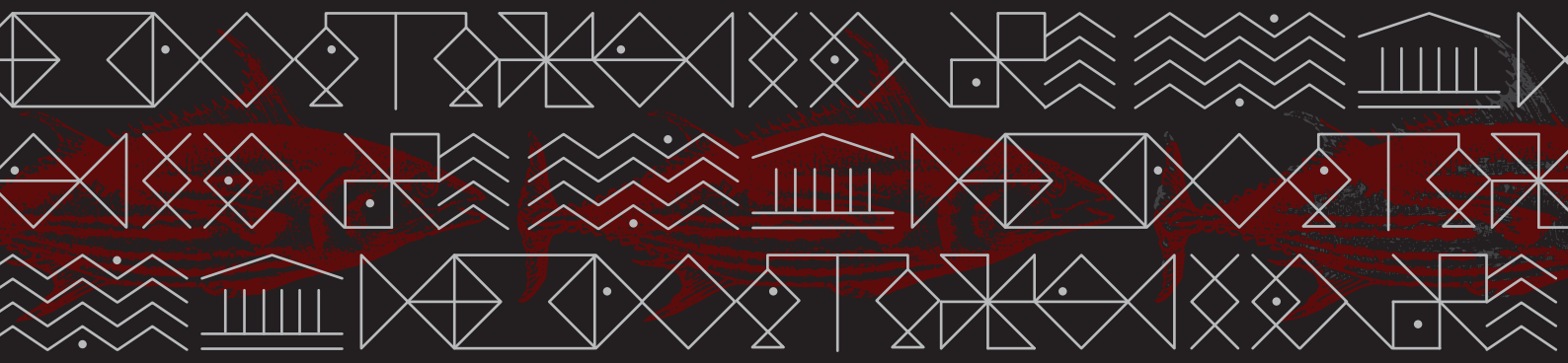
A Review of Near Shore Fisheries Law & Governance in Fiji



James Sloan & Kevin Chand

This report provides a snapshot of near shore fisheries law and governance in Fiji as of January 2015.

It includes an objective, detailed description and analysis of both the modern legal system based on English common law and the traditional *iTaukei* system of law and governance, and how they apply to near shore fisheries throughout the country.

The report also seeks to clarify the relative balance – and the potential gaps, redundancies, and limitations – between these two governing systems by describing how they are or can be used for day-to-day, practical management of near shore fisheries and coastal resources.

Ultimately, this report is intended to shed light on a governance system that, on the one hand, has done well over the past 10-15 years to facilitate a dramatic increase in efforts to improve near shore fisheries management in Fiji; but on the other hand, probably requires a thoughtful update sometime in the next several years, with input from all stakeholders, if it is going to promote durable changes in the way near shore fisheries resources are managed for the benefit of both human welfare and environmental integrity.

The authors would like to thank those individuals who took the time to talk with us, who provided us with useful data and perspectives, and, in particular, who reviewed draft versions of this document.It is our sincere hope that this report not only clearly articulates the state of Fiji's near shore fisheries law and governance but that the information in it is a useful contribution to the impressive work and commitment of those managing Fiji's fisheries and coastal ecosystems.

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January 2015

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Executive Summary

Management of Fiji's near shore fisheries and coastal ecosystems is guided by a "dual" legal and governance system that simultaneously incorporates both a modern legal framework, based on English common law that arrived following Fiji's cession to Britain in 1874, and a traditional *iTaukei*[1] system of law and governance deeply rooted in the country's history and customs.

One of the most distinguishing characteristics and differences between these two systems is that the modern, centralized Government system adapted from western democracy models applies to and affects all Fijian citizens, regardless of ethnicity or heritage, whereas the traditional system – its social hierarchy, its customs and world view, its rights and responsibilities – is reserved for indigenous Fijians. That is not to say the traditional governance system has no effect on non-indigenous Fijians, who now make up just under half of the country's population. It certainly does. If, for example, a non-indigenous Fijian wants to fish in a coastal traditional fishing ground to which it has, under customary law, no legal access or rights – and no non-indigenous groups or individuals do own those rights – they must get permission from the communal *iTaukei* group that does.

This dual legal and governance system that applies to near shore fisheries is complex and, as a result, not always well or consistently understood by people and institutions in Fiji. We hope this report will assist those who are working hard to ensure that Fiji's near shore fisheries and coastal resources remain healthy far into the future.[2]

This report is intended to help minimize that lack of clarity of the laws, policies and governing institutions that most directly affect near shore fisheries and coastal resource management in Fiji. In particular, it seeks to:

- Objectively describe the "dual system" of law and governance, as it currently exists.
- Analyse (a) the level of Government authority and responsibility under modern legal and governance frameworks as it relates to Fiji's near shore fisheries, as well as (b) the political and practical control of near shore fisheries that is vested in hundreds of communities through a mix of legally recognised rights, customary law, tradition and practice.
- Identify the most important matters of near shore fisheries law and governance that are particularly open to interpretation or are frequently sources of confusion for those individuals and institutions seeking to find a healthy and durable balance between exploitation and conservation.

To understand near shore fisheries governance in Fiji, it is important to acknowledge that, ultimately, Fiji's modern legal system resides in its written laws – its Statutes, Promulgations and Decrees.[3] Traditional *iTaukei* systems are nested within that modern legal framework. These written laws confer a large degree of control, responsibility and authority over public functions related to near shore fisheries to the central Government and its administrative offices. There are, for example, no devolved provincial or community-level law-making functions to address local near shore fisheries management. Put another way, existing written laws allow for very little to no legal transfer of authority and responsibility from Fiji's central administration or Government departments to other organizations, including, for example, provincial government offices, independent civic entities, or the private sector.

Having said that, Fiji's leadership has for many years been careful to preserve the country's unique heritage of traditional law, customary governance, and participatory decision-making amongst *iTaukei* communities, a governance system that appears to decentralize day-to-day resource management to local leaders and the communities they represent.[4]

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1 *iTaukei* translates as " the owner" and, in particular, traditional and/or indigenous owner, as determined by Fiji's rich and complex social.

2 To understand and be able to write knowledgeably about this dual governance, we reviewed numerous academic articles and relevant legal documents, and we interviewed a number of people, from independent fisheries policy experts to officers within the Department of Fisheries. Still, it is a complex topic, and we apologise in advance for any errors or oversimplifications in our reporting. For example, we try not to over-generalize *iTaukei* processes and relationships, knowing that how local decisions are made can vary across provinces and communities.

3 Statutes, Promulgations and Decrees are essentially the same thing. Different usage of the terms reflects the status of the governments that enacted them. Statutes (or Acts) are generally laws enacted under democratically elected or pre-independence governments of Fiji. Decrees and Promulgations were enacted by recent administrations that replaced democratically elected governments. For the purposes of this report, all primary legislation has the same authority, representing written law as applied by the current Fiji Government.

4 In practice, most local decision-making is ultimately done by a relatively small number of chiefs and other individuals with honoured status who are understood to represent their communities, as opposed to what might be considered a highly participatory system with equally-weighted public votes.

The modern legal system clearly recognises some rights of *iTaukei* "ownership," "access to" and "use of" certain natural resources. This includes, for example, ownership of 88% of Fiji's land, and access to and use of (but not ultimate jurisdiction or ownership over) near shore fisheries resources within limits as prescribed by law. That legal recognition, the respect usually (though not always) shown to *iTaukei* traditional systems and decision making by Fijians, and practical and political realities regarding the functional reach of Fiji's central government to remote corners of the country, means that *iTaukei* communities can have a strong influence on near shore fisheries management.

The recent 2013 Constitution, for example, codifies *iTaukei* rights by including, amongst other things, provisions to protect customary land, and to ensure landowners and those with customary fishing rights receive an equitable share of royalties from mineral exploitation that displaces them. The Constitution receives legislative support from the *iTaukei Lands Act*[5], *iTaukei Land Trust Act*, and the *Fisheries Act*[6], which together are among the most important pieces of legislation recognising and defining the limits of customary rights and traditional law.

All of this means that, under current law, the central Government retains ultimate control over the actual law-making and public administrative functions pertaining to near shore fisheries, as well as ownership of near shore fishing areas. The blurred boundaries of the dual system (and indeed, why we refer to it in this report as a dual system) reside in things like direct day-to-day use, permitting, enforcement, and general management of near shore fisheries and other related coastal resources and habitats. As a result, careful thought analysis, and understanding of how these dual systems interact is required to determine how best to support sustainable fisheries management and to stimulate and ensure meaningful stakeholder involvement.

That careful thought and analysis begins with a sound, baseline understanding of the full range of legal commitments and policies affecting near shore fisheries management in Fiji. That is the primary intent of this Report – to provide a clearer understanding of:

a. Existing and proposed national laws, regulations and policies, such as the 2013 Constitution and the draft Aquaculture Decree

b. International treaties and conventions affecting Fiji's own near shore fisheries

c. The way Fiji's central government is organized to manage near shore fisheries

d. The way, generally, traditional governance systems work in Fiji

Recommendations for or advocacy of specific legal and policy reform are beyond the scope of this study and the authors' expertise, and the Report is not intended to draw bright lines between indigenous and non-indigenous Fijian rights. Creating or addressing controversy is not an objective.

On the other hand, there are three specific areas of law and governance pertaining to near shore fisheries that are highlighted for particular attention. These are areas of law and governance that appear to represent gaps, redundancies, cross-purposes, or points of particular uncertainty in the legal framework. They are highlighted because, based on the research and interviews conducted in support of this study, they appear to represent points of law and/or policy that require either greater clarity or simply more widespread and common understanding by those most interested in the long-term health and sustainability of Fiji's near shore fishing. In brief, those points are:

1. That Fiji's laws and Constitution consistently recognise State ownership of coastal areas and traditional fishing grounds, though rights of access, use of, and day-to-day management in those traditional fishing grounds by local *iTaukei* communities is also recognised.

2. That while section 9 of the *Fisheries Act* enables the State via the Fisheries Department and the Minister to establish marine protected areas it is questioned whether section 9 provides an adequate legislative tool to create[7] (MPAs) or networks of MPAs to enable Fiji to reach its self-imposed target of 30% of Fijian waters under protected status by 2020. It seems to us that this ultimately depends on how section 9 is utilised by the State and whether processes could be formulated to balance community participation in the decision making process involved with a section 9 type decision that would provide implicit recognition of the dual system and the importance of community ownership as part of the process. In other words while the power to create a MPA is legislated for the process to guarantee community participation is not. In our view any such process would have to recognise and then carefully balance the State's and the Communities' interests and it is hoped would find a common aim through the protection and sustainable use of near shore fisheries resources that would benefit local communities now and in the future.

5 s3, *iTaukei* Lands Act

6 ss13-15, *Fisheries Act*

7 Techera and Troniak 2009

3. That those charged with enforcing day-to-day management of near shore fisheries, have ambiguous status and no clear mandate to do their work either on behalf of the State or of the communities from which they originate.[8] This is especially so for the Fisheries Department, whose functions are complicated by the involvement of other Government agencies in the process of working with traditional leaders and their own governing bodies, such as the Provincial Councils.[9]

Finally, it should be stated here that this Report focuses on the law as it exists. It is, for example, the authors' current understanding that law reform in the shape of the draft Inshore *Fisheries Decree* has been "shelved" for the present time. This is important, of course, because the draft Inshore *Fisheries Decree* includes language that would affect the definition of *qoliqoli* ownership. This Report is intended to objectively clarify and explain the current status of near shore fisheries law and governance in Fiji as of January 2015, and so only discusses draft laws if they are under active consideration (e.g., the Aquaculture Decree). If the *Inshore Fisheries Decree* does come under active consideration, this Report will need to be updated, because it could have profound effects on much more than Fiji's near shore fisheries governance.

8 A senior TAB officer we interviewed noted the potential inconsistency and lack of sustainability in having Fish Wardens, who are from local villages and who operate within the context of traditional systems, responsible for enforcement work on behalf of the central government without actually being on the government payroll.

9 However, one interviewee from the Fisheries Department has reported that working with communities and ensuring traditional processes are followed has improved recently and is particularly assisted by the Conservation Officers stationed within Provincial Council offices.

1. The Current State of Fiji's Near Shore Fisheries

The Constitution vests in Fiji's national Government ultimate authority and responsibility over public functions relating to near shore fisheries governance. No law-making power has been formally devolved or delegated below central Government or Ministerial level. Provinces, districts, and communities do not have law-making authority.

Having said this, not all authority and decision-making in Fiji is squarely or only in the hands of the central Government. Fiji's cultural, political, and social life is, in many ways, defined by a longstanding mix of formal and informal governance systems.

Land ownership is an important case in point. *iTaukei* rights to own land on a communal basis are recognised by the Constitution. *iTaukei* own about 88% of land in Fiji. This land is "inalienable" and owned on a communal basis. It is divided into parcels that are mapped and registered to a *mataqali* (an extended family or clan). Individual members of a particular *mataqali* are joint owners of the land registered to his or her respective *mataqali*. All *iTaukei* land, although inalienable, is legally held in trust by the *iTaukei* Lands Trust Board, which must provide permission before any lease of *iTaukei* land is legal. The rest of Fiji's land is classified as either Freehold or State/Crown Land.[10] It is also important to understand that landowners own surface rights, but not mineral or seabed rights, which are vested in the State. Traditionally owned land-based resources, therefore, generally include what is on land and excludes mineral resources or anything six feet below its surface.

The same legal definitions of traditional ownership do not, however, extend to the foreshore or to traditional fishing grounds, or *qoliqoli*. The Constitution does not recognise *iTaukei* rights to own traditional fishing grounds – only to manage, access, and utilize the resources within them. This right to fish a *qoliqoli* is registered with the *yavusa*, or a family group whose origins can be traced back to one original member. The country's 410 *qoliqoli* areas are comprised within Fiji's near shore waters[11] and this exists within its territorial waters all of which is owned by the State pursuant to the State Lands Act. The State Lands Act is a law inherited from the British Colonial administration that declares the State owns the foreshore, which is generally taken to include near shore fishing areas. Under the State Lands Act, the Director of Lands also has the authority to issue leases of foreshore areas if in the public interest to do so, therefore confirming State ownership and the right to transfer temporary title.

Since Fiji's independence from Great Britain in 1970, questions about precisely who does or does not own and control natural resources have been linked to political unrest, and *iTaukei* claims of ownership over *qoliqoli* areas and the fishing rights registered to them has, in particular, been contested in Parliament and in the courts. On the one hand, many strongly advocate for full *iTaukei* ownership of all *qoliqoli* areas, not just the right to fish. They want to expand *iTaukei* control. Then there are many others who argue for new laws in the other direction. They argue that the existing system that gives *iTaukei* communities the exclusive right to manage all *qoliqoli*, and that gives no rights or ownership capacity to non-indigenous Fijians (which make up just under half of Fiji's present day population), is not equitable. They argue not only against expanding the law to allow full *iTaukei* ownership of *qoliqoli*, but of reforming the law that gives exclusive fishing rights to just half of the population.

The most recent example of this controversy was the *Qoliqoli* Bill of 2005.[12] Amongst other things, the *Qoliqoli* Bill, depending on whether the final draft had retained its original language and had it become law, could have transferred full and clear legal ownership of *qoliqoli* areas to registered *iTaukei* communities. The *Qoliqoli* Bill prompted passionate public debate both for and against it. While proponents argued the Bill was simply a recognition of pre-colonial conditions of traditional rights and ownership, opponents were concerned with the idea of ceding, from their perspective, nearly 140 years of the State's recognised sovereign rights to near shore area and inland waterway ownership.

Given the dual nature of Fiji's governing systems, it is understandable that these questions would arise and that the answers

10 A small number of islands in Fiji are privately owned or freehold islands. While the extent of the title should show what resources transferred into private ownership, this does not necessarily mean that those islands would own the *qoliqoli* areas around them. To determine this, each island would need to be treated as an individual case, and the *qoliqoli* area maps held by the *iTaukei* Affairs Board would have to be examined to determine which *iTaukei* group, or *yavusa*, has the registered *qoliqoli* access rights. Regardless, though, the State would retain actual ownership in accordance with the State Land Act.

11 s9, Marine Spaces Act. Territorial waters extend 12 nautical miles from coastal baseline.

12 Govan et al. 2012; McCarthy 2007

would elicit strong opinions from all sides. But in looking at the historical legal record and taking a strictly legal view of the matter, it seems Fiji's successive colonial and post-colonial governments have, by and large, maintained a consistent, legal status quo whereby land is owned by traditional communal units and the near shore area where the *qoliqoli* are located is ultimately owned by the State.

One important reason, of course, that the question of ownership persists is that respect for the traditional system and recognition of how deeply communities, customs, and rights are tied to the land and sea remains strong in Fiji, 40 years after Fiji's independence and political self-determination. The history and strength of traditional laws and customs must be kept in mind while trying to understand why certain governance conditions exist the way they do, or why certain decisions are made. It helps, for example, to understand near fisheries ownership and management in the context of the following three examples:

1. The 2013 Constitution and the Aquaculture Decree (which is currently in draft form and described a bit more in Section 2 of this Report) are two landmark pieces of legislation that were written with this legal status quo as a foundation – that the State owns the near shore fisheries areas, as determined by the State Lands Act and the Marine Spaces Act. In other words, they were written to confirm what Fijian government leaders believed to already be enshrined in law. The Constitution respects *iTaukei* cultural practices and their ownership of *iTaukei* land, but only contains one specific reference to *iTaukei* fishing rights, and this only in the context of, as mentioned earlier, compensation or royalties related to mining activities. For its part, the Aquaculture Decree sets out the central Government's power to declare areas of a *qoliqoli* suitable for aquaculture projects, while also having the power to ban aquaculture operations from other areas of a *qoliqoli*. Presumably, permitting or banning aquaculture from a specific place would be done in consultation with local communities and those with fishing rights, because not doing so could jeopardize the success of that aquaculture venture, but what is important here is that consultation is not, from what we have seen so far, legally required.

2. Bylaws, including those relevant to near shore fisheries, can be made in *iTaukei* villages to administer that village's day-to-day functions. In other words, communities can create by-laws that govern their own behaviour in their place. The right to create these bylaws is recognised by law and through a process managed by the *iTaukei* Affairs Board. Those bylaws that are initiated at the village level to respond to a village's particular need, however, are subject to review. Ultimately, the power to codify and enact local bylaws, as well as create regulations – or not – is held at the Ministerial level following a consultative process undertaken via Provincial Councils.

3. The Ministry of Fisheries and Forests, through its Department of Fisheries and in accordance with its current Annual Corporate Plan (also described in more detail in Section 2), recently announced that it intends to utilize section 9 of the *Fisheries Act* 1942 to create up to 16 legally recognised Marine Protected Areas (MPA) within near shore fisheries areas. This will be done via regulation by the relevant Minister's delegated authority. The Fisheries Department has, presumably, consulted with community leaders about this plan. But whether or not it has, the point once again is that, from a strictly legal perspective, it does not need to in law. The *Fisheries Act*, for example, prohibits certain fishing activities and fishing methods within *qoliqoli* areas, and it requires licenses for fishing for commercial purposes. The Minister of Fisheries and Forests, not community leaders, has the power to make exemptions to the provisions of the *Fisheries Act* in respect to licensing and the regulation of fishing methods. This applies to everyone, including those who have fishing rights and who feel they "own" their *qoliqoli*. The power to enforce these rules is, in the end, vested in the State – in this case, the Fisheries Department – under the *Fisheries Act*, although in practice enforcement is delegated to fish wardens who may be from *iTaukei* communities to which the *qoliqoli* rights are registered.

The current legal reality is that the State owns the *qoliqoli* areas, while the registered *qoliqoli* members have rights, limited by law, to fish within them (a harvesting right). At the same time, the current practical reality is that *iTaukei* communities live next to, utilize, and enjoy the benefits of what they perceive to be their traditionally-owned and managed near shore fishing areas, which also often happen to be directly adjacent to the land that they actually and legally do own. In other words, in their eyes, the physical and legal borders between the two are blurred.

One result of this *de facto* control of near shore fishing areas by local communities is that – in relation to any initiative related to near shore fisheries management aimed at encouraging sustainable use of fisheries resources, whether it be a Government or NGO-led initiative – formal consultation in line with *iTaukei* traditions must take place at the community level (this community-level consultation process is described more fully in Section 5). This consultation requires a traditional introduction with the community, (a) to explain what a given initiative is all about, (b) to request the community's active cooperation and coordination to ensure sustainability of the initiative over the long term, and (c) to receive permission to move forward.

For any near shore fisheries initiative within a *qoliqoli* to succeed and to last, there must be agreement between local communities, government agencies, and other third parties about roles and responsibilities. This starts with a common recognition amongst all stakeholders that (a) local communities will almost always be the day-to-day lead implementers of any central Government initiative;[13] (b) that the further one travels from centres of Government in Fiji's island nation, the less direct influence the Government's laws, policies, and initiatives tend to have, no matter how well-intentioned those laws and policies might be; and (c) that sustainable fishing practices – whether guided by Government or traditional law – are, in the long run, beneficial for legally-recognised and *de facto* resource owners alike. Coming to this type of agreement on roles, responsibilities, and a common purpose is likely the basis for closer cooperation and trust between Government and communities.

Non-Government Organizations (NGOs) have attempted to be a bridge – to facilitate communication, cooperation and the provision of technical assistance to communities and Government agencies. This is particularly true over the past 15-20 years where near shore fisheries management is concerned. At the risk of over-simplifying years of hard work and the inevitable ebb and flow of relationships between institutions, most near shore fisheries efforts over the past two decades have been community-led initiatives, rather than centrally controlled activities. The Fisheries Department and other Government agencies have also been involved in these community-led programs, but for a variety of reasons that involvement has varied over time and across locations. At times, it appears the Fisheries Department itself has had difficulties negotiating the complexities of the traditional governance system. Regardless of the reasons, more consistent engagement in near shore fisheries management has come from community leaders and those most immediately affected by either good or poor management. But there is today general agreement[14] amongst community, Government, and NGO stakeholders that cooperative management is needed for long term solutions, aided by (a) a solid understanding of both central Government and traditional governance structures in Fiji; (b) better cooperation on monitoring and enforcement; and (c) improvements in gathering and reporting fisheries data that can improve decision-making.

Of course, a common purpose also helps. While some confusion over the legal status of near shore fisheries ownership matters, what often matters more is the inevitable and persistent push and pull of managing fish resources strictly for

13 As one interviewee commented, "If we can regard the communities as government implementers, it may reduce the perceived conflict between law and traditional governance systems of near shore fisheries."

14 It was our observation that this agreement was evident from (and may have even been advanced by) the strategic information exchange and planning workshop held in Suva and facilitated by the Packard Foundation on April 15 and 16 2014. The record of this April Workshop is contained in the report entitled "Toward Healthy and Productive Coastal Marine Resources in Fiji" by Katherine Short, of F.L.O.W collaborative.

revenue or for their ecological, nutritional, and cultural values. This is where clarity in policies is just as important as clarity in legal standing. Over the past 15-20 years, communities, NGOs, and Government agencies have not always shared the same near shore fishing interests in equal measures, with the Government often perceived, rightly or wrongly, as being oriented more towards revenue generation and economic development than sustainable catches and conservation. And *iTaukei* communities, with NGO assistance, are thought to be more actively seeking a balanced approach to fisheries exploitation, one that seeks both biodiversity conservation and a level of fishing effort that improves the health of the community and ecosystems alike. The Fiji Locally Managed Marine Area Network (FLMMA) is often cited as evidence of the latter, intentionally working with and through traditional community processes to improve near shore fisheries management in hundreds of coastal villages in Fiji. In the context of near shore fisheries management, it has probably been the most enduring and far-reaching initiative in Fiji in twenty years.

FLMMA is a member-driven initiative, and the Fisheries Department has been an active member for over ten years. But FLMMA is comprised mostly of NGOs that tend to be better resourced than the Fisheries Department, and FLMMA's activities are guided by *iTaukei* community leaders. As a result, FLMMA-related work has been more oriented toward site-based management, sustainable fish catches, subsistence fishing, local enforcement and management, and traditional governance systems – and less oriented toward the work plans and strategies of central Government agencies like the Department of Fisheries, and less concerned with the finer points of what constitutes legal – as opposed to practical, day-to-day – ownership of near shore fisheries resources.

The result is that, within dozens of *qoliqoli*, near shore environmental conditions (e.g., fish populations, habitat integrity, land-based pollution) have either improved, remained at a steady state, or *possibly* deteriorated at a slower rate than it would have in the absence of FLMMA-related work. But it is also necessary to point out that there are also many *qoliqoli* sites where interventions have not succeeded in reversing degradation of natural systems. In the aggregate, near shore fisheries and habitats are still in decline in Fiji. All of FLMMA's stakeholders realize that the current state of near shore fisheries management is not optimal, needs to improve, and could be helped by greater legal clarity of roles and responsibilities as well as better alignment between how the Government and communities value their near shore resources. Co-management has not yet been achieved, but certainly a wide array of stakeholders in Fiji, not just the FLMMA Network members, are now far more aware of the current state of near shore fisheries than even ten years ago, and are working towards better management, even if progress towards an ultimate goal of co-management can sometimes seem to be *two steps forward, one step back*.[15]

For his part, the Minister of Fisheries prior to the September 2014 elections had, for example, publicly stated that, in future, he would like the Fisheries Department to place less emphasis on production and revenue generation, and more on the sustainability of both near and off shore fisheries and on Fiji's commitments to various international treaties and conventions.[16] The Fisheries Department's own Annual Corporate Plan provides that, going forward; it will place greater focus on near shore fisheries than it has in the past (off shore fisheries in Fiji, especially tuna, largely draws attention away from the comparatively less economically valuable fish caught near shore).[17] And for their part, *iTaukei* community leaders can, for example, help improve monitoring and enforcement of fishing effort on site and in cooperation with the Department of Fisheries, perhaps by expanding or strengthening training for experimental warden systems that have already been implemented in a number of villages. On this last point, a change in law or policy is probably not needed, just a change in trust, cooperation, and political will.

15 As one independent fisheries expert and interviewee said, "…[T]hose communities with substantial NGO involvement are likely to suffer less from the effects of over-exploitation. The problems are (a) that substantial NGO involvement does not occur in all communities, and (b) in some respects, upgrading the management of fisheries resources is generational in time frame."

16 The new Minister, according to newspaper reports immediately following the September 2014 election, appears to be promoting development of the near shore fisheries sector. It is not, therefore, certain at this point what this might mean in terms of sustainable management of near shore resources.

17 Personal communication with a Department of Fisheries officer. Also see Hand et al. 2005 and Clark 2006.

2. Overview of Fiji's Constitution and Specific Laws Affecting Near Shore Fisheries Governance

2.1. The Constitution 2013

The Constitution was brought into force on September 7, 2013. The Constitution is the supreme law of Fiji, and it deems any previous law inconsistent with it to be invalid. The Constitution created:

- The Parliament as the supreme law making body
- The Office of the President as the Head of State in which executive authority is vested
- A Cabinet responsible to Parliament
- The Office of Prime Minister
- The Office of Attorney General as the Government's chief legal advisor
- An independent judiciary whose functions must be adequately funded by the Government

The Constitution and State Obligations

The Constitution states that State services shall (a) include efficient, effective and economic use of public resources; and (b) provide prompt response to requests and questions from the public, and delivery of service to the public.[18]

It also makes clear that the Fiji police force will continue to exist as it did under previous law and that the functions of the police force shall be to maintain law and order, the preservation of the peace, the protection of life and property, the prevention and detection of crime, and the enforcement of all laws and regulations with which it is directly charged.[19]

The Constitution and Resource Ownership

Preamble to the Constitution recognises, as before, *iTaukei* traditional ownership of land. It also makes a declaration regarding the need to safeguard the environment. Regarding land ownership, the body of the Constitution re-iterates that all *iTaukei* land shall remain with customary owners of that land, and *iTaukei* land shall not be permanently alienated, whether by sale, grant, transfer or exchange, except to the State.[20]

The Constitution also retains ultimate State ownership of *qoliqoli* areas, but affirms communal access to marine resources under both modern and traditional law.[21] It also provides individuals with the right to royalties or compensation for loss of fishing rights in relation to mining operations.[22]

The Constitution and the Right to Food Security

Section 36 declares that the State must take reasonable measures within its available resources to achieve the right of every person to be free from hunger, to have adequate food of acceptable quality, and to clean and safe water in adequate quantities.

The Constitution and Environmental Rights

According to Section 40, every person has the right to a clean and healthy environment, which includes the right to have the natural world protected for the benefit of present and future generations through legislative and other measures. In addition, to the extent that it is necessary, a law or an administrative action may authorise the limitation of the rights set out in Section 40.

The Constitution and Rights to Good Executive Administrative Decisions and Consultation

Section 16 guarantees the right to challenge administrative actions before the Court and the right to executive or administrative action that is lawful, rational, proportionate, procedurally fair and reasonably prompt. This provision suggests that, before an executive or administrative action is taken, there should be reasonable consultation with the people affected.

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18 s124, The Constitution

19 s5, The Constitution

20 ss27 and 28, The Constitution

21 s26(8)(g), The Constitution

22 s30, The Constitution

Section 16 also declares that any adversely affected person of any executive or administrative action has the right to be given written reasons for the action, and that the action can be challenged in a court of law.[23]

The Constitution and Parliamentary Authority over International Treaties and Conventions

Fiji is not legally bound to any obligations under international treaties or conventions unless Parliament has expressly approved it to be.[24]

2.2. Fisheries Act

The *Fisheries Act* 1942 is the primary legislation regulating near shore fisheries in Fiji. Its primary role is restricted to fisheries management, which is largely implemented through a permit and licensing scheme. The key national implementing agency of the *Fisheries Act* and management of marine resources is the Department of Fisheries.

2.2.1. *Qoliqoli* Areas

The customary right of *iTaukei* to fish in *qoliqoli* areas is recognised in the *Fisheries Act*. The Act states that permission must be obtained from the registered communal *qoliqoli* members if a person wishes to fish that area. In this instance, the two governance systems – *iTaukei* and central government systems – converge. *Qoliqoli* fishing right holders are registered by the *iTaukei* Fisheries Commission in the Register of *iTaukei* Customary Fishing Rights.[25] This Commission, although created by the *Fisheries Act*, falls under the jurisdiction of the Ministry of *iTaukei* Affairs. The Commission is charged with (a) ascertaining the "ownership" of *qoliqoli* areas and mapping those areas, and (b) resolving any disputed ownership claim that may arise. Although some disputes still do arise over boundaries of *qoliqoli* areas, by and large the task of mapping the 410 *qoliqoli* areas across Fiji (and, therefore, of registering the traditional fishing rights of those areas to the particular communities) has been completed. All *qoliqoli* maps are kept at *iTaukei* Affairs Board, and they are generally used and accepted as the means by which boundary disputes (which sometimes arise) are settled.

2.2.2. Marine Protected Areas

The *Fisheries Act* provides broad powers to the Minister, including the authority to make regulations for any matter relating to the conservation, protection, and maintenance of fish stocks, including prohibiting the capture of fish in a designated area or during particular seasons.[26] The *Fisheries Act* also permits the declaration of "restricted areas" which prohibit any person from capturing fish in that area, unless with a hand net, wading net, spear, or line and hook.[27] This language should not, however, be considered marine protected area (MPA) legislation. Section 9 aside, the *Fisheries Act* does not include provisions for declaring MPAs, Locally Managed Marine Areas, or networks of them.[28]

2.2.3 Protected Species

The Minister has further powers under Section 9 of the *Fisheries Act* to prohibit the taking of a particular species of fish entirely. Fish species so far protected for under fisheries regulations include turtles, porpoises, dolphins and sharks (Shark Reef Marine Reserve - Serua).

2.2.4. Permits and Licenses

Non-Commercial Near Shore Fishing

A fishing permit is not required for subsistence fishing by local community members within their own *qoliqoli*, or for any non-commercial fishing using a hook and line, spear, or single user portable trap. A fishing permit is, however, required if a person intends to fish in a *qoliqoli* that is not of his or her own community. The fisherman must first obtain written approval from the respective *qoliqoli* owners. This letter of consent is then endorsed by the *Roko Tui* of the respective province (the *Roko Tui's* role is described in greater detail in Section 5 of this Report). The *Roko Tui's* endorsement is then conveyed to the Divisional Office, where the Commissioner may grant the permit at his or her discretion pursuant to section 13 of the *Fisheries Act*. These permits often specify the area and gear that can be used to catch fish.

Commercial Fishing in Near Shore Areas

The *Fisheries Act* requires a fishing license – in addition to a permit – if a person intends to capture fish for trade or

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23 It is worth noting that some recent pieces of legislation (Decrees, in particular) have precluded the use of judicial review to challenge central government (Ministerial) decisions taken under that legislation.

24 s51, The Constitution

25 Minter 2008

26 s9, *Fisheries Act*

27 s11, *Fisheries Act*

28 Based on our interviews, the Department of Fisheries, using Section 9 of the *Fisheries Act*, plans to legally establish three MPA in 2014, with a plan to designate more in the next several years. Fisheries officers indicated that they were aware of and are following the necessary consultation process with relevant communities.

business. These fishing licenses are granted by Fisheries Department Licensing Officers and are valid for a twelve-month period. If a fisherman violates the terms of the license, the Fisheries Department may choose to either not renew the license or, alternatively, apply to court for its cancellation. Note that near shore fishing licences are granted for fishing within *qoliqoli* areas.

2.3. Offshore Fisheries Management Decree

The *Offshore Fisheries Management Decree* 2012 guides the management, development, and sustainable use of offshore, commercial fisheries in Fiji. It provides the Fisheries Department with more regulatory control and enforcement responsibility than it had in the past. This is largely due to recognition of the important part tuna and other offshore commercial fisheries play in Fiji's present day economy. This Decree covers areas outside of the *qoliqoli* areas and, therefore, precludes traditional community involvement in resource use and management and, in turn, places more emphasis on the relationship between central government and the private sector for good management.

2.3.1. Administration

The *Decree* makes provisions for the creation of an Offshore Fisheries Advisory Council, which advises the Minister on policy matters relating to fisheries conservation, management, development, and sustainable use. The Council must be comprised of key representatives from the fishing industry, non-governmental organisations, and government representatives.

2.3.2. Fisheries Management Plans and Marine Protected Areas

The *Decree* contains provisions for the establishment of (a) Fisheries Management Plans for designated fisheries, and (b) marine protected areas through the Minister of Fisheries upon the recommendation of the Director of Fisheries and the advice of the Permanent Secretary of Fisheries.

2.3.3. Licensing

The *Decree* requires that all fishing vessels, including vessels used for sport or recreational fishing, comply with all requirements in respect to fishing licenses or other obligations under the Decree. The Decree describes penalties ranging from $2,000 to $1,000,000, depending on the type of vessel and who commits the violation (i.e., vessel operator, master or crew).

2.3.4. Monitoring and Control

The Decree confers to the Ministry of Fisheries and Forests broad powers to enforce its requirements. Fisheries Officers have the power, as vested in them by the Minister, to monitor, control and survey fishing activities, including the authority to enter, search, and or seize vessels and their fishing equipment.

2.4. Marine Spaces Act

The Marine Spaces Act makes provision for the demarcation of marine spaces in Fiji consistent with UNCLOS III, defining the territorial waters of Fiji (12 nautical miles from the baseline) and the EEZ (200 nautical miles from the nearest baseline). The Territorial waters are the sovereignty of Fiji and this extends to the airspace over these waters as well as to the seabed and subsoil thereunder. *Qoliqoli* are present within the confines of territorial waters.[29] In respect to its EEZ, Fiji has a sovereign right here for the purpose of exploring and exploiting, conserving and managing natural resources in this space.

The Offshore Fisheries Management Decree has also supplanted aspects of the Marine Spaces Act relating to Fisheries Management.

2.5. [DRAFT] Aquaculture Decree

This draft *Aquaculture Decree* had not been enacted at the time of writing this Report, but it is generally expected to become law in 2015. If it does, it will have significant implications for near shore fisheries management. The proposed Decree recognises, and is based on the premise that, (a) the State ultimately owns Fiji's near shore areas, while simultaneously acknowledging that (b) community members to whom a given *qoliqoli* area is registered have the right to fish in the recognised boundaries of that *qoliqoli*. This matters, of course, for how aquaculture sites are chosen.

The proposed *Decree*, if enacted, provides for central regulation of aquaculture by:

- Vesting ultimate regulatory power in the Minister for Fisheries, or his or her delegated Permanent Secretary. Policy development and implementation will be assisted by the Director of Fisheries, a yet-to-be established Aquaculture

29 Govan 2011

Advisory Council and Scientific Committee, and a Licensing Committee comprised of heads of government departments.

- Enabling the Minister to designate aquaculture areas after taking into account "scientific, social, economic, environmental and other relevant considerations." The Minister has the authority to determine if an area is important to the public interest, and if it requires management measures to ensure sustainable aquaculture.
- Enabling the Minister to declare areas where aquaculture is prohibited, with fines of between $100,000 and $200,000 levied against those who violate the prohibitions.
- Making the Director of Fisheries responsible for drafting a "development and management plan" after a site is designated for aquaculture activities. The plan shall "protect the fishing interests of artisanal and subsistence fishers and small scale fishers."
- Requiring a license to engage in aquaculture in a designated area. Licenses are granted by the Permanent Secretary for up to 15 years. To engage in aquaculture without a license is punishable by a fine between $100,000 and $1,000,000.
- Requiring that all aquaculture activities be registered with the Ministry.

Part 5 of the *Decree* regulates the trade of aquaculture products, and Part 6 describes monitoring and enforcement. Part 7 guides how the High Court should consider evidence of any offence under the *Decree*[30], while Part 8 provides for fixed penalty notices.

This proposed aquaculture *Decree* confirms the current Government's stance that, because near shore fishing areas are ultimately owned by the State, they may be controlled and regulated by the State. The *Decree* has, for example, minimal requirements for the Minister to consult with communities when designating sites acceptable for aquaculture operations, and it includes a "national interest" test, which suggests that the State's interests can be readily deemed paramount to community interests or concerns. Having said this, it should be emphasized that s23 does require consideration of "scientific, social, economic, environmental and other relevant considerations" (italics added), and the *Decree* does not preclude or ban a challenge before the High Court (known as an application for Judicial Review) of the Minister's decision to designate an aquaculture area.

It should also be noted that the draft *Decree* enables the Government to designate areas where aquaculture is allowed or is banned. In practice, this means the Ministry could have a direct impact on existing, community-driven aquaculture ventures in areas that community members believe they own. The draft *Decree* does not include an explicit provision for compensation of loss of fishing rights, though it does say the Minister can make regulations that include "royalties" and compensation related to licensing, authorizing or registration.

2.6. [DRAFT] Inshore Fisheries Management Decree

The *Inshore Fisheries Management Decree* has been drafted and circulated amongst fisheries stakeholders, but has not yet been enacted.

While it is difficult to speculate on what the final form of this *Decree* will be if it is enacted, it seems – at least in the context of ultimate ownership of near shore *qoliqoli* areas – that it will not represent a radical departure from the legal status quo as described in the draft *Aquaculture Decree* or the Constitution. As noted, this legal status quo that recognises Government ownership has persisted for many years, and it would take a significant political shift to reverse that.

2.7. International Seabed Mineral Management Decree

The *International Seabed Mineral Management Decree* was enacted to govern all matters related to Fiji's seabed mineral activities – exploration, drilling, etc. The main objectives of the *Decree* include (a) enabling Fiji to act as a sponsoring state for engaging in seabed mineral activities; (b) establishing a clear and stable legal operating environment for parties to undertake seabed mineral activities; (c) ensuring that seabed minerals-related activities are carried out in a way consistent with the rules of the International Seabed Authority and the United Nations Convention on the Law of the Seas; and (d) optimizing benefits for present and future generations. This *Decree* appears not to have had any direct impact on Fiji's near shore fisheries as its area of jurisdiction generally does not overlap.

2.8. National Trust for Fiji Act

The *National Trust for Fiji Act* creates the statutory body known as the National Trust for Fiji. The Trust exists for many

30 On this last point, it seems that the *Decree* is written in a way that somewhat reduces the burden of proof and facilitates prosecution of violations. For example, all offences are considered ones of strict liability, where it is not necessary to prove "intent." (see ss52 and 54)

reasons, among them the protection and preservation of Fiji's reefs, animal, and plant life. The Trust is empowered by the *Act* to (a) acquire and manage property of natural or cultural heritage significance[31]; (b) create by-laws for the regulation and protection of Trust properties[32]; (c) enter into heritage conservation covenants with landowners[33]; and (d) declare national heritage sites[34].

2.9. Continental Shelf Act

The *Continental Shelf Act* regulates the exploration and exploitation of natural resources of the continental shelf within Fiji's territorial limits. All rights vest in the State in respect to exploring and exploiting the continental shelf, which, of course, includes near shore areas. Natural resources are defined in the *Act* to include minerals and other non-living resources, as well as living organisms that are sedentary in nature. While this does not directly include fish, it does refer to the habitats they depend upon.

2.10. Endangered and Protected Species Act

The *Endangered and Protected Species Act* was enacted to regulate and control the trade, possession, and transportation of wild fauna and flora listed in the Convention on International Trade in Endangered Species (CITES). The *Act* creates a CITES Management Authority and a CITES Council tasked with advising the Government on its obligations under CITES, as well as reporting to the International CITES Secretariat. The *Act* is relevant in that it regulates the international trade of near shore species listed in CITES' Appendix 2.

2.11. Regulation of Surfing Areas Decree

The *Regulation of Surfing Areas Decree 2010* was enacted to de-restrict access to any surfing area in Fiji for the purpose of tourism or recreation. The *Decree* vests the Director of Lands with authority over any interest in any surfing area on behalf of the State. Conditions for the right to use a surfing area excludes the right to fish. In short, the *Decree* supports the State's ultimate ownership of *qoliqoli* areas, but when it was enacted, it reversed the right of *qoliqoli* fishing rights holders to invoke traditional ownership to either charge surf operations an access fee, or else deny access to popular surf breaks.

2.12. State Lands Act

The *State Lands Act* confers to the State ownership of all public lands in Fiji, including foreshores. This *Act* encompasses State responsibility for the control, administration, and disposal of, for example, mangrove areas and salt marshes. It also includes provisions for issuing foreshore leases, or what are referred to as "wet leases".

To demonstrate how the dual systems of modern and traditional governance interact, it is worth describing how a foreshore lease is obtained. An applicant must first get the *qoliqoli* owner's consent via an endorsed "waiver of fishing rights form," which is executed by the head of the *yavusa* after consultation with the wider community. This form is then submitted to the Lands Department with the Foreshore Lease application. The Native Lands and Fisheries Commission will verify the contents of the waiver form to ensure that the correct *qoliqoli* owners were consulted. The Lands Department will also consult with other government departments (e.g., the Department of Fisheries, Department of Environment) regarding foreshore lease applications. Following this, the Director of Lands decision is given before seeking final Ministerial consent.

It is our understanding that the process around the waiver of fishing rights by registered qoliqoli owners is a process that is based on a 1978 Cabinet decision. It may have been a process that was put in place which was prompted by an expansion of Fiji tourism at that time and saw hotels being built close to the shore.

2.13. *iTaukei* Affairs Act

The *iTaukei Affairs Act* is administered by the Ministry of *iTaukei* Affairs. The Act establishes the *iTaukei* Affairs Board (TAB), which is an independent statutory authority specifically formed to "ensure effective and efficient participation of *iTaukei* in the nation's peace, progress and prosperity." The *Act* confers upon the Minister of *iTaukei* Affairs the ability to make regulations to be obeyed by all i*Taukei*, providing for the peace, order, welfare and good governance.[35] The very important role played by the TAB in near shore fisheries management is discussed further in Section 5, but it is worth noting here that Conservation Officers, and the role they play in communities throughout Fiji, were created under this provision. Conservation Officers assist with, among other things, the development of marine management plans in coastal communities.

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31 s10, National Trust for Fiji Act
32 s18, National Trust for Fiji Act
33 s10, National Trust for Fiji Act
34 s20, National Trust for Fiji Act
35 s6, *iTaukei* Affairs Act

2.14. Environmental Management Act

The Environmental Management Act provides for (a) the protection of natural resources; (b) the control and management of industrial and agricultural development; (c) waste management and pollution control; and (d) the establishment of a National Environment Council (NEC).

The *Act* also recognises the traditional owners of Fiji's resources and the relationship of *iTaukei* with their ancestral lands, waters, and sacred areas.[36] The *Act* subjects all development activities to an Environmental Impact Assessment. This rule is binding for all stakeholders, including Government. The *Act* also makes the NEC responsible for ensuring that Fiji meets its commitments under regional and international environmental agreements.[37] The NEC is also responsible for advising the Government on international and regional treaties, conventions, and agreements relating to the environment.[38] The *Act* also prescribes that the National State of the Environment Report must be published at least every 5 years.

The *Act* seeks to control development via an administrative decision made by the "approving authority" which is most frequently the Director of Environment. As an administrative decision made by a public authority the decision may, if challenged, be subject to court oversight. This means that a clear and transparent decision making process should be followed that takes into account all relevant considerations. In the context of near shore fisheries governance this would include not only the EIA and its recommendations, but also all relevant law and relevant policies. In addition, relevant considerations may be made via public submissions from affected stakeholders which could include residents or *qoliqoli* owners.

36 s2(3)(d), Environmental Management Act

37 s8(1)(f), Environmental Management Act

38 s8(1)(g), Environmental Management Act

3. Policies Guiding Management of Fiji's Near Shore Fisheries

National policies are not always backed by legislation and, therefore, not always enforceable. But they do influence and guide the vision, mandate, strategies, and day-to-day operations of government departments, private industry, public opinion, and more. What follows is an overview of the policies that most affect near shore fisheries and the broader development goals of Fiji.

3.1. People's Charter for Change, Peace and Progress

The Charter was developed as part of a national initiative "to build a better Fiji for all" and complements the Constitution. It also establishes guidelines for government policies. The Charter identifies eleven pillars of growth to build a non-racial, culturally vibrant and united, well governed, democratic nation that seeks progress and prosperity through merit-based equality of opportunity and peace. The Charter's fifth pillar, *Achieving Higher Economic Growth while ensuring sustainability*, prioritizes environmental protection by strengthening institutional capacity and promoting sustainable management of natural resources.

3.2. National Biodiversity Strategic and Action Plan (NBSAP)

As a signatory to the Convention on Biological Biodiversity, Fiji's National Biodiversity Strategic Action Plan (NBSAP) was formulated in 2003 but only endorsed in 2007. It seeks to conserve and sustainably utilize Fiji's terrestrial, freshwater, and marine biodiversity, as well as maintain the ecological processes on land and sea that benefit the whole country. The NBSAP includes at least three several Thematic Areas relevant to near shore fisheries management:

Thematic Area 3: Inshore Fisheries

The Fisheries Department and Department of Environment are tasked with identifying and helping to implement strategies that balance biodiversity conservation with food security and sustainable harvesting of marine resources.

Thematic Area 4: Coastal Development

Passage of the Environmental Management Act led several years ago to the establishment of a committee on Integrated Coastal Management [s8(3)].The ICM Committee was created to lead the development of a plan to help coordinate, manage, and monitor Fiji's rapid coastal development – hotels and resorts, industry, residences, agriculture, waste management, etc. The ICM Committee has had from the beginning – and still has – close and frequent interactions with *qoliqoli* owners, fishermen, local leaders, and provincial and national government agencies.

Thematic Area 6: Protected Areas

Ten years ago, Fiji's Government made a public commitment to place 30% of its marine environment under protected status by 2020. The NBSAP included a Thematic Area to help build momentum towards that commitment by increasing community engagement, identifying sites of particular environmental and cultural value, highlighting legislative and policies needs, and bringing biodiversity conservation and traditional fisheries management systems together to expand a national marine protected area network. The National Trust of Fiji is the lead agency, along with the National Protected Areas Committee.

3.3. Roadmap for Democracy and Sustainable Socio-Economic Development (RDSSED)

The Roadmap outlines the Government's plans and strategies to achieve sustainable democracy, just governance, socio-economic development, and national unity during the 2009-2014 period. The development of the Roadmap is based upon the Peoples Charter.

3.4. Green Growth Framework

The Green Growth Framework is Fiji's attempt to develop a national response to the outcome of the international Summit on Sustainable Development convened in Rio in 2012. It is intended to support and complement the RDSSED and its succeeding development documents. It adopts the vision of the RDSSED, *A Better Fiji for All*.

A key thematic area of the Green Growth Framework in respect to near shore fisheries is Thematic Area 3: Sustainable Island and Ocean Resources. This section identifies key needs that are outlined below:

i. develop a natural resource management system that is inclusive and integrated;

ii. recognise the importance and potential of Fiji's vast marine ecosystem;
iii. develop a mechanism to access data on state of environment and natural resource use to facilitate proper decision making;
iv. establish a coordinated mechanism to manage the competing demand for land; and
v. strengthen enforcement of existing legislations that govern natural resource use and management.

The Green Growth Framework also feeds into Ministerial Strategic and Annual Strategic Plans and in particular, that of the Fisheries Department.

3.5. Government Ministry Strategic Plans

Each government ministry has a 3-year strategic plan outlining its respective strategic goals and objectives. Each ministry's strategic plan is tightly linked to the Constitution, the People' Charter, and the government's Annual Corporate Plan.

3.6. Government Ministry Annual Corporate Plans

Each government ministry has an Annual Corporate Plan (ACP) derived from its three-year strategic plan. The ACPs describe the ministry's targets and implementation strategies on a quarterly basis – targets and strategies that are directly linked to the higher level objectives outlined in both the People's Charter and the Roadmap for Democracy and Sustainable Socio-Economic Development.

The Fisheries Department's ACP consists of 11 outputs that help the Department organize and prioritize its day-to-day work. Those 11 outputs are:

- Output 1: Portfolio Leadership, Policy Advice & Secretariat Support
- Output 2: Research & Development – Fisheries
- Output 3: Education and Training – Basic Fisheries Resource Management Techniques
- Output 4: Public Awareness and Promotion – SFM
- Output 5: Food Security and Income Generation – Aquaculture and Inshore fisheries development
- Output 6: Fisheries Law Enforcement – Licensing, Compliance and Monitoring fisheries resources
- Output 7: Sustainable Trade Environment – Fisheries
- Output 8: Climate Change Adaptation and Resilience
- Output 9: Strengthen Global, Regional and National Partnership – Fisheries Development
- Output 10: Promote Gender Equality & Women Empowerment – Fisheries
- Output 11: Financial Services – Fisheries

Figure 1 **The Ministry of Forestry and Fisheries Divisional Planning Framework**

3.7. Integrated Coastal Management Framework

The Integrated Coastal Management Framework was launched by the Department of Environment in 2011. It is intended to recommend proposals for action and policy towards sustainable coastal resource management. The framework advocates a multi-sectoral approach to safeguard Fiji's coastal environment from threats posed by increasing urban development. The ICM Committee is a lead agency for the activities tied to the Framework.

4. Government of Fiji's Structure

Fiji is a sovereign democratic republic. Its structure is comprised of Executive, Legislative, and Judicial branches, as outlined in the Constitution.

4.1. Executive Branch

4.1.1. President

The President is the Head of State. Executive authority of the State is vested in him or her. The president also acts as the Commander-in-Chief of the Republic of Fiji's Military Forces. The President exercises powers as executive authority only on the advice of his or her Cabinet, a Minister, or other person or authority prescribed by the Constitution.

4.1.2. Cabinet

The Cabinet is comprised of the Prime Minister, who acts as chairperson, and a select number of Ministers appointed by the Prime Minister. While the President is the executive authority, this power is often exercised by the Cabinet, which is charged with being collectively responsible for government policy.

4.1.3. Prime Minister

The Prime Minster is the Head of the Government. The Prime Minister is responsible for appointing Ministers and assigning titles and portfolios as he or she determines. The Prime Minister is also generally responsible for the business of the Government. He or she may, by notice in the Government of Fiji Gazette, assign specified parts of the business of Government to any Minister.

4.1.4. Attorney General

The Attorney General is the chief legal advisor to the Government and is assisted by the Solicitor General. The Office of the Attorney General comprises several divisions, and these divisions administer various statutes assigned to the Attorney General. The Attorney General may take part in the Cabinet as a Minister, and may also sit in Parliament, although without voting privileges.

4.2. Legislative Branch

4.2.1. Parliament

The authority and power to make laws for the State is vested in Parliament. This is done by way of enacting Bills that are passed by Parliament and assented to by the President. Parliament consists of Members of Parliament and the President.

4.2.2. Creating Legislation

Any Member of Parliament may introduce a Bill (save for a Money Bill, which must be introduced by the Minister of Finance). Once a Bill is introduced in Parliament, sufficient time is given for members to consider the Bill. Upon completion of deliberation of the Bill, amendments are made to reflect input from Members of Parliament. Upon the satisfaction of Parliament, the Bill is passed. Once the Bill is passed by Parliament, the Speaker of the House must present the Bill to the President. Within seven days of receiving the Bill, the President must provide his assent. If his assent is not provided within seven days, then the Bill is considered approved. Within seven days of assent, the Bill must be published by the Attorney General in the *Fiji Gazette* as an Act of Parliament. An Act of Parliament comes into force on the date determined in the Act. If a date is not prescribed by the Act, it comes into force on the seventh day after its publication in the Fiji Gazette. This is what is meant by the term "gazetted".

4.3. Judicial Branch

4.3.1. Courts

The judicial power and authority of the State is vested in the Supreme Court, the Court of Appeals, the High Court and the Magistrates Court. The Judiciary is independent of the Executive and Legislative branches of Government, and is subject only to the Constitution and the Law.

4.3.2. Solicitor General

The Solicitor General is responsible for providing independent legal advice to the Government and to holders of public office. He or she also prepares draft laws on request from the Cabinet and represents the State in court in any legal proceedings to which the State is a party. The Solicitor General also acts as the Permanent Secretary for the Office of the Attorney General.

4.3.3. Director of Public Prosecutions

The Director of Public Prosecutions is primarily responsible for instituting and conducting criminal proceedings. This includes intervening where proceedings raise a question of public interest that may affect the conduct of criminal proceedings or investigations.

4.4. Government Ministries and Departments related to Near Shore Fisheries

The chart below lists all Ministries and Departments relevant to near shore fisheries management.

Government Ministry, Department or other Entity	Primary Functions	Near Shore Fisheries Involvement
Department of Fisheries in the Ministry of Fisheries and Forestry	✣ Lead role in fisheries development and management at national level ✣ Implements the *Fisheries Act* and the *Offshore Fisheries Management Decree* ✣ Administers fishing licenses ✣ Monitors and enforces all fisheries in Fiji	✣ The lead agency and first point of contact for all near shore fisheries in Fiji ✣ Appoints members of *qoliqoli* committees (formed within villages) as Fish wardens ✣ Co-operates with and is a member of the Fiji Locally Managed Marine Area network
Department of Environment	✣ Implements *Environmental Management Act* ✣ Implements and mainstreams the majority of Fiji's international environmental obligations under various treaties and conventions	✣ Assesses coastal development plans and projected environmental impacts ✣ Has a key role in drawing marine protected areas into coastal zone planning

Department of Lands	✣ Administers, develops and manages all State land ✣ Responsible for protecting mangroves, foreshore areas and inland waterways	✣ Manages development in coastal areas ✣ Can issue "wet leases" following a specific process that includes consultation with government departments and a community waiver of fishing rights
Mineral Resources Department	✣ Oversees and facilitates development of Fiji's mineral and groundwater resources	✣ Regulates coastal and deep sea mining projects
Investment Fiji	✣ A statutory body with a mandate to promote and facilitate economic development	✣ An important contact for developers with an indirect role in near shore fisheries management
***iTaukei* Affairs Board**	✣ Statutory body established by the *iTaukei Affairs Act* that regulates affairs relating to the primacy of *iTaukei* roles in Fijian society	✣ Placed conservation officers in each province who provide technical assistance regarding coastal resource management and sometimes coordinate stakeholder and community meetings for government departments and NGOs
***iTaukei* Land and Fisheries Commission**	✣ Demarcates *qoliqoli* boundaries	✣ Resolves resource rights disputes with *qoliqoli* owners
Ministry of Rural Development	✣ Implements rural development policies and programmes ✣ Operates in each of Fiji's 4 geographic Divisions through the respective Divisional Commissioner's Office	✣ Assists in facilitating implementation of coastal and rural development projects
Provincial Councils	✣ Each of Fiji's 14 provinces has a Provincial Council. A *Roko Tui* heads each Council ✣ The *iTaukei Affairs Act* enables Provincial Councils to make by-laws for its members subject to the *iTaukei* Affairs Board's approval ✣ The Councils are an essential point of contact in rural settings for outside interests by facilitating communication with community leaders	✣ Instrumental in ensuring that village and community development activities proceed sustainably
Strategic Planning Office in the Ministry of Strategic Planning, National Development & Statistics	✣ Coordinates, formulates and monitors implementation of the National Development Plan and Strategies ✣ Formulates Public Sector Investment Programmes and the Capital Budget. Monitors implementation of capital projects	✣ Assists in the formulation and monitoring of Department of Fisheries strategies

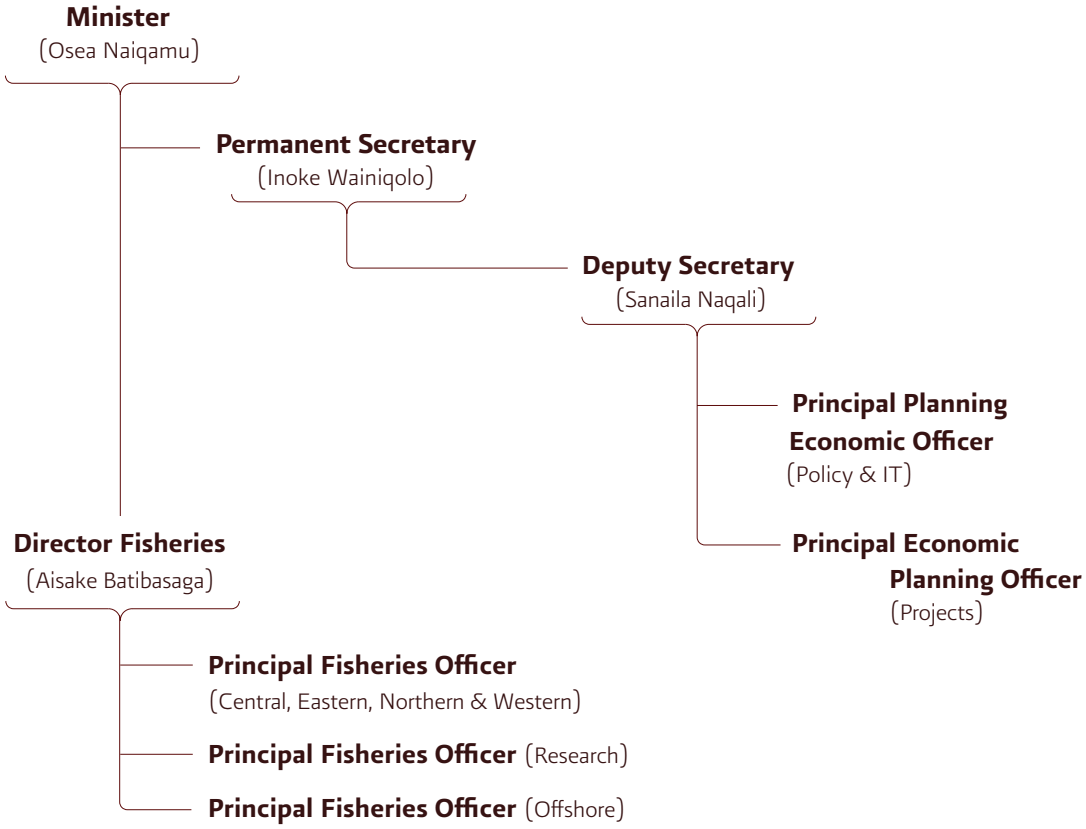

Figure 2 **The current organisational structure of the Department of Fisheries**[39]

39 Prior to the September 2014 elections, the Minister was Lt. Col. Inia Seruiratu.

5. The Traditional System's Structure for Governance and Decision-making

5.1. Background, Social Hierarchy and Important Terms and Concepts

Fiji's traditional governance system is integral to resource management for a number of reasons, not the least of which is that it extends to every village on every island, no matter how remote, across the country and in communities where the central Government and its laws are, sometimes, less immediately present.

The traditional system is characterised by *iTaukei* rights to land and other natural resources that are based on birthright. Resources are owned communally by clans and administered through a commonly understood hierarchical structure. Any decisions related to communally owned resources are made in consultation between community members and their traditional leaders.

Well before colonisation at the end of the 19th century, Fijian communities had developed a hierarchical and unwritten system of governance based on communal ownership and shaped by conquest of one group over another. Ownership of rights to resources in a practical, day-to-day sense was a constantly shifting notion. What remained steady was an overriding concept that the natural world was not truly owned by any single entity. The historical record suggests that, when the Fijian Chiefs who signed the Deed of Cession with Britain in 1874, they explained that they could not as individuals truly cede land, reefs, and fishing rights because they were communally owned and not theirs to give. In their view, the Chiefs were likely ceding their loyalty to the Crown, not necessarily rights to the physical world. In the end, colonial administrators chose to accept this arrangement and did not try to dismantle this traditional worldview. Instead, they did two things that continue to affect resource management today.

First, they surveyed which group owned and/or had the rights to what territory and resources at that point in time, and then, based on that status, codified traditional rights and registered land and other resources to the groups that it considered should or did own those resources on a communal basis. Land was, as stated, registered in the name of an extended family, or *mataqali*, the rights to fish *qoliqoli* areas was registered to a *vanua* (a communal unit larger than a *mataqali*), and ownership of foreshore land and adjacent habitats (e.g., mangroves, reefs) was transferred to the State.

Second, Colonial administrators, as represented by a Governor appointed by Great Britain, established a parallel, western-style governance system modelled on their own. Colonial administrators divided Fiji into 14 provinces and 187 districts, or *tikina*. *Tikina* are comprised of many villages, or koro. Today there are 1171 registered villages in Fiji. Each Province was and still is served by a Provincial Council.

These Provincial Councils do not have a law making function, but they do serve as a primary channel of communication between central Government and traditional leaders, particularly those representing the Ministry of *iTaukei* Affairs and, in turn, the *iTaukei* Affairs Board (TAB). Provincial Councils also include a Provincial Administrator, who is typically a government officer from the Ministry of Rural Development. For its part, the TAB employs – or, at least, pays – for the services of iTaukei administrators who live within a given village community and are the locally appointed individuals responsible for bridging communication between government agencies. These individuals are called the *Turaga ni Koro*, or the village headman, and the *Mata ni Tikina*, or the representative of a *Tikina*.[40]

The *Turaga ni Koro* is generally the first point of contact for any community-based initiative.[41] He or she I selected by the Village Council[42] to serve a variety of administrative functions in return for a stipend from *iTaukei* Affairs Board. The *Turaga ni Koro* reports to the *Mata ni Tikina*, with whom he or she discusses village-based projects and whatever local issues that might be of particular interest at Provincial Council meetings, which are held twice each year.

The *Mata ni Tikina* is selected by the Minister of *iTaukei* Affairs to be a trusted communication link between the traditional *Vanua* for his or her *Tikina* and the Provincial Council. The *Mata ni Tikina* represents the *Tikina* at Provincial Council meetings and reports whether or not his *Vanua* has, for example, approved any new local projects or ventures within their

40 Directly translated, "*Mata ni Tikina*" means "the eyes of the *Tikina*".

41 Personal communication with a senior TAB officer.

42 Village Council meetings are inclusive of everyone in the village, including women and youth groups.

villages. The *Roko Tui* and the *Mata ni Tikina* are expected to work closely together, but it is not a one-to-one relationship as there are more than one *Tikina* in a Province, requiring the *Roko Tui* to develop and sustain multiple partnerships with several *Mata ni Tikina*) the different *Mataqali* had specific roles to play, for example, some were fishermen, others warriors, others priests and others farmers.

Between these three individuals – the *Roko Tui*, the *Mata ni Tikina*, and the *Turaga ni Koro* – and the Village Council and Provincial Council meetings, all local activities are vetted and are ultimately conveyed to relevant Government officers (e.g., within the departments of Fisheries, or Environment, or Lands), thus ensuring that both branches of the dual governance system are well-informed and able to perform their respective duties.

The *Turaga Ni Koro*, the *Mata ni tikina*, and *Roko Tui* all operate, of course, in a larger customary social context. At the top of the traditional communal hierarchy is the *Vanua*. There also exists a loose affiliation of *Vanuas* called a Confederacy, but the *Vanua* is of primary importance. *Vanua* can mean land, home, or village in literal translation, but it is also commonly used to establish ones identity – the land to which a person is tied, the family and tribe of which a person is a member, the belief systems one holds, and more. *Vanua* can be used to mean:

- The land itself, including *qoliqolis*.
- A process of consultation (e.g., "The *Vanua* has given its blessing…")
- A set of unwritten rules or even directions that underpin the entire traditional structure (e.g., "One cannot do that because it would offend the *Vanua*…")
- The source traditional authority and governance itself (e.g., "One must remember the *Vanua*; without the *Vanua* you have no power".[43]

In the context of local governance and hierarchy, *Vanua* is also used to mean a collection of *Yavusa*. *Yavusa* are family groups or tribes. Most Fijian villages are comprised of multiple *Yavusa*. Each *Yavusa* is, in turn, comprised of multiple *Mataqali*, or extended families or clans that are defined well enough to be the level at which land ownership is conferred.

At each level of this social hierarchy there is a chief who makes decisions that apply to the people subordinate to him or her.[44] The chief is entrusted as a guardian of resources while not necessarily owning them on an individual basis. Again, resources are communally owned, and the *Mataqali* represent the landowning units, not an individual.

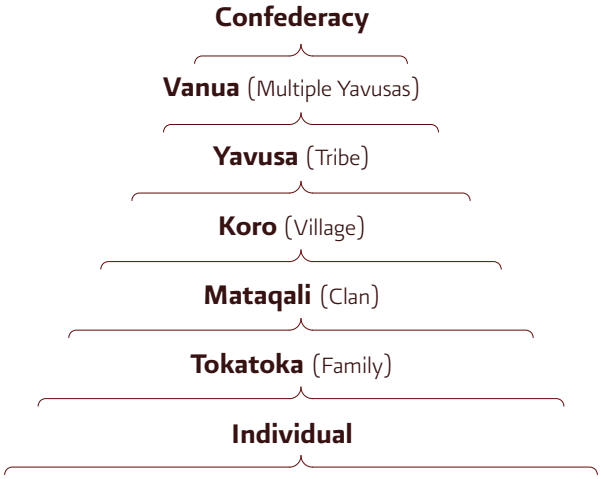

Figure 3 **Traditional Hierarchy**

43 These words are paraphrased and translated from a statement in *iTaukei* language that was expressed to the current Prime Minister, within a traditional context, during his recent political campaign.

44 In Burebasaga confederacy, the Chief may be and currently is a woman; in the other two Confederacies in Fiji, it must be a man.

5.2. Intersection of Traditional and Modern Governance

For this system of resource ownership and rights of access to work, records must be kept of which *iTaukei* group owns what land and which fishing rights on a communal basis. The *Taukei* Affairs Board (TAB) is that record keeper. Every *iTaukei* individual is recorded in a book called the *Vola ni Kawa Bula* (VKB).[45] Entries are recorded by a child's parents shortly after birth. The entry includes name, date of birth, and paternal[46] lineage to a particular family unit, or *Tokatoka*, that is located within the father's home village.

This registration has a great deal of significance for natural resource governance, because:

- It lasts for the entirety of that individual's life
- It is used by both the traditional and modern governance systems to ascertain rights and to resolve disputes
- It identifies which *Mataqali* the person is from and, therefore, the land and resources that belong communally to him or her, together with the rest of the *Mataqali* members.
- It defines the *Yavusa* and *Vanua* that the individual is from, and therefore the person's communal right to fish any *qoliqoli* that is registered to the *Yavusa* or *Vanua*.[47]

Two parallel systems are at work here. Every child born in Fiji is given a birth certificate, but only *iTaukei* are registered in the VKB. Registration in the VKB certainly helps both modern and traditional governance systems ascertain resource rights of access and ownership, but it probably helps the modern system more, because from the perspective of customary rights, if a child is not registered in the VKB, it does not negatively affect his or her birth right and share of resources in the traditional sense.

The two systems merge in at least one other very important way. As mentioned earlier, Fiji is divided into four Divisions: Northern, Western, Eastern and Central. These Divisions and their development plans are administered by the Ministry of Rural and Maritime Development and National Disaster Management. Unlike the *iTaukei* Affairs Board, the Ministry is responsible for promoting economic development on behalf of all Fijians, not just *iTaukei*. Each Division is headed by a Commissioner, whose job it is to coordinate development initiatives and consultation with all relevant stakeholders which, in the case of near shore fisheries management, could include, for example, the Fisheries Department, Department of Environment and the Department of Lands.

This coordination function also includes the iTaukei Affairs Board and the Provincial Councils. The Four Divisions are also divided into 14 Provinces – roughly the same Provinces as those defined by the *iTaukei* Affairs Board for the purposes of its own work with *iTaukei* communities.[48] To facilitate this, a Provincial Administrator from the Ministry of Rural and Maritime Development and National Disaster Management actually sits in each Provincial Council. His or her primary responsibility is to link the respective Ministry Commissioner (and via the Commissioner to all other government departments) on all matters occurring at the provincial level, including *iTaukei* matters. Where a development project, for example, requires access to or use of community resources, the Commissioner and/or Provincial Administrator will liaise with the respective *Roko Tui* to facilitate traditional consultations and consents.

This is, therefore, where the Government and traditional leadership interact most frequently on matters involving resource management, particularly where "outside" interests are hoping to access locally-controlled resources for the purposes of developing a project or enterprise. That direct interaction is focused on the Divisional Commissioner (who now reports to the Prime Minister in an effort to accelerate Fiji's economic development), the Provincial Administrator, and others from Government with the TAB, the Provincial Council, *Roko Tui*, and by extension, the *Mata ni Tikina* and *Turaga ni Koro*.[49]

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45 Dodd 2012

46 In the Tovata confederacy, children can be registered matrilineally.

47 As mentioned elsewhere, land is registered to the *mataqali*, but rights to fish a *qoliqoli* is registered to larger groups of either *Yavusa* or *Vanua*, depending on where in Fiji the registration occurs.

48 In other words, the TAB geographically defines and manages *iTaukei* Provincial matters somewhat differently than does the Ministry; another way in which the systems converge, but not completely.

49 During one interview, a Commissioner expressed some frustration that NGOs rarely consult with him prior to a given project commencing, making it difficult to assist after the fact if the project runs into difficulty.

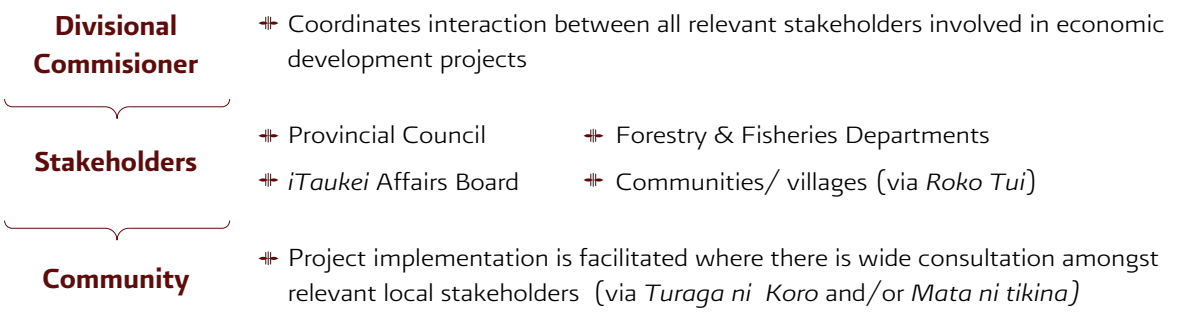

Figure 4 **Interaction with Communities on Economic Development projects**

In the diagram above, the arrow points down to denote the process by which individuals, organizations or companies outside of a village might seek assistance in facilitating relationships, but the reverse direction would also generally hold true if a project or business were initiated from within the community.

The role of the Ministry and the interaction between the dual governance system is illustrated well by the process of obtaining a licence to fish within a *qoliqoli*:

1. Consent is sought from a Chief representing the communal owner of a *qoliqoli* area. This consent is received by way of a Letter from the Chief.
2. That letter of consent is then taken to the *Roko Tui* of the respective Province, who either endorses it or identifies deficiencies with the request.
3. If the Letter of Consent is endorsed, it is then taken to the Commissioner of the respective Division, who then issues a Permit (assuming all is in order).
4. That Permit is then taken to the Fisheries Department, where a Licence to fish is issued.

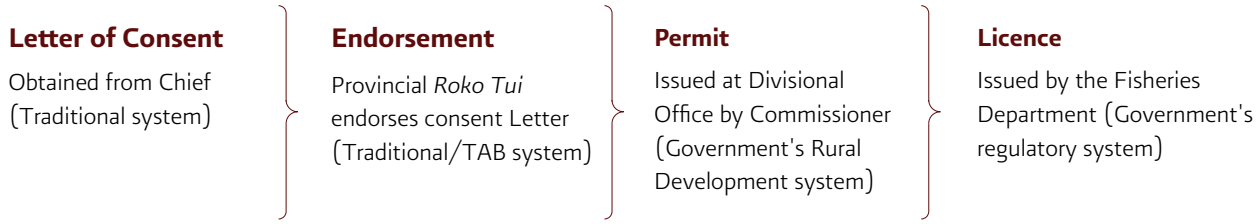

Figure 5 **Steps to obtaining a fishing licence**

There are at least three other good examples of how the traditional and central Government processes converge:

1. **Enforcement of near shore fishing rules and regulations.** The Fisheries Department is, according to the *Fisheries Act*, legally and administratively responsible for enforcement of those fishing areas owned by the State – which, of course, covers both off shore fishing grounds in the country's wider (200 miles) Exclusive Economic Zone, and near shore *qoliqoli*. But the practical reality is that the Fisheries Department does not have the resources to patrol all of that territory, and it is the local communities with the greatest and most immediate interest in managing their *qoliqoli* on a daily basis. As a result, the Fisheries Department, in consultation with Provincial and Village Councils, appoint fish wardens. The *Fisheries Act* gives the Department the ability to make these appointments. But those fish wardens, who are almost always selected from the village that owns the right to fish an adjacent *qoliqoli*, are not paid by the Fisheries Department and are, therefore, not Government employees. While this arrangement can work, it also raises a number of questions about how much and from where the wardens derive their authority to enforce rules, and on behalf of whom they are actually working. Are they Government representatives with an externally driven mandate, or are they being asked to enforce internal rules on the communities and the families from which they originate?

2. **Mapping *Qoliqoli*.** Through the *Fisheries Act*, the Government needed to map all of the country's traditional fishing grounds. The Government worked directly with the *iTaukei* Affairs Board to make this happen. The TAB had the expertise and the community connections to draw boundaries that met with a traditional and historical understanding of where the *qoliqoli* are or were at the time that communal owners were originally tied to fishing rights and areas. Recording *qoliqoli* boundaries was done through consultation and legal oaths made by the resource owners themselves, a process that started to take place in the 1940's and 1950's. That process was aided by a statute that required a 90-day objection period to the mapping process.
3. **The Concept of *Vanua*, Near Shore Fisheries Management, and the Provincial Council.** *Vanua* is, clearly, a very influential concept for *iTaukei*, who feel obliged to follow any pronouncement of the *Vanua*, particularly if the source of that pronouncement was a meeting of high chiefs, or a *Bose ni Vanua*.[50] For near shore fisheries management and coastal resource conservation that means any community-based or -led initiative must ultimately work with both central Government and traditional leaders in the dual governance system to obtain the permissions and acceptance necessary to proceed.

In very practical terms, once the *Vanua* has approved of a near shore fisheries management initiative affecting its *qoliqoli*, that permission will be conveyed by the *Mata ni Tikina* to the Provincial Council. The Provincial Council will provide its own approval only once it is assured of the *Vanua's* position. After the *Vanua* and Provincial Council have, in essence, agreed to grant a fishing permit, the decision is then shared with the Divisional Office and, ultimately, the Department of Fisheries.

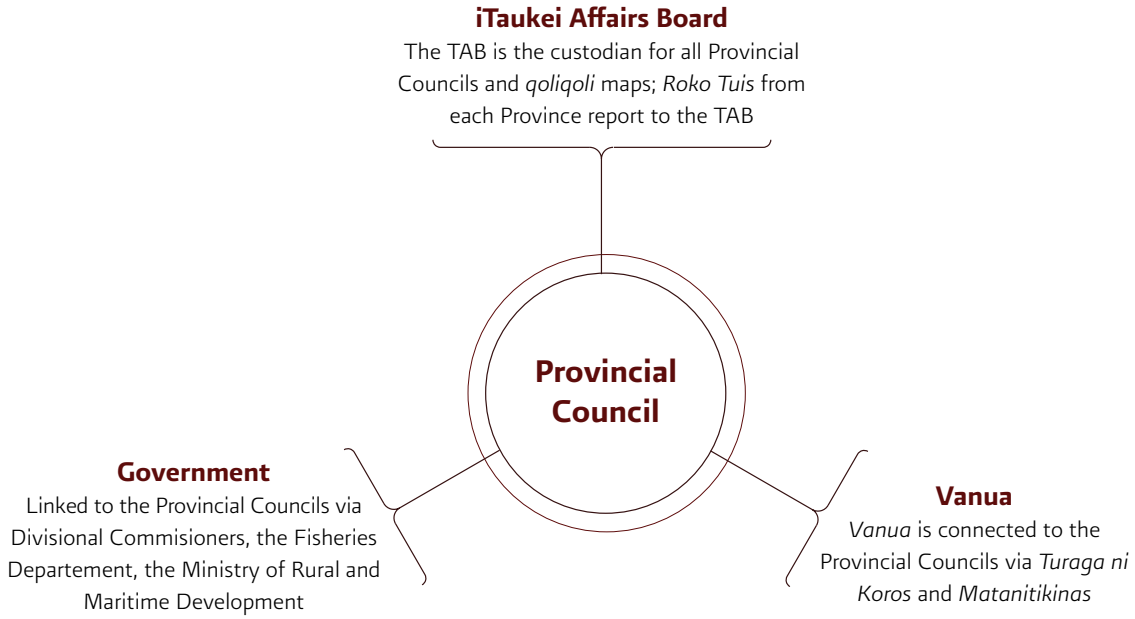

Figure 6 **Provincial Council relationships**

It is important to emphasize here a point made earlier in the Report: from a strictly legal perspective, the Government has the ability to circumvent customary governance and traditional systems on matters affecting near shore fisheries management and, potentially, aquaculture, but it cannot ignore them. Explicit permission and cooperation from the *Vanua* and between traditional leaders and Government officers not only allows a community-based, near shore fisheries management initiative to start, it greatly increases its chances of succeeding in generating benefits for all stakeholders involved, of being financially and managerially sustainable over the long term, and of not being disrupted when inevitable conflicts arise.[51]

Initial consultation must, therefore, include a formal introduction between the "outsider" wishing to conduct work in a given village or District and the communal owners of the resources, preferably with relevant Government officers also aware of or

50 Ewins 2001

51 For example, disputes over who key decision makers or rightful chiefs are; who is or should be considered the "owner" of a *qoliqoli* and what its boundaries are; or whether or not payments should be made, and how much.

present for the introduction.[52] If an open discussion about the "outsider's" ideas and intentions results in the *Vanua* giving its blessing to proceed,[53] the next steps include (a) identifying and building relationships with advocates within the village, not the least of which is the *Turaga ni Koro*, who starts the communication link to the Provincial Council and Government offices; and (b) requesting *qoliqoli* maps to understand not only the spatial parameters of the near shore fisheries management are, but also the very tightly linked social ties to that *qoliqoli*.

5.3 *Qoliqoli*s and Traditional Governance

As stated, ownership of near shore fishing areas vests in the State. Fishing rights (or harvesting rights) to near shore areas designated, mapped, and registered as *qoliqoli* vest in *iTaukei* groups. There are 410 *qoliqoli*s across Fiji. The TAB is charged with maintaining accurate records and maps that show which *iTaukei* group, or *Yavusa*, is registered to which *qoliqoli* area.

Any *iTaukei* who is from the *Yavusa* to whom the *qoliqoli* area is registered and the right to fish has been transferred may fish for subsistence purposes in that area without a fishing licence. At the same time, the chief of the *Yavusa* to whom the *qoliqoli* area is registered may provide a fishing permit – essentially a right to fish – to any person from outside that *Yavusa* (*iTaukei* or non *iTaukei*) to engage in commercial fishing activities in that *qoliqoli* area. It is important to state here that this permit and fee system is not standardized in law. Permit fees and the number and type of permits given can, therefore, vary from place to place.

Because the Government ultimately owns the near shore territory and, therefore, the physical *qoliqoli* area, its laws can be enforced to supersede the *iTaukei* traditional right to fish. For example:

- The *Fisheries Act* can be invoked to permit or prohibit certain types of fishing or types of fishing gear by any person within the *qoliqoli* area through, for example, fish size limits, fish catch limits, or restrictions on nets.
- Final decision on whether to grant a fishing licence to any person – including any person from the relevant *qoliqoli* – for commercial fishing purposes within the *qoliqoli* is vested in the State; in this case, the Fisheries Department.
- The power to enforce laws and regulations pertaining to fishing in *qoliqoli*s is vested in the State/Fisheries Department under the *Fisheries Act*. In practice, those powers are often delegated to local fish wardens who may be from the Taukei community to which the *qoliqoli* rights are registered.
- The *Fisheries Act* gives the State the authority to designate and create "Marine Protected Areas(s9), not *iTaukei* leaders.

While in practical terms *iTaukei* communities are the most significant group of near shore managers, by virtue of living next to the *qoliqoli* and directly relying on it for the food security, the law does not provide any formal mechanisms to those *qoliqoli* managers to use traditional systems of governance to control the use of the *qoliqoli* areas by any third party – whether the private sector, an NGO, etc. This means that, if *qoliqoli* managers unilaterally decide to establish a no-take zone or *tabu* area, the *tabu* legally only applies to their own community. This act of internally declaring an area as a *tabu* does not mean that the area has any additional legal protection, since it is already within the law for a community to declare a *tabu* on itself.

Again, it would be a mistake for one to assume that, because a *iTaukei* community has no devolved law making power and is ultimately subject to the controls imposed by the State, the traditional resource governance system (or the *Turaga ni Koro*, for example) can be circumvented or ignored at the village level if, for example, one wants to pursue a near shore fisheries management project, resort development, or a mining operation. Community acceptance and active participation is, as mentioned above, essential not only because *iTaukei* communities have legally recognised ownership over most of Fiji's land and do have recognised fishing rights, but also because they often strongly believe they are the rightful resource owners regardless of written law.[54] It is generally accepted that *iTaukei* want full ownership of the *qoliqoli* areas; the more limited right to fish a *qoliqoli* is considered by *iTaukei* as a derogation of their traditional and historical ownership rights. Without their ascent, therefore, they have the ability to either stall and derail or facilitate and ensure a project's success.

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52 One interviewee pointed out that many NGOs, who also try to bridge the gap between Government services and community needs, are fully aware of this, and that the approach most favoured by them is a series of discussions to identify community needs first before projects are planned and announced, and before outside funding is sought. In doing so, the initiative becomes the product of the community, not simply shown to them for its "buy in." The important point here being that, as stated in one interview, "Consultation is different from participatory decision-making. Successful community development NGOs use the latter approach." It is also probably good practice to initiate relationships with a given community by also notifying the Provisional Council and the Division Commissioner.

53 *iTaukei* prefer consensus, and therefore not to have open confrontation. As a result, silence should not be taken as consent. Active, explicit approval is important. See Madraiwiwi 2014.

54 Vukikomoala et al. 2012

Applying this legal status to real world conditions – and, in particular, to the Fiji Locally Managed Marine Area Network (FLMMA) – helps explain why FLMMA's approach has essentially become the most widely adopted near shore fisheries management and site-based conservation initiative in Fiji. FLMMA members speak directly to *qoliqoli* communities, at their invitation, and provide relevant information and technical expertise so that local community leaders can make their own decisions regarding internal governance and use of their *qoliqoli*. The FLMMA process does not impose management tools that are binding in law upon any person outside the *qoliqoli* community. It is, essentially, a voluntary adoption of rules and enforcement by communities who have access to information that tells them new near shore fisheries resource management practices can be beneficial to them, their families, their villages, etc.

The FLMMA process also ensures that the *qoliqoli* community retains control of its *qoliqoli*, that it is the community's decision whether to open or close an area to fishing, to stop fishing a particular species, or to prohibit the use of a type of fishing gear. To the extent that those self-imposed rules do not counter Government laws such as those under the *Fisheries Act* (or the State just does not find out about it), management of near shore fisheries in that place becomes a day-to-day practice led almost entirely by local people.

On the other hand, if communities wanted to go further to establish some form of legal control in relation to their *qoliqoli* area and to keep outsiders from exploiting resources within their *qoliqoli*, they and their FLMMA partners would need to engage with the central Government system, probably by way of the Provincial Councils and/or the Department of Fisheries. In doing so, a *qoliqoli* could become, for example, a gazetted and legally protected marine protected area (MPA) as designated by the Fisheries Department under of the *Fisheries Act*. In addition it is theoretically possible for a community to apply to the Director of Lands for a foreshore lease of the *qoliqoli* area. However, whether this foreshore lease is granted and on what terms would be for the Director of Lands to determine.

As it turns out, these mechanisms have rarely been used. One reason is probably that the perceived ambiguity over *qoliqoli* ownership works, up to a point, to the advantage of local communities. In other words, going through the formal process of establishing and gazetting an MPA can be perceived as a potential loss of control or as diminishing *iTaukei* rights within their *qoliqoli*. A legally declared MPA or bylaw would bind all parties to the agreement.

6. International Laws and Conventions Affecting Near Shore Fisheries

The chart below lists the International Conventions, Treaties and Agreements that Fiji has ratified, along with a brief description of associated obligations as they relate to near shore fisheries.

Convention/ Treaty	Details
Agenda 21	A non-binding, voluntarily implemented action plan of the United Nations concerning sustainable development. It resulted from the Rio Declaration and 1992 UN Conference on Environment and Development. The designation of protected areas is identified as a tool for limiting the use of marine ecosystems.
Barbados Programme of Action	A non-binding policy document that (a) addresses the economic, environmental, and social developmental vulnerabilities facing island states and nations around the world, and (b) outlines a strategy that seeks to mitigate those vulnerabilities.
Convention on Biological Diversity	The CBD has three objectives: (1) biodiversity conservation; (2) sustainable use of those biologically diverse resources; and (3) fair and equitable sharing of benefits arising out of the use of genetic resources. The CBD strongly promotes the conservation of marine and coastal biodiversity, as well as the use of protected areas. In January 2005, the Fiji Government committed to establish at least 30% of Fiji's inshore and offshore marine areas as MPAs. This was done under the recommendation of the NBSAP, which in turn was part of Fiji's CBD obligations.
Convention on International Trade in Endangered Species	Regulates international trade of CITES-listed endangered species, including marine species. Fiji has taken steps to incorporate CITES into legislation via the *Endangered and Protected Species Act 2002*. Fiji became a party to CITES in 1997.
Noumea Convention	Also known as the Convention for the Protection of Natural Resources and Environment of the South Pacific Region, the Convention obliges Parties to take all appropriate measures to prevent, reduce, and control pollution from any source and to ensure sound environmental management and development of natural resources, using the best practicable means available and in accordance with their capabilities.
Ramsar Convention	*The Convention on Wetlands of International Importance* promotes the conservation and wise use of wetland areas around the world through local, regional and national action and international cooperation. Wetlands, according to the Convention, include marine areas up to a depth of 6 metres at low tide. Fiji acceded to the Ramsar Convention in 2005.
UN Convention on the Law of the Sea	Establishes the broad legal framework for protection and governance of the oceans. UNCLOS defines national jurisdiction and sovereign rights over the sea, and contains provisions requiring nations to protect and preserve their marine environment.
United Nations Framework Convention on Climate Change	The objective of the treaty is to "stabilize greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.
World Heritage Convention	The main objective of the *World Heritage Convention* is to identify and conserve the world's cultural and natural heritage. Fiji has been a party to this Convention since 1990.

7. Regional Development Agencies Relevant to Near Shore Fisheries

The chart below lists Pacific-focused regional agencies with links to the fisheries sector.

Organisation	
Forum Fisheries Agency	Established in 1979 to help countries sustainably manage offshore fishery resources – especially tuna – within their Exclusive Economic Zones. FFA acts as an advisory body providing expertise and technical assistance. It is based in Honiara, Solomon Islands and has 17 member Pacific states and territories. When it was founded, FFA was involved in inshore fisheries, but in the 1990s changed its focus to concentrate almost exclusively on offshore fisheries. The FFA did, however, provide recently legal expertise for drafting Fiji's inshore, offshore and aquaculture decrees.
Melanesia Spearhead Group	An intergovernmental organization composed of Fiji, PNG, Vanuatu, the Solomon Islands and New Caledonia. The MSG represents a sub-regional preferential trade agreement. It was established to promote economic development through trade.
Pacific Islands Development Forum	A forum for mainstreaming sustainable development principles in Pacific Island countries and territories. PIDF seeks to identify innovative solutions that will ensure sustainable development, promote a green economy, and facilitate collaboration with international partners. PIDF is also the regional counterpart to the United Nation's various initiatives focused on Small Islands and Developing States. PIDF is open to all Pacific Island governments, private sector, and civil society organisations.
Pacific Island Forum Secretariat	The Secretariat's mandate includes coordinating the implementation of the *Pacific Plan*, a regional strategy to strengthen regional cooperation and integration. The Pacific Islands Forum is a political grouping of 16 member nations and territories where many topics important to the region are discussed, not the least of which is tuna, near shore fisheries, marine protected area networks, and traditional resource management systems.
Secretariat of the Pacific Community	SPC is a regional intergovernmental organisation comprised of 22 Pacific Island countries and territories. Its primary objective is to develop the technical, professional, scientific, research, planning and management capability of its members. SPC is very directly involved in near shore and tuna fisheries, and in trying to provide the types of information and advice Pacific Island managers need to make well-informed choices.
South Pacific Regional Environment Programme	SPREP is an intergovernmental organisation charged with promoting cooperation Pacific Island cooperation in support of rehabilitation, protection and sustainable use of both terrestrial and marine environments. It has a long history of projects focused on coastal habitats and near shore fisheries.
Western and Central Pacific Fisheries Commission	The WCPFC is the central decision making body for management of tuna fishing in the Western and Central Pacific Ocean. It was established by the Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, and entered into force in June 2004. WCPFC has a total of 32 member states, including the 17 FFA members. WCPFC members, and this includes Fiji, are legally bound by the provisions of the WCPFC Convention.

8. Conclusion

Fiji has much to be proud of in relation to its marine ecosystems. Given today's fishing technologies, local and global demand for seafood, the pressure to accelerate economic development, changing climatic conditions and ocean chemistry, and much more, it is a positive sign that there is still marine biodiversity and fish stocks to conserve and manage within Fiji's territorial waters, and that the future of ocean management in the country is not all about rehabilitation of what's been lost. As a result, nearly a million visitors come to Fiji each year to enjoy its relatively healthy beaches, reefs, and recreational fishing, and who represent an important foreign exchange earner for Fiji.

But it is also true, of course, that Fiji's off shore and near shore marine resources are feeling the pressure, from damaged reefs to reduced tuna stocks. In short, Fiji needs to find a way to sustainably manage its ocean territory, and especially its near shore fisheries, which are so immediately important to the health and economic livelihoods of all of its citizens. Better management will, in very tangible and measurable ways, improve food security, benefit the tourism industry, and improve the quality of life for the vast majority of Fijians who live close to the shore.

That better management will require strong governing institutions with clear, fair and reasonable laws, rules and regulations, as well as the human skills, scientific data, and financial resources to consistently implement them. Right now, the dual system of natural resource governance, especially as it pertains to near shore fisheries, may be perceived to be a liability because of very real gaps in existing laws and policies – and the way they are perceived by Government institutions and traditional leaders – and gaps or limitations in the skills and resources governing bodies need to make well informed decisions and then act on them.

However, the balance between the rights of the State and those of traditional resource owners has generally been good and has served Fiji well since independence, but now, to maintain the health of near shore fisheries in Fiji in the face of greater human and environmental pressures, that balance needs to be re-calibrated and made less ambiguous.

We do not think that re-calibration must mean revolutionary change, but the legal basis of resource management in Fiji has not been fundamentally altered from Colonial times. Starting with a re-articulation by the Government and traditional leaders of common goals for better resource management, law and policy reform within the existing system can contribute very significantly to better near shore fisheries management, and to better cooperation and co-management between Government, traditional resource owners, and civil society organizations.

As made clear in this report, a core issue is that, at present, the legal and administrative system for near shore fisheries governance is a highly centralised one, with no decentralised law making functions; yet day-to-day practical power to access and manage natural resources is, to a large extent, highly decentralised, and only partially recognised by law.

As a result, near shore fisheries laws and governance is burdened by gaps, redundancies, and cross-purposes. Greater clarity, or simply more widespread and common understanding by those most interested in the long-term health and sustainability of Fiji's near shore fishing, of these laws, statutes and the role of various institutions will go a long way to improving near shore management. This is precisely why this Report was written – to help clarify and improve a common, baseline understanding of the laws, agencies, and customs that shape near shore fisheries in Fiji.

As was stated at the outset, this Report does not attempt to recommend specific legal or policy reforms, or to advise Government institutions, NGOs, the private sector, or traditional owners on how they might improve their impact or management. That remains beyond the scope of the authors' expertise and as noted we have seen firsthand there are many committed individuals within the NGO sector, communities and the Department of Fisheries. And yet, that does not mean specific reforms and improvements are not needed.

If there is one recommendation we make here it is to call for a focused group of relevant individuals to start describing, from a non-partisan perspective, different options for near shore fisheries reform that considers how best to engage with communities and utilises the best of the current dual governance system, and phase out the most confusing or

counterproductive parts with the aim of developing a system that balances and appreciates the nuances of the dual governance system to achieve more sustainable near shore fisheries management.

We also see potential to formalise legally recognised processes to ensure the voices and considerations of communities (including all community members and particularly women who form the backbone of the fisheries industry) are taken into account as part of the centralised decision making process. It is very likely that initiatives of this sort are already happening and a good example of where a formalised participatory process could benefit all stakeholders would be in the designation of MPAs via section 9 of the Fisheries Act.

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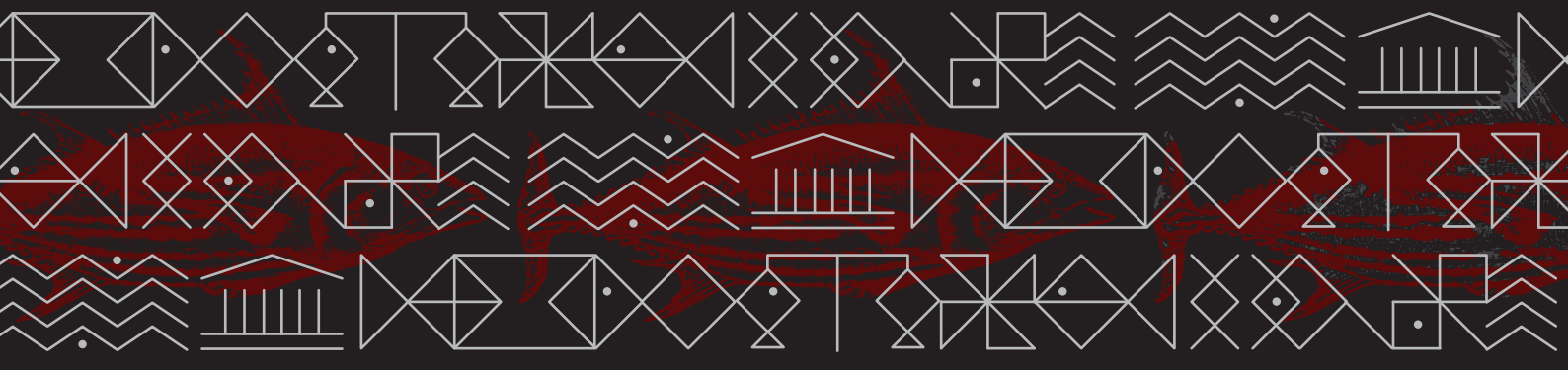
Appendix 1: Definitions

Governance	For the purposes of this report, governance is used to describe the web of relationships that together provide a system managing and regulating the near shore fisheries industry in Fiji, taking into account both traditional and modern governmental structures
Koro	Equivalent to Village
Law	Rules, statutes, and precedents based on English common law that are created by a recognised institution for the purpose of governing matters and the people within Fiji
Mata ni tikina	Elected person from a *Tikina* who is appointed by the Minister of *iTaukei* Affairs to link the traditional structure (or *Vanua*) for his or her *Tikina* and the Provincial Council. He or she represents the *Tikina* at Provincial Council meetings that are held twice a year. The *Roko Tui* and the *Mata ni tikina* are expected to work closely together. Because there is more than one *Tikina* in any given Province (or *Yasana*), the Province's *Roko Tui* must work with multiple *Matanitikina*
Mataqali	Land owning unit or Clan
Nearshore fisheries	Fisheries within Fiji's territorial sea, archipelagic waters, and internal waters, including areas where customary fishing rights are recognised
Qoliqoli	Traditional fishing grounds
Roko Tui	Head of the Provincial Council. *Roko Tui's* generally have one or more Assistant *Roko Tui*s. The *Roko Tui* is the main communication link between the modern and traditional government systems
Tikina	Equivalent to District
Turaga ni Koro	A village member, elected by the Village Council, who performs a variety of administrative tasks in return for a stipend from *iTaukei* Affairs Board. The *Turaga ni Koro* serves as a link between the traditional structures in the village, the *vanua*, and the *matanitikina*. The *matanitikina* calls all *Turaga ni Koros* for meetings to discuss projects that will be implemented in the villages. They are expected to raise particular issues to be deliberated in the twice yearly Provincial Council meetings
Yavusa	A Fijian village is usually comprised of several *yavusa*. The *yavusa* is basically a family group or tribe going back to one original indigenous member.



A Review of Near Shore Fisheries Law & Governance in Fiji *James Sloan & Kevin Chand*

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