenants, conditions and stipulations;

- (iv) requiring land surveys;
 - (v) dealing with objections to the proposed lease or licence;
 - (vi) approving draft leases;
 - (vii) receiving and disbursing rents (to the nominated agents);
 - (viii) receiving or dispensing with fees and commissions;
 - (ix) surrendering leases and licences.
- (e) No lease or licence of any customary land for any agricultural or pastoral purpose can be given to any Samoan who is not a holder of a Matai title.
- (f) There can be no provision in a lease or licence for a power to distrain for rent, and it is not lawful for any person to distrain for rent under the lease or licence.

The fundamental question – should the power to lease customary lands only lie with the Minister?

6. There may well have been good reasons in 1965 for all leases and licences of customary lands to be made only by the Minister, as trustee for the beneficial owners. This fundamental restriction on the exercise of rights by customary owners has not been directly addressed in any recorded consideration of the economic use of customary lands.

7. The final report of *ADB TA No. 3549 SAM – Capacity Building of Financial and Business Advisory Intermediaries Project* made the following findings and recommendations:

- “274 ...the lease is a creature of the State and the law. The government has a valid interest in how this legal tool is used, and a valid interest in a legal framework that best promotes economic activity (and minimizes disputes). The existing legislation is an example of the government requiring a proper process before a lease can be established – including preventing titleholders from entering into lease directly.
- 275 For these reasons, there is a potential role for the government to ensure that appropriate levels of mandate and governance are achieved in the leasing process...
- 276 Whether this is a role for government, and if so what the minimum standards of mandate and governance should be, should be subject to further consultation and discussion...
- 277 Once these discussions have been progressed, there is potential to formalize these requirements as part of the Minister’s role in the lease application process. This could be by way of published criteria, for instance, informing potential applicants of the minimum standards of mandate and governance required...
- 278 ...Requiring minimum standards of mandate and governance has the potential to improve decision-making and the performance of the customary land system over time, but still leave the aiga potopoto and the titleholders free to negotiate their own arrangements.” (pages 37 and 38)

8. Para 276 seems to raise the fundamental issue but puts consideration of it off to another day. The question now is – has that day arrived?

The case for change

9. Is it timely to consider whether the following circumstances now exist to remove the limitations, and the trustee relationship, and to permit customary landowners to enter into leases of their customary lands as the full beneficial owners of them:

- (a) Has the capacity of Samoan landowners now reached a point when they can and should be permitted to act in their own interests when dealing with their customary lands?
- (b) Has the expansion of Samoa's legal profession, and particularly those in private practice, now enabled Samoan landowners to obtain appropriate and independent legal and commercial advice in the context of developing their customary lands, without relying on government officials to render such advice?
- (c) Are opportunities to develop customary lands being missed due to the complex legal processes and arrangements under the current statutory provisions?
- (d) Should the current exposure of government to liability arising from its advisory, trustee and fiduciary roles under the current leasing arrangements now be avoided or minimised by moving away from these complex relationships?
- (e) Has the experience with paying rents and other payments due under the leases or licences to nominated agents, rather than to all those entitled to an interest in the land, proven to be workable, or is this an area where some exposure to criticism or liability of the government has arisen?
- (f) Have landowners been denied the right to take action to protect their interests as the legal rights are vested in the Minister and not in the landowners themselves?

The case for the status quo

10. The following matters could justify retaining the current leasing arrangements whereby leases and licences of customary lands can only be made (and enforced) by the Minister as trustee for the beneficial owners of the lands:

- (a) The complex relationships arising from the holding of "communal" title in customary land have not changed in any material way.
- (b) There may still be a demonstrable need for the government to play a role in the nature of trustee to ensure that the rights of all beneficial owners of customary lands are protected.
- (c) The increased accessibility to legal and commercial advice may still only act to the advantage of particular landowners or families, and they may use this advice to secure a privileged position under a lease or licence at the expense of other landowners within the "group".
- (d) If the benefits of the development (i.e rents and other non-financial benefits) are not shared equably amongst all the landowners then

disaffection will inevitably arise. The current arrangements provide for some vetting of the nominated “agents”, and preserve individual rights of action against them.

- (e) The government’s exposure to liability under the current arrangements can be mitigated by appropriate resourcing, and relevant statutory provisions.
- (f) Appropriate provisions can be inserted into the Act to give landowners the right to take action to protect their interests under a lease or licence, even if the lease or licence is made by the Minister on their behalf.

Another key question - leases or licences for agricultural or pastoral purposes

11. Is there merit in retaining the current prohibition on leases or licences of customary land for any agricultural or pastoral purpose being given to any Samoan who is not a holder of a Matai title?

And the final issue – the prohibition on distraining for rent

12. Section 16 of the ACL Act prohibits any provision of a lease or licence of customary land which permits action being taken to “distrain for rent”, or for any such action to be taken by any person. It is difficult to understand the intention and effect of this provision and prohibition. Under any lease or licence it will be the obligation of the lessee to pay rents (to the CEO in accordance with section 11). It is the right of the Minister, on behalf of the landowners, to receive the rents, and to make demand for their payment.

Section 16 certainly seems inappropriate, and possibly redundant. It should be made clear in the Act that the Minister (and preferably also the landowners) should be given clear rights to take action in the event that rental payments are not duly made.

Summary of issues for consideration by the LWG

13. Views about the following matters are invited from the members of the LWG:
- (a) Should the current arrangements whereby leases of customary lands are granted solely by the Minister in the capacity as trustee of the beneficial owners of the lands be modified to permit the landowners to deal directly with potential lessees?
 - (b) Are there other aspects of the current leasing framework which are problematic, or which should be improved by appropriate legislative reform?
 - (c) Is there a current and relevant justification for the existing prohibition on the granting of leases for agricultural or pastoral purposes to non-matais, or should this provision be removed from the ACL Act?
 - (d) Is there any justification for section 16 (No distress for rent) to be retained. The issues concerning the rights of landowners to receive rents, and to take action to recover them when they are not duly paid, will be considered in Issues Paper 3.

Feedback from LWG members

14. There is time for members of the LWG to fully consider the important 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.

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| Issue 1 Do you support a change to the current leasing arrangements to permit landowners to deal directly with lessees and mortgagees when their lands are leased and/or secured by mortgage? (This will remove the current role of the Minister and the current trustee relationship) | Yes / No |
| Issue 2 Are there other aspects of the current leasing arrangements under the ACL Act which merit review and reform when the new leasing framework is developed? | |
| Issue 3 Should the current restriction in section 3 against the leasing of customary lands for agricultural or pastoral purposes to non-matais be removed from the Act? | Yes / No |
| Issue 4 Is there any merit in retaining the prohibition against distress for rent in section 16? | Yes / No |