

LEGAL ARGUMENT

Reserve, Public Open Space and Canal Land

Pacific Harbour Residential Scheme, Deuba, Fiji

Basis for Formal Vesting in the State

March 2026

1. Overview and Purpose of This Argument

This document sets out the legal argument for the formal vesting in the State of Fiji of the reserve land, public open space, and canal and waterway reserves that were designated as part of the original Pacific Harbour Scheme of Development Plan. It is a stand-alone legal argument separate from, though complementary to, the grounds for non-payment of EMSL's annual assessment fees.

The core proposition is straightforward: when a developer obtains approval to subdivide land in Fiji, any lots or areas designated on the approved plan as public open space, road reserve, canal reserve, or other public utility land are intended by law to be dedicated to or vested in the State or a local authority — not retained indefinitely as private property by the developer to be monetised through fee collection. Where that vesting has not occurred, it is overdue and can be compelled.

The specific concerns driving this argument are: (a) the canal and waterway system that was a defining feature of the Pacific Harbour development and which appears on the development maps as an integrated network throughout Sections A and B; and (b) public park and green space lots that were shown on the original scheme maps and which residents recall as public amenity land but which have been allowed to deteriorate or may have been dealt with inconsistently with their designated status.

Summary of Key Legal Positions

Issue	Canal/waterway reserves neglected or privatised; park/green space lots sold off or built on
Evidence available	Resident recollection of original designations; development maps (Sections A & B); Deed of Covenant text
Outcome sought	Formal vesting of reserve and open space land in the Fiji State

Primary legislation	Subdivision of Land Act Cap. 140; Land Transfer Act 1971; Rivers and Streams Act Cap. 136; Crown Lands Act Cap. 132; Town Planning Act Cap. 139
Responsible authorities	Director of Lands; Registrar of Titles; Director of Town & Country Planning
EMSL's conflicted position	EMSL charges fees for maintaining land it should never have retained as private property

2. The Legal Framework Governing Reserve Land in Fiji Subdivisions

2.1 The Subdivision of Land Act (Cap. 140) — Open Space Conditions

The Subdivision of Land Act (Cap. 140) governs all land subdivisions in Fiji. Section 4 provides that no land shall be subdivided without the prior approval of the Director of Town and Country Planning. Under section 8(3), the Director has express power to impose, as a condition of subdivision approval, a requirement that a portion of the land — not exceeding one-twentieth of the total area — be reserved as open space for the health, amenity or convenience of the neighbourhood.

The Subdivision of Land Regulations made under the Act further provide, in specific and unambiguous terms, that lots designated for open space reserves, roads, or other public utilities — described as lots "intended to be dedicated or otherwise transferred to the Crown or local authority" — are treated as a wholly separate category. They are excluded from the lot charge calculations precisely because they are not private lots at all. They are public assets in the making.

The Pacific Harbour Scheme was a very large subdivision requiring Director approval. Given its scale, the likelihood that open space conditions were imposed — and that specific lots were formally designated as public reserve on the approved deposited plan — is extremely high. These conditions would have been a precondition of the subdivision approval that allowed the developer to sell residential lots in the first place.

2.2 The Land Transfer Act 1971 — Vesting Upon Deposit of Plan

Section 160 of the Land Transfer Act 1971 governs plans of subdivision. Section 162 provides for the vesting of public roads in the State automatically upon the deposit of a subdivision plan with the Registrar of Titles. The significance of this provision is fundamental: the act of depositing the approved plan itself triggers the vesting of designated public infrastructure in the State. No further transfer or deed is required for roads.

While section 162 is specifically expressed in terms of roads, the underlying principle — that land shown as public on an approved deposited plan passes to public ownership at the point of plan registration — applies equally to lots designated as public open space or reserve. Once a plan is deposited showing certain lots as public reserve, those lots cannot thereafter be privately sold, built upon, or

monetised by the developer without a formal and lawful change of designation. Any such dealing, absent an amendment to the deposited plan approved by the Director, would be irregular and potentially void.

Importantly, the Torrens mirror principle — which requires that the Certificate of Title reflects all interests in land — means that if EMSL holds no registered title over these reserve lots, it has no legal basis to control, develop, or charge for them. Conversely, if EMSL does hold registered title over lots that were designated as public reserve on the approved plan, that registration may itself be open to challenge.

2.3 The Rivers and Streams Act (Cap. 136) — The Canal System

The Rivers and Streams Act (Cap. 136) is the most directly relevant legislation for the canal and waterway system at Pacific Harbour. Section 2 of the Act provides:

All waters in Fiji which the natives have been accustomed to traverse in takias or canoes, whether the same be navigable for vessels built on the European model or not... shall, with the soil under the same, belong to the Crown and be perpetually open to the public for the enjoyment of all rights incident to rivers.

Section 3 provides for a mandatory public easement on the banks of all waters that are open to the public — a strip of land along the water's edge within which the public has access rights. This easement cannot be extinguished by private ownership of the adjacent land.

The critical legal question for the Pacific Harbour canals is whether they constitute "waters" within the meaning of the Act. The canals were purpose-built as part of the development — they are artificial waterways. However:

- The canals connect to, and were fed by, the Garanisau River (clearly marked on the Section A development map as forming the western boundary of the scheme). Natural waterways and their tributaries attract the full protections of the Act.
- Even where waterways are artificial, if they have been treated as public amenity infrastructure — integrated into the scheme's open space and used by the community for boating, fishing, and recreational access — there is a strong argument that public rights of access have been established by long usage and cannot now be revoked.
- The canal reserve strips — the land immediately adjacent to the water — were shown on the development maps as a distinct element of the scheme design, separate from the residential lots. These strips are exactly the kind of land that would be designated as public reserve under subdivision approval conditions.

Section 4 of the Rivers and Streams Act further provides that nothing in the Act shall affect the existing powers of the Crown over public waterways. The Crown (now the State) therefore retains inherent supervisory jurisdiction over the canal system regardless of any private claims EMSL may assert.

2.4 The Crown Lands Act (Cap. 132) — Foreshore and Water Margins

The Crown Lands Act (Cap. 132) defines Crown (State) land to include all foreshores and the soil under the waters of Fiji. Section 20 provides that a grant or lease under the Act shall not, unless otherwise expressly provided, confer any right to the foreshore or to soil under the waters of Fiji. This means that even if EMSL holds freehold title to land adjacent to the canals, that title does not extend to the waterway beds or their foreshores — those remain State property by operation of law.

Section 21 further provides that no lease of any Crown foreshore land or any soil under the waters of Fiji shall be made without the express approval of the Minister, who must first declare that such lease does not create a substantial infringement of public rights. The procedural requirements are strict and must be publicly advertised. If EMSL has purported to deal with canal margins or waterway reserves without this Ministerial approval, any such dealing is void.

2.5 The Town Planning Act (Cap. 139) — Ongoing Planning Controls

The Town Planning Act (Cap. 139) provides the overarching framework for development control in Fiji. Any change to the use or designation of land that was approved as public open space or reserve under the original subdivision consent would require a fresh planning approval. Dealing with reserve land — including allowing it to deteriorate, erecting structures upon it, or privatising it — without planning approval constitutes a breach of the Act.

The Director of Town and Country Planning has enforcement powers under the Act, including the power to require the restoration of land to its approved use. Residents can make formal representations to the Director requesting enforcement action in respect of any open space or reserve land that has been dealt with inconsistently with its approved designation.

3. EMSL's Conflicted and Legally Untenable Position

3.1 The Deed of Covenant Acknowledges Public Open Space

The Deed of Covenant that EMSL requires Pacific Harbour lot owners to sign contains a direct and telling admission. Clause 1(d) obliges EMSL to maintain:

...the cutting of the grass and other growth on and otherwise keeping in a tidy condition the areas indicated on the published Proposal Plan as public open space.

This provision is significant for two reasons. First, it expressly acknowledges that the original Proposal Plan designated specific areas as public open space — areas distinct from the private residential lots. Second, it frames EMSL's obligation to maintain those areas as a service it provides in exchange for the annual assessment fee.

But there is a fundamental legal contradiction embedded in this arrangement: EMSL is charging residents a private fee for the maintenance of land that is, or should be, public property. It is treating public open space as a private asset from which it can extract revenue. This is precisely the arrangement that Fiji's planning and subdivision law was designed to prevent.

3.2 The Double-Charging Problem

The financial injustice of EMSL's position compounds over time:

- **Stage 1 — Purchase price:** Residents paid inflated land prices that reflected the amenity value of the canals, parks, and open spaces. The public open space was capitalised into the sale price. Residents paid for these assets when they bought their lots.
- **Stage 2 — Annual fees:** EMSL then charged ongoing annual assessments, expressly justified in part by reference to open space maintenance under Clause 1(d). Residents paid a second time for the same assets, annually.
- **Stage 3 — Neglect:** Despite collecting these fees, the canal and open space infrastructure has been allowed to deteriorate. Residents have paid twice and received diminishing benefit.
- **Stage 4 — No legitimate title:** Throughout this period, EMSL may have held no lawful title over the reserve land at all — it was public land that was never properly vested.

This is not merely a contractual dispute about fees. It is a question of whether public assets have been unlawfully retained and monetised by a private company for decades.

3.3 The 2018 High Court Judgment: Relevant Context

In *Estate Management Services Ltd v Minami Taiheiyo Kaihatsu Kabushiki Kaisha* [2018] FJHC 1153, the High Court dismissed all of EMSL's fee claims. While that case was primarily about the contractual fee arrangement, the Court's findings illuminate EMSL's broader approach to its obligations.

The Court found that EMSL had ceased providing services — including the maintenance of road verges and drains — and had explicitly told the defendant by email that it was doing so. This conduct is consistent with a pattern in which EMSL makes contractual promises about service provision (including open space maintenance), collects fees, and then progressively withdraws services without adjusting its charges.

The reserve land question now brings a further dimension: to the extent that EMSL's fee justification has always included maintenance of public open space, and that open space was never legitimately EMSL's private property to charge for, the entire fee structure is built on a flawed foundation.

4. Establishing the Facts: The Evidence Challenge and How to Address It

4.1 What Residents Currently Know

The starting position is that residents recall what was originally designated as public space but do not have documentary evidence of the original deposited plan or the subdivision approval conditions. This is a common situation and is not an

insurmountable obstacle. The following evidence-gathering steps should be pursued urgently.

4.2 The Deposited Plan — The Key Document

The original deposited plan — filed with the Registrar of Titles when the subdivision was approved — is the single most important document in this matter. It will show, definitively, which lots and areas were designated as: residential lots (now privately titled); public roads (which vest in the State under s.162 LTA); public open space and reserve lots; canal and waterway reserves; and other public utilities.

This document is public record. It is held at the Registrar of Titles office, Suva. Any person may apply to inspect or obtain a copy. The deposited plan number for the Pacific Harbour scheme should be ascertainable from the Certificates of Title of any existing lot owner (the title will reference the deposited plan number). The cost of obtaining a copy is modest.

Once the deposited plan is obtained, it should be overlaid against the development maps already in residents' possession (the Section A and Section B maps) to identify precisely which lots and areas were designated as public reserve.

4.3 Title Searches on Suspect Lots

Once the reserve lot numbers are identified from the deposited plan, a title search should be conducted at the Registrar of Titles for each of those lots. This will reveal:

- Whether the lot has a Certificate of Title in private ownership (including EMSL's name)
- Whether any dealings — transfers, mortgages, leases — have been registered against those lots
- Whether any caveats or encumbrances exist
- Whether the lot remains in State ownership (i.e., has already vested, as it should have)

If reserve lots that were designated as public open space on the deposited plan are found to carry private Certificates of Title in EMSL's name, or have been transferred to third parties, this is a serious irregularity requiring immediate referral to the Registrar of Titles and the Attorney-General.

4.4 Resident Declarations and Community Evidence

While documentary evidence from the Registrar is essential, resident recollection is also legally relevant. Statutory declarations from long-standing residents attesting to:

- The original condition and use of the canal system (for boating, fishing, community use)
- The location and condition of parks and green spaces that were present at the time of purchase
- Changes they have observed over time — encroachment, neglect, fencing-off of previously open areas

- Any representations made by EMSL or its predecessors at the time of lot purchase regarding what open space would be maintained

— would constitute admissible evidence in any court or tribunal proceedings and would support the formal application for State vesting.

4.5 The Deed of Covenant Itself as Evidence

The Deed of Covenant, in its reference to "the published Proposal Plan" and "areas indicated on the published Proposal Plan as public open space", is itself documentary evidence that such a plan existed and that public open space areas were formally designated on it. This is an admission by EMSL — contained in its own standard form document — that public open space was an integral and identified feature of the Pacific Harbour scheme.

5. The Legal Argument for Formal State Vesting

5.1 Grounds for Vesting

The argument for formal vesting of the reserve and open space land in the State rests on four independent legal grounds, any one of which is sufficient:

Ground 1: Vesting by Operation of Law Upon Plan Deposit

To the extent that the original deposited plan designated specific lots as public open space, road reserve, or canal reserve, those lots vested in the State (or became subject to public dedication) at the point of plan registration under the Land Transfer Act 1971. This is not a discretionary outcome — it is what the law requires. EMSL's subsequent retention of those lots, if it occurred, would be contrary to law. The appropriate remedy is recognition of the vesting that already occurred and correction of the register by the Registrar of Titles.

Ground 2: State Ownership of Waterway Beds and Margins

Under the Rivers and Streams Act (Cap. 136) and the Crown Lands Act (Cap. 132), the beds of natural waterways and the soil under the waters of Fiji belong to the Crown/State by operation of law. To the extent that the Pacific Harbour canals connect to or were derived from natural waterways (including the Garanisau River), the waterway beds and their margins are State property. No act of EMSL can extinguish this. The State should assert and register its title accordingly.

Ground 3: Compulsory Acquisition for Public Purposes

Even if reserve lots were irregularly titled in EMSL's name following subdivision, the State has power under the Crown Acquisition of Lands Act to compulsorily acquire land for public purposes, including for open space and amenity purposes. Given the public benefit — a large residential community that was sold lots on the understanding that public open space would be maintained — this is a compelling case for the exercise of acquisition powers.

Ground 4: Planning Enforcement and Restoration

Under the Town Planning Act (Cap. 139), the Director of Town and Country Planning has power to require restoration of land to its approved use where it has been dealt with contrary to the subdivision approval conditions. An application to the Director requesting enforcement action — including a direction that reserve lots be restored to public open space use and formally vested in a public body — is a procedural step available without court proceedings.

5.2 The Mechanism: How Formal Vesting Is Achieved

Achieving formal State vesting will require engagement with multiple government bodies. The following is the recommended procedural pathway:

1. **Registrar of Titles — Title Investigation.** Apply for copies of the original deposited plan and conduct title searches on all lots identified as reserve or open space. If irregularities are found (private titles over public reserve lots), lodge a formal complaint with the Registrar requesting rectification of the register under the Land Transfer Act 1971.
2. **Director of Lands — Crown/State Vesting Claim.** Write to the Director of Lands identifying the waterway beds, canal margins, and any lots that should be State land under the Crown Lands Act and Rivers and Streams Act, and requesting that the Director assert and register State title over those parcels. The Director has both the power and the obligation to do so where State land is found to be in private occupation.
3. **Director of Town and Country Planning — Planning Enforcement.** Lodge a formal representation with the Director requesting enforcement action against any dealings with reserve land that are contrary to the original subdivision approval conditions. Request that the Director require restoration of open space lots to their approved use.
4. **Attorney-General's Office — If Private Title Is Found.** If title searches reveal that reserve lots have been privately titled and dealt with by EMSL contrary to their designated status on the deposited plan, the matter should be referred to the Attorney-General's Office, which has standing to bring proceedings to rectify the register and recover public land.
5. **Minister for Lands — Ministerial Intervention.** For matters involving the foreshore, canal beds, and waterway margins, the Crown Lands Act requires Ministerial approval for any alienation of such land. A representation to the Minister requesting formal assertion of State title over these areas, and an inquiry into whether any unauthorised dealings have occurred, is appropriate.
6. **Community Advocacy — Raise Public Awareness.** The reserve land issue is of public interest beyond the Pacific Harbour community. The neglect and potential privatisation of public open space in a major residential development is a matter that warrants media attention and engagement with civil society organisations concerned with environmental protection and public land rights in Fiji.

6. Interaction with the Fee Unenforceability Argument

While this document is a stand-alone legal argument, the reserve land issue and the fee unenforceability argument are mutually reinforcing:

- **EMSL's fee justification is undermined:** If the public open space that EMSL charges to maintain is not its private property, its contractual right to levy fees for that maintenance is further weakened. It is charging for services on land it does not own and was never entitled to retain.
- **The double-charging argument strengthens the equitable case:** Courts exercising equitable jurisdiction are unlikely to be sympathetic to a party that has charged residents for decades for the maintenance of public assets while those assets have deteriorated and their public status has been obscured.
- **Discovery of improper title dealings would be devastating to EMSL's credibility:** If title searches reveal that EMSL has registered private title over lots that were designated as public reserve on the deposited plan, this would be a matter of significant legal seriousness — not merely relevant to the fee dispute but potentially involving regulatory and criminal consequences.
- **Government involvement changes the dynamic:** Formal engagement of the Director of Lands, the Registrar of Titles, and the Director of Town and Country Planning in the reserve land question brings institutional weight to bear that EMSL will be unable to ignore or litigate away through default judgments against individual residents.

7. Recommended Formal Letters to Government Bodies

The following outlines the substance of formal representations that should be made to each relevant government body. Residents or their legal representatives should adapt and send these letters as soon as possible.

7.1 To the Registrar of Titles

Request: Copies of the original deposited plan for the Pacific Harbour subdivision; current title searches for all lots designated as open space, reserve, or canal reserve on that plan; and, if private titles are found over such lots, a formal explanation of how such titles came to be registered and what steps the Registrar will take to rectify the register.

Basis: Land Transfer Act 1971, sections 160 and 162; the Registrar's duty to maintain the integrity of the register.

7.2 To the Director of Lands

Request: Confirmation of the State's ownership of the bed and margins of the Pacific Harbour canal system and its connection to the Garanisau River; assertion of State title over any waterway beds and foreshores within the scheme that are not currently registered in the State's name; and an investigation into any dealings by EMSL with land that is State property under the Crown Lands Act or Rivers and Streams Act.

Basis: Crown Lands Act Cap. 132, sections 3 and 20; Rivers and Streams Act Cap. 136, section 2.

7.3 To the Director of Town and Country Planning

Request: Copies of the original subdivision approval conditions for the Pacific Harbour scheme, including any conditions requiring the reservation of open space; an inspection of the scheme to assess compliance of current land use with the approved plan; and enforcement action under the Town Planning Act in respect of any lots whose use or condition is contrary to the approved designation.

Basis: Subdivision of Land Act Cap. 140, sections 4, 8 and 11; Town Planning Act Cap. 139.

7.4 To the Attorney-General's Office

Request: An investigation into whether EMSL or its predecessor (Pacific Hotels and Development Limited) registered private title over lots designated as public reserve on the approved deposited plan; and, if so, commencement of proceedings to rectify the register and recover those lots for the public.

Basis: Land Transfer Act 1971; Crown Lands Act Cap. 132; the Attorney-General's standing to bring proceedings in the public interest.

8. Important Disclaimer

This document is prepared as a legal argument framework for the use of Pacific Harbour residents and community representatives. It does not constitute formal legal advice. The strength of the arguments advanced will depend in significant part on what the original deposited plan reveals — which is why obtaining that document is the single most urgent priority.

Residents should not take unilateral action — such as physically accessing or improving land claimed as public reserve — without first obtaining legal advice. The appropriate pathway is through formal representations to the relevant government bodies, as set out above.

This argument should be read alongside the separate Legal Framework document addressing the unenforceability of EMSL's annual assessment fee demands, which sets out the contractual and property law grounds for non-payment of those fees.