

# CREATING MARINE PROTECTED AREAS THROUGH THE STATE LANDS ACT'S FORESHORE LEASING AND LICENSING MECHANISMS

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# INTRODUCTION

- ELA engages in policy and law reform process for improved environmental outcomes and sustainable NR management, in particular in relation with fisheries and MPAs
- State Lands Act as an alternative legal basis for creating MPAs?



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# DEFINITIONS

## Foreshore

*“the area of a shore that lies between the average high tide mark and the average low tide mark”*

*“the shore of the sea, channels or creeks that is alternatively covered and uncovered by the sea at the highest or lowest tides. (Environment Management Act, 2005)*

## Marine Protected Area

*“ a clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values”. (IUCN)*



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# ESTABLISHING MPAs IN FIJI

## Current Status

- No protected areas legislation
- Most MPA in Fiji In-shore and characterised by dual governance and dual legalism
- MPAs in Fiji are:
  - Statutes-based: the Fisheries Act
  - Community-based:
    - Customary tabu
    - LMMAs



# STATUTORY MPAs : Fisheries Act 1942 and Regulations

- S.9 empowers the Minister to make regulations for the conservation, protection and maintenance of a stock of fish, inter alia by “*prescribing areas and seasons within which the taking of fish is prohibited or restricted, either entirely or with reference to a named species*”
- Regulation 11 provides for “restricted areas”, which are to be listed in the Fifth Schedule of the Act
- Regulations have been added for the creation of MPAs (Incl. marine reserves)
- Fishing restrictions or prohibition become enforceable when published in Government’s Gazette



# LIMITATIONS & CHALLENGES TO MPAs CREATED UNDER THE FISHERIES ACT

- Exemptions In restricted areas (reg 11):
  - Fishing with hand net, wading net, spear or line and hook remain authorised
  - Discretionary powers of the Commissioner to authorise fish take
- The gazettal process is lengthy
- The prohibitions and restrictions are inflexible
- Loss of customary fishing rights, governance and management rights in qoliqoli areas
- Local communities tend to disengage from monitoring the area
- Only few MPAs have been created under s.9 of the Act:
  - Ulunikoro MPA, Ono, Kadavu
  - Wainiyabia Shark Reserve, Serua
  - Wakaya Marine Reserve



# MPAs CREATED ON CUSTOMARY BASIS

- Traditional fishing rights are recognised in Fisheries Act, and reaffirmed in the Constitution of Fiji
- Customary MPAs
  - Traditional fisheries management measures (Tabu)
  - Network of Locally Marine Managed Areas (LMMA) created in Fiji:

Approx. 466 LMMAs across the 12 provinces covering 79% of Fiji's Inshore Fisheries



# MPAs CREATED ON CUSTOMARY BASIS LIMITATIONS

- No legal recognition of tabu areas and of LMMAs
- Customary prohibitions and restrictions are not enforceable by Fisheries enforcement officers





## In summary...

**Finding:** The creation and management of MPAs in Fiji are hindered by the governance and enforcement issues

**Question 1:** Can the State Lands Act provide an alternative legal basis for creating MPAs?

**Question 2:** Could a State Lands' lease or a licence issued to customary fishing rights holders bridge the gap between statutory and customary governance?

**Question 3:** Could a State Lands' lease or a licence issued to customary fishing rights holders enable statutory enforcement of customary MPAs?



# State Lands' Leases and Licences

- The State Lands Act vests ownership of foreshore and the soil under waters of Fiji to the State
- Customary rights are recognised in the SLA by providing for compensation when infringed by a lease
- Special provisions are made in Part V for “Foreshore and Soil under Waters of Fiji” with special conditions for foreshore leases (no mention of foreshore licences)
- Part IV of the Act provides for leases and licences of State Lands, approved by the Director. Licences may be issued for purposes other than those listed in s.29 of the State Land (Leases and Licensing) Regulations subject Ministerial approval (reg.30 (1)).



# Leases of Foreshore and Soil under Waters of Fiji State Lands Act 1946

Leases may be issued by the State in foreshore areas, subject to the “Special Provisions Relating to Foreshore Land and Soil under the Waters of Fiji” (Part V), affording greater protection of public rights:

- Such lease requires express approval by the Minister declaring that it does not create a substantial infringement of public rights
- Applicant must disclose the substance of the lease
- The lease application must be publicised and objections are heard
- Infringed rights of customary land and fishing rights owners may be compensated for.



# State Lands' Leases and Licences in Practice

**In practice**, the Ministry of Lands has identified the following purposes for foreshore leases and licences:

- Jetty
- Marina
- Integrated Tourism Development
- Wet leases
- Gravel/Sand Extraction
- **MPA**
- Aquaculture
- Mangrove Harvesting



# Marine Protected Areas established under the State Lands Act

Two MPAs have been created in 2015 through a Department of Lands' licence

- A licence was issued to a resort in Namotu, Malolo, for the purpose of creating an MPA
- A licence was issued to the Naivuatolu Cooperative Ltd, a legal entity representing the resource owners, for establishing the Waivunia Marine Park



## Some answers

### SLA as legal basis for MPAs?

**Question 1:** Can the State Lands Act provide an alternative legal basis for creating MPAs?

**Answer:** Yes, MPAs can be, and have recently been, established under the State Lands Act, through licensing mechanism.

- It remains to clarify why a licence was issued rather than a lease (foreshore lease or 'wet lease')?
- Could a lease enable the prohibition of all types of fishing (NTZ)?



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## Some answers: Bridging Governance?

**Question 2:** Could a lease or a licence issued to customary fishing rights holders bridge the gap between statutory and customary governance?

**Answer:** Yes, to some extent

- A lease or a licence give customary rights holders a statutory right (and control) over the activities approved by the lease (the conservation of species and other sustainable management measures defined in the MPA lease or licence).
- Leases and licences are issued by the Dept of Land after extensive consultation with all relevant stakeholders, including the Dept of Fisheries and local communities



# Bridging Governance Challenges

Remains to clarify:

- whether conditions of a licence or lease may provide for in-built flexibility such as temporary lifting of a fishing prohibition for customary purpose
- whether a licence or a lease may provide for prohibition of non-commercial fishing rights? (fishing allowed anywhere without a licence)

Other challenges:

- Leased or licenced state land may be subject to acquisition for any public purpose (S3 State Acquisition of Lands Act)
- Other laws may take precedence and interfere with an MPA established under the SLA. E.g. Mining Act, Surfing Decree, Continental Shelf Act



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## Some answers: Enforcement

**Question 3:** Could a lease or a licence issued to customary fishing rights holders enable better enforcement of customary MPAs?

- **Answer:** Mitigated
  - A secure statutory right and sense of ‘ownership’ created by a lease or licence granted to communities over a MPA can be expected to motivate the active engagement of communities in monitoring and enforcement - In particular when alternative means of livelihoods are created



# Enforcement - Challenges

- The Dept of Lands is responsible for the compliance of the lessee/licensee with the conditions of the lease/licence (what about third parties?)
- The Dept of Lands is not equipped to monitor and enforce fisheries matters (at sea).
- Clarification is required on the extent to which the Dpt of Fisheries/Fisheries Officers have authority to monitor and enforce a MPA they have approved but is not gazetted under the Fisheries Act



**Vinaka vakalevu**

**Thank you very much**

**Merci beaucoup**



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