THE PROTECTORATE ERA AND HOW IT SHAPES PEOPLE'S (CONTEMPORARY) PERCEPTION OF THE LAW ON OWNERSHIP OF THE LAND BELOW HIGH WATER MARK IN SOLOMON ISLANDS

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INTRODUCTION

In Solomon Islands, culture and the recent protectorate era have influenced the current law of Solomon Islands, as well as people's perceptions about the law, which in turn informs how they respond to state law.

The Solomon Islands Law Reform Commission (SILRC) is currently working on a reference regarding the law (state and customary) that governs ownership and use of land below high water mark.

The paper examines how the living past has shaped people's perception on the law governing this area of land. It considers:

- protectorate and current law on ownership of this area of land; and
- perceptions held by people in Solomon Islands about the law, and actions and responses to development occurring on this area of land.

The paper draws on research and consultation undertaken, and the submissions received, by the SILRC.

Law introduced during the protectorate era was influenced by a world view that the sea is a free access area, and that the state controls resources found in this area of land. By contrast, the world

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view that underpins Solomon Islands culture is that this area is owned and controlled by those who use the land and are connected to it through tribal and clan affiliation.

The legal establishment of the Protectorate by Great Britain did not transfer any rights over land to the Crown that would derogate or take away the rights of tribes or people of Solomon Islands.[1]

However, State law governing ownership of land below high water mark, and the use of the resources found in this area of land, introduced during the protectorate era is inconsistent and uncertain. This confusion is now reflected in the attitudes held by many people regarding the law, and has contributed to ongoing mistrust of government, and its actions.

The paper concludes that the way forward is awareness raising, and law reform, to ensure fair dealings for tribal customary owners over this area of land.

SILRC LAND BELOW HIGH WATER MARK REFERENCE

In 1995 the Solomon Islands Law Reform Commission (SILRC) received a reference to review the law on land below high water mark.[2] The reference came as a result of both concern and confusion about the impact of state law (the *Land and Titles Act* [Cap 133]) on the ownership and control of this area of land. There was a strong perception, influenced by the experience of the protectorate era, that continued to dominate after independence that as a result of the introduction of British law into Solomon Islands this area of land is Crown land. This was in direct opposition to the strong belief held by Solomon Islanders that this area of land is tribal customary land. The explanatory note for the reference to the SILRC reflects this conflict:

> Beaches/shores and land under the sea are currently owned by the Commissioner of Lands on behalf of the State under statutory law. This position has been questioned as not representing customary law. What then is customary law regarding ownership of beaches/shores and land below low water-mark?

[1] Sue Farran & Don Paterson, *South Pacific Property Law* (2004) 38-39; Collin H. Allan, *Report of the Special Lands Commission on Customary Land Tenure in the British Solomon Islands Protectorate*, Western Pacific High Commission (1957) 63-64.

[2] Solomon Islands Law Reform Commission, *Land below high water mark and low water mark reference* (1995).

> There are also two conflicting interests at stake, namely, call for change in the law so that all land in this category be returned to customary landowners as opposed to other developments associated with the tourist industry in Solomon Islands. The position should therefore be further investigated to find a permanent position based upon compromise or otherwise.[3]

The conflict was reinforced by the case of *Allardyce Lumber Company Ltd v Laore*[4] (*Allardyce* case), decided in 1990, well after Independence. In the *Allardyce* case, the High Court of Solomon Islands decided that customary land could only go as far as the foreshores or the beaches; customary land does not include reefs and seabed (swallow area permanently under water).

THE LAW ON LAND BELOW HIGH WATER MARK DURING THE PROTECTORATE ERA

Laws introduced during the protectorate era, and court decisions about this area of land, were based on the world view underlying English law that foreshore and seabed is public land, or should be vested as public land, subject to customary rights that might be asserted. This world view, and legal position, gave primacy to the introduced legal system. A parallel with this situation was the concept of 'waste or vacant land' that was introduced during the Protectorate era to legitimise foreigner traders occupying and cultivating the customary land. Both concepts were foreign to Solomon Islanders.[5]

Land and Titles Regulation 1959

This Regulation vested ownership of the foreshore in the Land Trust Board (LTB) as public land.[6] Specifically, this was land between mean high water and mean low water, and all land

[3] Solomon Islands Law Reform Commission, n 2.
[4] [1990] SBHC 46 http:www.paclii.org.
[5] Judith A. Bennett, *Wealth of the Solomons* (1987) 130.
[6] Section 47(1) *Land and Titles Regulation 1959*.

adjoining the sea coast within sixty-six feet of mean high water mark. However, this provision did not apply to native customary land.[7]

Native customary land was defined in the Regulation to mean unregistered land owned by a Solomon Islander, or group of Solomon Islanders, that was used for the purpose of occupation or cultivation by the owners or people permitted to use it at some time during twenty-five years prior to first of January 1958.[8]

Land and Titles (Amendment) Ordinance 1964

This amendment vested ownership of all public land below mean high water mark including land below mean low water within the territorial limits of the Protectorate in the Commissioner of Lands (COL), instead of the LTB. This vesting in the COL of the land did not apply to native customary land.[9]

Cases

During the protectorate era the High Commissioner's Court did recognise customary rights over foreshores and reefs, however the decisions emphasised the requirement to prove exclusive ownership which itself is contrary to customary law of communal (tribal) ownership, and is derived from English common law. For instance, in 1951, the High Commissioner's Court in the case *Hanasiki v O J Symes*[10] decided that fringing reefs could be owned by customary owners and recognized a claim of exclusive rights over the fringing reefs. In this case the customary owners were trying to protect their reef from commercial exploitation by agents of a foreigner. In the *Fanilei Reef case*[11] in 1955 the same Court refused to grant an order to the Salt Water people to stop the Bush people from fishing on the reefs adjacent to Fanilei Island. The Court

[7] Section 47(4) *Land and Titles Regulation 1959*.
[8] Section 2 *Land and Titles Regulation 1959.*
[9] Section 13 *Land and Titles (Amendment) Ordinance 1964*.
[10] This Case was cited in Frank Kabui, 'Crown ownership of foreshores and seabed in Solomon Islands' (1997) 21 *The Journal of Pacific Studies* 123.
[11] British Solomon Islands Protectorate, *Legislative Council Debates*, Ninth Session, Second Meeting 19th November to 4th December, Official Report (1968). Also found reference in Collin H. Allan, n 1.

found that fishing on those reefs for trochus and other marine resources was not exclusive to the Salt Water people, and that the Bush people shared in the use of the reefs.[12]

Land and Titles Act [Cap 133]

This Act, even though was enacted during the protectorate era in 1968 by the Legislative Council, is the current law that deals with land below mean high water mark.

Part III of the Act deals with Settlement of Unregistered Documentary Titles and section 10 allows the COL to apply to be registered as the owner, on behalf of the government, of the perpetual estate in land below mean low water mark, and between the points of mean high water mark and mean low water mark, as long as the COL had gained ownership under the old Land and Titles Ordinance. The COL did not gain any rights of ownership under the previous Ordinance if the land in question was native customary land.[13]

Speaking in the Legislative Council when the Bill[14] was read for second time JB Twomey, Commissioner of Lands and Surveys said:

> Part III deals with first registration by persons holding title deeds and includes a provision whereby the Commissioner of Lands may register the Government's interest in land below high water mark. As studied to the Select Committee, this does not mean that reefs lawfully owned by Solomon Islanders are affected by these provisions.[15]

PEOPLE'S PERCEPTION OF THE LAW ON LAND BELOW HIGH WATER MARK DURING THE PROTECTORATE ERA

In the political sphere, concern about the impact of introduced law on customary ownership and control of reefs, foreshores and the resources found in this area came to a head in 1968 following the passage of the *Land and Titles Act* [Cap 133]. The prevailing perception of the law on ownership on land below high water mark during the protectorate era was that the area of land is

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[12] British Solomon Islands Protectorate, n 11. Also Collin H. Allan, n 1.
[13] Section 47(4) *Land and Titles Regulation 1959* and Section 13 *Land and Titles (Amendment) Ordinance 1964*.
[14] Land and Titles Bill 1968 which was passed by the Legislative Council in that year and is the current *Land and Titles Act* [Cap 133].
[15] British Solomon Islands Protectorate, *Legislative Council Debates* Ninth Session, First Meeting 5th June to 14th June, Official Report (1968) 36.

Crown land. This perception was strong despite the provision in the *Land and Titles Act* [Cap 133] that the COL could not register, and land did not vest, if it was customary land.

Motion on beaches, reefs and river mouths

In 1968 Honourable Baddeley Devesi (then Member of the Legislative Council for North Guadalcanal) moved a motion in the Council requesting Government to introduce legislation to safeguard the rights, privileges and interests of landowners on beaches, reefs and rivermouths.[16] The motion illustrates the dominance of the perception that land below high water mark is Crown land. Honourable Devesi was advocating for a law to safeguard customary ownership to this area of land. He said in support of the motion:

> Now it is high time that Government recognises as I have always said in this House, the purpose of customary ownership on anything as regards the land, especially the trees and the people of the Solomons rather than be content with the expatriate viewpoint that there is no such thing as ownership of reefs, beaches, rivers and river mouths.[17]

In support of the motion he gave details about conflict between fisherman at reefs off Tasimboko in his constituency. This included the claims that outsiders were being supported or encouraged to fish in the area by expatriates. Honourable Devesi had this to say on that issue:

> ...I am sorry to say, or to mention in this Council, ...that the expatriates or people who were responsible for organising this venture in this place encouraged the Solomon Islanders to say that they could fish anytime they liked...fishermen went on to say that if a person or people stopped them from fishing, then Government had given them permission to tie up anybody, put them in a canoe, and push them.[18]

He was supported by Honourable W Betu (Member of the Legislative Council for Isabel and Russells) who confirmed that he had also received complaints from people about outsiders going onto reefs to fish, collect shells and other seafood.[19]

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[16] British Solomon Islands Protectorate, n 11, 79.
[17] Ibid.
[18] Ibid, 80.
[19] Ibid.

The response from the Attorney-General (an expatriate) is revealing. He says:

> [W]hen local laws do not cover any particular point, however, then one has to turn back to the law of England... The law of England deals with the problems that we are dealing with now, that is, the question of the rights of ownership over reefs, beaches, rivers and river mouths...The general common law principle is anyone is allowed to fish in the sea, or in a river mouth, or off a reef lying under the sea. I think Honourable Members will agree that this is as it should be – that anyone should be able to go out and fish in the sea. The English law however also recognises certain specific rights and to this extent it is also the Protectorate Law in the absence of any specific law covering this point in our own laws. English law also recognises that people may have particular rights to fish at the mouth of river, or off a reef, or off a beach, but in order to protect the right and retain it for themselves alone they must show that it is an exclusive right, a right that is exclusive to them alone and no-one else.[20]

Honourable Devesi's response (which clearly communicates his frustration with the legalistic responses) was that the Legislative Council should be introducing laws that suit the place, and insists that customary law should be incorporated into the laws being made by the Council. He says:

> ...I feel strongly that these exclusive rights with the Laws of England to put in the Solomon Islands to say that they should go with personal usage, is wrong...I feel and I will always maintain that in order to carry out any laws, successfully, to achieve aims in this country for peace and order, we should promulgate legislation that will co-ordinate with the customs of the people in many areas.[21]

The Attorney-General in his response did not mention that the *Land and Titles (Amendment) Ordinance of 1964*[22] and the recently passed *Land and Titles Act* [Cap 133] of 1968[23] did recognise that this area of land could be customary land, and therefore not subject to the provisions vesting ownership in the COL. He instead relied on the common law for his advice to

[20] British Solomon Islands Protectorate, n 11, 80-81.
[21] Ibid, 83.
[22] Section 13 *Land and Titles (Amendment) Ordinance 1964.*
[23] Section 10(4) *Land and Titles Act* [Cap 133].

the Council. That itself was an ignorance of the law. His assertion that there are no local rules that govern use and ownership of reefs is at odds with the comprehensive Allan Reports[24] which had recorded customary land tenure over reefs in a number of places in the protectorate.

The debate on the motion illustrates the tension between the world view of Solomon Islands, and English law, as well as an unspoken view that introduced or English law should prevail over any indigenous rules or system regarding marine land tenure.

The issue of land below high water mark was also raised during the Select Committee proceedings over the Land and Titles Bill in 1967. There was a request that the government clearly define the reefs, beaches, and river mouths as customary land. The government's response was that the definition of customary land in the Bill of "any land not being registered land other than land registered as customary land, locally owned, used or occupied by a person or community in accordance with current customary usage"[25] would address the issue. This position was reflected in the *Land and Titles Act* [Cap 133] which was passed by the Legislative Council in 1968 and is still the current law.

Forty-three (43) years later, the mover of the motion now Sir Baddeley Devesi gave a submission to SILRC revealing that Crown ownership of minerals, forests, and land below high water mark were issues of national concern from 1967 when he was a member of the Legislative Council. He recommends that any law reform should clarify customary usage as it only encourages more litigation over land below high water mark.[26]

THE CURRENT LAW

Land and Titles Act [Cap 133]

Section 10 of the *Land and Titles Act* [Cap 133] allows the COL to apply to be registered as the owner, on behalf of the government, of the perpetual estate in land below mean low water mark, and between the points of mean high water mark and mean low water mark, as long as the COL

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[24] Collin H. Allan, n 1.
[25] British Solomon Islands Protectorate, n 11, 79.
[26] Sir Baddeley Devesi, *walk-in submission to SILRC* (Tasimboko, Guadalcanal Province) (2011) Submission No. 73.

had gained ownership under the old Land and Titles Ordinance. The COL did not gain any rights of ownership under the previous Ordinance if the land in question was native customary land.[27]

However, as illustrated in subsequent cases there can be some misinterpretation of section 10 of the *Land and Titles Act* [Cap 133]. The misinterpretation results in the thinking that section 10 vests the land in the COL as Crown land absolutely. This interpretation does not take into account reading section 10 alongside the previous regulation/ordinance.[28]

Cases

This misinterpretation is plainly reflected in the case *Francis Waleilia & Others v David Totorea*[29] *(the Totorea Case)* where a Magistrate Court interpreted section 10 to mean Crown absolute ownership of the foreshores or land below high water mark.

Two High Court cases (Allardyce and Combined Fera) have dealt with this area of land under the current law and reached different conclusions. In *Allardyce Lumber Company Ltd v Laore*,[30] (Allardyce Case) the Defendant claimed ownership over the foreshore (beaches), reefs and seabed. The Court accepted that the custom of the people of the area allows for customary ownership over the foreshore and that the foreshore could be customary land under the *Land and Titles Act* [Cap 133] as long as the Defendant can prove customary ownership. The Court rejected the claim by the Plaintiff that the foreshores were vested in the Crown absolutely.

However in relation to the reefs and seabed (below low water mark) the Court reached a different conclusion. Chief Justice Ward held that 'land covered by water' (the definition of land in the *Land and Titles Act* [Cap 133]) does not include seabed. He stated that the word 'land' as used in the Act is the opposite to sea.[31] He decided that the seabed and the reefs are not land, and therefore could not be customary land.

The Court was prepared to accept (subject to proof) customary rights other than ownership to the Lofung reefs, seabed and sea. Chief Justice Ward emphasized that at common law, ownership of

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[27] Section 47(4) *Land and Titles Regulation 1959* and Section 13 *Land and Titles (Amendment) Ordinance 1964*.
[28] *Land and Titles Ordinance 1959* and *Land and Titles (Amendment) Ordinance 1964*.
[29] This Case was cited in Frank Kabui, n 10.
[30] [1990] SBHC 46 http://www.paclii.org.
[31] The Chief Justice Ward meaning of land was influenced by common law that land is opposite to sea.

the seabed vests in the Crown, but that may be modified by a grant of certain rights to individuals.

At the time of this decision the Solomon Islands *Constitution 1978* was in force. It provides that customary law is law of the Solomon Islands, unless it is inconsistent with the *Constitution* or an Act of Parliament. The principles and rules of common law and equity apply as laws of Solomon Islands unless they are inconsistent with the *Constitution* or any Act of Parliament, they are inapplicable to or inappropriate in the circumstances of Solomon Islands, or in their application to any particular matter they are inconsistent with customary law applying in respect of that matter.[32]

Despite the provisions in the *Constitution* about the relevant law, including the provision that common law applies subject to the tests about appropriateness to Solomon Islands, this decision is clearly influenced by the common law and foreign view about ownership of reefs and seabed. It is arguable that resort to English common law was wrong because there was relevant customary law, and the common law principles (including the view that land is the opposite of sea, and does not include land covered by sea) are both inapplicable and inappropriate in Solomon Islands which has its own system of marine land tenure.

The *Combined Fera Group v Attorney-General*[33] case was the second and most recent case in the High Court that deals with this area of land. This case concerns the anticipated lease of area of reclaimed land commonly described as the 'Market Area', which area includes the Auki wharf, measuring some 80 metres out from the high water mark. The Land went through the acquisition process (in the *Land and Titles Act* [Cap 133]) as though it was customary land.[34]

The Magistrates' Court decided that according to the old *Land and Titles Regulation*[35], *the Land and Titles (Amendment) Ordinance 1964* and the current *Land and Titles Act* [Cap 133],[36] the land in dispute is not customary land but land vested in the Crown, although not registered. The

[32] Section 76 and Sch 3 *Constitution 1978*.
[33] [1997] SBHC 55 http://www.paclii.org.
[34] The acquisition process was not completed due to court cases that began when the decision (determination) of the Acquisition Officer was challenged in the Magistrate Court, appeal to the High Court, remitted back to the Magistrate Court. It is understood that new claims over the Auki Seafront emerges.
[35] *Land and Titles Ordinance 1959.*
[36] Section 10(4) *Land and Titles Act* [Cap 133].

determination of the acquisition officer was set aside and replaced it with an order that the land belongs to the Government or Crown and should be transferred to the Province.

The Appellants appealed to the High Court. They claimed that the land is customary land with competing customary rights vested in each of them. Justice Palmer of the High Court made these findings:

1. The land is customary land. If land covered by water is now capable of including the seabed, and could vest in the Commissioner of Lands as public land, then it raises a very strong presumption in favour of the view that the seabed could also become part of native customary land.[37]
2. The land covered by water includes seabed and the foreshore, hence capable of customary ownership if prior to 1st January 1969, evidence of ownership, use and occupation can be proved to have existed.[38]
3. It was an error of law to decline to hear any customary evidence pertaining to the lawful ownership, use and occupation of the land by the claimants.

The High Court ordered a rehearing in the Magistrate Court to determine which appellant tribes has lawful ownership, use or occupation of the land in accordance with current native usage prior to 1st January 1969.

After 11 years, the Magistrate Court finally gave its decision on the land in July 2009. The Magistrate Court decided that the reclaimed land is customary land. The Court relied on documentary evidence, previous land case decisions and sworn evidence to come up with its decision. The Court identified the landowning groups and their representatives who have the right to sell or lease out the land.[39] The decision was not accepted. The area now attracts a lot of different parties all claiming to be 'the right original owners'. All forms of the Solomon Islands justice system (local court, Magistrate court, and High Court) are currently being used as claimants search in desperation to get a decision that could recognise their claims as true original landowners.

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[37] Justice Palmer's interpretation of section 10(4) *Land and Titles Act* [Cap 133].
[38] Ibid.
[39] *George Tafisisi & Others v Attorney General* (Unreported, Magistrate Court of Solomon Islands, CC. Nos 6, 13, 14, 15, 15A & 22/91, 2 July 2009, Maina, L).

The definition of customary land in the *Land and Titles Act* [Cap 133][40] leads to multiple claimants over customary land in Solomon Islands. The definition recognises proof of customary usage (use) as one of the bases for claimants to demonstrate customary land ownership. This is illustrated by the various proceedings over the Auki seafront land.[41]

The conflict between the outcomes of these two cases (*Allardyce* case and *Combined Fera* case) is a reflection of the inadequacy and ambivalence of the existing state law. It also reflects the way state law might be applied differently, depending on the world view, and values of the judge making the determination.

PEOPLE'S CURRENT (POST-INDEPENDENCE) PERCEPTION OF THE LAW ON OWNERSHIP OF LAND BELOW HIGH WATER MARK

The protectorate era has influenced people's perception about Crown ownership of land below high water mark. This perception of the law has roots in the views and dealings of protectorate government officers and foreign traders. On the one hand protectorate law (and state law following Independence) gave some recognition to customary land tenure over reefs, but on the other hand there was a strong perception that this area of land is Crown land. This perception remains dominant among Solomon Islanders, although customary owners are resistant to this legal position, which they perceive to be a foreign law.

The perception that this area of land is vested in the Crown/State is illustrated in the legal proceedings (post independence) and political demands for the 'return' of this land. It is also illustrated by the way some people have responded to the SILRC's inquiry on this reference. One other point is the unwillingness of the state (the government) to resolve the matter since Independence.

[40] Section 2 *Land and Titles Act* [Cap 133].
[41] Auki seafront land is the land disputed in the *Totorea case*, *Combined Fera* case and *George Tafisisi* case.

Legal proceedings

Allardyce case

In the Allardyce case Counsel for the plaintiff advanced the argument that the ownership of the foreshore and seabed, vests in the State/Crown and that the customary owners have no right to the land. The Judge (CJ Ward) had this to say to the argument advanced by the plaintiff:

> As far as the foreshore is concerned, I feel that is too sweeping a statement... Under English common law it is clear that the foreshore and rights over the sea bed in some areas could be owned by the owners of the land adjacent. Many of the authorities deal with grants by the early English monarchs and others refer to the rights arising out of immemorial user. Generally, however, under common law, in the absence of such rights the foreshore does vest in the State giving rights of user to the public and that is the position here.[42]

This case makes no reference to section 10(4)[43] of the *Land and Titles Act* [Cap 133]. The decision might be different had counsels drawn the attention of CJ Ward to that section.

Section 10(4) was drawn to the attention of the Auki Magistrate Court judge in the *Totorea Case*. The magistrate interpreted section 10(4) to mean Crown absolute ownership of the foreshores or land below high water mark. Again in 1995 in the case *Renaldo & Others v David Totorea*,[44] over the Bina harbour area, the Auki Magistrate Court ruled that land below high water mark is not customary land. These decisions were influenced by the decision in the *Allardyce* case and the interpretation that section 10(4) of the *Land and Titles Act* [Cap 133] means Crown absolute owner of the land below mean high water mark.

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[42] *Allardyce Lumber Company Ltd v Laore* [1990] SBHC 46 http:www.paclii.org (Chief Justice Ward).

[43] "The Commissioner may apply to be registered as the owner on behalf of the Government of the perpetual estate in such land – a) below mean low water; and b) between the points of mean high water and mean low water, as vested in him under paragraphs (a) and (b) of section 47(1) of the repealed Act."

[44] This Case was cited in Frank Kabui, n 10.

Combined Fera case

In this case the then Attorney-General of Solomon Islands advanced the view that land below high water mark is Crown land and that the area cannot be land. His argument was "once a vesting had taken place according to law, it subsists, unless or until it had been cancelled or withdrawn. His analysis and conclusion on the relevant legislation is that the title to the reclaimed area of land had vested in the Commissioner of Lands by virtue of section 47(1) of the LTA of Cap. 56 on 1st February, 1963 and that it had never been divested."[45] The Attorney-General did acknowledge that subsection 47(4) did not allow those vesting provisions to apply to native customary land, however his main argument was that land below high water mark is Crown land.

Guadalcanal bonifide demands

Among the demands made to the Solomon Islands Government by the people of Guadalcanal Province was the issue of c*oastal reefs in front of Honiara.* In 1999, Guadalcanal Province on behalf of its province submitted demands to Solomon Islands Government that the Government properly acquired the coastal reefs that are below high water mark in front of Honiara. The demands refer to the situation that the coastal reefs in front of Honiara were never acquired in accordance with the provisions for acquisition under the *Land and Titles Act* [Cap 133] and as a result, the original landowners and their descendants lost their traditional and customary rights over the whole area. The Solomon Islands Alliance for Change (SIAC) Government in 2000 responded to the demands by saying Government will address this in the overall review of the *Lands and Titles Act* [Cap 133]. To do these reviews properly, Government needs to have the time for them. This was agreed to by the Guadalcanal Province negotiating Team.

No national government since then has addressed this demand.

[45] *Combined Fera Group v Attorney-General* [1997] SBHC 55 http:www.paclii.org (Attorney-General).

SILRC nationwide consultations

Following the launch of a consultation paper for this reference in 2009 the SILRC conducted consultation around Solomon Islands and received 74 submissions from individuals, groups, associations and organisations. The consultation shows that customary tenure over foreshores, reefs and seabed is very strong. The tribe is the primary holder of rights, and due to the nature of the area there is considerable flexibility around use rights. For example, while one tribe can make decisions about limiting access or use, members of other tribes are permitted to use marine areas to fish and gather resources for sustenance. There are some variations to the nature and extent of this tenure, depending on factors such as the existence of local governance mechanisms (for example Lauru Land Conference), technology, the impact of land alienation that occurred during the protectorate era and demographic factors such as population growth and migration.

For the purpose of this paper, two areas were highlighted and addressed in consultations and submissions. The first is the perception that people held around the position of state law in relation to this area of land, the second is the extent of mistrust of government and its actions in relation to customary land, including land below high water mark.

A number of submissions objected to the concept (which they believed to be the position of state law) that the Crown or government owned this area of land:

Submission No. 2[46]	The concept that Crown owns land below high water mark is a foreign concept.
Submission No. 12[47]	High water mark and 6 feet issues are like political rape – rape people of their conscience.
Submission No. 21[48]	The Lauru Land Conference of Tribal Community (LLCTC) is a Lauru Indigenous NGO, representing the people (men, women, youth and

[46] SILRC, *Consultation* (Police) Auki, Malaita Province (2009) Submission No. 2.
[47] Mr. Moses Ramo,*Telephone conversation to SILRC*, Indigenous People Human Rights Advocacy Association, Honiara (2010) Submission No. 12.
[48] Lauru Land Conference of Tribal Community Trust Board Inc, *Written submission to SILRC*, Taro, Choiseul Province (2010) Submission No. 21.

	little children) to give comments and to express the concerns about the Foreign Law, - "Land Below High Water Mark and Low Water Mark." This British Law has been here in the Solomon Islands for the last two centuries (19th and 20th Centuries). Most of the people in this country, especially those in the rural areas have not been aware that their indigenous tribal land is owned by the Government. We understand that land below high water mark and low water mark is legally under the control of the Commissioner of Lands, which means that it is the Government land. Therefore, we strongly intend that "Land below High Water Mark and Low Water Mark" be returned to the rightful tribal land owners. It is our land. If any development is required to be established on that particular piece of tribal land, a proper negotiation be made, not to an individual person, but to the tribes or clans.
Submission No. 28[49]	High water mark rule is a foreign concept. All participants recommended amendment to law to ensure that land is reverted back to the customary land owners.

The perception of state ownership and control of land below high water mark is a hangover from the protectorate era. The perception, while not legally right, has an overwhelming influence on people's thinking and perceptions regarding state law on land below high water mark. The submissions made to the SILRC indicate that this thinking is still influential.

More importantly while this view is strong (that state law has effectively alienated foreshore and seabed), people also perceive that the state law is foreign, and they do not respect it or trust it. As a consequence there is strong resistance to use and exploitation of these areas by government as shown by SILRC consultation,[50] case law,[51] anthropological accounts,[52] and people's

[49] SILRC, *Consultation (community)* Gorou, Tetere, Guadalcanal Province (2010) Submission No. 28.
[50] SILRC, *Nationwide consultations* (2009-2011).

resistance to national projects like wharfs[53] planned to be built on this area of land. The lack of trust, and suspicion of state law processes as being hostile to customary marine tenure was a strong theme during our consultation, and in the submissions received by the SILRC. The suspicion or resistance to state processes (such a land acquisition, or negotiations to use foreshores to build wharfs) is linked in the minds of people to the whole history of government dealings (pre and post independence) with customary land.

Some examples of this are:

Submissions No. 5;[54] Submission No. 12;[55] and Submission No. 19[56]	Law reform must put right unfair dealings on vacant and waste land issues. Waste land is wrong – no such thing as waste or vacant land in custom in Solomon Islands. Government needs to know that most land dealings in the past were unfair to landowners. Vesting minerals below 6 feet in the State is inconsistent with customary law.
Submission No. 6[57]	Customary landowner's ancestor's were first to settle the land and not government or Commissioner of Lands. Government policies, regulations, constitution and law only Steal, Kill, and Destroy land.
Submission No. 7;[58]	All alienated land acquired in the past by Government through unfair

[51] *Allardyce* case, *Totorea* case, *Renaldo* case, and *Combined Fera* case.
[52] Edvard Hviding, *Guardians of Marovo Lagoon: Practice, Place, and Politics in Maritime Melanesian* (1996) 268 – 311.
[53] Author's personal knowledge on propose wharf constructions in Mbita'ama, Matakwalao, Bina Harbour international sea port project in Malaita Province, Solomon Islands.
[54] SILRC, *Consultation* (Savo Counsel of Chiefs) Sunset Lodge, Savo, Central Islands Province (2009) Submission No. 5.
[55] Mr. Moses Ramo, *Telephone conversation to SILRC*, Indigenous People Human Rights Advocacy Association, Honiara (2010) Submission No. 12.
[56] Mr. Andrew Kuvu, *Walk-in submission to SILRC* (Chairman Lengo Landowners Association, Foxwood, Guadalcanal Province) (2010) Submission No. 19.
[57] Landowners Advocacy and Legal Support Unit, Public Solicitor's Office, Gizo workshop (Rannogga) Western Province (2009) Submission No. 6.

and Submission No. 8[59]	dealings should be returned to the rightful customary owners.
Submission No. 21[60]	Land alienations in the past were obtained through vacant, waste, private and public land. In Lauru custom, Choiseul Province, there were no such things as vacant, waste, private and public land. The acquiring of land in the past under these foreign concepts was one of the main causes of problems of tribal land ownership between original land owners and government nowadays. The sale of tribal mother land in the past (19th and twentieth century) have greatly affected land ownership, tribal land boundaries, tabu sites, and so forth. Those who involved in the sale were not the right and important people in the tribe, some just got good relationship with the tribal chiefs. Because of their knowledge in speaking pidgin-English, they involved in the sale of land to Europeans.
Submission No. 27[61]	"Land is our mother" – no such a thing as alienated land in custom. Sadly, Government alienated people's land and allow the land for foreigners to use for commercial purposes. The people are now poor at the expense of government. People who allow their land for development should receive proper revenue sharing from the development. There should be proper negotiation between landowners and the government before any development to happen on customary land. The right landowners were left out from enjoying the benefit of their land. There is a need for a mechanism to fairly return land to custom owners. People who had good education during the protectorate era had

[58] SILRC, *Consultation Taro* (Provincial Government and other NGOs stakeholders) Choiseul Province (2009) Submission No. 7
[59] SILRC, *Consultation Tigoa* (West Rennell Council of Chiefs) Renbel Province (2009) Submission No. 8.
[60] Lauru Land Conference of Tribal Community Trust Board Inc, *Written submission to SILRC*, Taro, Choiseul Province (2010) Submission No. 21.
[61] SILRC, *Consultation Munda* (Community leaders from Ludomaho, Dunde, Kidu and reps from Tetepare Decendant Association) Western Province (2010) Submission No. 27.

	sold different people's land to Government and foreigners. In colonial times and early independence development on customary land was easy. Now it is harder. People now see land as more important and appreciate its value therefore people less likely to make easy agreement about its use. Because of the past experience (land taken from customary owners for a particular purpose and then it was made public land). Public interests projects and commercial development: the Government past dealings with people about land that resulted in massive lands been alienated by the Government had made people nowadays not willing to deal with government about land regardless of the benefits that such development might bring to the people. Tetepare Descendant Association (TDA) still struggling to get back the Perpetual Estate (PE) from the Commissioner of Lands over a portion of land on Teterape Island. Other big part of the Island already given back to the customary landowners through TDA. Don't know why Government still holding onto their land even though Government no longer has any property on that land. Past Government (protectorate) land deals make people not trust government and don't open up land for development.
Submission No. 31[62]	As a landowner she is not happy with the protectorate government's alienation of their land. The land dealings during the protectorate days were really bad. They still are struggling to take back their land from the government even though the landowners now cultivate the land and have properties on the land. She questioned - who is the Commissioner of Lands to own their land? They don't see any fairness in the past land dealings that result in the alienation of their land during the protectorate

[62] SILRC, *Consultation Kirakira* (a female landowner) Makira Province (2010) Submission No. 31.

	days. Landowners no longer trusted the government because of these past unfair land dealings.
Submission No. 42[63]	Surrender all Perpetual Estate (PE) to the true owners before any developmental deals.
Submission No. 51[64]	Past land dealings unfairly done; European came and fired gun at locals. Locals flew away – European then occupy the land. After that Europeans invite locals (most of them were not right landowners) and gave them axe, smoking pipes, bottles, and few pounds – those locals then allow the land for Europeans to use. In some places, Europeans (colonial government) consider some land as waste/vacant land – they then took it for them. There is no such a thing like waste/vacant land in Guadalcanal custom.
Submission No. 53[65]	He was concerned over the past Protectorate Government dealings to land that result in waste/vacant land taken up by the government. He said such land dealings were bad and that Government need to re-look at those lands alienated from the landowners under such move.

CONCLUSION: WAY FORWARD

Awareness raising

Awareness raising, using a variety of communication strategies is crucial for putting right "putim stret" the perception that has been in existence since the protectorate era. This is important in order to erase the long held perception of Crown ownership of land below high water mark.

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[63] SILRC, *Consultation Honiara Law Week* (Samson Sonia, Balasuna, Guadalcanal Province) (2010) Submission No. 42.
[64] Grace Delight Buga, *Walk-in submission to SILRC* (Landowner Isunakomu tribe, Gold Ridge, Suta District, Guadalcanal Province) (2010) Submission No. 51.
[65] Wilson Tetea, *Walk-in submission to SILRC* (Marau – Main Land, Guadalcanal Province) (2011) Submission No. 53.

Since 2009 the SILRC has been raising awareness through workshops, meetings with individuals and groups, media releases through the newspaper and the radio programs broadcast on Solomon Islands Broadcasting Cooperation (SIBC) throughout Solomon Islands, to educate people about the current law and issues in relation to land below high water mark. The awareness raising activities also encourages people to give submissions to SILRC about customary land tenure over this area of land, and other issues in relation to use and ownership of land below high water mark.

The work by the SILRC has sought to clarify people's perceptions about the law on ownership of land below high water mark and advocate what it perceives to be the right law. Through this consultation process, people voluntarily voice out their grievances on how land dealings were done in the past, especially during the protectorate era.

One limitation on awareness raising by the SILRC is that Solomon Islands is scatted over a vast ocean space, and that limited resources means that the SILRC is unable to visit all islands. However, its radio program reaches to all corners of Solomon Islands; at least to educate the people of the law and issues on land below high water mark.

Law reform

Law reform is also important to clarify the state law regarding ownership of land below high water mark. The *Land and Titles Act* [Cap 133] should be amended to clearly specify that all non registered land below high water mark is tribal customary land. This will remove the perception currently held by the people that this area of land is Crown land. It will allow the tribal landowners and the government to negotiate freely with clear minds or perspectives about development, for public benefit, or private business, planned for this area of land.

The requirement to prove customary ownership of land below high water mark prior to 1st January 1969, as was held in the *Combined Fera* case, should also be addressed through reform of the *Land and Titles Act* [Cap 133]. Customary landowners own, use, occupy, and possess their land until today without reference to arbitrary cut-off date(s).

The definition of customary land in the *Land and Titles Act* [Cap 133] should be amended to remove customary usage (use) as one of the bases for proving ownership. This provision attracts

multiple claims, and is particularly unsuitable for marine areas where use rights are often broader than ownership, and contributes to a never ending litigation over a piece of tribal customary land. Proving customary ownership to a piece of tribal customary land should be left to an acceptable hybrid tribal customary land dispute mechanism in the area of dispute which its decision is final on a piece of land or its decision could only be appealed once.