with little or no individualized tenure. In any event, even if the proposition is acceptable it is not land law but land use that needs changing. The most that the law can do is to facilitate, or at least not prevent, change when the need for change is generally felt.

Communal tenure stifles initiative. This of course is a statement of social and political philosophy, and not a legal one. In world terms, it is hardly worth thinking about. But communal tenure and a degree of individualized tenure are by no means incompatible - the question is one of degree, which can only be settled for a particular place and at a particular time. Proponents of the theory seem to have settled for 18th Century England and 19th Century America as the chosen place and time for all times and places.

Loan security is essential for development and land is the only satisfactory security - this cannot be provided for under custom. As a purely legal statement, this could be most kindly described as utter balderdash, for a number of reasons.

That loan security is essential for development is again primarily a statement of a particular social and political philosophy, at least in its application to the individual.

That land is the only satisfactory security is a banker's shibboleth, which in any event is true only while land values are increasing or at least remaining steady in real terms. This is admittedly the case at the moment in the Western World. Part of the argument seems to be that personal security

is risk security because the individual may die, etc. But custom recognizes corporate land-holding entities, the problem being simply that the law is not customized or sophisticated enough to recognize them.

The third part of the proposition is true only to the extent that the law has not developed custom to an extent cognizable by Westernized lending agencies. This particular issue is, I think, important not only in practice but also as giving room for a few examples of what might be done if we stopped trying to adapt the needs of the people to the forms of the law instead of working the other way round (I assume for the moment that some sort of security over land is a necessity).

Firstly, if in principle customary land can be alienated (as it can be under Section 16 of the Land Ordinance 1962-1971), why in principle should there not be some form of conditional alienation? - at least subject to the same limitation, that the alienated portion must be surplus to subsistence requirements.

Secondly, there are [illegible] possibilities other than the conventional mortgage that should be looked at. For instance, why not, instead of a mortgage, a vifgage, described in Jowitt's Dictionary of English Law (Lond., Sweet and Maxwell Ltd., 1959, p.1842) as being -

> "when a person borrowed money of another and granted to him an estate to hold till the rents and profits repaid the sum borrowed with interest. The estate was conditioned to be void as soon as the sum was realized.".

A somewhat similar form of charge was the so-called Welsh mortgage, described by Jowitt (op.cit., p.1856) as -

> "a conveyance of an estate redeemable at any time by the mortgagor on payment of the loan, the rents and profits of the estate being received in the meantime by the mortgagee, in satisfaction of interest.".

As a matter of real interest in connexion with the giving of security over land, the following description of a Tolai custom by the then Native Land Commissioner S.S. Smith and Dr. R.F. Salisbury (Notes on Tolai Land Law and Custom, roneoed, Native Land Commission, Kokopo, 6 September, 1961, at para.16) is almost a perfect description of a Welsh mortgage as described above -

> "There is no mortgaging of land in the European meaning, but pledging of land was a pre-European custom. When the person was temporarily unable to repay a loan of tambu (or now money) he could give the lender a piece of land as an earnest of his intention to repay. The lender could then plant gardens on the land, or collect the produce of trees already planted there, for as long as the loan was not repaid. When the loan was repaid the use of the land for gardens, and the produce of planted trees, returned to the pledger.".

Jowitt (op.cit., at p.1865) remarks of the vifgage and the Welsh mortgage that

> "In neither ... was the estate ever forfeited",

and in principle the same seems to have applied to the Tolai custom. I should add that Jowitt may be well oversimplifying things - compare Pollock and Maitland, The History of English Law, (2nd. Ed., Camb. Univ. Pr., 1952, Vol.II at pp.117-124) - but for present purposes the details are irrelevant.

Thus it is only by a historical accident - actually the expulsion of the Jews from England (Pollock and Maitland, op.cit., p.124) - that Australia did not come to Papua New Guinea with a legal process to which custom (at least Tolai custom) might have been assimilated.

To go any further would be merely boring. The point is that, even without abandoning what is at the moment our basic legal set-up, English law both present and past is such a rich heritage that it is not legal precedent that has been wanting to customize our land law, but legal imagination.

However, it is not unfair to ask, why play around with the present situation when custom now applies to about 97% of the land of Papua New Guinea, custom is recognized and enforced as law, and custom is legally recognized by Section 4 of the Native Customs (Recognition) Ordinance 1963 as being more capable of development and adaptation than even the received Common Law? The answer, I think, is fourfold. Firstly, it seems unlikely that a self-governing or independent Papua New Guinea will accept a legal situation in which the economically most significant section of the land (at least in a cash sense) is regulated entirely by an alien legal structure. Secondly,

admitting that custom can and does develop naturally to meet new needs it seems inevitable that Government will want such development to be planned and regulated by it to a large extent. Thirdly, there is no doubt that, left to itself, custom is not likely to develop institutions and procedures suitable for some Government purposes (e.g., for the purposes of land tax, if this be desired as an economic or policy measure). Finally, the history over recent years of disputes as to customary land (for instance, in the Western Highlands, where killings over land disputes are commonplace) is not such as to lead any Government to place much reliance on the unaided self-regulating powers of custom.

What limits are there on the possibilities of customizing? I doubt if this question can be properly asked in advance of detailed investigation. The real question is as to the limits within which any land law must operate. The answer, insofar as it can be given at the moment, seems to lie in three propositions:

Firstly, such as they are the existing guarantees of title should not be upset.

Secondly, the system must provide for whatever level of guarantee of title is needed to meet economic requirements.

Thirdly, customizing is an exercise in land law reform, not land tenure reform.

As Crocombe has pointed out, the direction of land tenure reform is dictated by social context and goals

(Land Tenure in the Pacific, Melb., O.U.P., 1971, p.375) and, of course, so is the concept of "economic requirements" - and it is just not possible for me, as a lawyer, to accept Fleming's bland statement ("Land Problems in Developing Countries", Australian External Territories, Vol. II. No. 1, Jan/Mar, 1971, p.27) that -

> "The comparison (i.e., between customary and imported tenure systems - C.J.L.) is not favourable to customary law. The indigenous farmer sees the expatriate settler protected by a registered title guaranteed by the State on which he can borrow money and develop his land. On the other hand, customary law knows no form of individual ownership and restricts the occupant's right to deal with the land and it is not possible to borrow on its security. Moreover, the occupant's rights and interests are subordinate to those of the family or the clan and development in accordance with modern or improved farming practices is almost impossible.".

The contribution of a lawyer committed to customizing would be to ensure that whatever changes in the law are necessitated by social policy or political philosophy should reflect as far as possible, and should deviate as little as possible from, local practice.

CONCLUSION.

In a paper of this size and nature I have, of course, been forced to be selective. So I have concentrated on substantive law, and on giving examples of the sort of approach that might be used to the customizing of it. But there are other aspects of land law that are at least as much in need of customizing. For instance, there is land administration - the control of the allocation of and dealings with land - and the problem of land disputes. Land administration obviously should be localized as far as practicable (this was in fact provided for to some extent in the Land Control Bill 1971 introduced by Government into the House of Assembly and subsequently withdrawn) and if my suggestions above are correct then the original land-owning groups, as the underlying owners, should probably be given at least a symbolic part in the process. Again, on the question of land disputes there is no doubt inn my mind that customary dispute-settlement processes offer the best hopes of long-term settlement. But these must be different stories.

However, it would be pointless if I did not complete this paper with some suggestions as to how we might go about customizing the land law. Clearly, what would be needed are four things.

Firstly, we need a firm decision by Government to customize.

Secondly, we need a program for the isolation and elimination of obsolescent, irrelevant or hampering doctrines of law - if need be, piecemeal.

Thirdly, we need to have digested into a legally-relevant form the immense amount of research already done (not only by academics) into land customs and attitudes in Papua New Guinea, and the isolation of general customs and attitudes of significance to the lawyer.

Fourthly, after this process of digesting and the filling-in of any gaps shown in the process we need a comprehensive review and restatement of the land law in the light of the results. This does not mean that all land law reform should wait for such a review, nor does it mean that either land law or land custom itself should be frozen as at a particular time and place.

In short, here is an exciting and potentially fruitful field of co-operative effort for politicians, administrators, lawyers and behavioural scientists. What is undoubtedly required is early action on facts already known.

NOTES.

1. In point of fact, on at least one occasion to my knowledge the Administration attempted to recognize ancestral interests. The report on an attempt to establish a VHF-UHF Station near Kerema in the Gulf District of Papua (kindly made available to me by the Department of Posts and Telegraphs) reads in part -

> "... (the owners) ... still refuse to sell stating that the proposed area is their original village site and that they have deep emotional attachments to the land because the spirits of their ancestors are held within the land itself and the vegetation thereon .
>
> "I asked if they would be prepared to have a special religious ceremony conducted by a Minister of their Church, or a special ceremony conducted by their tribal 'magic man' for the purpose of placating the ancestors. In addition I suggested the area could be 'consecrated' by their Minister and a suitable cairn or memorial erected with an inscription setting out the details of this historic site.".

I am sorry to say that this imaginative attempt failed.

2. In a personal communication, the Assistant Director (Mental Health) of the Papua New Guinea Department of Public Health has emphatically agreed with the ideas put forward in this paragraph. His comments are set out at page below.

3. The same theme runs throughout the numerous statements by Indian leaders quoted by Dee Brown in Bury My Heart at Wounded Knee (an Indian history of the American West).

COMMISSION OF INQUIRY INTO LAND MATTERS

TERMS OF REFERENCE

"The Commission is to investigate fully and report on the major land questions with which Papua New Guinea is faced today. The Commission should consider and evaluate alternative solutions to the problems it identifies in order:

to provide a sound basis for the formulation of Government policies in relation to these questions; and

to enable Members of the House of Assembly to debate any land legislation introduced by the Government following reports by the Commission, with a full appreciation of the problems involved and of alternative solutions.

Without limiting the power of the Commission to make any investigation which it considers relevant to these objectives, the Commission should particularly investigate and report on -

(1) The nature and extent of disputes over land rights involving Papua New Guineans and the methods of resolving them giving particular consideration to -

(a) the effectiveness of the Land Titles Commission and the Supreme Court in dealing with these disputes, and possible ways of improving the functioning of the present system of resolving disputes by judicial means;

(b) whether land disputes could be more satisfactorily dealt with through another system under which the Land Titles Commission might be replaced by a different type of national land-dispute settling institution, using non-judicial procedure, or by small local bodies or by other means of resolving these disputes.

levels.

(2) The problems associated with alienated land, especially in areas where there is a shortage of land available for use by Papua New Guineans, or acute social tension. The Commission should put forward detailed proposals which identify the areas where these problems are most acute, indicate the nature and extent of the problems, and specify ways of resolving them, giving particular attention to -

(a) possible legislative changes designed to facilitate the acquisition of alienated land for the benefit of Papua New Guineans;

(b) the approximate cost of carrying out a programme of acquiring, for the benefit of Papua New Guineans in land short areas, alienated land in those areas, and possible bases for determining responsibility for meeting this cost;

(c) what encouragement might be given by way of advice, loans, intermediary services and other assistance to enable villagers to enter into direct negotiations with owners of alienated land, for the purchase of such land;

(d) the best means of apportioning alienated land reacquired or held by the Administration or the Government, for the benefit of villagers;

(e) appropriate legislation to enable villagers to acquire land and crops as communal entities and to operate plantations and other agricultural enterprises on a communal basis; and

(f) the principles of customary laws of succession as they apply to registered land.

(3) The ways in which customary land tenure systems affect the utilization of land, giving full consideration to land acquired by right of conquest, and to the effects of movement of people onto land not traditionally owned by them -

(a) the extent to which traditional systems of land tenure are being modified to meet changing circumstances;

(b) sale, inheritance and other forms of transmission of customary land rights;

(c) (i) whether customary interests in land can be recorded or otherwise formalised satisfactorily, Not without changing them

(ii) whether such interests should be recorded or otherwise formalised,

(iii) ways of recording or otherwise formalising those interests and the advantages and disadvantages of the various procedures which might be used;

Needed, but problems of rigidifying

(d) ways of making customary land available for commercial development by corporations both public and private and for governmental purposes, while ensuring significant participation by customary owners in the benefits of such development;

(e) promoting the more effective utilization of customary interests in land and interests in crops and fixtures as security for development finance;

(f) the extent to which dealings in customarily owned land should and could be effectively controlled;

(g) where customary land is or has been permanently alienated, ways of ensuring that the purchase price or any compensation payments, as the case may be, is used to give maximum benefit to the former customary owners and their heirs.

investment ✓

(4) The major obstacles to improved land utilization in both urban and rural areas, and ways of overcoming them.

(5) ways of -

(a) maximising the range and spread of benefits from land development to all members of local communities;

(b) minimizing social dislocation arising from land development; while actively promoting better utilisation of Papua New Guinea's land resources.

(6) The advantages and disadvantages of land re-settlement and the extent to which further re-settlement schemes should be undertaken.

(7) The legal and administrative problems arising out of the present laws relating to alienated land.

(8) Generally the attitude of the people towards -

(a) the functioning of the present legislative, administrative and judicial structure in relation to land matters;

(b) alternative ways to those used at present of bringing about greater use of Papua New Guinea's land resources, such as by making security of non-customary tenure depend upon land use rather than upon registration of title, by encouraging the leasing or granting of occupancy rights of outright sale of such land, promoting group enterprises, and imposing land tax.

The Commission is to make its report to the Administrator during the month of September, 1973."

UNIVERSITY OF PAPUA AND NEW GUINEA

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Dear Ron,

During my traditional Easter clean up I came across an envelope addressed to you with these papers in it. In other words, you were meant to get them much sooner.

The papers were prepared in a rush as the Commission decided to start travelling soon after it was formed.

The paper on General Purpose Corporations is confidential as the legislation proposal has yet to be (and is about to be) considered by Cabinet. It describes a draft Bill and legislation submission which I prepared and have been fighting with Departments over for the last six months.

Regards

Peter Fitzpatrick

agricultural development, village industry, better internal trade, and more spending channelled through local and area bodies;

d. an emphasis on small-scale artisan, service, and business activity, relying where possible on typically Papua New Guinean forms of organisation;

e. a more self-reliant economy, less dependent for its needs on imported goods and services, and better able to meet the requirements of its people through local production;

FOR THE COMMISSION OF INQUIRY INTO LAND MATTERS

LAND REFORM AND THE AIMS OF THE IMPROVEMENT PROGRAMME

P. Fitzpatrick
March 1973.

1. INTRODUCTION

This paper considers the relevance to the work of the Commission of the aims of the Improvement Programme. These aims make for a dramatic change in the orientation of development.

The paper firstly considers the aims with particular concern being given to the aspects of them relevant to land. Then the Commission's terms of reference relevant to the aims are indicated. Finally the relations between the aims and the terms of reference are considered.

This final section outlines a type of land policy to avoid. It then looks at the growth of rights in land as property and at "individualisation." This leads to an analysis of the role of group land holding and intermediate tenure systems. The notions of equality and participation are then considered. Concluding, there is a brief section dealing with tax and administration.

2. The aims of the Improvement Programme

These aims are:

a. A rapid increase in the proportion of the economy under the control of Papua New Guinean individuals and groups and in the proportion of personal and property income that goes to Papua New Guineans;

b. more equal distribution of economic benefits, including movement toward equalisation of incomes among people and toward equalisation of services among different areas of the country;

c. decentralisation of economic activity, planning, and government spending, with an emphasis on agricultural development, village industry, better internal trade, and more spending channelled through local and area bodies;

d. an emphasis on small-scale artisan, service, and business activity, relying where possible on typically Papua New Guinean forms of organisation;

e. a more self-reliant economy, less dependent for its needs on imported goods and services, and better able to meet the requirements of its people through local production;

f. an increasing capacity for meeting government spending needs from locally raised revenue;

g. a rapid increase in the active and equal participation of women in all types of economic and social activity; and

h. government control and involvement in those sectors of the economy where control is necessary to assure the desired kind of development.

There are several aspects of these aims which are particularly relevant to the Commission's terms of reference. The emphasis is on Papua New Guineans participating more fully in the running of the country's economy. Most of the money economy is at present controlled by expatriates and foreign companies and most of the benefits of economic development go to these companies and expatriates. The last five year plan emphasised economic growth even at the expense of social and political factors. There was considerable economic growth but little of this benefited Papua New Guineans. The new aims say that there must be a rapid increase in the proportion of the benefits of growth going to Papua New Guineans and a rapid increase in the proportion of the money economy under their control.

There are some particular aspects of the aims relevant to achieving this control and relevant also to land policy. These comprise village industry, agricultural development and self-reliance. One facet of self-reliance included in the aims which is relevant to a land tax or produce tax is the expectation that the government will increasingly be able to meet its needs from locally raised revenue.

Agricultural development and village industry, and also decentralisation, are all concerned with one of the key ideas behind the aims - that of rural improvement. This idea attempts to tackle two problems usually described as "urban drift" and "unemployment."

One of the biggest problems facing developing countries is that too much resources are poured into towns built up in colonial days. This attracts people to towns and there is then a demand for further resources for the towns. The more that resources are devoted to the towns, the less resources there are for the great majority of people in the countryside who tend to be disregarded.

The other relevant problem is that of "unemployment." The aims conspicuously fail to mention large scale industrialisation, doubtless because this strategy has failed to create any substantial employment in other developing countries. Hence the aims rely on agricultural development, small-scale village industries and other small scale activities. This is probably the

fundamental point for land policy: land apparently must be the predominant means of providing employment (including self-employment) opportunities for people. This point is emphasised by population trends and estimated figures for future employment. The population of Papua New Guinea is estimated to increase by close to 700,000 between 1966 and 1976 and there is, as yet, no indication of a reverse in this trend. On the latest figures available (i.e. as at 30th June 1970) the number of Papua New Guineans in wage employment was 128,585; wage employment is expected to drop by the comparatively high figure of 6 - 7000 during 1972/73 and 1973/74.

An aim of special relevance is that which envisages a "more equal distribution of economic benefits, including movement towards equalisation of incomes among people." It is often argued that, to have development, some people must be a lot richer than others so that the richer people will have a surplus of income to invest. It is said that, under this policy, incomes and benefits will eventually even out more with increased development. This kind of policy has not worked in other developing countries. It has led to greater inbuilt social inequality and social unrest, which provokes revolutionary violence as the only means of helping the great majority of the people.

3. <u>The terms of reference</u>

On the aim of increased participation, paragraph (2) of the terms of reference is particularly important with its emphasis on the acquiring of alienated land by Papua New Guineans. Paragraph (3)(d) is also relevant in its concern with the participation of customary owners in the benefits of commercial development that takes place on their land.

The need for increased agricultural employment as an aspect of participation was emphasised earlier. Paragraph (3) is relevant to this because land use and the adaptability of customary relations are crucial factors in any strategy for rural employment. Subparagraph (f) of this paragraph (3) may be particularly relevant here in that controls may need to be exercised so as to preserve or even maximise employment (especially self-employment) opportunities. The concern with "greater use of Papua New Guinea's land resources" (paragraph (8)(b)) is also of obvious relevance here. The related theme of self-reliance is relevant to paragraph (8)(b) in the possibility of land tax providing an extra source of revenue.

The aim of equality in the distribution of economic benefits among the people and in incomes also figures large in the terms of reference.

The extent to which disadvantaged people can move onto land in other areas is raised in paragraph (3)(a)(ii). The aspect of equality in the use of crops and fixtures as security for development finance (paragraph (3)(e))has already been considered in part 4, of my paper "Land-free securities in Papua New Guinea." One purpose of the control over dealings in land raised by paragraph (3)(f) could be to bring about and preserve equality. The reference to "maximising the range and spread of benefits from land development to all members of local communities" in paragraph (5)(a) is presumably a way of referring to equality in the distribution of economic benefits, at least within "communities."

Finally, the aim of decentralisation does have some bearing on the administration of land matters raised in paragraph (1).

This part of the paper is, of course, only a very general indication of the bearing which the aims have on the Commission's terms of reference. In the next part an effort is made to develop the relations between the aims and the terms of reference into a consistent land policy.

4. Land policy and the relations between the aims and terms of reference.

(i) a type of land policy to avoid

The type of land policy to avoid is one that recognises and encourages inequality. This policy assumes that it is necessary to have a few rich people so that they will have a surplus of income to invest. It has already been mentioned in part 2 of this paper that such a policy has not worked in other developing countries. Indeed it has caused widespread misery in Asia and Latin America by depriving a great many people of their land.

The policy deliberately seeks to promote inequality. If people or companies have particular advantages, such as considerable power in traditional communities, access to some capital or appropriate contacts, these advantages will be maximised through the provision of easy credit, free infrastructural benefits and free extension services. In short, the benefits of development are concentrated on those few who are already privileged.

The specific effects on land of this policy is an increasing concentration of land in fewer hands, the growth of a landless peasantry which has to find rural wage employment (usually on exploitative terms) or migrate to towns, failure to provide adequate employment opportunities because capital intensive farming techniques are resorted to and the regard for land as merely an item of capital. This last effect means that there is speculation which

creates an artificially high price for land, land is often left unproductive if its owner is only interested in a return on its resale and absenteeism and landlordism develop.

In the past Papua New Guinea has been subjected to policies which could have led in this direction. Indeed preliminary symptoms have already appeared with a few Papua New Guineans owning large plantations (Finney, 1969: 65), absenteeism in the Hoskins oil palm project (Ploeg: personal communication) and exploitation of labour (Epstein, 1968: 104; Finney, 1969: 38).

(ii) the growth of rights in land as property and "individualisation"

This process of unequal development and its effect on land is usually accepted as being natural and correct (e.g. by Shand: 310). In support of this view it is often said that "individualisation" is patently occurring and inevitable and that this must lead to a breakdown of traditional relationships.

In part 5.3 of my paper on land-free securities, I referred to studies which indicated that cash cropping had led to a firmer definition of property rights in land on which the crops were grown. This definition is usually one of individual interests. To some extent however (and the paper also indicated this) processes leading to a firmer definition of property rights can be found at work in traditional society:

> "Individual rights of property use, transfer and control seem to have been more clearly defined, and of greater relative importance, the greater the investment of labour, the higher the population density, and the greater the frequency of use." (Crocombe and Hide: 305)

There is some evidence of a trend towards greater recognition of individual rights in property (see e.g. Crocombe, 1967; Epstein, 1968: 70, 83 and 85; Epstein, 1970: 20; Finney: in press). It may even be, as Crocombe (1971: 383) has suggested, that "there may be a case for having a phase of peasant proprietorship during which the basic behaviour and thought patterns associated with corporate action of the traditional kind are modified."

It would be dangerous, however, to assume that this indicates a process of"individualisation", an indiscriminate rejection of communal ties and individual ownership of the land. It is not a long step from this assumption to the conclusion that since the individual owns the land he can sell it, lease it out, misuse or fail to use it and employ any production techniques (e.g. capital - intensive) he likes.

Evidence as to the balance between individual and community interests in cash cropping land is difficult to come by and it is mostly vague. This balance would be tested in the crucial

situations of sale and transfer. Except for the special case of matrilineal societies, there appears to be no detailed study of these situations. Whilst communal relations support personal security and whilst the only way of guaranteeing this security is by tying these relations to interests in land, community interests in land will continue.

Given this, laws which promote a crude individualisation (such as laws for tenure conversion, individual sale and unconditional power to dispose of property by will) do not merely fail to reflect reality but provide a weapon for the unscrupulous to use to negate their community obligations.

It can be accepted however that there is a demand for fixed and simple rights to cash-cropping land. Community based obligations of support are, in contrast, flexible and complex.

(iii) group land holding

Crocombe (1972) has finely analysed ventures in the pacific islands based on group land holding and (mostly) group working relations. He evaluates these enterprises basically in terms of commercial success. Although the results of his analysis cannot be summed up briefly, they do indicate that traditionally based groupings and work organisation are not usually conducive to this kind of success.

Overemphasis on communal ties has probably been as mistaken and almost as disastrous as the overemphasis on individualisation could be (see Crocombe, 1964; 1971: 384; and 1972: 160). Nor is this overemphasis on the communal confined to colonial mistakes or the Pacific area (see e.g. Feldman).

Clearly, however, continuation of some communal interests in land is necessary for some reasons and desirable for others. It is necessary for the aspect of personal security already discussed. It is desirable because group ventures are sometimes successful even if largely based on traditional relations (Salisbury: 270-2; McGregor) and because, for some rural industries, large scale holdings may prove necessary and this could require group co-operation.

(iv) intermediate tenures

So far this part of the paper has provided underpinning from the aims of the Improvement Programme for the conclusion reached by Crocombe (1971) from studies of land tenure in the Pacific:

> "Some form of intermediate group tenure continues in many Pacific territories, even where governments have ignored it or tried to replace it by individual tenure. It is significant that so many contributors to this book have come independently to the conclusion that more provision is needed for

> legal and administrative recognition of appropriate group rights to accommodate to the realities of existing patterns which, though changing, will continue for some years." (383-4)

Crocombe (1971(2)) describes some intermediate group tenure systems used in the Pacific. In Papua New Guinea the General Purpose Corporations Bill or some modification of it could be used for this purpose. This bill has been discussed in my paper "Land Reform and the General Purpose Corporations Bill," March 1973.

Perhaps the most notable example of intermediate group tenure is that of Tanzania. It is based on the principle that security of individual tenure depends upon land development to a specified level of utilisation but the ultimate title to the land is held by the group (or an official on its behalf). Succession is subject to criteria of efficient utilisation and if these criteria exclude the customary successors they obtain compensation from those to whom the land is allocated. This is just the barest of outlines and fuller accounts and analyses of this system can be found in James (227 ff.) and McAuslan (1967; 1970: 93-6).

(v) equality and participation

The recognition of communal interests through a form of intermediate group tenure will doubtless promote equality and participation. However, other measures would appear to be necessary also. The strengthening of individual rights would tend to lessen group controls. Also, traditional group controls have not been entirely effective in checking the growth of inequality (see e.g. Finney, 1969). Further, the strengthening of individual rights has led to the group-sanctioned exclusion from effective participation of many younger men in cash-cropping ventures (Crocombe, 1968: 76-7). This has doubtless aggravated the problem of "urban drift." In short, even if group controls are recognized they would not be adequate to ensure equality and participation and to prevent the kind of harmful development described in part 2 of this paper.

Experience in other countries does suggest further measures for promoting equality and participation and for checking harmful development.

In Tanzania laws have been passed to prevent people in privileged positions in politics and the public service from being landlords. James (216-23) describes these laws and presents the arguments for and against them. Recently further and much more comprehensive laws have been passed against landlordism in Tanzania, but I do not yet have details of these.

Several African and European countries have laws laying down

maximum areas which can be held by any one person. The arguments for and against this sort of law have been lucidly summarised by Crocombe (1968: 77-81). Although there are some difficulties about enforcing a law like this, it is much cheaper to administer and more effective than a system of bureaucratic control over every transaction. Provision would have to be made for a procedure whereby the law could be adjusted to companies, co-operatives, other corporations and partnerships.

A related legal provision, found in the Cameroons, is one which empowers the government to shift the boundaries of group lands. This can be used to adjust land use to population changes and to promote equality.

On participation and the exclusion of younger men, Crocombe (1968: 76) has suggested a system of progressive (or, rather, anticipatory) inheritance. The Department of Lands (1971) have adopted guidelines which aim to promote participation. These should be considered in the context of other laws relating to licensing of businesses, preference in employment and reserved occupations.

(vi) tax and administration

Crocombe (1968: 100-103) summarises various approaches to land tax including the taxation of produce. I doubt that he gives enough emphasis to the administrative costs of assessing and collecting the land tax. Also, where assessment involves an element of official discretion (as it would almost certainly have to in the Papua New Guinean context) there is enormous scope for corruption. The U.N.D.P. report (Overseas Development Group: 54), on which the aims of the Improvement Programme were largely based, recommends a "witholding or export tax" on crops as "urgent and appropriate." The Committee of Inquiry on Taxation (White Paper: 30-31) has also recommended a witholding tax on farm products.

Administration is relevant to the aim of economic decentralisation when this aim is seen in the context of current political trends. It is also of interest that decentralisation of the creation and administration of land laws was the chief matter that concerned the anthropology students at the Administrative College in their debates on land matters (see record of debates submitted on 21st February).

As Jacoby (335-6) has pointed out, there is a strong tendency to decentralise administration of land matters. But as he also indicates (336), in the interests of social justice the tendency should be resisted.

BIBLIOGRAPHY

CROCOMBE, R. G., 1964. "Communal Cash Cropping among the Orokaiva", New Guinea Research Bulletin No. 4.

CROCOMBE, R. G., 1967. "Four Orokaiva Cash Croppers", in "Papuan Entrepreneurs", 3-22, New Guinea Research Bulletin No.16.

CROCOMBE, R. G., 1968. Improving Land Tenure, Technical Paper No. 159, South Pacific Commission, Noumea.

CROCOMBE, R. G., 1971. "Land Reform" in Ron Crocombe ed. Land Tenure in the Pacific, 375-400, O.U.P., Melbourne.

CROCOMBE, R. G., 1971 (2). "The Cook, Niue and Tokelau Islands", 60-90, ibid.

CROCOMBE, R. G., 1972. "Social aspects of co-operative and other corporate land-holding in the Pacific islands" in P. M. Worsley ed., Two Blades of Grass, 159-198, Manchester U.P.

CROCOMBE, R. G. & HIDE, Robin 1971. "New Guinea" in Crocombe ed. op. cit.

EPSTEIN, T. Scarlett, 1968. "Capitalism, Primitive and Modern", A.N.U. Press, Canberra.

EPSTEIN, T. Scarlett, 1970. "Indigenous entrepreneurs and their narrow horizon" in "The Indigenous role in Business Enterprise", New Guinea Research Bulletin No. 35.

FELDMAN, David 1969 "The Economics of Ideology: Some Problems of Achieving Rural Socialism in Tanzania" in C. Leys ed. Politics and Change in Developing Countries, Cambridge U.P., Cambridge.

FINNEY, B. R., 1969 "New Guinea Entrepreneurs", New Guinea Research Bulletin No. 27.

FINNEY, B. R., in press Big-men and Business.

JACOBY, Erich H.,1971 Man and Land, Andre Deutsch, London.

JAMES, R. W., 1971 Land Tenure and Policy in Tanzania, East African Literature Bureau.

LANDS, SURVEYS & MINES Department of, 1971. "Guidelines for Promotion of Indigenous Business", roneo, Konedobu, 11th June 1971.

McAUSLAN, J.P.W.B, 1967. "Control of Land and Agricultural Development in Kenya and Tanzania" in Sawyerr ed., East African Law and Social Change, East African Publishing House, Nairobi.

McAUSLAN, J.P.W.B., 1970 "Co-operatives and the Law in East Africa", in Carl Gosta Widstrand ed., Co-operatives and Rural Development in East Africa, Africana Publishing, New York.

McGREGOR, A.M., 1971. "Langandrowa and M'Buke", New Guinea Research Bulletin, No. 43.

OVERSEAS DEVELOPMENT GROUP, 1973. A Report on Development Strategies for Papua New Guinea, O.P.A.C., Port Moresby.

SALISBURY, Richard F., 1970. Vunamami, Melbourne U.P.

SHAND, R. T., 1969. "Papua-New Guinea" in R. T. Shand ed., Agricultural Development in Asia, A.N.U. Press, Canberra.

WHITE PAPER Committee of Enquiry on Taxation, Port Moresby, September 1971.

FOR THE COMMISSION OF INQUIRY INTO LAND MATTERS

A NOTE ON LAND-FREE SECURITIES

P. Fitzpatrick
February 1973.

1. Introduction

This note is relevant to para. (3)(e) of the Commission's terms of reference:

> "(e) promoting the more effective utilisation of customary interests in land and interests in crops and fixtures as security for development finance."

The note summarises a somewhat lengthy and technical paper I am submitting on this subject.

2. The present law

The paper shows that the present law is almost entirely inadequate in providing for the type of loan security envisaged in the terms of reference.

3. The notion of a land-free security

This part of the paper is merely explanatory. For the purpose of this summary a "land-free security" can be described as a security over crops or fixtures.

4. Land as security

This part of the paper indicates that land cannot be looked upon as a widely available basis for security. This raises the dilemma that, for long-term finance, a security over land is usually considered indispensable.

The paper suggests that the Development Bank's inability to use land as security and its consequent reliance on personal factors in lending in conducive to social inequality. Conversely, the paper asserts that a widely available form of security would conform to the government's aim of social equality.

5. Crops as security

The paper points out that, because of difficulties over land, there is an increasing reliance in developing countries on crops as security. Most significant cash crops in Papua New Guinea are

capable of providing long term security.

It is sometimes suggested that because of the traditional relation between land and produce, crops may be particularly appropriate as a security. In support of this argument reference is made to the separation of ownership of economic trees from the interests in the land on which they are grown and to the lending of land to cultivate food crops. Although the evidence is somewhat equivocal, the paper concludes that these factors are not relevant to the situation created by cash crops.

Cash crops would nonetheless appear to provide a stable basis for loan security. The paper suggests there are four related factors which support this assertion. These are:

(i) cash cropping leads to more firmly established property rights in land on which the crops are grown;

(ii) in traditional society where land was considered particularly valuable (e.g. through scarcity) property rights in land were more firmly established;

(iii) generally, a person can only plant cash crops on land to which he has strong rights of use or can only plant cash crops with the permission of the group which has ultimate control of the land;

(iv) the Development Bank's clan land agreements, which rely on affirmed customary tenure, have been a success.

(These propositions will need refinement and they are not adequately supported by the evidence presented in the paper. They may provide fruitful lines of enquiry).

6. Fixtures as security

The paper does no more than raise some difficulties about the use of fixtures as security and suggests that the subject needs further consideration. The paper implies that the use of fixtures as security should be confined to the situation where the removal of the fixture does not greatly reduce its value.

7. Changing the law

The paper is only concerned with broad issues and does not cover detailed questions of policy or technical matters involved in devising a new law. References are given to literature and legislation that may be of assistance.

One particular policy issue is singled out for attention -

that of safeguarding the interests of the borrower. The various safeguards considered are:- putting a time limit on the effectiveness of the security transaction, a court remedy against oppression, bureaucratic control of the granting of the security or its enforcement, restricting the terms on which a security can be given and restricting the bodies that can take a security to instrumentalities over which the government could exert adequate control such as the Development Bank and any state-run trading or savings bank. The paper suggests that only the last is likely to be at all generally adequate but that some of the other types of safeguards may have a limited value.

THE COMMISSION OF INQUIRY INTO LAND MATTERS

LAND-FREE SECURITIES IN PAPUA NEW GUINEA

P. Fitzpatrick
February 1973.

This paper is arranged as follows:-

1. INTRODUCTION

This paper considers the general issues involved in using a type of security that would to a large extent lessen the need to use land as security.

The paper has some considerable limitations. The references used are probably not comprehensive as they are a spin-off of research oriented in another direction. The paper is rushed because I did not know that the Commission would have so little time to consider general issues before it commenced inquiries in the field. Because it is rushed it has come out as rather too technical and must be taken as addressed to the Commission's advisers.

2. THE NOTION OF A LAND-FREE SECURITY

A land-free security can be broadly described as a security which is related to land but does not give the secured party rights in the land itself. Typically the secured party is entitled to resort to the income of the land in the event of default. His right to do this may be restricted, e.g. to a certain proportion of the income.

Such a security is found in many societies where land is the basic factor of production and examples as diverse as the Tolai (Smith and Salisbury: 16-17), feudal France (Sturges) and the Yoruba (Lloyd: 308-325) can be cited.

3. THE PRESENT LAW

Apart from an inconsequential aspect of hire purchase legislation, the only provision of the introduced law for a land-free security is

...hat of Part III of the Instruments Ordinance 1953 relating to crop liens. However, this has hardly been used and is almost totally inappropriate.

This part of the Ordinance is derived from Australian legislationand, like that legislation, it only accommodates annual crops in that the security or lien is only good for one year (p. 27). Also, in Australia, loans on crops are typically short term to cover expenses of harvesting.

Here the situation is different. Security over land is only exceptionally possible and land-free security may have to play a more prominent role. All of Papua New Guinea's export crops of any significance take many years to mature and they can be harvested for many years further.

There is the added and incidental complication that long growing crops may well constitute "land" for the purpose of the control of dealings in land under present legislation.

A minor point is that Papua New Guinean legislation on crop liens takes over some of the many difficulties and obscurities of its Australian precedents (Else-Mitchell: 273; Sykes: 43).

4. LAND AS SECURITY

To talk of land as security implies a power to sell land on default and sale, in turn, usually implies a market. Even if every effort were made to promote a comprehensive market in land, it would be a very long time before this came about, if ever. Whether it should come about can seriously be doubted.

Even if the absence of a market could be overcome, there would be huge problems in enforcing the security so far as concerns the bulkof the land in Papua N ew Guinea. Given the continued supportive role of the subsistence sector , the sanction of sale is too severe to be credible (Lipton: 264). Land remains basic to group identity and even much of the land nominally marketable could not be sold with effective rights of occupation.

Yet, the FAO has pointed out (Crellin 1969: 2),"as far as long-term credit is concerned experience has proved that security of real estate is indeed indispensable." To develop a planting of most cash crops in Papua New Guinea long-term finance is needed.

The Development Bank's response to this situation is to"lend to the man" and this is described as "really our basic philosophy" (Crellin 1971: 11). There is a related tendency for rural credit in developing countries to go primarily to bigger and wealthier farmers who need it least (Joy: 190). Those who hold land in an effective market would also have an advantage when it came to getting credit as they could provide security. As a counterpoint, one of the aims of the Improvement Programme includes a "more equal distribution of economic benefits." A more widely available form of security would promote this aim.

CROPS AS SECURITY - GENERAL

For reasons similar to those just considered, one now finds in developing countries an increasing reliance on future crops as security instead of land (Lipton: 264). Unlike annual crops in Australia, most cash crops in Papua New Guinea can provide security for long-term finance. It is arguable that crops provide a stable and effective basis for security. This argument is considered in the following sections.

5.2 CROPS AS SECURITY - TRADITIONAL RELATION OF LAND AND PRODUCE

It is sometimes argued that traditional ideas of the ownership of economic trees and of produce show a predisposition towards accepting a security over crops. Although I shall conclude that the argument seems unhelpful, it deserves consideration and serves as a useful background to an analysis of the effect of cash cropping.

Herskovits (358) has generalised for Melanesian communities that they "admis of ownership of produce rather than the garden where it is grown". This may be an exaggeration for the garden part but it does serve as a reminder that it is probably false to look on land in reified property terms in traditional society but that there may be clear property notions concerning crops. If this distinction is or remains applicable it would make sense to concentrate on crops rather than land as security.

It seems to have been common in Papua New Guinea for the ownership of economic trees to be separable from interests in the land on which they grew: see e.g. Crocombe and Hogbin (56-7), Hogbin (71), Lea (68) and Page (15). The only exception I know of is that noted by Smith and Salisbury (15) for the Gazelle but this exception is at best dubious (Epstein: 118). Also it was quite common for land to be lent to outsiders for the growing of crops: see e.g. Brookfield and Brown (125-6), Lea (70) and Smith and Salisbury (7).

An important apparent qualification here is that the greater the concern over and possible value of land, the more was land reified - see Lea (72) and Meggitt (294) and Crocombe and Hide (305). In the Chimbu vigilance against intrusion into the more valued areas is especially keen (Brookfield and Brown: 125).

It is important to grasp the reasons for the separation of economic trees and the lending of land. Lea (70) notes that probably the most common reason among the Abelam for lending land is to cement relationships. Salisbury (1970: 123) has observed that a loan of land is used as payment for labour. More generally, Crocombe and Hide (307) have said that having gardens and trees on the land of other people (and having other

...ts in such land) "was ecologically as well as socially adaptive. ...n times of extra need for feasts and payments, or when natural disasters, destruction in warfare or banishment made one's primary resources inadequate, these rights outside the primary group provided an alternative source of sustenance". These explanations are not comprehensive but they are adequate for present purposes.

5.3 CROPS AS SECURITY - THE EFFECT OF CASH CROPPING

Crocombe and Hogbin (79) have said that, for a group of the Orokaiva, cash cropping is "in harmony" with traditional rights to economic trees. Yet they also say (72) that there are no precedents on how to treat cash cropping and this has lead to disputes. Writing of another group of Orokaiva, Rimoldi (95) suggests that cash cropping by individuals has not reduced the flexibility of exchanges and transmission of land rights. Panoff (24) has said of the Maenge of New Britain that the separation of economic trees had nothing to do with subsequent cash cropping but it should be noted (Panoff: 7) that there were few economic trees held separate from the land and it was the prerogative of a few notables to plant them. Salisbury (1971: 21) says that payments by the first European settlers on the Gazelle were looked on as payment for totokom (a kind of lease) extending to one cycle of use. However Smith and Salisbury (7) suggest that totokom can now only be used for food and A.L. Epstein (136) says that this is definitely so. Page (8) notes, regarding the Amele of the Madang Central Sub-District, that the old custom of separating economic trees from ownership of the land does not apply to cash crops.

Although somewhat equivocal this discussion does not encourage confidence in relying on traditional notions to support the use of crops as security. The general effect of cash cropping likewise does nothing to encourage such confidence.

It has been generally asserted for Africa that cash cropping leads to "individualisation" of tenure (Middleton: 42). The effect is put perceptively by the Tiv who say that to attach a person to a piece of land (i.e.) to a thing) is tantamount to disavowing his rights in the social group; any notion of landed property is resisted because they view "property" in land as an ultimate disavowal of their social values (Bohannan) "Individualisation" in this sense is clearly inconsistent with the kinds of relations (considered in part 5.2 above) which supported special rights of ownership in trees and produce. However, statements about "individualisation" both here and in africa are put in very crude terms and the process has not been studied in any discriminate way.

It can at least be argued that there is pressure for more clearly established ownership rights in land (Shand: 310). Some detailed studies do provide support for this. Crocombe and Hogbin (75) found a desire to have certainty of tenure of cash cropped land. Panoff (25-6) recounts cases where the holder of land on which he had planted cash crops attempted to buy out all other interests in the land. Page (17) notes that a large increase in population and the present desire to plant tree crops are both making people far more land conscious and anxious to obtain title over marginal lands. It has already been suggested (in part 5.2 above) that concern with the value of land may have lead, in traditional society, to a concern with land as a property item. On the other hand Morawetz (36-7) has claimed for the Ombi - Tara conversion scheme in the Northern District that a desire for security of tenure way not a motivation for conversion. This point has been contradicted by Gray (7ff.). Crocombe and Hide (317) note that in the Gazelle and Madang areas where cash cropping is extensive, demarcation committees have made relatively rapid progress. See also Brookfield and Brown: 98.

Another, and more immediately pertinent, side of this argument is that the presence of cash crops is an indication (and perhaps a strong indication) of security of tenure. Jackson (55) in his study of the Wain says that a man will only use land for coffee to which he has inherited rights from his ancestors but he also notes that this is an ideal with exceptions. Page (13) notes that group permission must be sought to plant cash crops. Salisbury (1970:71) says that even for a person who has rights to cultivate land, the intention to plant tree crops involves the possible intervention of the lualua. Smith and Salisbury (8) record that a person must consult the lualua because tree crops are regarded as arrogating the land in question. They further record (13) that the power of the lualua is being used to regulate the planting of tree crops. See also Hogbin:73 and Morawetz:13 and e.g. Crocombe and Hogbin:39 and Rimoldi:95-6.

This evidence is straightforward but sketchy. I have discussed cash cropping (in an unstructured way) with a group of fifteen people from the East New Britain, Morobe, Central, Gulf and Milne Bay districts. This does not make the evidence much more comprehensive but they all said that to plant cash crops one must either "own" the land or have permission of the group. The success of the Development Bank's clan land agreements obliquely supports this conclusion; only one has been disputed and it involved cattle.

There is, therefore, considerable evidence indicating that crops would make a stable security even if traditional precedents may be irrelevant

FIXTURES AS SECURITY

Another type of land-free security could cover fixtures. "Fixtures" is a category which includes some crops but is much broader. Generally it covers anything that becomes affixed to the land in such a way that one would have to go to considerable trouble to remove it. It would cover buildings, yards and timber trees.

The value of fixtures as land-free security is severely reduced in many cases because a realisation of the security would involve a removal of the fixture. Often after removal the only value the item would have would be as second hand materials. The secured creditor could drain most of the value out of the asset to the excessive detriment of the debtor and other creditors. But generally more thought needs to be given to the use of fixtures as security.

7.1 CHANGING THE LAW - GENERAL

This paper has only dealt with broad issues. If it were decided to adopt a form of land-free security there would arise of host of questions of detail (on matters of policy as well as technical matters).

An indication of the issues can be obtained from Else-Mitchell, Sykes, Crowther (Vol.1: 227-8), the Permanent Editorial Board for the UCC (197-210), the English Agricultural Credits Act, 1928 and the Crop Liens Ordinance, 1904 of Fiji.

7.2 CHANGING THE LAW - SAFEGUARDS

Probably the main matter of policy involved in a change of the law is the issue of safeguards.

If there were no safeguards a lender could attain a position functionally close to that of a mortgagee of land by taking a long-term land-free security on appropriate terms (cf. Holdsworth Vol 111: 128-9). One logical and usual way around this is a limitation of the period for which the security is effective. However, for Papua New Guinea this way would not be practicable. If the period is short the security will be useless because a lengthy period is needed for most cash crops but if the period is long it is too easy to disguise a mortgage as a land-free security. Some time limitation may be useful as a backstop measure to prevent the worst abuses.

Another method is to resort to the courts to correct any oppression that has occurred; see e.g. Horwood v. MILLAR's TIMBER and Trading Company Ltd. 1917 I.K.B. 305. Although this approach also has some value as a backstop, it assumes the borrower has a high awareness of his legal rights, that the court is financially, geographically and socially accessible and

the court can effectively determine this kind of issue. None of these assumptions will usually be well-founded. There is also an inherent problem: if courts are adequately flexible for such a remedy to be effective, then the element of security (= certainty) is adversely affected.

A bureaucratic solution where each transaction is subject to consent and conditions is difficult to evaluate in the abstract. The Commission's general consideration of land control measures will have a bearing on this. A cheaper method would be to merely subject the enforcement of the security to control. This may adversely effect the utility of the security and be difficult to police.

Another possible safeguard (but probably one not adequate alone) is to restrict the terms on which a security could be given).. For example there could be a prohibition on taking possession of the trees or crop (unless perhaps there was a failure to harvest) but the secured party could still be given first slice of the proceeds.

Probably the best general solution, all things considered, is to only allow the security to be taken by institutions over which the government has effective control or influence. This was an approach used in the Land Control Bill 1971, s.23(1)(c) and the Schedule. Probably the approach was too broad there in its inclusion of the commercial banks as well as the Development Bank. The solution in Fiji (s.22 of the Development Bank Ordinance) is to confine this to the Development Bank. This could be extended to any state controlled bank that takes over the Commonwealth Bank.

BEBLIOGRAPHY

BOHANNAN, Paul, 1963. "'Land', 'Tenure' and Land-Tenure" in Land-Tenure" in Biebuyck ed., African Agrarian Systems.

Brookfield, H.C., and BROWN, Paula, 1963. Struggle for Land, O.U.P. Melbourne.

CRELLIN, Keith, 1969. "Land Tenure in Relation to the Provision of Credit", Third Waigani Seminar.

CRELLIN, K.G., 1971. "The Use of Credit Facilities in Rural Areas", Fifth Waigani Seminar.

CROCOMBE, Ron and HIDE, Robin, 1971. "New Guinea", in Crocombe ed., Land Tenure in the Pacific 292-333, O.U.P., Melbourne.

CROCOMBE, R.G. and HOGBIN, E.R., 1963. "Land, Work and Productivity at Inonda", New Guinea Research Bulletin No 2.

CROWTHER, 1971. Consumer Credit: Report of the Committee, H.M.S.O., London.

ELSE-MITCHELL, 1939. "Liens on Crops and Wool - A Critical Review of the Legislation" (1939) A.L.J. 270-3.

EPSTEIN, A.L., 1969. Matupit, ANU Press, Canberra.

Geoffrey G., n.d., "Land-Tenure Conversion in the Northern District; The effects of land tenure conversion at Ombi-Tara", roneo, N.G.R.U.

HERSKOVITS, Melville J., 1960. Economic Anthropology, Alfred A. Knopt, New York.

HOGBIN, G.R., 1964. "A Survey of Indigenous Rubber Producers in the Kerema Bay Area "New Guinea Research Bulletin No. 5.

HOLDSWORTH, A History of English Law.

JACKSON, Graham, 1965. "Cattle, Coffee and Land among the Wain", New Guinea Research Bulletin No. 8

JOY, Leonard, 1971. "Strategy for Agricultural Development" 174-202, Dudley Seers and Joy eds. Development in a Divided World, Penguin, Harmondsworth.

LEA, D.A.M., 1964. Abelam Land and Sustenance, Ph.D. Thesis, Department of Geography, A.N.U.

LIPTON, Michael, 1971. "Financing Economic Development", 231-269, Dudley Seers and Joy eds. op. cit. (Joy).

LLOYD, P.C., 1962. Yoruba Land Law, O.U.P. London.

MEGGITT, M.J. 1965. The Lineage System of the Mae-Enga of New Guinea, Oliver and Boyd, Edinburgh, London.

MIDDLETON, John, 1966. The Effects of Economic Development on Traditional Political Systems in Africa South of the Sahara, Mouton, The Hague, Paris.

MORAWETZ, David, 1967. "Land Tenure Conversion in the Northern District of Papua". New Guinea Research Bulletin No. 17.

PAGE, J.B., 1964. Notes on Land Law and Custom amongst the Amele speaking people of the Madang Central, Sub-District. Typescript, Madang.

PANOFF, Michael, 1969. "Land Tenure among the Maenge of New Britain", THIRD WAIGANI SEMINAR.

PERMANENT Editorial Board for the Uniform Commercial Code, 1971. Review Committee for Article 9 ...., Final Report, Philadelphia.

RIMOLDI, Max 1966. "Land Tenure and Land Use among the Mount Lamington Orokaiva". New Guinea Research Bulletin, No. 11.

SALISBURY, Richard F., 1970. Vunamani, Melbourne University Press.

SALISBURY, R.F., 1971. Report to the Administrator...., Acting Government Printer, Port Moresby.

SHAND, R.T., 1969. "Papua New Guinea", 281-312, Shand ed., Agricultural Development in Asia, ANU Press, Canberra.

SMITH S.S. and SALISBURY R.F., 1961. Notes on Tolai Land Law and Custom, romeo, Kopoko.

STURGES, Wesley A., "Mortgage" in Encyclopedia of the Social Sciences Vols. X1-X11 at p.33.

SYKES, E.T., 1959. "Crops and Wool Lien Complexities", 33 A.C.J., 43 and 67.

FOR THE COMMISSION OF ENQUIRY INTO LAND MATTERS

LAND REFORM AND THE GENERAL PURPOSE CORPORATIONS BILL

P. Fitzpatrick. March '73.

1. Introduction

A legislation submission for a Bill to be called the General Purpose Corporations Bill has for some time been under consideration by the relevant government departments and instrumentalities. The Bill aims to provide a simple, flexible and generally available form of incorporation which can be used for any purpose.

The Bill is directly relevant to two of the Commission's terms of reference: legislative changes designed to facilitate the acquistion of alienated land for the benefit of Papua New Guineans ((2)(a)) and appropriate legislation to enable villagers to acquire land and crops as communal entities and to operate plantations and other agricultural enterprises on a communal basis ((2)(b)).

The Bill also has a bearing on the terms of reference concerning the use of crops and fixtures as security for development finance ((3)(e)), control of dealings in customary land ((3)(f)), th use of compensation payments or purchase price for customary land ((3)(g)), occupancy rights in customarily held land and promoting group enterprises ((8)(b)).

The purpose of this paper is to consider the relation between these various parts of the terms of reference and the Bill. The paper will firstly consider the purposes of the Bill and then, in a summary form, its basic principles and provisions. In the light of this consideration, attention is then given to each of the terms of reference mentioned above.

2. Purposes of the Bill

As its title suggests, the Bill is designed to provide a form of incorporation for any type of organisation be it social, economic, political or (as will usually be the case) mixed. In discussions on the Bill the main emphasis has been on economic organisation because the Bill aims to replace the present situation where it is close to impossible for Papua New Guineans in any substantial number to legally form an economic organisation. (The purposes of the Bill regarding land arise from much the same considerations; they are considered later).

More particularly, the Bill aims to provide an adequate ...ative to present legal forms of organisation. The most ...ortant of these are partnership, company and co-operative. ...e partnership form is inadequate because it is restricted to a maximum of twenty members, because it is unstable and because it causes particular difficulties where there is a change of membership. The company form is hopelessly complex and involves great and needless expense. The co-operative form also tends towards complexity; it is only suitable for a narrow range of ventures and it is not uniformly popular.

Incidental aims of the Bill are to facilitate the granting of credit, to facilitate the collection of income taxation and to help check the misuse of funds paid to groups (e.g. as compensation under mining laws).

Generally the Bill seeks to promote the aims of the Improvement Programme. It would facilitate greater participation of Papua New Guineans in the economy and would be particularly relevant to the emphasis in the aims on village industries and typically Papua New Guinean forms of organisation. The existing narrow legal forms not only hinder but also distort Papua New Guinean participation.

Finally, the Committe on Regional Development Corporations has recommended, as a matter of urgency, that there be introduced an ordinance providing a simple and flexible form of incorporation.

3. <u>Basic principles and provisions of the Bill</u>

The basic principles on which the Bill is based are as follows:

(i) respect for the autonomy of each corporation in the application of the legislation: this is of particular relevance to the wide powers given to the Commissioner for General Purpose Corporations in the interests of flexibility (see below) and is meant to ensure that these powers are not abused;

(ii) flexibility of law, so as to permit development of new practices and rules suited to Papua New Guinea, to accommodate the wide variety of possible organisations seeking incorporation and to facilitate adjustment to change; the ordinance is drafted specifically with a view to

excluding as much as possible of Anglo-Australian case-law by the use of new terms, by avoidance of established formulae, and by making the legislation as comprehensive as possible;

(iii) provision for Papua New Guinean practices and forms of organisation: in particular for the widespread collection of funds, the notion of informal controls on leadership, the expectation that contributions to funds should be withdrawable in certain circumstances, and the fact that it is unrealistic to expect all locally based organisations to adhere to Western standards of accounting and procedural formality;

(iv) provision of flexible remedies to counteract abuses likely to arise in local context and the encouraging of members to use remedies: notably the right of members to call for an independent report on the affairs of the corporation, to apply to a court for a discretionary order to remedy any exploitation or oppression, and to apply for an enquiry by the Commissioner and in the provision of official control through the Commissioner who will have power to impose certain directions on any corporation or any class of corporations in respect of matters of accounting and disclosure, the raising and repayment of capital, and the formalisation of internal procedures for election and supervision.

The basic provisions of the Bill are:

(i) Formation: any two persons may apply for registration on giving simple particulars of name and address of corporation, nature of membership and proposed activities, and names of committeemen; the Commissioner may control unsuitable names and require membership to be more precisely specified if group identification is not adequate but may not refuse registration

except where he is not satisfied that the corporation will be effectively controlled by Papua New Guineans;

(ii) Effects of incorporation: registration will mean that the corporation will be entitled to hold land and property in its own right, so that the death of any principle member need not affect the survival of the organisation; members will have limited liability, though in certain circumstances a court may make an order against anyone involved in the management of the corporation's affairs for the repayment of specified amounts to the corporation; the corporation will have all the legal powers of a person of full capacity; the corporation can be bound in contract by any Committeeman unless it is known that the Committeemen has no authority;

(iii) Internal organisation: there is a minimum of formal requirements in relation to internal organisation: to the extent that no other provision is made, local custom and practice are deemed to apply; where there are formal rules they must be in writing, and available for inspection; a copy of the basic rights of members under the provisions of the Ordinance must be prominently displayed in a suitable language at each principal place of activity, breaches of the constitution (custom or rules) could be the subject of an application to the court for a remedial order, or to the Commissioner to impose a directive for the future; cases of improper or seriously defective conduct by a committee of a corporation may be dealt with in a similar way; a duty of reasonable care and honesty is impose on committeemen the breach of which may lead to a court order for restitution or compensation to the corporation;

to provide for cases in which members suspect that something is wrong, but cannot establish anything definite, they are entitled to appoint any person to make a report to them on the state of the corporation's affairs; an application may also be made for an official inquiry by the Commissioner; except as otherwise provided in the constitution (rules or custom) the committee has all the powers of the corporation;

(iv) Transfer of interests: provision is made for control of the transfer of members' interests by the committee (this may be necessary to preserve a specifically local character for a corporation); otherwise interests are, subject to the constitution, freely transferable; on the death of a member, and subject again to the constitution, his interests will pass directly to his heirs under customary law, unless otherwise disposed of, but where this would result in an unacceptable person becoming a member the committee would pay out the value of the interests on behalf of the corporation on reasonable terms.

(v) Capital: no provision is made for a formal capital structure on the ground that to do so would not be relevant to many corporations and would introduce unnecessary complexities without providing any real benefit (in theory the maintenance of capital is an attractive idea, but to achieve anything substantial for creditors stringent and complex provisions would have to be made); accordingly a corporation is entitled to collect funds in any form, whether in payment for an interest or by way of simple or secured loans from members or non-members; all such payments are refundable subject to any provisions of the corporation's constitution or of any contract of loan,

but in the case of contributions in respect of an interest, refund is at the discretion of the committee; the refusal to make such a refund may be the subject of an application for a remedial court order;

(vi) Credit: provision is made for a simple system for the registration of all charges on a corporations property; this part would not affect any law for the registration of mortgages and charges over land; registration is primarily the duty of the person who seeks to secure his loan or debt, and where it is not duly registered the security is of no effect against other creditors; priority for charges is strictly in accordance with the date of registration, regardless of the time of the creation of the charge; the provision also includes hire-purchase obligations;

(vii) Commissioner's controls: the power of the Commissioner to issue directives to individual and classes of corporations is an essential part of the Bill; no detailed requirements have been included in respect of disclosure and accounting; it is envisaged that the Commissioner would impose directions in respect of simple account keeping and audit on those corporations which grow to a substantial size or which are promoted with a view to encouraging the general development of commercial activities in an area, as with regional development corporation; in time the various directions issued by the Commissioner on accounting and other items would become standardised in respect of various types of corporation, and would be issued in consolidated form; it would then be possible for the Commissioner to make a simple order assigning a corporation to a particular class, or altering its class, upon which an appropriate set of accourting and disclosure and other requirements would apply (e.g. provision for proxy voting and other formal

procedures and restricting the issue and transfer of interests to a particulary group); this method of proceding is likely to produce a more satisfactory classification of corporations in relation to patterns of development than an attempt to provide in advance for a number of different classes in the body of the legislation;

(viii) Insolvency: the basic objective of the Bill in respect of insolvency is to simplify and combine existing procedures for winding up and official management so as to permit the Commissioner to take action to salvage worthwhile ventures which are not inherently unsound but through inexperience or impropriety on the part of committeemen have got into difficulties; the procedure prescribed is, in summary, a where a corporation appears insolvent or cannot pay a substantial debt as defined, an application is made to the Commissioner for a preliminary order against the corporation; such an order acts as a stay on all proceedings against the corporation, though its business may be continued under the general direction of the Commissioner; (B) the Commissioner then causes a statement of the corporation's affairs to be prepared (either by a member of his department or other suitable official or by the corporation itself) on the basis of which a decision can be made by the Commissioner whether to order a winding up or an official management; in the case of basically sound corporations it is intended that the Commissioner will seek to preserve the corporation from liquidation by ordering an official management for a period of, say, a year; this may be ordered to for such a period even without the agreement of creditors; (C) the rules for the conduct of an official management or a winding up are then set out

in general form; provision is made for priority of debts in the usual form, for the conversion of an official management into a winding up and vice versa, and for the making of composition agreements with creditors.

4. The terms of refernce

(i) legislative changes designed to facilitate the acquisition of alienated land for the benefit of Papua New Guineans ((2)(a)).

The Bill could be looked on as one way of facilitating such acquisitions and this indeed is an aim of the Bill.

It is becoming very common for Papua New Guinean groups to want to purchase lands held under registered title. This trend is increasing because many expatriates now wish to sell their properties yet there are few expatriates who wish to purchase them and few Papua New Guineans able to purchase them as individuals. Also plantations may be acquired more frequently in future with government assistance by groups of people where there are serious land problems.

Under existing law there is no adequate way in which a group can purchase and acquire title to registered land. To take one example: the people of Tulu Village on Manus paid for a plantation in 1957 yet they do not yet legally own the plantation because there is no adequate legal means for the people to purchase the plantation and hold title to it.

The available legal means have been outlined in part 2 of this paper. Partnership was out of the question in this case because a partnership has no legal identity apart from the individuals who compose it and the land could not be transferred into individual names because it was purchased by more people than the maximum number which can be entered in the register. The company form was prohibitively complex and expensive and, in the circumstances, totally unworkable. Some thought was given to a co-operative but this seems to have been rejected by the people themselves. Subdivision provided no answer because the people were only willing to have part of the land subdivided and, in any case the Administration was not prepared to carry out the subdivision.

This is just an example of a common and stupid situation and clearly some form of group holding is necessary.

Incidentally, should the Commission decide that the Bill or some variation of it is not suitable for group holding, then a preliminary warning should be given against resort to the

roup incorporation provisions of the 1971 Land Bills; these provisions are deficient in almost every conceivable respect.

(ii) Appropriate legislation to enable villagers to acquire land and crops as communal entities and to operate plantations and other agricultural enterprises on a communal basis ((2)(e)).

The part of this term of reference dealing with acquisition has just been considered. It can be said that one of the aims of the Bill is to enable villagers to acquire land and crops as communal entities.

Communal operation of plantations and other agricultural enterprises was in mind as one of the purposes for which the Bill could be used. The Bill in its conception of members "interests" can accommodate any type of involvement and such involvement can, if the members wish, be taken out of the domain of custom and usage and defined in rules in a formal manner. Likewise provision can be made in each corporation's rules for such matters as distribution of profits, work organisation, management and land use (these last two being taken from the rules provision of the Communal Land Rights (Vesting in Trustees) Law, 1958 of the Western Region of Nigeria).

It has often been noted that Papua New Guineans lack of means of enforcing economic relations when they engage in new economic activities because traditional means of enforcement prove to be inadequate for the relations arising out of these new activities. The ability to make formal rules will provide a means of enforcing these relations if people wish to use this means, Model rules for different types of venture can be combined with this approach.

The Commission may not wish to follow this permissive approach. If some formal requirements were to be made mandatory the powers of the Commissioner under the Bill to give directions (see part 3(vii) above) could be extended for this purpose. This would provide flexibility (which, presumably, would be very much needed) but it may involve giving an excessive amount of power to an official. He could perhaps be contrained by use of guidelines - a michanisin used (or about to be used) in Business Licensing law in Papua New Guinea.