

**SUBMISSION TO THE AD HOC
SELECT COMMITTEE ON LAND**

“THE ALTA/NLTA DEBATE”



CITIZENS' CONSTITUTIONAL FORUM LIMITED

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INTRODUCTION

As members of the Ad Hoc Select Committee on Land will be only too aware, issues relating to land tenure and use in Fiji are some of the most difficult issues facing our society today. They assume national significance, owing both to the critical importance of land as an economic resource and to its cultural and spiritual value in the traditions of the indigenous Fijian population.

Since 88% of land in Fiji is owned collectively by indigenous Fijians, issues relating to land inevitably take on a significant racial dimension. They are also inextricably tied up with the fortunes of the agricultural sector, and of the sugar industry in particular, which is the nation's main commodity export earner, and has historically been dominated by Indo-Fijian farmers.

For all of these reasons, land issues are heavily politicised, with stakeholders being overwhelmingly divided along racial lines and negotiating positions often polarised.

The Citizens' Constitutional Forum ('the CCF') has believed since its inception in the early 1990s that resolving issues relating to land tenure and use in Fiji is vital to the nation's future, and we have been active in promoting and facilitating public discussion of these issues.

We note at the outset that the Committee's advertisement published on 1 March 2005 has provided only nine days for the preparation of written submissions, and thirteen days for oral submissions at the Suva meeting to be held on March 14. This is clearly insufficient for a thorough-going analysis of issues of this complexity.

The CCF has therefore drawn on what we believe to be the best available research and our own previous work to briefly discuss some of the issues and develop a few basic ideas for reform of the most contentious planks in the current legal framework of land tenure and use in Fiji – namely, the *Agricultural Landlord and Tenant Act* (Cap. 270) ('ALTA') and the *Native Land Trust Act* (Cap. 134) ('NLTA').

SUMMARY

Our main points and recommendations to the Committee are as follows:

1. The un-competitive nature of the market for agricultural leases in Fiji tends to undermine both the market value (NLTA) and 6% UCV (ALTA) formulae for rent assessment. The CCF therefore recommends that the Committee consider a possible rental formula based on the value of gross returns to farmers, net of all input costs (including farm management). Such a formula would provide an equitable distribution of income and risks between

landowners and tenants, since a rise or fall in production would lead to a corresponding rise or fall in rent. We have not had sufficient time to arrive at a firm view as to what percentage of farmers' returns they should be charged as rent.

2. So-called "good will" payments to landowners, premiums, new lease consideration imposed by the Native Land Trust Board ('NLTB'), and so on, should all be prohibited, and this prohibition should be strictly enforced. Tenants are already at a disadvantage in their dealings with the NLTB because of its monopoly position, and the ability to impose additional charges for new leases creates opportunities for corruption.
3. The CCF does not oppose a review of the minimum lease term under ALTA, but has not had sufficient time to arrive at a firm view as to what would be an appropriate minimum term for agricultural leases. There appear to be persuasive arguments for retaining a minimum term, however, and this should be long enough to give farmers sufficient time to recoup their investment in the land, to give banks and other financial institutions the confidence to lend money to new farmers, and to encourage sustainable farming techniques and protect the environment.
4. The CCF recommends that the Committee examine the Farmers Assistance Scheme in the context of its consideration of the ALTA/NLTA debate, and address the issues of assistance and compensation with a view to encouraging farmers from all ethnic groups to enter and remain in the agricultural sector and ensuring that those who leave do not fall into poverty. Compensation, in particular, should not be seen as affirmative action.
5. Above all else, there needs to be a process of consensus building among all stakeholders in the development of reform options. The Talanoa sessions from 2001 to 2004 appeared to make some progress in this regard. However, a wider and deeper ongoing dialogue is needed to foster trust and cooperation, help landowners and tenants to recognise their interdependence and contain the racial dimension. It is this process which the CCF regards as urgent, and not the implementation of any particular reforms.
6. The entrenchment of ALTA under section 185(2) of the *Constitution (Amendment) Act 1997* ('the Constitution') encourages consensus building and helps to contain the inevitable racial dimension of the ALTA/NLTA debate, and the CCF therefore supports its continuation.

OBJECTIVES OF REFORM

The CCF notes with approval the ultimate objective of the Committee's work, as stated in its terms of reference, which is "to arrive at the most satisfactory outcome for all", and also its "guiding principles", which are:

- "the values of building trust and confidence";
- "creating fairness and equity";
- "providing best possible security"; and
- "giving optimum terms and conditions with the view to fulfilling the overarching vision of fostering the social and economic advancement of landowner and tenant communities".

The history and politics surrounding the ALTA/NLTA debate must not be allowed to obscure what needs to be achieved here, which is a sustainable resolution of the issues that is acceptable to both landowners and tenants. The CCF also believes it is important to bear in mind what this debate cannot achieve – in particular, amendments to ALTA and/or NLTA cannot and will not arrest the decline and imminent crisis of the sugar industry. At best, an ideal legal environment might:

- encourage farmers to enter and remain in the agricultural sector;
- provide incentives to investment and best farming practices such as soil conservation;
- ensure an equitable distribution of income and risks among all stakeholders;
- assist farmers who leave the agricultural sector, to ensure they do not fall into poverty; and
- foster trust and cooperation among all stakeholders.

The CCF believes that all of these objectives need to be achieved in order to give the sugar industry the best possible chance of survival and to enable Fiji's agricultural sector as a whole to become more competitive and profitable in the medium to long term.

We would also like to note, in the context of the objectives of reform, the existence of certain political realities which limit what can be achieved at the present time. Most notably, the CCF accepts that the NLTB is probably here to stay for the foreseeable future. However, we would still support a review of the role of this body, which has demonstrated in recent years a disturbing lack of

accountability to the landowners whose interests it is intended to serve, as well as non-responsiveness and inefficiency. Consider for example the criticism of the NLTB by the Court of Appeal in the recent case of *Tiva v Director fo Lands, Native Land Trust Board, Attorney General of Fiji and Fiji Hardwood Corp Ltd* (Barker and Kapi JJA, Scott RJA, 4 March 2005, Civil Appeal No. ABU0015 of 2004S). Other options for control of native land have been suggested in the past, such as a devolution of control to regional bodies within a reformed Fijian Administration (perhaps the Bose Vanua proposed in the *Review of the Fijian Administration* completed by PriceWaterhouseCoopers for the Ministry of Fijian Affairs in 2002).

POLITICISATION

As mentioned above, land issues have become heavily politicised, and stakeholders are overwhelmingly divided along racial lines. That is, the interests of indigenous Fijian landowners and the NLTB are often seen to be in conflict with those of the predominantly Indo-Fijian sugarcane farming tenants. This has led to a polarisation of the two main negotiating positions, with landowners and the NLTB on one side demanding higher returns from their land, and tenants on the other demanding greater security of tenure. Over the past few years, the landowners' position has become associated with calls for the repeal of ALTA and for agricultural leases to be brought under NLTA. Two arguments are raised in support of this proposal:

1. NLTA provides for rents to be fixed according to market value,¹ while ALTA restricts rent to a maximum of 6% of the unimproved capital value of the land ('UCV').²
2. NLTA enables the NLTB to determine the terms of leases on a case-by-case basis,³ while ALTA requires a minimum lease term of 30 years.⁴

Tenants, on the other hand, are said to favour the retention of ALTA for these very same reasons.

The CCF wishes to make two points regarding politicisation. First, it has resulted in an over-simplification or "dumbing down" of the debate, to the point where the two negotiating positions have become little more than slogans. This is not conducive to the resolution of the underlying issues.

¹ That is, "the rent properly payable under a lease of native land shall be the annual rent at which that land might reasonably be expected to be let in the open market": *Native Land Trust (Leases and Licences) Regulations* cl 13(5).

² *Agricultural Landlord and Tenant Act* s 22(2).

³ Up to a maximum of 99-years: *Native Lands Trust (Leases and Licences) Regulations* cl 6.

⁴ This applies to all agricultural leases created after 1 September 1977: *Agricultural Landlord and Tenant Act* s 6(b). Leases created before that date were subject to a minimum term of 10 years: s 6(a).

Secondly, the stakeholders need to recognise (and many do) that they are inter-dependent. Landowners will not be able to draw income from their land if no-one is willing to farm it. As rents increase, fewer farmers will be able to afford to stay in business. If the sugar industry collapses in the next few years, both landowners and tenants will suffer dramatically, and flow-on effects will be felt throughout the national economy and society. As more farmers leave the agricultural sector, rental income received by landowners will decline, more farmers' families will move to urban and peri-urban areas, and greater strain will be placed on the infrastructure of our towns and cities. Because there are very few jobs and little affordable housing available for these internal migrants, poverty and squatter settlements will increase.

These trends are already observable, as members of the Committee will be aware. The question now is whether it is possible to reverse them or at least to mitigate their effects. Everyone in Fiji has an interest in achieving this. As already mentioned, resolving the ALTA/NLTA debate in itself will not save the sugar industry. However, a sustainable resolution of land issues will help to give it the best possible chance of survival.

FIXING A FAIR RENT

Market for Agricultural Leases is Un-Competitive

By now there has been a significant amount of research into the economics of land tenure and use in Fiji, especially in so far as they affect the sugar industry. The CCF urges members of the Committee to explore the literature that this research has produced, especially the work of Dr Padma Lal and Dr Mahendra Reddy, two experts who have written extensively on these issues in recent years.⁵

One important point concerning the economics of land issues that the CCF wishes to emphasise is that the market for agricultural leases in Fiji is inherently and overwhelmingly un-competitive. The NLTB controls 88% of the land, and it is the landlord for nearly all agricultural leases. It therefore occupies a monopoly position in the market. This means that farmers wishing to enter the agricultural sector generally have no choice as to who will be their landlord. If suitable lease conditions cannot be agreed with the NLTB, it will generally be impossible for a farmer to find another landlord with whom to negotiate. The fact that the NLTB has a monopoly on agricultural leases has significant implications for the ALTA/NLTA debate.

Because there is no competition between different landlords, market forces alone cannot be relied upon to determine what is a fair rent. If maximum rents for

⁵ See for example Lal, PN, Lim-Applegate, H, and Reddy, M, "Land Tenure Dilemma in Fiji – Can Fijian Landowners and Indo-Fijian tenants have their cake and eat it too?" *Pacific Economic Bulletin*, volume 16(2), pages 106-119, 2001.

agricultural leases were not limited by ALTA, the NLTB could fix rents as high as it liked, and a farmer would simply have to pay the high rent or change his or her occupation. Clearly, if the NLTB fixed rents so high that no farmers could afford to stay in business, it would destroy the agricultural sector and impoverish the landowners whom it serves. However, short of this extreme, the NLTB would be free to choose the level of rent that it considered appropriate, without the need to compete with other landlords for tenants.

The CCF believes that this tends to undermine both the market value (NLTA) and 6% UCV (ALTA) formulae for rent assessment. As stated above, the market is un-competitive. The presence of a monopoly landlord skews market forces in favour of higher rents. This affects both the market value and 6% UCV formulae. UCV is supposed to be based on past sales of freehold and Crown land, as well as leases of native land. However, there is very little land in the first two categories and information on past sales is sparse, patchy and out of date. Since the third category, native land, includes 88% of all land and is controlled by a monopoly landlord, the 6% UCV formula provided by ALTA is open to the same criticism as the market value formula under NLTA.

For this reason, the CCF supports the exploration of alternative methods of rent assessment. Another reason for exploring alternatives is that the 6% UCV formula has resulted in cane farmers on low-productivity land (so-called "Marginal" or "Class III" land) paying a significantly higher proportion of their net income in rent than farmers on high-productivity land.⁶ The CCF therefore recommends that the Committee consider a possible rental formula for agricultural leases which is based on the value of gross returns to farmers, net of all input costs (including farm management). Drs Lal and Reddy call this a "resource rent". Such a formula would provide an equitable distribution of income and risks between landowners and tenants, since a rise or fall in production would lead to a corresponding rise or fall in rent. It would also serve to emphasise the mutual interests and inter-dependence of landowners and tenants, and so help to foster trust and cooperation between them.

Data to support a "resource rent" formula should be available from the Fiji Sugar Corporation and other industry bodies. While it may not be practical to generate such data in "real time", historical data with periodic updates should be adequate for the purpose.

Determining the Percentage of Returns to be Charged as Rent

The CCF has not had sufficient time to arrive at a firm view as to what percentage of farmers' returns they should be charged as rent. However, we note that, under a resource rent formula, the rent payable for agricultural leases would resemble income tax. With this comparison in mind, it may be appropriate to

⁶ See above, note 5. Figures and analysis in Lal, et al (2001), are based on estimates and data from the Sugarcane Growers Council and the Fiji Sugar Corporation.

consider a graduated formula, so that farmers achieving low returns pay proportionally less rent than those achieving higher returns. For example, the NLTB might impose a 5% rental on the first \$5,000 of a farmer's returns, 10% on the next \$15,000 (that is, returns in the range \$5,000-\$20,000) and 20% on any returns exceeding \$20,000. Please note that these figures are only intended to illustrate how a graduated resource rent formula might work. They do not represent the CCF's recommendation as to what percentage of returns should be charged as rent.

Some commentators have claimed that the NLTB currently charges significantly less than the maximum 6% UCV allowable rent for agricultural leases. The CCF urges the Committee to investigate the truth of this claim. We also suggest that the Committee review all available statistics on what percentage of their returns farmers are paying as rent now – including farmers growing different crops and those on different classes of land. These figures should then be compared with rents payable on comparable leases overseas, before any determination is made as to what percentage of farmers' returns they should be charged as rent in Fiji.

So-called "Good Will" Payments, Premiums, New Lease Consideration, Etc

ALTA provides for a tenant to pay a "premium" to a landlord on first entering into an agricultural lease, but not for any extension of the lease term, except where the landlord has made improvements to the land with the tenant's consent.⁷ NLTA does not specifically provide for or prohibit the imposition of any charges on tenants other than rent and administration fees.

It seems that the NLTB frequently imposes additional charges on new tenants, described as "new lease consideration", and it is apparently common for tenants to make similar "good will" payments directly to local landowners.

The CCF strongly opposes these charges, which have more of the appearance of extortion or "stand over" payments than anything resembling good will. Clearly, any demands for payments by local landowners are illegal. However, given reports that 86% of tenant farmers have made such payments,⁸ there is a significant problem here. This suggests an urgent need for education of both landowners and tenants on this issue, and for decisive action by police to protect tenants.

In the case of payments sought by the NLTB, the CCF believes that the current law should be amended to prohibit them, so that all charges for new leases are limited to the cost of processing. This is because premiums and new lease consideration bear no relationship to a fair rent for land leased, and the NLTB's monopoly on agricultural leases means that farmers will generally not be in a position to refuse unreasonable demands. The ability to impose additional

⁷ *Agricultural Landlord and Tenant Act* s 14.

⁸ Reported without reference to a source in Lal, et al (2001): see above, note 5.

charges for new leases also creates opportunities for corruption and is likely to distort competition between prospective tenants.

MINIMUM TERM FOR AGRICULTURAL LEASES

As mentioned above, ALTA sets a minimum lease term of 30 years. There is no minimum term under NLTA, although the regulations establish a maximum of 99-years.

Two related economic factors need to be taken into account in determining whether and how to set a minimum term for agricultural leases. First, the leases must be long enough to give farmers sufficient time to recoup their investment in the land. If lease terms are too short, fewer farmers will enter or remain in the agricultural sector and those that do will be more likely to use unsustainable farming techniques which damage the environment, in order to maximise their returns in the short term. This would impoverish the sector in the long term. Secondly, the leases must be long enough to give banks and other financial institutions the confidence to lend money to new farmers to help them get started. This means that the money lenders must be confident that the farmers will be able to repay their loans, which is related to the first factor.

Another consideration is that, if so-called “good will” payments are allowed to continue, then shorter leases will result in more of these payments, further confusing the issue of what is a fair rent and creating yet more opportunities for corruption.

One social factor that should be considered is the fact that the vast majority of farmers in Fiji live on their agricultural leases. This may be less compatible with shorter leases. It not only means that farmers’ initial investment is likely to be greater, owing to the need to house their families, but also that the expiry and non-renewal of leases may be more costly. As we have seen recently, if carried out *en masse*, non-renewal of leases has the potential to cause significant social upheaval through internal migration. This issue is discussed further below under the heading, **Assistance for New Farmers and Compensation for Those Leaving the Agricultural Sector**.

From the point of view of landowners, longer lease terms mean fewer opportunities to consider and decide how their land is used. This reduction in opportunities may be compensated by greater continuity of rental income. In principle, the CCF supports the NLTB’s practice of seeking landowners’ consent before granting new leases or extensions, as a means of maximising landowners’ control of their own affairs and minimising any feelings of dispossession. However, the NLTB should provide landowners with sufficient information to make an informed decision whether to give their consent in each case, and take responsibility for ensuring that the practice does not facilitate illegal demands by landowners for “good will” payments from tenants.

The CCF has not had sufficient time to arrive at a firm view as to what would be an appropriate minimum term for agricultural leases. There appear to be persuasive arguments for establishing a minimum term, however, both in order to encourage sustainable farming techniques and protect the environment, and in recognition of the un-competitive nature of the lease market.

RENT RE-ASSESSMENT AND DISPUTE RESOLUTION

The CCF has not made a detailed study of the rent re-assessment and dispute resolution mechanisms provided by ALTA and NLTA. However, we would make the following general comments:

- As far as possible, rent assessment should be based on objective data and mathematical calculations. Subjective criteria should be avoided. A resource rent formula, such as we recommend, would achieve this. Re-assessment of rent should be available periodically at the request of either the NLTB (or other landlord) or the tenant.
- There should be an administrative tribunal for the determination of disputes concerning rent assessment and other matters relating to agricultural leases. Tribunal members should have appropriate expertise and be nominated by a committee that includes representatives of both landowners and tenants. Both the NLTB (other landlords) and tenants should have the right to bring a dispute before the tribunal, and a right of appeal from the tribunal to the courts.

ASSISTANCE FOR NEW FARMERS AND COMPENSATION FOR THOSE LEAVING THE AGRICULTURAL SECTOR

At a workshop hosted by the CCF in the Province of Ra last year, involving mostly indigenous Fijian landowners and farmers, participants claimed that approximately 55% of the Government's \$10,000 assistance package for new farmers actually goes to the NLTB in the form of administration fees. They expressed concern that this is yet another financial scam and called for the NLTB to explain itself. Participants at the workshop also suggested that the Farmers Assistance Scheme is racially discriminatory, because only 107 displaced Indo-Fijians have received assistance, compared with 1,851 Indigenous Fijians, and new farmers from other ethnic groups have not been assisted.

The CCF believes that assisting new farmers and compensating those leaving the agricultural sector is primarily the responsibility of Government. We strongly oppose any racial or other unfair discrimination in this regard. The movement of displaced Indo-Fijian farmers and their families into Fiji's towns and cities has significantly increased poverty and squatter settlements in recent years, and it cannot be seriously doubted that these families need Government help to re-

establish themselves. If the widespread non-renewal of leases continues, and if the decline of the sugar industry is not arrested, then this internal migration is going to continue as well.

It may be possible for the sugar industry and the NLTB to internalise some of the cost of assisting new farmers and compensating those leaving the sector. The requirement in the regulations under NLTA that the NLTB must compensate an outgoing tenant on refusing to renew the lease is an example of this,⁹ although anecdotal evidence suggests that the NLTB frequently avoids paying such compensation.

This compensation under NLTA, which is supposed to represent the value of a transfer of the lease in question, had it been renewed,¹⁰ is to be contrasted with that payable under ALTA on a non-renewal, which represents only the value of improvements made to the land by the outgoing tenant.¹¹ It is only fair that the tenant should be compensated for improvements; however, this is a separate issue to that of compensation for the loss of livelihood and residence.

The CCF recommends that the Committee examine the Farmers Assistance Scheme in the context of its consideration of the ALTA/NLTA debate, and address the issues of assistance and compensation with a view to encouraging farmers from all ethnic groups to enter and remain in the agricultural sector and ensuring that those who leave do not fall into poverty. Compensation, in particular, should not be seen as affirmative action.

NEED FOR CONSENSUS BUILDING IN DEVELOPMENT OF REFORM OPTIONS

The CCF wishes to emphasise to members of the Committee that it makes no practical difference whether the legislation under which land is leased for agriculture is called “ALTA” or “NLTA” or anything else. What matters is not the title of the Act but its substance. While the CCF does not support the repeal of ALTA and the bringing of agricultural leases under NLTA in its present form, it is clear that some amendment of ALTA, and possibly also NLTA, may be desirable.

ALTA has been demonised by the NLTB and others on account of the 6% UCV rent formula and the 30-year minimum lease term. There are arguments for amending both of these provisions, some of which have been discussed in this submission. However, these provisions are not the main cause of the sugar industry’s decline, nor of the widespread non-renewal of agricultural leases. The decline of the sugar industry is a structural problem, exacerbated by increasing international competition and the imminent loss of preferential access to the EU.

⁹ *Native Lands Trust (Leases and Licences) Regulations* cl 19.

¹⁰ *Native Lands Trust (Leases and Licences) Regulations* cl 19(3).

¹¹ *Agricultural Landlord and Tenant Act* s 40.

The recent non-renewal of leases appears to have been provoked by a variety of factors, one of which is undoubtedly the poor returns received by landowners from their leased lands. However, these are probably the result of the excessive administration costs of the NLTB and the system of distribution of rent and other money among the members of each land-owning unit, as much as anything. Another factor appears to be the desire of indigenous Fijians to use their land, either for traditional purposes or in order to become commercial farmers themselves.

Adjusting the rent payable for agricultural leases will not resolve these issues. However, as stated earlier, the CCF does support consideration of a possible new formula for rent assessment, in order to provide a more equitable distribution of income and risks. This should be combined with the prohibition of so-called “good will” payments.

Likewise, adjusting the minimum lease term may influence the way farmers invest in the land, but ultimately it will not remove the possibility of non-renewal.

As stated in the introduction to this submission, land issues in Fiji inevitably take on a racial dimension. It is all too easy for unscrupulous individuals to use this to stir up resentment between indigenous Fijians and other ethnic groups. This potential will remain for so long as we maintain a racialised system of land ownership. However, it can be minimised by developing a legal framework for land tenure and use which fosters trust and cooperation.

Above all else, it appears that what is needed in the ALTA/NLTA debate is a process of consensus building in the development of reform options. It is this process which the CCF regards as urgent, and not the implementation of any particular reforms. Consensus building requires dialogue among all stakeholders, in order to identify mutual interests and establish trust. It should start at the top, with our political, business and community leaders. The Talanoa sessions between the Government and the Fiji Labour Party from 2001 to 2004 appeared to make some progress in this regard; however, they do not seem to have generated the momentum for a wider and deeper ongoing dialogue.

Section 185(2) of the Constitution recognises the need for consensus building by providing that ALTA may only be amended with the support of at least two-thirds of the members of each House of Parliament, and 9 of the 14 Senators nominated by the Bose Levu Vakaturaga. In effect, this means that ALTA can only be amended with bipartisan support from the two major political parties, and that representatives of both the Indigenous Fijian and Indo-Fijian communities must have a say. Whatever amendments, if any, may be proposed by the Committee, the CCF strongly supports the continued entrenchment of ALTA under section 185(2), as we believe this encourages consensus building and helps to contain the inevitable racial dimension of the ALTA/NLTA debate.