

**SUBMISSION TO THE JOINT SECTOR
STANDING COMMITTEE ON
NATURAL RESOURCES AND
ECONOMIC SERVICES REGARDING
THE QOLIQOLI BILL 2006**



CITIZENS' CONSTITUTIONAL FORUM LIMITED

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INTRODUCTION

The Citizens' Constitutional Forum ('the CCF') is pleased to present this submission on the Qoliqoli Bill 2006 (Bill No. 8 of 2006) to the Joint Sector Standing Committee on Natural Resources and Economic Services.

As members of the Committee may be aware, the CCF is a non-government organisation based in Suva, with over ten years' experience in community education and advocacy on Fiji's Constitution, democracy, human rights and multiculturalism.

The Qoliqoli Bill 2006 has a long history, which extends right back to the cession of Fiji to Great Britain in 1874. The history of customary fishing rights in Fiji is of course far longer.

The CCF supports the legal recognition and protection of customary fishing rights in Fiji, by way of an Act of Parliament, for the three reasons listed below under the heading, **RECOGNITION AND PROTECTION OF CUSTOMARY FISHING RIGHTS.**

We would therefore very much like to be able to support the Qoliqoli Bill 2006, which has the potential to improve the recognition and protection of customary fishing rights that has been provided since 1964 by the *Fisheries Act* (Cap. 158). Unfortunately, however, we cannot do so while the Bill remains in its present form, due to seven serious concerns regarding its intent and drafting. These concerns may be summarised as follows:

1. **The Qoliqoli Bill 2006 goes beyond recognising and protecting customary fishing rights.** As stated in its long title, the objects of the Bill include: "to provide for the transfer of the proprietary ownership of qoliqoli areas from the State to the qoliqoli owners". In the CCF's view, such a transfer does not bear a sufficient relation to customary rights. We recommend that the Bill should be amended to limit the rights to be transferred by the State to *qoliqoli* owners to the right to take fish and other marine products from the *qoliqoli*, and the corresponding right to prevent others from taking such products or damaging the marine environment. This would ground the Bill most firmly in customs that are widely agreed and practised in the past and present.
2. **The Bill is silent on customary responsibilities,** which the CCF believes are an important corollary of customary rights. The right of *qoliqoli* owners to prevent others from damaging the marine environment in their *qoliqoli*, which we have suggested the Bill should recognise, flows directly from the right to take fish and other marine products, because damage to the marine environment will inevitably affect the organisms that live and grow there. The same reasoning suggests that *qoliqoli* owners must have a responsibility to prevent damage to the marine environment, including a responsibility to avoid damaging it themselves. While recognising that this may not sit easily with the development of *qoliqoli* through

dredging, reclamation and so on, the CCF recommends that the Committee consider how customary responsibilities in *qoliqoli* can be recognised in the Bill.

3. **If the Bill is enacted in its present form, the CCF believes it will be open to a constitutional challenge in the courts and some of its provisions could be declared invalid.** This is because, according to our legal advice, transferring from the State to *qoliqoli* owners rights that do not bear a sufficient relation to customary rights would unfairly discriminate against non-indigenous Fijians on the ground of ethnic origin. To the extent that the Bill purports to effect such a transfer, it would contravene section 38 of the Constitution.
4. **The CCF fears that the Qoliqoli Bill 2006 will exacerbate the “hand out” mentality that is widespread among indigenous Fijians, by once again propagating the myth that collective ownership of natural resources can make them rich without needing to work for it.** The truth is that the vast majority of individual *qoliqoli* owners will receive no more than “pocket money” from *qoliqoli* fees or rents under the Bill, as has proven to be the case for rental income from native land. **The CCF also fears the Bill could further damage inter-ethnic relations, by fuelling resentment among non-indigenous people, to whom it offers no benefits, and among *qoliqoli* owners, when their expectations of riches are disappointed.** We are therefore concerned that the Bill could increase the cost of doing business in Fiji’s tourism industry, without contributing positively to the development of *qoliqoli* owners, their communities and the country as a whole. We recommend that the Committee investigate how the Qoliqoli Bill 2006 can be used to create incentives for resorts to become more socially responsible, without significantly increasing their operating costs.
5. **The mechanism proposed in the Bill for distributing income from *qoliqoli* fees and rents is flawed.** We do not believe that the distribution mechanism and formula should be modelled on those used for native land, because that mechanism and formula have not been successful. The CCF recommends that the Committee investigate how returns from the use of *qoliqoli* by commercial operators can be applied to promote better development outcomes.
6. **The wide and vague language used in the Bill to define the term “commercial operation” appears likely to lead to problems during implementation, including unnecessary disputes, disruptions and distress caused by misunderstandings.** It is essential that the Bill explains clearly, and preferably in simple language, what types of activity may be freely undertaken in a *qoliqoli* and what types of activity may not.
7. **The powers that the Bill would vest in *qoliqoli* officers relating to entry onto private property, inspection and search are excessive.** The power of inspection probably violates the right to be secure against unreasonable searches, and possibly also the right to personal privacy, both of which are guaranteed by the Constitution.

These concerns are further explained below under separate headings, along with suggestions as to how each of them may be addressed.

RECOGNITION AND PROTECTION OF CUSTOMARY FISHING RIGHTS

As stated in the introduction, the CCF supports the legal recognition and protection of the customary fishing rights in Fiji, for three reasons:

First, such recognition and protection is historically justified by the maintenance within indigenous Fijian communities of long-standing traditions relating to customary fishing grounds. The nature of those traditions is discussed under the next heading.

Secondly, the *Constitution (Amendment) Act 1997* ('the Constitution') instructs the Parliament to make provision for the application of indigenous Fijian customary laws (section 186(1)), and specifically provides for the application of indigenous Fijian customs relating to fishing rights (section 38(8)(a)(i)). This point is expanded under the heading, **UNFAIR DISCRIMINATION AGAINST NON-INDIGENOUS FIJIANS**.

Thirdly, recent developments in international law and standards suggest a trend towards greater recognition of the rights of indigenous peoples around the world. For example, the *Indigenous and Tribal Peoples Convention*, adopted by the International Labour Organisation at Geneva in 1989 (often referred to as "ILO Convention 169"), to which Fiji is a party, provides in Article 23(1):

"Handicrafts, rural and community-based industries, and subsistence economy and traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering, shall be recognised as important factors in the maintenance of their cultures and in their economic self-reliance and development. Governments shall, with the participation of these people and whenever appropriate, ensure that these activities are strengthened and promoted."

The draft United Nations Declaration on the Rights of Indigenous Peoples, which is currently awaiting adoption by the UN General Assembly, states in Article 25:

"Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard."

Article 26 of the draft Declaration also states:

"1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.”

The draft Declaration does not represent international law. Even after it is adopted by the UN General Assembly, it will only represent a “standard of achievement to be pursued”, because it is not expressed to be legally binding. Nonetheless, the CCF supports the draft Declaration, especially in light of Article 45(2), which states:

“In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law, in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.”

BILL GOES BEYOND CUSTOMARY RIGHTS

The Qoliqoli Bill 2006 will only recognise and protect customary fishing rights to the extent that it accurately reflects those rights. In order to assess whether the Bill accurately reflects customary rights, it is first necessary to examine the concept of “customary law”. This concept does not simply equate to whatever is done by indigenous people in general, or by *qoliqoli* owners in particular. If it did, it would have no explanatory value, as “customary law” would encompass the whole spectrum of good and bad behaviour, and old and new practices, that different individuals display every day.

The distinction between fact and law can be described as the difference between what *is* done, and what *should be* done, according to a certain normative or moral system – in this case, a legal system. If the term “customary law” is to explain anything, it must refer to a type of legal system, so that it describes what *should be* done, and not simply what *is* done.

A distinctive feature of any legal system is the set of rules by which laws within the system are identified. In Fiji’s modern legal system, for example, the rules for identifying laws can be found in the Constitution, which is itself the supreme law of the State. The Constitution vests the power to make laws in the national Parliament. However, the Constitution also maintains the traditional English doctrine of *stare decisis*, or precedent, which gives decisions of the national courts the character of laws as well. In

addition, the Constitution provides that international law can be taken into account by the courts in certain circumstances, so that it too forms part of the laws of Fiji. There are therefore three sources of law in Fiji's modern legal system, aside from the Constitution itself: Parliament, the courts and international law.

What are the rules for identifying the customary laws of Fiji's indigenous communities? This is not an easy question to answer. However, several points can be made. According to indigenous Fijian customary law, elders, and especially chiefs and *matanivanua*, are traditionally charged with maintaining customs within their communities and with the authority to make decisions that will be respected by members of their communities. There are no special rules for changing customary laws, although of course they develop over time. Known hierarchies determine lines of authority and decision-making powers, from the head of the family up to the chief of the *vanua*.

Discussions among staff of the CCF and members of our Steering Committee, many of whom are indigenous Fijians, indicate that, in the case of *qoliqoli*, decision-making powers are traditionally vested in the *vanua* chief. It is he (or she) who has the power to prevent fishing in a certain area of the sea, for example, by declaring it to be *tabu*. Our information is that customary rights in customary fishing grounds clearly include the right to take fish and other products from the customary fishing ground, and a corresponding right to exclude others from doing the same.

However, as far as the CCF is aware, *vanua* chiefs have never had any power to prevent people from walking, swimming, paddling or sailing through their *qoliqoli*. We have found no reliable evidence that *qoliqoli* owners anywhere in Fiji are or have ever been traditionally entitled to exclude other people from travelling through their *qoliqoli*, or from engaging in activities within it that have little or no impact on the marine environment. This leads us to conclude that customary rights in customary fishing grounds do not extend to a right of exclusive possession.

The difficulty of identifying, and agreeing on, the precise extent and limits of customary laws is evident in internal contradictions that emerge from the Qoliqoli Bill 2006 itself. Most notably, the Bill is confused in its treatment of exclusive possession of customary fishing grounds. As stated above, the CCF does not believe that customary rights in customary fishing rights have ever extended to such a right. Nonetheless, the Bill would transfer exclusive possession of customary fishing grounds from the State to *qoliqoli* owners (clause 6(1)). However, the very next clause of the Bill then seeks to preserve the rights of members of the public to travel through *qoliqoli* or engage in "non-commercial recreational activities" within them (clause 7). This is in direct contradiction to the previous clause, because, by definition, a right of "exclusive possession" means a right to occupy certain property and exclude others from entering onto it. If *qoliqoli* owners cannot exclude members of the public from their *qoliqoli*, then they do not enjoy exclusive possession of it.

The contradiction does not end there, however. Clause 20 of the Bill goes on to provide that anyone who wishes to undertake a “commercial operation” within a *qoliqoli* must obtain the approval of the Native Land Trust Board (‘the NLTB’). Presumably such approval would require the payment of a fee or rent. Clause 20(7) would enable the NLTB, on behalf of *qoliqoli* owners, to approve a commercial operation that prevents members of the public from travelling through the *qoliqoli* or engaging in “non-commercial recreational activities” within it. Since clause 7 of the Bill makes it clear that *qoliqoli* owners are not entitled to exclude members of the public from travelling through or engaging in non-commercial recreation within their *qoliqoli*, how can clause 20(7) of the Bill enable the NLTB, on behalf of the *qoliqoli* owners, to contract with a commercial operator, and extract a rent, to exclude these rights of members of the public? Put more simply, how can the Bill enable *qoliqoli* owners to grant to a commercial operator, through the NLTB, a right that the owners themselves do not enjoy? The right in question is, of course, exclusive possession of the *qoliqoli*. Clause 6 of the Bill states that *qoliqoli* owners have it, while clause 7 of the Bill states that they do not. Clause 20(7) of the Bill states that *qoliqoli* owners will be able to grant exclusive possession to commercial operators, even if they do not have it themselves.

The CCF believes that this is a serious flaw in the Bill. These clauses violate one of the fundamental principles of property law, captured in the Latin maxim, *nemo dat quod non habet*, which translates as “You cannot give that which you do not have.” Consistently with this principle, *qoliqoli* owners, who do not enjoy exclusive possession of their *qoliqoli*, cannot grant exclusive possession of the *qoliqoli* to a commercial operator.

Violating the principle of *nemo dat quod non habet*, as the Bill proposes, is likely to produce absurd and undesirable results. Commercial operators could obtain, through the NLTB, rights over *qoliqoli* that the owners of the *qoliqoli* do not have. Since these are rights that the *qoliqoli* owners do not have, they must be rights that belong to the State – so, effectively, the NLTB would be contracting rights of the State to commercial operators in exchange for rents to be paid to the *qoliqoli* owners. The CCF submits that this is highly undesirable, since the NLTB does not represent the interests of the State, and *qoliqoli* owners have no claim to rents paid for State rights.

Worse still, as a result of the Bill, *qoliqoli* owners who wished to exclude members of the public from their own *qoliqoli* could set themselves up as a commercial operator and obtain the approval of the NLTB to keep the public out. Any rents paid to the NLTB under this arrangement would ultimately be returned to the *qoliqoli* owners as rental income, minus only those amounts that the NLTB withheld for administrative costs. In effect, the *qoliqoli* owners would be paying rent to themselves, and in return they would secure exclusive possession of their *qoliqoli* – the very right that clause 7 of the Bill states they do not have.

Clearly, this is an absurd result and, again, the CCF submits that it would be highly undesirable for the NLTB to be able to grant exclusive possession over *qoliqoli* when *qoliqoli* owners themselves do not enjoy that right.

In addition to this absurdity, the application of complex and contradictory legislative provisions is bound to cause numerous misunderstandings, leading to unnecessary disputes, disruptions and distress. The Qoliqoli Bill 2006 seeks to regulate an area of conduct that involves many ordinary people as well as commercial operators, and it is important that the potential for disputes is minimised. This will be achieved by making the Bill as simple and easy to understand as possible.

If the State wishes to permit resorts, for example, to exclude members of the public from the beaches, reefs and waters adjacent to their private property, then the State has the power to do so, because in Fiji's modern legal system, the State owns the territorial sea, including all land below the high water mark. Whether or not the State *should* permit resorts to keep members of the public out of these areas is a separate question altogether, and a controversial one, which the CCF suggests should be considered quite apart from the present Bill.

As stated above, the information available to us concerning customary law is that *qoliqoli* owners have never been entitled to exclude members of the public from their *qoliqoli*. Consequently, in the CCF's view, resorts that wish to exclude members of the public from beaches, reefs and waters should be required to contract with the State, and not with *qoliqoli* owners or the NLTB. There is no justification for the State to grant *qoliqoli* owners, through this Bill, rights they do not possess in customary law.

It is hardly coincidental that the Fijian word *qoliqoli* translates into English as "customary fishing ground". The activity of fishing is central to the meaning of the word and the nature of the rights involved. If, as the CCF believes, *vanua* chiefs have never had any power to prevent people from walking, swimming, paddling or sailing through their *qoliqoli*, this provides a strong argument that customary rights in customary fishing grounds do not extend beyond the right to take fish and other products from the customary fishing ground, and a corresponding right to exclude others from doing the same. If this is indeed the extent of *qoliqoli* owners' rights, then the Qoliqoli Bill 2006 should not have anything to say about activities that do not involve the taking of fish and other marine products, prevent the *qoliqoli* owners from doing so, or damage the environment that produces those products. This would leave activities such as sunbathing, snorkelling, diving and surfing totally unaffected by the Bill, whether or not they involve a commercial operator.

The great advantage of limiting the Bill to the recognition and protection of customary rights to take fish and other marine produce in customary fishing grounds is that it would ground the Bill most firmly in customs that are widely agreed and practised in the past and present by *vanua* chiefs. For this reason, and in light of the practical issues discussed above, the CCF recommends that the Bill should be amended to limit the rights to be transferred by the State to *qoliqoli* owners to the right to take fish and other marine products from the *qoliqoli*, and the corresponding right to prevent others from taking such products or damaging the marine environment.

BILL IS SILENT ON CUSTOMARY RESPONSIBILITIES

It was stated under the previous heading that the CCF has found no reliable evidence that *qoliqoli* owners anywhere in Fiji are or have ever been traditionally entitled to exclude other people from travelling through their *qoliqoli*, or from engaging in activities within it that have little or no impact on the marine environment. However, there certainly is evidence that *vanua* chiefs have regarded themselves, and been seen by their people, as being responsible for the management of customary fishing grounds, and obliged to prevent or limit fishing in certain places at certain times for ceremonial and other reasons.

The CCF believes it is unfortunate that the Qoliqoli Bill 2006 is silent on these customary responsibilities. We recommended above that the Bill should be amended to limit the rights to be transferred by the State to *qoliqoli* owners to the right to take fish and other marine products from the *qoliqoli*, and the corresponding right to prevent others from taking such products or damaging the marine environment.

The suggestion that *qoliqoli* owners should enjoy a right to prevent others from damaging the marine environment in their *qoliqoli* may at first seem novel or insufficiently related to customary law. However, the CCF believes it flows directly from the right to take fish and other marine products, because damage to the marine environment in a customary fishing ground will inevitably affect the organisms that live and grow within that environment. In an extreme case, damage to the marine environment could negate the right to take fish and other products from a *qoliqoli* by killing or destroying them.

The same reasoning suggests that *qoliqoli* owners must have a responsibility to prevent damage to the marine environment, including a responsibility to avoid damaging it themselves. Such damage might be caused by harmful fishing techniques, excessive breakage of coral, or simply over-fishing.

Clearly, the legal recognition of a customary responsibility to protect the marine environment in *qoliqoli* will not sit easily with the development of *qoliqoli* through dredging, reclamation and so on. This difficulty may be the reason why the Qoliqoli Bill 2006 has nothing to say on the matter. However, the CCF believes that customary responsibilities in *qoliqoli* are an important corollary of customary rights, and we therefore recommend that the Committee consider how they can be recognised in the Bill.

BILL UNFAIRLY DISCRIMINATES AGAINST NON-INDIGENOUS FIJIANS

It was stated above that, as far as the CCF is aware, *vanua* chiefs have never had any power to prevent people from walking, swimming, paddling or sailing through their *qoliqoli*. More broadly, it was stated that we have found no reliable evidence that *qoliqoli* owners anywhere in the country are or ever have been traditionally entitled to exclude

other people from travelling through their *qoliqoli*, or from engaging in activities within it that have little or no impact on the marine environment. From this we concluded that customary rights in customary fishing grounds in Fiji do not extend to a right of exclusive possession, and that, in fact, they are limited to a right to take fish and other products from the customary fishing ground, and a corresponding right to exclude others from doing the same.

Clearly, the Qoliqoli Bill 2006 reflects a more expansive view of customary rights in customary fishing grounds than the one arrived at by the CCF. However, we believe that, if the Bill is enacted in its present form, it will be open to a constitutional challenge in the courts to the extent that it purports to transfer from the State to *qoliqoli* owners rights that do not bear a sufficient relation to customary rights. There are two reasons for this.

First, section 186 of the Constitution provides:

“The Parliament must make provision for the application of customary laws and for dispute resolution in accordance with traditional Fijian processes.”

Legal advice obtained by the CCF indicates that this provision may offer some protection to the Qoliqoli Bill 2006 against a constitutional challenge to the extent that the Bill accurately reflects customary law. Clearly, section 186 instructs the Parliament to recognise and protect customary law through legislation. However, provisions of an Act of Parliament that do not reflect customary law will receive no protection from this section. As stated above, the CCF’s view is that the Qoliqoli Bill 2006 goes beyond customary law in seeking to enable *qoliqoli* owners, through the NLTB, to grant exclusive possession of their *qoliqoli* to a commercial operator, and to extract fees and rents for commercial operations undertaken in the *qoliqoli* that do not involve the taking of fish and other marine products, prevent the *qoliqoli* owners from taking such products, or damage the environment that produces them.

Secondly, section 38(2)(a) of the Constitution provides that a person must not be unfairly discriminated against, directly or indirectly, on the ground of his or her race or ethnic origin. Legal advice obtained by the CCF indicates that the Qoliqoli Bill 2006 discriminates indirectly against non-indigenous Fijians, because it purports to transfer from the State to *qoliqoli* owners certain rights, and *qoliqoli* owners are exclusively of Fijian ethnicity. This discrimination will be “unfair” for the purposes of section 38(2)(a) if it is not otherwise justified or protected by the Constitution.

Section 38(8)(a) of the Constitution provides that a law may limit the right set out in section 38(2) for the purpose of:

“providing for the application of the customs of Fijians or Rotumans or of the Banaban community:

- (i) to the holding, use or transmission of, or to the distribution of the produce of, land or fishing rights; or

(ii) to the entitlement of any person to any chiefly title or rank”.

Clearly, section 38(8) protects certain customary laws from a constitutional challenge based on discrimination. The customary laws in question are those relating to land, fishing rights, and chiefly titles or ranks. The reference in section 38(8)(a) to “fishing rights” suggests a category of customary rights that is centrally concerned with fishing. It certainly does not suggest rights that extend to exclusive possession of customary fishing grounds, or to extracting fees and rents for activities that have no significant impact on the marine environment.

The CCF’s legal advice is that the protection provided by section 38(8) of the Constitution is only available for a narrow category of customary fishing rights, and the Qoliqoli Bill appears to exceed that category. Accordingly, if the Bill is enacted, some of its provisions could be declared invalid by the courts in a constitutional challenge based on section 38(2) of the Constitution, unless they are justified by customary law itself.

As stated above, the CCF believes that the Bill does not accurately reflect customary law. We are therefore concerned that, if the Bill is not amended as we have suggested, it is likely to be challenged in the courts and some of its provisions could be declared invalid.

BILL COULD EXACERBATE “HAND OUT” MENTALITY AND FURTHER DAMAGE INTER-ETHNIC RELATIONS

Much time and effort has clearly been put into drafting provisions of the Bill that would enable the NLTB to charge fees and rents to resorts and other businesses for the use of *qoliqoli* for commercial operations of all kinds. The purpose of this is clearly to maximise the returns to *qoliqoli* owners. The CCF believes that this purpose must be limited by the need to ensure that the Bill accurately describes customary fishing rights, as discussed above.

We also believe the purpose of maximising returns to *qoliqoli* owners needs to be balanced against the competing purpose of maintaining a competitive business environment for tourism, in order to ensure that the industry remains viable. In addition, it should be combined with the complementary purpose of ensuring that the Qoliqoli Bill 2006 contributes positively to the development of *qoliqoli* owners, their communities and the country as a whole.

On the issue of maintaining a competitive environment for tourism, charging fees and rents to commercial operators for the use of *qoliqoli* will clearly lead to increases in the cost of doing business. Although some resorts are already making voluntary payments to *qoliqoli* owners, there is a likelihood that the Bill will lead to increased demands and the amounts paid will therefore increase in at least some cases. If *qoliqoli* owners were already universally satisfied with “goodwill” payments, there would be no need to enact the Bill. However, commercial operators themselves are in a better position than the CCF to assess the likely impact of the Bill on their businesses and the tourism industry.

The question that the CCF wishes to pose here is whether State intervention to increase the fees and rents paid collectively to the traditional owners of natural resources represents a sensible model for development in Fiji today. The problems associated with collective ownership of native land are now well known. Prominent among these is the fact that providing income to indigenous Fijians through collective ownership of native land has made only a very few people wealthy, and has not prevented large numbers of indigenous Fijians from falling into poverty along with many members of other ethnic groups.

36 years after independence, the expectation that collective ownership of natural resources will make indigenous Fijians rich has proven to be a false hope. This is by now undeniable. Nonetheless, the hope persists, and it continues to be exploited by unscrupulous individuals, including some indigenous leaders (witness the recent six-billion dollar hoax perpetrated by the supposed “Office of International Treasury Control”). The effect of this false hope, and its exploitation, is that too many indigenous Fijians are afflicted with a “hand out” mentality. It is as if they are caught between a lack of motivation and waiting for deliverance. This, in the CCF’s view, is the modern manifestation of a “cargo cult”.

People need to be encouraged to improve their lives through their own efforts, and not to wait for the State or anyone else to do it for them. The promise of rental income through collective ownership of native land has done nothing to encourage personal achievement among indigenous landowners. In fact, the CCF believes it has discouraged them. Some experience feelings of resentment when they see their tenants growing wealthy while they themselves receive only “pocket money” in rental income. They are led to believe this means the rents are too low. However, the truth is that increasing the rents extracted from tenants will not lead to significant increases in the amount of rental income received by the vast majority of indigenous landowners, because most of the income is reserved for a small number of chiefs. Even if the distribution formula was changed so that everyone receives the same amount, the large number of individuals involved would mean that it is still a relatively small sum.

In addition, the CCF believes that the resentment some indigenous Fijians feel when they see tenants growing wealthy from working their land is one of the root causes of inter-ethnic conflict in Fiji. Instead of waiting in vain for others to earn their living for them, indigenous Fijians need to learn that wealth comes through hard work, and not from resource ownership alone.

There is every reason to think that the Qoliqoli Bill 2006 will replicate the problems associated with collective ownership of native land in the case of collective ownership of customary fishing grounds. It appears, once again, to propagate the myth that collective ownership of natural resources will make indigenous Fijians rich. However, if the Bill is enacted in its present form, the vast majority of individual *qoliqoli* owners will receive no more than “pocket money” from *qoliqoli* fees or rents, just as they do in rental income from native land.

Some have argued that the Qoliqoli Bill 2006 will improve inter-ethnic relations in Fiji by meeting the reasonable demands of *qoliqoli* owners. However, the CCF fears that it risks further damaging inter-ethnic relations, because it is already fuelling resentment among non-indigenous people, to whom it offers only higher costs of doing business, and because it may ultimately fuel resentment among *qoliqoli* owners too, when their expectations of riches are inevitably disappointed.

To illustrate this point, we refer the Committee to a letter that appeared in the *Fiji Times* newspaper on 23 September 2006:

“I refer to ... [name omitted] letter (FT 19/9). First it was the land. Now it is the sea. Next is education and business where we Fijians lag behind. We will control all in maybe 20 years.”

The future that the author of this letter predicts is a fantasy of envy and greed. He seems to be proposing that all non-indigenous people be driven out of Fiji or subjugated to indigenous domination. If this really came to pass, it would be a nightmare for all concerned. Investment in business would cease, the economy would collapse, and poverty and crime would explode. Fiji would come to resemble Solomon Islands or even Bougainville.

However, it does not have to be this way. Indigenous Fijians do not need to “control” the land, sea, education or business. They would be much better served by becoming more active participants in their own development. As stated above, the history of native land in this country proves that collective ownership of natural resources does not lead to universal prosperity for the owners. Only active participation in development will ensure indigenous Fijians share the benefits that development can bring, and also that they are better placed to influence the progress of Fiji’s national development.

A much brighter future than the one this author predicts can be achieved if the Government and the leaders of indigenous communities embrace a model of development that makes its first priority to encourage everyone to become active in the economy, to reward hard work and good ideas, regardless of ethnicity, and to help natural resource owners become active participants in the development of their resources. This model suggests a different approach to customary rights in customary fishing grounds, in which commercial operators could increasingly become partners of *qoliqoli* owners, and not simply their licensees or tenants.

The CCF urges the Committee to consider the examples that already exist in Fiji of creative partnerships between resorts and other businesses, on the one hand, and local indigenous communities, on the other. Businesses that buy local produce, employ and train local people, support other local businesses, engage with community leaders to design new income-generating opportunities, and otherwise seek to contribute to community prosperity, may be far better development partners than businesses that simply pay more fees and rents. It should be possible to use the Qoliqoli Bill 2006 to

create incentives for resorts to become more socially responsible, without significantly increasing their operating costs, and the CCF recommends that the Committee investigate how this can be done.

MECHANISM FOR DISTRIBUTING QOLIQOLI INCOME FLAWED

In addition to the above, the Bill does not clearly state how income from *qoliqoli* fees and rents is to be used or distributed. Clause 22 provides for the establishment of a separate trust fund for every “qoliqoli area”, with income from that area to be paid into it. Clause 23 provides that the Qoliqoli Commission to be established by the Bill will appoint at least five trustees for each trust fund. Clause 24(1) then provides that monies in these trust funds “shall be applied or distributed by the Board [NLTB] in accordance with regulations made under the Native Land Trust Act.” This suggests that the powers and duties of these trust funds established under the Bill are intended to be provided by regulations made under the *Native Land Trust Act* (Cap. 134). The CCF doubts that it can be permissible to make regulations under the *Native Land Trust Act* to deal with matters arising under the Qoliqoli Bill 2006.

More importantly, given the controversial nature of the distribution mechanism and formula for fees and rents from native land, set out in the *Native Land Trust (Leases and Licences) Regulations*, the CCF recommends that the powers and duties of the separate trust funds to be established under the Qoliqoli Bill 2006 should be set out in the Bill itself, so that the Committee, Parliament and the public can properly scrutinise them.

We also recommend that the Committee investigate how returns from the use of *qoliqoli* by commercial operators can be applied to promote better development outcomes. The distribution mechanism and formula should not be modelled on those used for native land, because, as discussed under the previous heading, that mechanism and formula have not been successful.

WIDE AND VAGUE DEFINITION OF “COMMERCIAL OPERATION”

Clause 20(2) of the Bill states, in part:

“No person may, without the prior written approval of the Board [NLTB], undertake any commercial operation within a qoliqoli area”.

This provision appears to complement clause 7(b) of the Bill, which seeks to preserve the right of members of the public to engage in “non-commercial recreational activities” within *qoliqoli*.

The difference between a “commercial operation” and “non-commercial recreational activities” appears to turn on the definition of “commercial operation” set out in clause 2 of the Bill, which states:

“commercial operation’ means any fisheries or non-fisheries activity within qoliqoli areas undertaken for commercial purposes or for other benefit or gain”.

It appears to be the intention of the Bill that the need to obtain the approval of the NLTB to undertake an activity within a *qoliqoli* will depend on whether the activity comes within or falls outside this definition. It will therefore be very important that members of the public and *qoliqoli* owners are able to understand and apply the definition of “commercial operation” so that they know what activities may be freely undertaken in a *qoliqoli* and what activities may not.

The CCF submits that the current definition of “commercial operation” is too wide and vague for this purpose. For example, sunbathing is an activity that a person undertakes for “benefit or gain”, within the definition quoted above, in the form of relaxation and a suntan. Surely, this activity should not require the approval of the NLTB? Similarly, swimming may be undertaken for the “gain” of fitness. What about when these activities are undertaken by guests in a resort whose private property lies adjacent to the *qoliqoli*? Arguably, the sunbathing or swimming is still done for recreation, and not for commercial purposes; however, the resort benefits from the availability of beach and sea for sunbathing and swimming by its guests, and the resort’s purposes are clearly commercial. Would the resort need NLTB approval for this use of the *qoliqoli*? Or would it only need approval if it wished to keep members of the public and *qoliqoli* owners off the sand and out of the water where its guests sunbathe and swim?

To take another example, would a boat owner who occasionally ferries surfers to a surf break for a small fee be required to obtain the NLTB’s approval if the surf break was in a *qoliqoli*? What if there were no money involved? How would anyone except the boat owner and the surfers know the difference between these two scenarios? If the boat owner were required to obtain the NLTB’s approval in order to operate such an occasional and low-income business, it seems likely that he or she would simply stop doing so, because the hassle and expense would be more than it was worth.

It was stated earlier in this submission that the application of complex and contradictory legislative provisions is bound to cause numerous misunderstandings, leading to unnecessary disputes, disruptions and distress. Even before the Bill was introduced into Parliament, there were stories of *qoliqoli* owners interfering, sometimes violently, in activities being undertaken by tourists in their *qoliqoli* that the owners believed entitled them to extract some form of payment. Incidents of this kind are of course highly undesirable and very damaging to Fiji’s image as a tourist destination.

It is therefore essential that the Bill explains clearly, and preferably in simple language, what types of activity may be freely undertaken in a *qoliqoli* and what types of activity may not.

In addition, it would seem that a person who wishes to engage in commercial fishing within a *qoliqoli* will be required to obtain both a licence issued by the Qoliqoli Commission under clause 16 of the Bill, and written approval from the NLTB under

clause 20. This may be a drafting error, as there does not appear to be any need to impose two separate administrative procedures in such cases.

EXCESSIVE POWERS VESTED IN QOLIQOLI OFFICERS

The last serious concern that the CCF wishes to record in this submission regarding the Qoliqoli Bill 2006 is that Part 7 of the Bill, as it is presently drafted, would vest *qoliqoli* officers with excessive powers relating to entry onto private property, inspection and search.

Qoliqoli officers will not be policemen and women, but individuals appointed by the Qoliqoli Commission (clause 29(1)). There is nothing in the Bill to indicate what, if any, training they will receive.

Clause 30 of the Bill deals with inspections designed to ensure compliance with the Bill and any regulations made under it. Clause 30 provides:

“... a qoliqoli officer may enter and inspect any place, including any premises, vessel or vehicle, in which the officer believes on reasonable grounds there is any work or undertaking or any fisheries resources or other thing in respect of which this Act [the Bill], regulations or bylaws apply”.

If the place to be inspected is a dwelling house, the *qoliqoli* officer may only enter with the consent of the occupant (clause 30(5)) or with a warrant issued by a magistrate. A magistrate may issue such a warrant if he or she is satisfied that entry into the dwelling house “is necessary for any purpose relating to the administration or enforcement of this Act [the Bill], regulations or bylaws” and such entry has been or is likely to be refused (clause 30(6)).

For the purpose of carrying out an inspection under this clause, the *qoliqoli* officer has the power to (clause 30(1)(a)):

- open any container that he or she believes contains “any fisheries resource or other thing”;
- examine and take samples of any fisheries resource or other thing;
- conduct any tests or analyses and take any measurements; and
- require any person to produce any documents or other records that the officer believes are relevant.

The CCF submits that the power of inspection proposed by clause 30 of the Bill amounts in substance to a power of search, but without the procedural safeguards that should accompany such a power. This can be clearly seen when clause 30 is compared with the next clause of the Bill. Clause 31 would give *qoliqoli* officers the power to:

“enter and search any place, including any premises, vessel or vehicle other than a dwelling house, in which the officer believes on reasonable grounds that there is:

- (a) any work or undertaking that is being or has been carried on in contravention of this Act or the regulations;
- (b) any fisheries resource or other thing ... in relation to which this Act or the regulations have been contravened
- (c) any fisheries resource or other thing that will afford evidence in respect of a contravention of this Act or the regulations.”

However, in order to exercise the power conferred by clause 31, a *qoliqoli* officer must satisfy a magistrate that “there are reasonable grounds to believe” that an illegal activity is occurring in the place to be searched, or that there is evidence in the place of an illegal activity (clause 31(2)).

The difference between powers of “inspection” and “search”, as those terms are usually used, is that inspections are routine or random and simply intended to ensure compliance with the law, while searches are a direct and targeted response to specific evidence or information suggesting non-compliance. For this reason, inspections should involve as little intrusion and disruption as possible, while searches may require a more thorough, and therefore invasive, approach. Accordingly, powers of search are usually accompanied by procedural safeguards such as the need to obtain a warrant from a magistrate, while powers of inspection usually are not.

The power of inspection provided by clause 30 of the Bill clearly does not conform to the description just given. The CCF considers that it is overly intrusive and could be used to unnecessarily disrupt commercial operations and private activities that are perfectly innocent, and concerning which there is not even a suspicion of wrongdoing.

Legal advice obtained by the CCF indicates that clause 30, as it is presently drafted, probably contravenes the right to be secure against unreasonable searches, which is guaranteed by section 26 of the Constitution. Our legal advice also indicates that inspections of dwelling houses may contravene the right to personal privacy guaranteed by section 37 of the Constitution, unless there is either a licensed “commercial fisheries operation” taking place in the house, in which case it would really be in the nature of a business premises, or there is a reasonable suspicion that an illegal activity is occurring in the house.

The CCF recommends that clause 30 of the Bill be amended so that inspections of private property for the purpose of ensuring compliance with the law may only be carried out where there is a commercial fisheries operation, licensed under clause 16 of the Bill, taking place on the property. This would mean that the inspections under the Bill are limited to monitoring catch-sizes and other aspects of the operation of commercial fishers in customary fishing grounds. Cooperating with such inspections would then be a condition of the licences granted for these operations.

If this recommendation is adopted, inspections under clause 30 would not be directed to determining whether a fisheries operation that is not licensed contravenes the Bill or any regulations or by-laws made under it. Nor would inspections be directed to determining

whether a commercial operation that does not relate to “fisheries resources”, such as a resort, is complying with the law, including the terms of its approval from the NLTB. These questions could only be the subject of a search.

In relation to clause 31, and the power of search, the CCF recommends that, provided a warrant has been obtained in accordance with clause 31(2), dwelling houses should be included. This is because, in our view, a reasonable suspicion of illegal activity justifies intrusion into a private home. The fact that dwelling houses are currently excluded from searches under clause 31, but included in inspections under clause 30, appears to be a drafting error in any case.

The CCF also recommends that clause 31 should be amended to remove sub-clauses (3) and (4). These sub-clauses provided for a *qoliqoli* officer to conduct a search of private property without a warrant from a magistrate where “by reason of exigent circumstances it would not be practical to obtain the warrant”. The problem with this provision is that, by removing the need for a warrant, it opens the power of search to abuse. It would not only be up to the *qoliqoli* officer to decide whether “exigent circumstances” exist – or, in other words, whether the search is urgent – but also whether there really are “reasonable grounds to believe” that an illegal activity is taking place – in other words, whether the search is justified.

Finally, the CCF is concerned that the power of entry provided by clause 32 of the Bill, which would enable *qoliqoli* officers and anyone accompanying them to “enter on and pass through or over private property without being liable for trespass”, is intrusive and unnecessary. *Qoliqoli* officers, like everyone else, should only enter private property with the consent of the occupant, unless they are exercising a power of inspection or search under other provisions of the Bill. We recommend that clause 32 of the Bill be removed.