Traditional Tenure and Modern Farming

D.M. Fenbury

On December 16th, 1972, Mr Michael Somare, Chief Minister of Papua New Guinea's National Coalition government, outlined the decisions reached by his Cabinet (during what he described as "a historic week") on the strategy of an overall "improvement programme" that would be launched in July 1973.

In a lengthy statement of his Government's objectives, Mr Somare emphasised that the new economic strategy's central themes were "decentralisation, rural improvement, equitable distribution of incomes and self-reliance - they are directed at improving the lives of our people". After pointing out that the plan sought a rapid increase in the proportion of the economy under local (i.e. indigenous) control, a more equal distribution of economic benefits, more agricultural development at village level and more involvement of local councils and area authorities in local development, the Chief Minister added: "there will be an emphasis on small-scale artisan, service and business activity, relying where possible on typically Papua New Guinean forms of organisation ....".

It is in this last sentence, perhaps, that the Chief Minister's statement betrays the wistfully wishful thinking of Niugini's[1] burgeoning nationalists. Well before the advent of the Australian Labour Government in December 1972, but in curious contrast to the not-so-distant days of the Barnes/Warwick Smith

---

[1]For convenience the terms 'Niugini' and 'Niuginian' have been used when reference is made to Papua New Guinea and its indigenous population.

era - the Coalition was being permitted and even encouraged by Canberra to exercise virtual self-government. But the Niuginian leaders also began to learn that the magic of newly-acquired western-type political power was of little use in solving their country's evolutionary woes.

Predictably enough, the urges of Niuginian politicians to shy away from appearing as brown-skinned Australians, and to seek traditional Melanesian approaches to solving non-traditional Melanesian problems, have been strengthened by the heady brew of rapid political evolution. But, equally predictably, these ambitions continue to be largely frustrated. While the validity of the blending of cultures thesis, once so dear to the hearts of some anthropologists and administrators, has been largely discredited by events, it is still, in confused and confusing ways, an article of faith with the evolving Niuginian villager. For this reason alone, few Niuginian bureaucrats, and fewer politicians, are as yet prepared to evaluate the probable cumulative effects of increasing population and economic development on a wide range of ancient subsistence-economy mores.

It is not necessarily significant that the Chief Minister's long statement on his government's "improvement programme" avoided mentioning that radical changes in indigenous systems of land tenure, land use and land inheritance would be pre-requisites to any durable improvements in the lot of the average Niuginian villager.

In fact, it is possible that Mr Somare, like many other educated Niuginians, may not consider that these evolutionary problems are as yet urgent, or that they already exist. But even

if the Chief Minister happens to be personally convinced that customary tenures don't make for sound commercial farming, he would be also clearly aware that in the Niugini situation of 1973 there is no political mileage to be gained from peddling this issue.

In February 1971, some of the problems attending progress in Niuginian tribal societies were outlined by the present writer in the following terms: "For all the wishful thinking and rationalisations, it seems as clear as anything is clear in these magic isles that when an erstwhile static tribal society of subsistence gardeners becomes involved with the medicine, education, commerce, technology and philosophies of 20th century industrialised civilisation, its pre-contact economic, social and political structure and usages - in fact, most of the tribe's traditional values - become progressively anachronistic."

"Planners who should know better are still apparently kidding themselves that village living standards can be permanently raised by superimposing rather inefficient cash-cropping onto land tenure and land use systems evolved for primitive subsistence needs. It even seems to work moderately well for a while - providing you avoid analysing per capita returns - until the dragon's teeth of increasing population, increasing individualism and increasing needs start to tear the facade apart" (1971, 40).

From the generalist administrator's viewpoint, the last two sentences of that excerpt summarise a persistent delusion that afflicts both the evolving villager and many of his agricultural mentors. But even in those few area situations where Government officials have made warning noises over long

periods, the Niuginian has not been prepared to change course. There seem to be certain magico-religious thickets in the hypothetical "average" Niuginian villager's philosophy, where land concepts are entwined with what he perceives as corner posts in his tribal society's structure. As the villager seems to feel this situation (I use the term "feel" advisedly), traditional land rights constitute both gnarled roots stretching back from these corner posts to remote but still potent ancestors, and new tendrils of social security stretching forward to his children's children. Even when faced daily with stark evidence that no more ancestral land is available, he is still both unwilling and unable to appreciate that as his community increases in size those sacred roots and shoots must wither.

Niuginians are not devotees of proverbs or abstract thinking, but most - including those in the more economically advanced areas - would endorse all that is implied in the much-quoted saying first attributed to an old Nigerian chief: "Land belongs to a vast family of which many are dead, few are living and countless members are still unborn".

Much of the political and administrative difficulty of effecting land tenure reforms derives from the awkward fact that until the culture contact process attains a certain momentum, the Nigerian adage <u>is</u> valid. Rowton Simpson has commented that while the process of individualizing customary tenures may be initially stimulated and subsequently accelerated or "brought on" by Government, "it cannot be kept too clearly in mind that a premature application of the obstetrical forceps, however well intentioned, may lead to still-birth. There have bean many abortive attempts in Kenya in the past ten years which have

cost much in time, effort and money. Papua/New Guinea can benefit from this experience" (1971, 5).

It verges on the trite to state that in 1973 the rural indigenous communities who comprise most of Papua New Guinea's 2.5 million population have been exposed to widely varying intensities of industrial civilisation influence for periods varying from less than a year to more than a century. It is, however, scarcely an exaggeration to add that in 1971, the evolutionary gap between, say, the Tolai of New Britain and the Huli of the Southern Highlands - in most aspects of their material cultures - is comparable to that between Sydneysiders and the Arunta west of Alice Springs. The present tendency is for the gap to widen. Between these extremes are innumerable gradations with varying tempos of culture contact.

Among the implications of this frequently forgotten diversity of the Niugini tribal scene is that while the needs for radical changes in land tenure and farming methods may have been urgent among the Tolai for forty years, the first evolutionary symptoms of any such needs may not yet be apparent in Huli society at all. The economic geographer may be able to predict, with morbid certainty, what is likely to happen to Huli farmers as population increases and acculturation gathers momentum. He can do little to obviate such developments.

In 1973 the hypothetical "average" middle-aged Tolai farmer is probably very far from being content. But he is still not prepared to accept reforms that he fears would destroy Tolai society. He has achieved some status and perhaps owns a one fourth share in a new utility truck bought on time payment. He is dimly aware that his income is not meeting his family's increasing

needs. He has also observed that his land's annual yields of coconuts and bananas seem to be decreasing, but he regards the use of fertiliser and insecticides, as practised on some European plantations, as a waste of money.

He yearns for secure title to a larger portion of his vunatarai (matriclan) land, and hopes that when he dies his biological family will be strong enough to reject the claims of his sister's children, defy the lualua (clan leader) and retain the cocoa grove that they helped him to plant. He and his brother have already had a long series of altercations with other kinsmen over the usufruct rights to small parcels of coconut plantation, with mutual accusations that custom had been flouted, and threats and counter threats of court action. He believes passionately that his mounting financial problems have their roots in past White trickery over guns and land deals with his grandparents, and current European manipulations of commodity prices. By comparative Niuginian standards he is well off. He eats meat more regularly than most of his countrymen. He likes drinking beer and talking local politics; but basically he is little better informed than is his primitive subsistence-gardening Huli contemporary regarding the actual character of the new forces impinging on Niuginian society. He tends to confuse economic causes and effects. The only cure he can suggest for his troubles is to get more land.

To the anthropologist it is axiomatic that detailed study of the traditional social structure and the land tenure system of each evolving Niuginian society is a pre-requisite to promoting sound and acceptable changes. Apart from questions of feasibility

(it is said that less than one fourth of Niugini's hundreds of linguistic groups have been studied by trained ethnographers) the continuing validity of this argument seems somewhat dubious in the case of tribal areas where culture-contact is now well into the third generation. Nevertheless, fear of the anthropologists has prompted me to attempt something from which they themselves mostly recoil - a crude generalised statement of customary land rights in Niugini - as a prologue to describing what happens to them as acculturation gathers momentum.

For the present purpose it is probably sufficient to say that in Papuo-Melanesian society land rights are inextricably linked with kinship arrangements and descent rules based on lineages, clans, phratries or moieties. For most of Papua New Guinea's pre-contact societies it can be crudely states that the community's land is group-owned and that land rights are acquired at birth. In such communities the fact that an individual is born a member of a kinship group endows him with certain rights in the land of that group. In the majority of Niuginian societies, most of which are patrilineal, only males can inherit rights in land; and this also generally applied in the few matrilineal systems that have been studied.[1]

But whatever the particular system of inheritance of land rights in the pre-contact era, it was rigidly followed and was closely linked with the acquisition of other rights and obligations associated with the individual's membership of his

---

[1] I understand that the Motuan people of the Moresby area are one of the few Niuginian communities where women acquire land rights by birth, and where land rights may be derived through either parent.

kinship group. It was usually not possible for an individual to decide how his rights to land or other property would be divided following his death. The salient point is that in primitive Pacific cultures land was the only form of really permanent property. As stated by Chesire "Land is fixed, permanent and vital to the needs of society, and a thing which must inevitably be the subject of derivative rights vested in persons other than the ostensible owner" (1954, 6).

The nature of rights in land in pre-contact Niugini communities varied according to the use made of the land. Thus the individual's "title" to his house site in the village approximated to what in layman's English might, perhaps, be called "life-time freehold". If the total area over which a pre-contact village community claimed ownership is envisaged as a series of concentric circles, the outer ring, where hostile neighbours were apt to be encountered, was hunting and collecting land, and was generally regarded as the joint property of the village community as a whole. The different lineages tended to establish firmer rights to these outer areas if or when cultivation commenced. The inner "circles" of land on which crops were planted were generally group-owned, with an individual acquiring basic cultivation rights by birth, and his kinship group being allocated particular garden plots each year. Individuals could also establish a form of individual rights to a particular area by planting coconut palms or fruit trees on it, but this individual ownership of things planted did not imply ownership of the land in the European sense.

The pre-contact system of kinship group land ownership was closely bound up with a defensive need for close group cohesion

in a hostile world, and for mutual assistance in performing large scale tasks such as tree felling and clearing with crude tools. The vesting of land rights in kinship groups was one aspect of the continuing need for a sense of kinship group unity, and an arrangement that was well suited to the needs of small static populations of subsistence farmers practising shifting cultivation. Warfare to increase the amount of subsistence land available to a community was commonly practised in parts of the densely populated highlands, but seems to have been relatively rare in the lowlands.[1] Quarrels between neighbouring groups over land boundaries were widespread, and frequent, but not necessarily connected with economic needs.

Within the groups, individual rights to trees, shares of produce, and portions of planted plots were recognized, but the necessity for continuous control by an individual over a particular area of arable land did not arise. This general absence of any need to assert permanent individual rights to land in the pre-contact Niugini subsistence farming economy has probably constituted the major obstacle to the villager adjusting his tenure concepts to a changed economic situation.

With the advent of cash cropping, particularly the growing of tree crops, which permanently tie up the land, individual rights become increasingly asserted. More use is being made of the land; and the land itself, as well as the crops grown on it, begins to be equated to cash. The whole process is accentuated

---

[1]The Tolai, however, apparently invaded the north-east portion of the Gazelle Peninsula from southern New Ireland in relatively recent times, and at the time of the first recorded European contacts were engaged in expanding their territory at the expense of the Butums, Timoips, Sulkas, Taulils etc.

by the rapid increases in population that occur in the second phase of culture contact, by a weakening of the group's feeling of community, and by the slow decay of traditional economic and social values that inevitably results from some imported education and exposure to industrial civilisation.

Mention was made earlier of the anxieties of a hypothetical Tolai farmer who dimly realized that the land tenure and land use customs of the ancestors were no longer really workable, who was prepared to flout them, but who was still quite unable to think his way out of the cultural squeeze. This is the common dilemma of tribal area cash croppers. The desire to move towards a system of individual ownership and testamentary disposition of improved land is diluted by years of conditioning as members of a lineage organisation. In May 1962 Charles Julius, former Government Anthropologist to the Papua New Guinea Administration, commented on the Tolai land situation then prevailing in the following terms:- "Even those who express a desire for change in the system of land rights frequently show nervousness concerning the possible effect on the lineage organisation, and a certain timidity in bringing themselves to consider the actual details involved in a change of the system. The more responsible section of the Tolai community realises how much of social discipline, order and security has depended on the lineage and general kinship organisation, and has seen the results in disorder and insecurity arising from increasing individual ignoring of lineage duties and obligations. This has led to uncertainty concerning land right changes, even among those most conscious of the need for change..."

In 1973, only an ill-informed traditionalist could dispute that the continuing validity of the Nigerian adage quoted earlier

in this paper is dependent upon the ability of tribal society to retain its salient pre-contact social characteristics. The historical record strongly suggests that primitive tribal society quickly loses most of its primitive virtues under the pressures of increasing population, increasing economic development and increasing individualism. Among the early casualties are forms of social security based on customary land tenure arrangements. As Rowton Simpson commented: "Individualization of tenure also precludes the operation of the social security system which assures every member of the land holding group, no matter how old, or how long absent, some share of the group land whenever he requires it for his own subsistence. But such a system depends on a plentiful supply of land and it can no longer operate effectively when population increases to the extent that the land is fully utilised. Another form of social security must then be arranged (as in Europe), and anything which ensures more production from the land - even perhaps a reform of customary tenure - must contribute more to the common good than a system which militates against good land use" (1971, 5-6).

In a letter on the Tolai Cocoa Project published in the "South Pacific Post" in May 1958, the present writer commented that the scheme ".... was necessarily imposed on a highly messy pattern of customary land tenure which had been crumbling for more than 40 years. The Tolais .... may be nearer the summit of their prosperity than they suspect. Within 10-15 years, unless other action is taken, the increasing pressure of their population on their land resources will lower their per capita incomes to poverty level - this at about the time when increased education and allied processes have conditioned them into expecting a steadily rising standard of living ...."

"The major lessons of the Tolai scheme strongly suggest that future plans for native economic development, to be sound in long range terms, must be based on the following:- Tenure control of any areas planted with tree crops must be removed from customary influences right at the beginning. The aim must be to achieve a series of indivisible, individual (or biological family) holdings, each an economic area, and with sale or mortgage subject to scrutiny. Whether tenure control is exercised through the Administration or local authorities is of subordinate importance to my present argument. Low-grade peasant farming is "out"."

I believe that the approach to individualisation of tenures, limited to tree crops, that is advocated in this letter of 1958, is still valid in principle, but probably no longer feasible in the more developed tribal areas. Without regard here to the physical and social problems inherent in a complete swing away from traditional farming methods, my current assessment is that the concept of wholly individual tenures is not compatible with existing Niuginian work attitudes and the reciprocity involved in village life. A keen awareness prevails of the ancient adage that many hands make light work. There is an almost mystic belief, possibly derived in part from misinterpreted observations of the operations of European commercial concerns, that "company work" - a Melanesian pidgin phrase denoting group effort with sharing of proceeds - somehow yields advantages disproportionately greater than the total efforts of the partaking individuals. Repeated experiences to the contrary, culminating in bitter litigation, never seem to shake this belief. With this, there is little realisation that in the long run the economic advancement

of a community is largely dependent upon the amount of per capita production, and that to increase economic production significantly means specialisation of labour and drastic reduction of the time spent on social obligations. By and large, wefts of "cargo cult" attitudes are still clearly discernible in Niuginian economic thinking, including that of the relatively advanced Tolai.

In the early 1950's, a series of spot analyses of how the average Tolai villager spends his time were carried out by district officials concerned with the Tolai local government councils. While not sufficiently methodical to warrant scientific status they yielded some disconcerting results. At that time, apart from morning and evening daily services, at least one day per week, apart from Sunday, was devoted to "church work". On average another two to three days per month were set aside for special religious occasions. One day per week was regarded as being devoted to communal public works such as village cleaning and road maintenance. Attendance at funeral feasts, wedding feasts, post-natal celebrations, visits to relatives and the like, as well as the preparation for these occasions - and the ensuing recuperative period - averaged out at one day per week. Other activities included subsistence gardening (less time-consuming with the now largely banana-cultivating Tolai than with other groups), fishing (coastal villages only), house repairing, going to market on Saturdays, etc. The crude official assessment, endorsed by Tolai leaders, was that the average adult Tolai "economic unit" did not devote more than nine days per month to economic production, that is, to labour directly concerned with earning cash.

In traditional village society there is a seasonal rhythm of activities. Spurts of intensive labour on garden clearing or house building, during which fourteen or more hours may be worked at a stretch, are usually followed by intervals of relative inactivity, devoted to feasting, dancing or sheer indolence. This ingrained fondness for "target work" - a fact well known to plantation managers - is reflected in the current Niuginian approach to home economic production. In so far as commercial agriculture in the tropics involves year round continuity of production to a greater degree than do most forms of temperate zone farming, it constitutes an important factor in any consideration of individual holdings. In village copra production the collection, cutting and drying is normally carried out in periodic bursts, the nuts being allowed to accumulate during the intervals. Admittedly, in most communities the number of palms is insufficient to support constant processing; but even where sufficient raw material is available, as in the Birar section of Kokopo, the growers are apparently disinclined to attempt maximum output. A Tolai leader recently informed the writer that groups from other Tolai communities still regularly spend intervals at Birar villages, purchasing "surplus" nuts at a low figure and processing them on the site. Even with the Tolai, elementary education in the economics of commercial farming from the industrial civilisation viewpoint is still at a low level. A cocoa grower is still quite capable of leaving his ripening pods to sprout whilst he engages in a six weeks' tambu shell buying expedition down the coast. (It is an oddity of Tolai society that tambu - the pre-contact currency - has not only survived a century of culture contact but is still an essential

for many ceremonial and trading purposes.) By and large, cash is still regarded as a useful commodity rather than an essential means of exchange.

A few individual Tolai "big men", mostly farmer/traders, commanding a family group labour force, probably devote as much time per week to economic production as the average Australian farmer; but these men are, as yet, exceptional.

The average Niuginian agriculturist is still a long way from clearly appreciating that enhanced living standards involve regularity of performance in economic production - involve more work. His motivations are still those of the subsistence economy, and he is not under economic pressure as industrial civilisation's victims recognize the term. While it can be validly argued that the building up of that pressure is an essential ingredient in any schemes for systematic economic development, the nature of the villager's response still cannot be predicted with any certainty. It is obvious that the prevailing quirks (from a European viewpoint) in native economic and social attitudes constitute formidable obstacles to a smooth and rapid transition to completely individual farming.

In the paragraphs above an attempt has been made to outline certain questions concerning the willingness and ability of Niuginian cultivators to change over to a completely individual system of commercial farming. My general conclusion is that, whilst the tenure problem is basically one of endeavouring to direct and accelerate evolutionary trends that arise from the introduction of cash crops, villager attitudes limit the scope of the initial approach that must be made. Broadly, the problem is an educational one, and in my view the best chance of success

would have lain in concentrating efforts on the systematic individualising of cash-crop area tenures in the initial stages of economic development. In some areas this would not have been possible; but in no area was it attempted. In the most evolved tribal localities the usual results accruing from population pressure and progressive fragmentation of holdings are now becoming clearly apparent. Rationalising the tenures of "rural slum" tree-crop areas is now a priority problem.

An approach along these lines leaves the question of subsistence gardening, based on shifting cultivation, to be resolved at a later time. This has obvious risks. The desirability of "rationalising" both aspects of indigenous agriculture jointly is not arguable; the question of feasibility is another matter.

Mention has been made earlier in this paper of one problem complicating the individualisation of subsistence gardening tenures: the degree to which garden clearing has been of necessity a communal task, and with this, the degree to which the economic and religious aspects of food production are woven into the social fabric. There remains, however, another aspect, which I approach with some diffidence. Even assuming that whole-hearted indigenous support was forthcoming for a complete change-over to individual holdings, can we supply feasible answers to the technical problems involved in preventing erosion and maintaining soil fertility, once bush fallowing has been replaced by more advanced agricultural methods?

The answers evolved in temperate regions, for more advanced economies - techniques based on mechanical equipment, contour ridging, crop rotation, the use of fertilisers and of livestock -

appear to me to have scope for only a limited application in the New Guinea village agricultural context.

The estimated proportion of village cultivation in the Territory carried out on critical slopes is not known to me, but it must be relatively high. In many areas one can walk for days without seeing a garden on a slope of less than 20 degrees, and cultivation on slopes of 40 degrees is not uncommon. (In parts of the Chimbu district the angles verge on the fantastic.) Most of the country generally is so broken that the proportion of truly arable land, in terms of non-critical slopes, is probably much lower than is commonly believed.

In a majority of tribal areas the terrain conditions will impose strict limits on the extent to which a sub-division of the land into individual farms, each suitable for subsistence food-growing and commercial cropping, can be laid out. Many of the slopes that currently support subsistence gardening would not be suitable for economic crops, particularly the tree-crops which, on current probabilities, will continue to be the mainstay of the agricultural economy. (Coconut palms, economically cultivable at up to 1,500 feet altitude, and tolerant of steep slopes, may be an exception.) If the Coalition Government adheres to the old Agriculture Department plan that cash crops should be promoted systematically, in areas selected by technical officers, these will naturally tend to be concentrated where the terrain is favourable, leaving the smaller pockets and more difficult areas for food growing. A pattern of this sort dove-tails well enough with the concept of tree-crop plantation lay-outs, each incorporating a number of individual holdings; but it does not lend itself to a lay-out of completely individual farms, each growing both subsistence food and economic crops.

Despite the pressures of soil conservationists, it is probable that the cultivation of steep slopes will continue, as a matter of sheer necessity, with a tendency for even steeper ridges to be brought under gardens as area populations build up. To date, the practice has not resulted in any marked degree of erosion, this, paradoxically, because of the technical crudity of the agricultural methods employed. Under existing techniques the land is rarely cleared completely. Large trees are ring-barked and left standing, or felled, without stump eradication, to produce a terracing effect. The digging stick is still the main agricultural implement, and the soil is not tilled. Crops are commonly planted in mixed stands; at no time is the garden area completely devoid of cover. These practices, coupled with fallow periods of up to seven years, during which the area reverts to heavy secondary bush, prevent erosion and apparently maintain fertility.

Such methods are obviously wasteful of land. As yet, apart from causing virgin forest to recede, they do not seem to have produced many cumulative harmful effects. (Some erosion is discernible in parts of the Markham Valley and Eastern Highlands.) A marked increase in population, which on current trends may be confidently anticipated in many areas over the next twenty five years, could, however, by accelerating the bush fallowing cycle, drastically alter the existing picture. It must therefore be concluded that a time factor, less pressing than that existing in regard to permanent tree-crop cultivation, also operates in regard to changing subsistence gardening methods. The difficulty lies in selecting and promoting feasible techniques.

A system of complete individual farming necessarily implies a cessation of shifting subsistence agriculture, for otherwise the

holdings would need to be larger than the amount of arable land - in most areas - can support. Fixed cultivation of annuals in turn implies promoting at least the rotation of crops, and use of the hoe and of insecticides. Clean clearing, contour ridging, composting and allied farming techniques not traditionally practised by Niuginian farmers are also implied in the change-over. All of this entails additional work and expense to the cultivator, without him necessarily gaining any additional income. The disposal of perishable food crops, surplus to local domestic requirements, would constitute, in many areas, major transport and marketing problems.

Again, while emphasising that I have no pretensions to agricultural knowledge, my reading of current literature has left me with a strong impression that much work remains to be done on the application of modern agricultural techniques to tropical soils, and under tropical climatic conditions. In Africa, the introduction of the hoe and the plough have promoted erosion; the desire and economic ability of the average Niuginian cultivator to use artificial fertilisers remain at best doubtful factors. The Niuginian is as yet a tyro in regard to animal husbandry; he is even further removed from an appreciation of the economic use of livestock in agriculture. In the days of the Belgian Administration, the Congo probably led the then colonial world in research into wet lowlands agriculture. My recollection of reports on some extensive Belgian work on systems of strip cultivation without artificial fertilisers is that quite lengthy fallow periods were still required.

The general conclusion I have reached regarding the modernisation of Niuginian subsistence agriculture is that the

approach needs to be empirical, and exceedingly cautious. There are too many incidental problems to which there are not yet conclusive answers. Admittedly, changes must be effected, and there is a time factor operating. But the need for change has not the same urgency that exists in regard to the "rationalising" of tree-crop areas.

The progress achieved in tenure conversion in Niugini since 1945 is relatively insignificant. The Native Land Registration Ordinance 1952 provided for the investigation and recording of rights and interests in indigenous-owned land, and also established the Native Lands Commission. The Commission's functions were quasi-judicial in character. The legislation provided for registration of the Commission's decisions in a Register of Native Land, and for ultimate survey. Between 1952 and 1963, a total of 472 claims were recorded. Presumably because of the lack of surveys, there were no registrations of these decisions by the Registrar of Titles.

The 1958 District Commissioners' Conference, under the chairmanship of the then Assistant Administrator, Dr J.T. Gunther, concerned itself mainly with discussion of land tenure problems. In the light of Niugini's later interest in Kenya land tenure reform it is interesting that the notes distributed to facilitate this conference's discussions included several extracts from a Despatch No. 44 of 1946, entitled "General Aspects of the Agrarian Situation in Kenya", and written by the then Governor of Kenya, Sir Phillip Mitchell, to the Secretary of State for the Colonies.

This 1958 Conference passed five resolutions generally aimed at promoting the individualisation of customary tenure

in Papua New Guinea. They included recommendations covering the compulsory acquisition (where necessary) and redistribution to indigenes, on a leasehold basis, of unused "tribal" land, and making optimum use of local authorities as intermediate landlords for the promotion of local area economic development. There does not seem to have been any attempt to implement the District Commissioners' recommendations.

In 1960 the Australian Minister for Territories announced a policy designed to encourage the development of individual land ownership and leading towards the eventual abolition of customary forms of tenure. A Land (Tenure Conversion) Ordinance passed by the Legislative Council in 1963 enabled an individual member of an indigenous land-owning group to apply for registration as the freehold title holder of a portion of the group's land. The legislation, however, was hedged by the important proviso that such registration would only be effected if all the people with rights in the land consented. The net result was that by 1970 only some 270 small blocks had been converted to freehold in this way.

In 1971, four new Land Bills based on Kenya land legislation were introduced into the House of Assembly. They provoked wide public controversy, during which representatives of several of the major religious missions combined with conservative indigenous politicians to voice conventional traditionalist fears. By June 1971 the successful passage of the Bills through the House of Assembly seemed dubious, and the Administration decided to withdraw them pending further explanation of their expected policy effects. The Land (Tenure Conversion) Ordinance 1963 still remains in force, but its underlying policy intention of stimulating the

individualisation of tenures has also been queried by some members in the House. The National Coalition Government thusfar has shown no public signs of being interested in reviving the draft legislation dealing with the adjudication and registration of tribal lands. In the meantime, with Niuginian community populations and expectations both steadily rising, the backlog of undecided land disputes continues to retard development and promote armed conflict, particularly in the congested Highlands Districts.

PAPUA NEW GUINEA

Ref: 1-1-10
Huffam:pmcp

Department of Lands, Surveys
and Mines,
P.O. Box 201,
MOUNT HAGEN, W.H.D.

28th June, 1973

The Chairman,
Commission of Inquiry into Land Matters,
P.O. Box 2459,
KONEDOBU, P.N.G.

UNDEVELOPED GRANTED APPLICATIONS ON RESETTLEMENT AREAS

Following discussion with Mr. M. O'Neill on 26th June, 1973, a check of files in the Land Settlement Branch indicates the following problems caused by the impossibility of dealings with Granted Applications.

AVI
Land Board No. 510 heard 609 applications for 125 portions in the AVI Subdivision during August-September, 1971. Due to an irregularity with some applications, the minutes were not released until December, 1972. In the interim, several successful applicants, particularly from the GEMBOGL (Chimbu) district, have moved from their home area and all efforts by staff of D.A.S.F., D.D.A., and Lands to locate these applicants have been unsuccessful. As Item "e" of the lease conditions states... "The lessee or his agent shall take up residency or occupancy of his portion of land within two (2) months from the date of grant", all such portions are liable for forfeit under section 54 of the Lands Ordinance 1962. Under present procedure these portions can not be forfeited until such time as the leases are registered and so, regardless of any Land Board recommendation or Minister's approval, they must remain idle until such time as the successful applicants are located and the Lease Documents executed. Thirteen portions are involved (10.4%).

KINDENG
Several portions granted in 1966 have been recommended for forfeiture by the Land Board and have been abandoned by their lessees. (One case was confirmed by the Administrator on 16th June, 1971). As these areas are Granted Applications, and not yet registered leases, they cannot be forfeited, re-advertised and reallocated, but must remain vacant or cause problems to the Administration with squatters, until such time as they are registered.

Six (6) portions are involved.

This office does not process the transfer of portions and so does not have complete records but to my knowledge, at least three transfers have been pending for periods up to

.../2

three years.because dealings in Granted Applications cannot be finalised. In most cases, the vendor of the property has sold his interest, signed all documents for the transfer, and left the area. When the time comes for the lease document to be executed, he will be virtually impossible to locate so that the transfer can be completed. (One such lease document has been in this office for several months now.) In these cases, the original lessee is still apparently liable for all fees and rentals until such time as the transfer is complete. This fact alone causes considerable illfeeling from the parties concerned. Six portions are known to be involved.

In this office we have constant enquiries regarding Re-settlement portions which are known to be vacant or occupied by squatters. In view of the demand for such portions (109 applications for 2 portions recently advertised,) Lands Settlement staff have extreme difficulty in explaining that this land cannot be made available for further applic-ations until the original lease is registered.

D.J. HUFFAM
Land Development Officer

DISCUSSION PAPER June, 1973

Reforming the Companies Ordinance

1. Introduction

In the Papua New Guinean context, the Companies Ordinance is seriously deficient and requires radical and comprehensive change. However this paper assumes that minimum change is desirable. This is because the proposed General Purpose Corporations legislation, if enacted, will confine the need for the Companies Ordinance to situations in which foreign capital or control is predominant. In such situations there is virtue in maintaining the maximum uniformity with Australian company legislation for a related set of reasons: firstly there is the provision of a familiar organisational form for the foreign investor with a well-developed and fairly certain set of rules and procedures; secondly, Papua New Guinea will, at least for some time, retain close ties with Australian financial institutions such as banks and the stock exchange and company law is an integral part of those ties; finally, Australia is fertile ground for the growth of ever varying methods of company fraud and as this growth will often extend to Papua New Guinea it may need to place considerable reliance on the same legal safeguards as those developed in Australia.

In addition to this approach of minimum change, there are other limitations on the scope of the paper. The paper only seeks to raise issues in a general way for discussion and so it avoids, as far as possible, matters of technical detail. Also, the paper is not based on a comprehensive review of the companies legislation; it merely covers problems which have recently been raised with the government by interested parties concerning the participation of Papua New Guineans through shareholding as well as a problem which has arisen as part of the government's consideration of policy on foreign investment. There may be further matters which others, particularly the Registrar-General, may wish to raise in this context. There is a final limitation in relation to which the Registrar-General's advice would be helpful: the paper takes no account of the possible relevance of either recent changes in company legislation in Australia or the reports of the Company Law Committee appointed by the Standing Committee of Attorneys-General.

The remainder of the paper is organised under the following headings: (2) bearer shares; (3) group or representative holdings; (4) assistance in purchase of shares; (5) disclosure, meetings and record of members; (6) capital contributions; (7) capital repayment; (8) transfer pricing.

Before looking at these particular points, it may help if some indication were given of the general problem which prompts this paper. Capital participation by Papua New Guineans on any considerable scale typically involves a comparatively large number of shareholders, their relative inaccessibility and, for the most part, small holdings. This is led to great administrative difficulties and to related, but less tangible, idiological difficulties.

On the administrative side there are considerable costs and difficulties over the transfer and transmission of shares, the replacement of lost share certificates, the distribution of dividends and of certain notices and information. On the ideological side it is difficult to be precise. It is the case that for some large companies with considerable Papua New Guinean holdings there is considerable disenchantment with the company.

Other companies with such holdings seem to fare better on this score. There is no short or ready answer to this issue. (An extensive comparison between the two sets of companies may throw light on the issue but the information for this is not available). The issue is obviously very important not only to determine the viability of large scale Papua New Guinean involvement but also the conditions necessary for the success of government aims for greater Papua New Guinean participation.

(2) Bearer shares

Bearer shares would help overcome problems associated with the transfer and transmission of shares and the distribution of dividends. Bearer shares are not registered against the name of any person. To effect a transfer or transmission of shares all that need be done is for the share script (the "share warrant") to be handed over. To collect dividends, the share warrant (or dividend coupons attached to it) is presented and the person presenting it is entitled to receive the dividend. For example, instead of many people in a village each going a long distrance to collect a small dividend and sign a receipt for it, their warrants or dividend coupons could be given to one person to collect the dividends on their behalf. The ease of transfer and transmission would obviate the seemingly irremediable chaos of many share registers. On all these counts there would be a considerable saving of costs.

There are drawbacks. With bearer shares the incentive to steal share certificates is increased because it is easier to dispose of them effectively. The problem of lost share certificates would be more difficult to resolve. It is impossible to levy stamp duty on transfers and transmission but this can be somewhat compensated for by the levy of a comparatively large duty on the issue of bearer share. Notice can only be given to holders of bearer shares via radio or newspaper (but this matters little in Papua New Guinea. See part (5) of this paper). Perhaps because of these drawbacks, s.57 of the companies ligislation in Papua New Guinea and Australia prohibits the issue of bearer shares.

Another possible difficulty concerns exchange control which could raise many complex issues. Probably the best way of tackling the matter at this stage would be to make a tentative decision as to whether bearer shares were worth considering. If this decision were in the affirmative, the matter of exchange control could then be referred to the Australian government for its (tentative) response. The response would help narrow the issues involved or would mean that there are no issues to be concerned with because, that is, the Australian government approves without qualification or firml disapproves. Presuming the prospect of bearer shares survived thus far, the matter would then have to be considered in the light of Papua New Guinea's own future attitudes on exchange control.

(3) Group or representative holdings

These holdings would mitigate all of the Administrative problems described earlier as they would mean that the Company could deal with a representative holder income the ideological problems by promoting involvement with the company through pre-existing group identifies. A related point is that the fewer the shareholders the more easy it is for them to participate effectively in the affairs of the company. Representatives can then report back to and get the views of the wider group of "members"; by using existing social organisations, a large number of people can be involved, and feel involved, in the company. This pattern has already been worked out and used in some companies.

One way of setting up a representative or group holding would be through vesting the shares in a general purpose corporation.

However alternatives to this should be considered because the General Purpose Corporations legislation may not be enacted and because, even if it is enacted, there is no need to burden the government machinery with registrations if there is a satisfactory alternative.

It would seem that the best alternative is the trust. Arrangements for a trustee to hold shares on behalf of many people are very common in the United States and similar arrangements could be used here. However there are several difficulties, none of which are insuperable but each of which requires some rather detailed consideration.

Firstly there is the arcanum of perpetuities. The "rule against perpetuities" makes invalid any arrangement under which property does not "vest" for a certain time. Shares in a company held for a group would not "vest" until the group is "closed", i.e. until its exact, final and unalterable composition is determined. Clan, lineage groups and, often, families can never be said to have a closed membership in this sense. This being so, the rule against perpetuities would make legally invalid an arrangement to hold shares om behalf of such a group.

This rule was developed in England to prevent people entering into arrangements which kept property out of the market for a long time. It has little or no relevance to Papua New Guineans most of whose property is not dealt within a market economy and who do not seek to enter into this kind of arrangement in respect of marketable property.

There would probably be agreement that the rule needs modifying. The how of it is another question. S.382 of the Companies Ordinance already provides that the rule has no application "to the trusts of any fund for the benefit of an employee of the company". This section could be extended. If it were extended to any representative holding this would have the effect of almost abrogating the rule entirely because a representative holding could be arranged on any terms in respect of any property. To confine the exemption to shares held on behalf of certain groups raises problems of definition of the relevant groups. One pertinent attempt at definition can be found in S.20 of the Savings and Loan Societies Ordinance: viz. " a group of persons having a common bond of occupation, association or interest or .... groups of persoms residing within a well-defined community or area". The definition may serve as a basis for discussion but it may be doubted whether it accomodates the "structural looseness of many traditional groupings in Papua New Guinea.

Another problem with group holdings is that s.14 of the Companies Ordinance prohibits "an association or partnership consisting.....of more than twenty persons, which has for its object the acquisition of gain". Whether or not a group holding would be an "association" for this purpose would often be a difficult question. If all that was involved was a request by individual members of the group for the shares to be held by the representative on behalf of the member, then there would be no "association" as a mere common interest is not enough to constitute an association. If, however,members of the group agreed that shares should be held on behalf of the group or that traditional transactional modes were relevant to the distribution of dividends, then there would probably be an illegal "association".

An exception to this prohibition can be based either on the group or representative aspect. Basing it on the group raises problems of definition similar to those touched on in considering perpetuities. By itself, the representative aspect is probably too broad a basis for exemption but if it is described so as not to provide a basis for a business (of share-dealing or investment) then there appears to be no objection to relying on the representative aspect.

These comments about exceptions apply also to ss.76 to 89 of the Companies Ordinance. These sections seek to regulate unit trusts and a variety of other more dubious schemes. The coverage of these sections is so broad that they would include a representative or group holding if, generally, "the public" could be said to be involved. Whether various kinds of groups could be said to import the "public" element would be difficult questions.

They are questions which should be avoided since the degree and type of regulation involved are entirely inapt for representative holdings. Therefore, an appropriate exception would have to be made in the case of these sections also.

This raises the query of whether group or representative holdings would require any regulation at all. Initially some courts in the United States were hostile to this sort of holding because it was thought to be against public policy to allow people to assign away their voting rights on shares. This hostility has long since subsided but remains reflected in the provisions of some United States laws that " voting trusts" or representative holdings cannot be effective for a period of longer than ten years. The only other regulation which the laws of some states of the U.S. require is that the document setting up the voting trust must be filed with the company where it is open for inspection by any shareholder or any person who is a party to the voting trust.

Such a disclosure provision seems desirable so that members of the company will know who is involved and it would seem desirable also to extend this disclosure to the public generally. As few representative holdings would be set up on the basis of a legal document it should be adequate to record that the shareholder on the record holds the shares on behalf of a named group or named individuals. This may meet with some opposition because some people, for various reasons, hide their interests in companies behind nominee holdings. At the least, however, it should be optional for a representative holding to be shown as such on the company's records because this could forestall disputes as to whether the shares were held in a representative capacity. Under s.156 (3) of the Companies Ordinance it is optional for shares held in trust to be entered as such in the company's records but this is subject to the company's consent.

There is a final matter which should be considered in this (already too lengthy) account of group or representative holdings. The matter is what rules, standards or practices should govern the relations between a representative holder of shares and those on whose behalf the shares are held. The law relating to trusts may be quite pertinent except to the extent that it erects a strict division between the trustee's personal concerns and his concerns as trustee. This division does not accord with traditional transactional modes. On this score, and most probably others, customary practices should play a part.

A related, and really inseparable, matter is the remedies. available to a person if the representative holder of his shares abuses his position. If an appropraite remedy is to be devised one of the difficulties may be fitting this in with the existing jurisdictional limits of the courts and the advice of the Secretary for Law

would be invaluable here. What seems to be needed is a widely available remedy along the lines of clause 17 of the proposed General Purpose Corporations legislation. This would provide a remedy against oppression, discrimination or any other unreasonable disregard of interests on the part of the representative holder of shares. In the context of the proposed legislation, the Secretary for Law has said that this remedy is not apt to be exercised by courts but, with respect (both formal and geniune), such broad remedies are given to courts in company law (Cf. the remedy against oppression in S.186 of the Companies Ordinance and the remedy against discrimination under the so-called "fraud on the minority" at common law).

4. Assistance in purchase of shares

The development aim of increased Papua New Guinean participation has given rise to questions as to how this can be achieved in enterprises that are presently expatriate dominated. It seems to be emerging as a clear item of policy that these enterprises will be expected to partly finance the purchase of their shares by Papua New Guineans, S.67 of the Companies Ordinance forbids a company to provide financial assistance for the purchase of its own shares.

Usually this prohibition is said to be based on the idea that a company must maintain its capital. Whatever the merits of the maintenance of capital idea (and they are illusory - see Tom Hadden, Company Law and Capitalism pp.58-64) it is quite erroneous to apply it here because a mere change in the nature of assets (from cash to a debt) does not involve diminu . . .

It has been rightly observed that there is little merit in the section in that it prohibits many unobjectionable transactions but fails to catch many that are quite objectionable (Jenkins Committee, paras. 170 ff.) To meet these defects the Jenkins Committee in Great Britain has recommended that a company be allowed to give financial assistance for the purchase of its own shares on two conditions: first the relevant transaction must be approved by a special resolution of the company and, second, a declaration of solvency must be filed with the Registrar of Companies. If a dissentient minority holding 10 or more per cent of the shares objects, they can apply to a court to prohibit the transaction. These procedures protect the interests of shareholders, including minority shareholders, and of creditors and they seem quite apt and sensible.

(In defence of the brevity of this part of the paper it sould be mentioned that there are many technical questions about the scope of S.67 which have not been covered here).

5. Disclosure, meetings and record of members

The point has often been made by representatives of companies with a substantial number of Papua New Guinean shareholders that existing provisions for the giving of notice to members and for providing them with copies of accounts are not only inordinately expensive to operate but also generally ineffective. The argument, briefly, is that the expense arises out of the existence of very many small shareholders - the person holding any more than one to five shares is very much the exception. Further, the procedures are ineffective because written (postal) notice and accounts make no sense in a village context.

These points go to the heart of company law protections. The English system, inherited by Papua New Guinea, has always placed prime emphasis on action by members, such action being informed by appropriate disclosure requirements. The present structure of shareholding, especially the great numbers and general dispersal of shareholders in large companies, makes this emphasis grossly inadequate even in countries like England

(Tom Hadden, Company Law and Capitalism pp.129-33). Further, "apart from their sheer quantity, the ineffectiveness of shareholders as a whole is also due to their quality" (P. Sargant Florence, The Logic of British and American Industry, p.179). The chief means of disclosure are accounts but "unfortunately, accounts in general and those of companies in particular are of little immediate help except to the well instructed, who are least in need of protection" (Gower, The Principles of Modern Company Law, p.454). It could be added that accounts, being basically under the control of management, are often defective or misleading.

There is no need to underline the magnified relevance of these arguments to Papua New Guinea where the great majority of shareholders are illiterate, are not in receipt of postal services and have have no access to professional assistance.

It has been suggested by company representative that the giving of notice via radio would be both more effective and would save considerable expense. Perhaps this should be qualified to the extent that the member can require that he be served with notice via the post. With accounts it has been suggested that it would be adequate if there were requirement that accounts should be given to any member who requested a copy, that they should be available at least three weeks before the annual general meeting and that ample copies should be on hand at the annual general meeting.

These provisions would only be relevant to lessening the expense of producing and distributing accounts; they leave untouched the problem of the ineffectiveness of disclosure. To meet this problem, thought should be given to the introduction of a form of management audit as was contemplated by the Companies Bill, 1969 in Great Britain - but this Bill was never enacted. Something broadly similar, but simpler, is found in the proposed General Purpose Corporations legislation where it provides that a meeting of members of a corporation may appoint any person to enquire into and report on any aspect of the affairs of the corporation on behalf of the members; for this prupose the person appointed has power to inspect and take copies of any accounts of the corporation, to interview any member, committeeman or employee of a corporation and to convene a meeting of members. Presently the Companies Ordinance, S.170 enables members by a special resolution to appoint inspectors to look into the affairs of the corporation but inspection is a complex proceeding and is generally considered to be an indication that the company is in grave difficulties.

A final matter that company representatives have complained of is the requirement which involves the preparation of an often extremely long list of shareholders for filing each year. It is argued that this is expensive and serves no real purpose. It would seem to be adequate to have a provision that changes in major shareholdings (defined in fractional terms) should be notified to the Registrar with the annual return.

The costs of conforming to these requirements as well as of generally maintaining the share register are difficult to estimate for large companies because they do much of the work themselves and there are difficult problems of allocation of overheads and of the time of some employees. However, some not so large companies do have much of this work done by accountants and a few joint venture companies around Goroka with comparatively modest numbers of Papua New Guinean members spend between $2,000 and $3,000 p.a. for this purpose.

(6). Capital contributions

Arguments about the irrelevance of disclosure of accounts in the village setting can be applied with even greater force to the prospectus and other information to be supplied when inviting

the public to contribute share capital to a company. The relevant provisions so increase the cost and difficulties of collecting capital of the village level that they are often disregarded. Not only is the process expensive and complex but, whilst capital continues to be collected, it has to be commenced all anew every six months (S.39 (1) of the Companies Ordinance quite disregarding the fact that large-scale capital collection in Papua New Guinea can be a very slow process.

It cannot be said that all this expense and complexity has any rational purpose at all. The effect of a prospectus on the Papua New Guinean investor must be negligible; the same could be said of most western investors but they have accessible professional advice and the backing of the stock exchange, issuing houses and the financial press.

Some other method of protecting investors in companies is clearly needed in Papua New Guinea. One approach would be to make invitations to the public to subscribe for shares subject to the consent of an investment assessment unit.

As dispensing with present requirements would save companies a considerable amount, there should be scope for charging fees adequate enough to sustain the unit.

Organisationally it would make sense to attach such a unit to any national investment authority that is set up. However to minimise the appearance of government involvement in approving the investment, the unit should perhaps be set up as an independent statutory corporation. Also companies should not be allowed to advertise in any way the approval of the unit (cf. s.83 (2) of the Companies Ordinance which is a provision to this effect concerned with the approval of certain types of investment arrangements).

Of course investment assessment by the unit will not dispense with the need for disclosure in all cases. The unit should be given power to require apt and potentially effective disclosure when it thinks this desirable.

(7) Capital repayment

Companies are forbidden to purchase their own shares. The prohibition seems to be peculiar to company laws based on the English system and it is founded on the notion of capital maintenance, which notion has already been disparaged in passing in part (4) of this paper.

At least one large Company in Papua New Guinea has made representations requesting that this prohibition be modified. The arguments presented are that the people expect to be able to get some refund on shares, that the ability to pay out disaffected members will stem disaffection and that, as most disaffected members are small shareholders, paying them out will reduce the expense involved in the matters already discussed in part (5) of this paper.

In his report on Ghanaian Company Law, Gower thought it necessary to allow for a company to purchase its shares as the absence of a market meant that no one else would. Without such a power and a market, there is a considerable disincentive to invest. In particular he was concerned that this disincentive would stifle any schemes for employee participation: employees can only " put all their eggs into one basket with no means of extracting them from that Basket" (Report p.66). These observations apply equally to Papua New Guinea with the added emphasis that even if a stock exchange is set up in Papua New Guinea, many companies in which Papua New Guineans would be investing are of a size and type which do not seek stock exchange listing.

The main objections to allowing a company to buy its own shares were described by Gower as (p.66): this reduces... It can be used by Directors to enhance their own control, to increase the value of their own holdings, or to misuse their inside information; if indulged in imprudently it may reduce the company to insolvency.

To meet or mitigate these objections he recommended certain provisions (pp.64-66) which are now part of Ghanaian Company Law. Generally these provisions pay that a company can purchase its shares; once purchased they become known (following U.S. practice) as "treasury shares". No voting rights are exercisable and no dividends can be paid on treasury shares. Further, not more than 15% of the issued shares can become treasury shares. These shares can only be purchased out of a "share deals account" which must be kept in credit by transfers from income surplus and by profits on the sale of treasury shares by the company. Details of dealings in the "share deals account" must be made available to members of the company and the public.

This reform is probably overcautious. It would seem to be adequate to provide that treasury shares cannot be voted on, can only be purchased out of income surplus or profits on share deals and that details of dealings in these shares must be disclosed.

(8) Transfer pricing

For present purposes transfer pricing can be said to entail an under or over pricing on a transfer of goods or services so as to mask a transfer of funds between the parties to the transaction. It is usually used to disguise the profits of a local subsidiary of an overseas parent company.

Although transfer pricing is usually considered in relation to the avoidance of taxation or exchange control measures, any manipulation of profits must affect company law's concern with the protection of shareholders and creditors. For example, the local subsidiary may be a joint venture with Papua New Guinean shareholders; if the overseas parent creams off profits through transfer pricing this is nothing less than cheating the Papua New Guinean shareholders out of some or all of their dividends.

Of course, following on with this example, it may be open to the Papua New Guinean shareholders to take legal action on the grounds of "fraud on the minority" or oppression but this course is usually quite illusory in these circumstances because the defrauded shareholders will have no information on which to base their case. Although an overseas company having a branch here must file its accounts, if it instead sets up a subsidiary it does not have to file accounts. On any realistic view this is quite inconsistent. The inconsistency is heightened in that company law requires a locally registered parent and its subsidiary or related companies to file a form of group accounts because, to this extent, the law recognizes that this type of accounting is necessary to give an accurate picture of the operations of any subsidiary or other type of company within the group. There is no reason in principle why this same policy should not apply to an overseas parent.

It may be objected that since the overseas parent has no presence within the jurisdiction, it cannot be forced to give information. This separation of legal personality should, in this instance, be treated as the fiction it is and the parent and subsidiary treated as the same legal entity.

Of course the availability of accounts would not overcome all problems of transfer pricing. It is a complex matter with much wider ramifications especially when seen in relation to taxation, exchange control, export pricing and policy on foreign investment generally. Clearly company law measures should be considered with and related to measures in these other areas - not that this should be used as an excuse to delay the reform of company law.

There would be practical difficulties in requiring disclosure of accounts on a group basis if the members of the group were numerous as is often the case with the large (so-called) multinational firm. In geographically locating profit these firms have considerable discretion and an extensive series of accounts would be needed to trace through the relevant information. Perhaps all that is feasible is to give the Registrar powe to require group-basis accounts or other relevant information to be disclosed and he could exercise this power both where there was a suspicion of fraud and also on a random check basis. Again, this aspect should be related to what organisational response to transfer pricing in general is eventually set up.

As well as the manipulation of profits, transfer pricing can extend to the manipulation of capital contributions. If the consideration given by a foreign parent for the isse of shares in the subsidiary is inadequate, this distorts the parent's rate of return on its investment. The parent may want to do this to disguise exorbitant profits or to evade tax based on capital. In terms of company law this can present a false picture to creditors and other shareholders as to the capital of the company. As for dividends, if the other shareholders (who will usually be Papua New Guinean) give more adequate value for their shares, the foreign parent is then drawing off profits at the expense of these other shareholders.

Although shares cannot be issued at a discount (except in special circumstances) it is possible to "water" shares by issuing them for something worth less than the shares because a court will accept the company's valuation of the consideration. If the offending shareholders control the company, that is the end of the matter - except for an easily evaded and not at all helpful disclosure provision in S.54 of the Companies Ordinance.

Some countries of Continental Europe get around this problem by insisting that a non-cash consideration for shares be independently valued. To require this in every case may be onerous, but, at least, the Registrar or the investment assessment unit could be given power to require a valuation and could exercise this on a random basis. Penalties would be imposed if the consideration were clearly undervalued. Again, however, this aspect should be considered in relation to other transfer pricing measures. Of particular relevance here is the recent cabinet decision on mining which would seem to require a valuation of capital contributions that are not made in cash.

Finally there are certain exemptions from the obligation of a foreign company with a branch operation to file accounts: Companies Ordinance, s.348 (5). Except for those relating to non-commercial bodies, these exemptions are quite unjustifiable. The basis for the exemptions is that the exempted foreign companies are like certain proprietary companies under the Ordinance and these latter do not have to file accounts. It is doubtful whether these proprietary companys will have this privilege much longer; certainly in so far as s.348 (5) exempts English private companies it is out of date since these companies now have to file accounts.

- - - -

It is difficult to see, however, why foreign private companies should be exempted simply because they are like a certain type of Papua New Guinean Company that does not have to file accounts. The fact that a foreign company has greater opportunities to manipulate profits and is less accessible in terms of extracting information from it gives Papua New Guinea a legitimate interest in requiring accounts to be filed. Although the manipulation of profits attributable to the branch operation would primarily concern the revenue, this manipulation can take place to the detriment of creditors, and this is a concern of company law.

LAND ADMINISTRATION AT NATIONAL AND DISTRICT LEVELS OF GOVERNMENT IN PAPUA NEW GUINEA

This paper was prepared at the request of the Commission. The views expressed are personal, and critical in order to open debate on the points raised.

The paper is divided into three sections:

A, a critical appraisal of the past and present land administration.
B, recommendations on the changes needed for more efficient land administration at the National level.
C, recommendations for more efficient land administration at District level.

The two main assumptions are:-

Firstly, that the future administrative structure of government will involve stronger District administration with less central control.

Secondly that land policy has received little attention in past policy decisions and programmes of development, and this must be remedied by the establishment of an appropriate planning structure.

A. Past and Present Land Administration

Post-war planning and co-ordination of economic activity has tended to neglect land policy requirements in developmental programmes. Lands Department to this day has no adequate nerve centre to ascertain people's aspirations so that land policy can be implemented according to the needs of its people.

In Papua New Guinea land policy should be focal in any planning programme involving the co-ordination and development of national resources, the location of industrial activity, and in resettlement. One reason for this is the need for understanding the variety of social groupings and group values. Lands Department has nothing to compare with the policy planning bodies as set up by the Department of Agriculture, the Department of Education and the Department of Trade and Industry, and other social and resource departments. Is it any wonder then that a Commission of Inquiry into Land Matters has been set up to ascertain the needs of its people so that future land legislation can be implemented taking into account the social factors that lie behind land problems.

This urgent need may have been avoided had there been direction from a policy body within the Lands Department in the past. It is only in the past two to three years that there has been any real action to rectify this situation. There have been attempts to re-organise the Lands Department

or the Division of Lands and to this end three positions of Project Officers at Class 7 and 8 levels were created in order to carry out research and investigations on socio-economic and political factors in land development. Further attempts at re-organisation have been frustrated with Self-Government rapidly approaching and the realisation that the Public Service Board will only consider very detailed and full organisational proposals which involve maximum indigenous localisation programmes.

The Project Officer positions that were created were at the best 'ad-hoc' attachments to the various sections within Lands. One officer was attached to the Director, another to the Land Settlement Branch and another within the Lands Division.

These officers have in the short time provided quite valuable assistance. They have been involved in studies and reviews of such projects as Waste and Vacant Lands, inter-Departmental discussions on major project developments and other studies.

It is suggested, however, that these officers would co-ordinate activities much better if they were under the one roof and have sound direction from a Principal Policy and Planning Officer who would be in charge of a Policy Planning, Information and Public Relations Section. Thus, for example, there would be no need for the Director or Assistant Director to channel files to the various Sectional Heads for hasty opinions on land matters requiring policy considerations which often need some depth in research and field studies as well as the appraisal of leading opinions from various sources and important contacts. How can administrative Sectional Heads have the time to devote to policy problems when they are under pressure to deal with the day to day administrative tasks?

In the past five year development programmes dating since the World Bank Report in 1964, very little emphasis has been given to the social aspects of land and its effect upon economic development, despite the recognition of its importance in the World Bank Report.

Since the World Bank Report was released a special Office of Planning and Co-ordination was established to consider programmes of development and policy relating to the programme. Very recently a representative from O.P.A.C. asked the Commission about land availability and policy with respect to major overseas projects involving injections of capital to develop the resources of this country. He could not ask anyone in the O.P.A.C. planning team for an opinion on the land question raised, because there was no one who deals with this specialty, despite the fact that land matters now emerge as the main obstacle to economic development in Papua New Guinea.

In this country land policy direction should be the focal of any resource planning and development. Social problems arising from land development could have been averted in the past had the Lands Department had an adequate planning team to keep in touch with the aspirations and the needs of its people to involve themselves in the development of resources of this country.

One may be tempted to say that the Lands Division of the Department of District Administration was established to look after the interests of the indigenous people in land. Firstly, it is suggested that this organisation was an escapist delegation of power out of the Lands Department which should never have occurred, and secondly that these powers delegated were fixed and not flexible to the changes needed. The powers delegated from Lands were merely a colonial mirror to impress the United Nations of the involvement of the colonial Administration to protect the interests of indigenous people.

The procedures designed to ensure native interest in land, as the Commission must now realise, have caused undue frustration rather than protection. The procedures created have tended to slow down economic activity, firstly, by diverting funds to administer the lengthy paper work or red tape involved (e.g. Land purchase is a lengthy process involving both Departments) and secondly, by the over-cautious protection of indigenous rights in land via a procedure of several courts of appeal.

The centralising of these administrative procedures has also tended to slow down economic activity and frustrate developmental activity in some Districts. In fact, the system has tended to frustrate useful rural farming activity, (e.g. Cardmon development) wanting to establish here and helped entrench those established colonial business plantations, the owners of which were in a better position to understand the detailed procedures and protection loopholes better than the local population.

The goals of economic advancement have been seriously miscalculated in small-holder rural activities because of technicalities in forfeiture procedures which make it virtually impossible to forfeit a small-holder lease. For some reason there has been legal over-protection of the individual at the expense of National development.

In concluding this section it is suggested that the Land Development Board is a useful but clumsy piece of 'ad-hoc' machinery created to act as watch-dog on resource development proposals brought before it by various resource departments. Sometimes it has requested inter-departmental studies for certain developmental proposals so that some consideration be given to the socio-economic and political factors involved.

B. National Land Administrative Requirements

Lands Department needs a small policy planning body of quality men to keep in touch with the people's needs, carry out research and keep in touch with developments on land matters, and opinions at home and in other developing countries, especially the South Pacific. The work of such a team would be co-ordinated by a Projects Executive Director and would involve:

a. A continued review of land policy in relation to other national goals.

b. The preparation and review of legislation required to achieve these goals.

c. To carry out research on and assessment of the social effects of land policy.

d. To co-ordinate and liaise with all sections of the Lands Department at the National and District levels to assess the needs and changes required and to maintain close liaison with the Director on all land policy matters.

e. To co-ordinate and liaise with other social and resource departments and outside bodies for advice on land matters.

f. To maintain documents, papers and library source material (possibly control the records section of land administration).

g. To implement news talks and publicity material for the awareness of land procedures and the involvement of the people to develop their resources, particularly lands, to the advantage of their District and their nation.

h. To maintain good public relations in order to achieve the maximum involvement and co-operation of the people in land development.

i. To represent the Department and to advise on land policy considerations at inter-department meetings on the development of natural resources and on project developments.

j. To implement policy according to the Government's needs following the tabling of the report of the Commission of Inquiry into Land Matters.

The above would mean that a talented pool of men would have an Executive Officer at its head, one or two Lawyers, Projects and Research Officers, a Social Worker or Anthropologist, a Publications Officer or Librarian and perhaps a Public Relations Officer.

Now it is quite feasible with inter and intra-departmental re-organisation, such a policy and planning body could be attained at little or no extra cost. No doubt the Commission is aware of appropriate men to fill or involve themselves in these positions, from the Commission itself, from the Law Department, from the Division of District Administration and from the Lands Department.

It is suggested, therefore, that land administration at the national level could be largely controlled by a small planning body and public relations section supported by an appropriate executive arm. The co-ordination of the national and district interests in land useage for the benefit of the people at both levels could be controlled at the national level by an appropriate policy direction body. This administrative unit would make up part of any proposed National Resource Development Department, council or whatever planning body is envisaged for the co-ordination and development of the national resources. Its major functions would be:

a. The implementation and continued assessment of a uniform set of procedures for land dealings to be carried out at the District level (appropriate variations if necessary).
b. To advise on national policy, to maintain statistics on land resources, population movements etc.
c. To control the resettlement of people from one District to another.
d. To recommend resource development projects above certain levels of investment.
e. To advise on highway and road development constructions.
F. To recommend to the central Government where finance would be channelled to assist District land use development proposals.
g. To control educational training and advisory services on land administration, development, mapping, surveying and related disciplines.

So much for the needs of future land policy and planning considerations implemented and supported at the National level.

C. District Land Administrative Requirements

The necessity to streamline the administration of land policy at the District level is now considered. There are two important needs here:

a. To absorb within Lands field and project staff of the lands section of D.D.A.
b. To absorb within Lands the Land Settlement Branch of the Department of Lands.

The above two departmental organisations are unnecessary administrative and field detachments away from the Land Administrative Division and should be absorbed to avoid unnecessary red tape and duplication of functions.

Along with the amalgamation of these two entities within the Lands Division there would be the necessity to also streamline the procedures in

all land dealings.

It is not necessary to have a separate detached organisation to carry out land purchases, to act as the protector of native interests, especially with the departure of the colonial power, to act as trustee for deceased estates and to mediate in disputes over land, as in the case of D.D.A.

Neither is it necessary to have a separate detached structure for the administration of rural lands, to establish land settlement schemes and to carry out inspections of leaseholds and for improvement covenants as in the case of the Land Settlement Branch. (The variety of functions carried out by this Branch suggests that the name of the Departmental organisation is misleading).

In the case of the amalgamation of the Land Settlement Branch, there would still be a distinction in the roles in Lands Division. The head man of this Branch could possibly be called the Principal Lands Officer Rural, whilst the present Principal Lands Officer, could be designated Principal Lands Officer Urban. The roles of these two officers at the National level would be to co-ordinate the activities of all District Administration.

The amalgamation of these two bodies would benefit a strong District structure of Government which is likely to be recommended and implemented.

There is a strong preference at District level for all land dealings to be decentralised - land purchase, advertising, leasing, re-settlement, selection of applicants, conveyancing and registration etc. (Note too the likelihood that the present Land Board would be dropped in favour of District Land Control Boards).

There has, by a process of administrative evolution, been a tendency to decentralise to the District level some land administration sections of the Public Service. For example, there are District Land Officers of D.D.A.; Regional Offices of the Land Settlement Branch have been established; Regional Offices, and to some extent District Offices, for Valuers and Surveyors have been established.

With appropriate legislative changes, the consolidation of these offices and others involved in land administration could be co-ordinated by a District Land Commissioner who could maintain strong District Land Administration control.

The organisation at the District level then would be headed by a District Land Commissioner and he would control the activities of a District Control Board and a District Policy and Planning Board. These two Boards would have public and civil service arms. On these Boards, Public Service representation would be made up of the District Registrar, the District Surveyor, the District Valuer, or some amalgamation of the above and perhaps the District Agricultural Officer. The civil service arm of the Boards would be made up of selected big men from the community such as village heads, village councillors, Church leaders, perhaps politicians or appropriate men of standing in the community. Those belonging to the civil service arm of the District Administration would possibly be in charge of area wards within the District, and it would be their job to ensure that land problems or disputes arising within their particular ward are brought to the notice of the District Policy and Planning Board, for the recommendation of appropriate action. It would also be a part of their function to involve themselves in mediation and arbitration of disputes within their ward and to supervise the appropriate demarcation and recording of land rights within the ward, and to report matters to the council or village area lands courts where arbitration and decision making fails.

The functions of the District Policy and Planning Board would be:

a. To liaise and co-ordinate with the national body on all matters of District land policy and administration.

b. To ensure that land was used to the best interests of its District and of the nation, and

c. To have supervisory control over the Land Commissioners at ward levels and also the District Control Board.

The District Control Boards functions would be similar to the role of the present national Land Board except that these powers would now be exercised in the District. They will be responsible for the advertising of land and the selection of settlers or suitable applicants. They would be in charge of trusts etc.

Conclusion

On some of the more critical points raised in this paper, I have failed to expand as this would involve lengthy documentation of details. In order to save time and to open debate on this subject, this paper has been prepared in haste. I would be pleased to elaborate further on any of the issues raised.

W.E. Welbourne
Secretary
Commission of Inquiry into Land Matters.

10th July, 1973.

NOTES ON DISPUTE SETTLEMENT
MEETING 10/7/73

1. Mediation

(a) One or more mediators to be used.

(b) Mediator(s) in the dispute to be chosen by the parties from a panel.

(c) Panel of mediators chosen by the District Supervising Magistrate (see Village Courts Bill) in consultation with the Local Government Councils.

(d) Mediators to work mainly in their own council wards, but not necessarily exclusively.

(e) Because there will always be someone in the village who is literate in the local "tok ples" or pidgin or other trade language or English, a note of any settlement reached should be taken. It should be filed at the Local Government Council with copies to Sub-District Office and to the parties.

(f) If a settlement is reached on a disputed boundary the boundary is to be walked by the parties and t mediator(s).

(g) Where the boundary is not a natural one, it shoul marked with tangets etc. by the parties under the supervision of the mediator.

2. Arbitration

(a) The weight of the discussion was in favour of having a Local Court Magistrate as Chairman of the Arbitration Tribunal.

(b) His assistants in the arbitration were to be chosen by the parties from the panel of mediators.

(c) A number of things concerning these assistants were not decided. The Commissioners were to seek the views of Magistrates and others on them during the rest of the tour. They were:-

(i) How many assistants - 2 or 4?

(ii) Should the assistants be arbitrators with a vote OR
Advisors to the Arbitrator with NO vote.

(iii) If they are to be voting arbitrators should the decision be by majority vote or should a unanimous vote be required?