(iii) The use of Crops and fixtures as security for development finance.

This has been the subject of another paper submitted to the Commission (Fitzpatrick, Land-free Securities. February 73). Part 2 of that paper shows that there is no generally available, effective security over major cash crops or fixtures. The Bill would ostensibly enable a security to be created by a corporation over these iterms. (Unlike the broadly equivalent provisions in the Companies Ordinance which do not apply to a security on "land", a category which includes fixtures and, most probably, the major cash crops. Under the Co-operative Societies Ordinance a security could be created over these items, but this has had no practical effect).

As the paper suggested (in parts 6 and 7), securities over these items should be attended with certain restrictions and safeguards. However since, for the present, fixtures and most probably major cash crops would be "land" for the purpose of the controls in the Land Ordinance 1962 there would appear to be no danger in not specifically qualifying the operation of the Bill in respect of crops and fixtures.

(iv) Control of dealings in customary land ((3)(f))

There are several ways in which the Bill is relevant to this term of reference. One way is the matter of fixtures and major crops as "land" which has just been discussed.

Another way is that a corporation may obtain control over customary land. Although existing controls would apply to the land itself, there is nothing to stop control over the land changing through a transfer of interests or shares in the corporation.

This point is not confined to general purpose corporations but identifies a gap in the law generally, i.e. control over customary land could change without being subject to the Lands Ordinance through a transfer of shares in a company or co-operative which controlled the land. This does not appear to have caused any problems so far but it could become a problem area in the future particularly if formal corporate holding of customary land were to become common.

However, unlike company and co-operative law, in an important way the Bill does provide some protection in the case of land controlled by general purpose corporation. The Bill will only provide for corporations effectively controlled by Papua New Guineans and, therefore, a transfer of interests in a corporation

ot result in control of customary land (or any other land eld by the corporation) moving into foreign hands.

There is a further protection in the Bill in that the transfer of interests in a corporation is subject, in the first place, to the constitution of a corporation and, in the second, to the approval of the Committee of a corporation. Therefore the constitution could provide for a restriction of membership and transfers to a particular group or the committee could exercise its power to this effect. Alternatively, however, the Bill would allow the constitution to be framed in such a way as to exclude this power of the committee but the Commissioner could direct that membership be confined in any way.

Under the Bill any contract entered into by a committeeman on behalf of a corporation is binding on the corporation unless the other party knew the committeeman had no authority. This accords with what is the almost invariable effect of the common law and is a necessary price for procedural informality in the internal organisation of the corporation, i.e. such informality makes it difficult or impossible to check on whether t the committeeman had authority. Some control of contracts concerning land may be thought necessary; this would depend on the Commissioner's general view of controls. In the interim the controls of the Lands Ordinance still operate.

(v) The use of compensation payments or purchase price for customary land ((3)(g)).

The Bill has an indirect relevance to this term of reference in that it aims to provide a means of preventing or remedying misuse of compensation payments or purchase price for customary land.

Under the present law it is often difficult to know whether payments are made for the benefit of the whole group with interests in the land and a person to whom the payment is made sometimes takes advantage of this uncertainty and misuses the monies paid. If the group is incorporated for the purpose of receiving the payment it is then quite clear that the payment is made to the group qua corporation and members of the group can resort to the remedies provided for in the Bill to correct any misuse of the payment.

(vi) Occupancy rights in customarily held land and promoting group enterprises ((8)(b)).

These items can be dealt with quite briefly.

Occupancy rights are considered in a separate paper (Fitzpatrick, Land Reform and the Aims of the Improvement Programme, March 73). If it is decided to institute a system of occupancy rights for individuals with ultimate title being held by the group of which those individuals are members, then the Bill could be used to make the group a legal entity for the purpose of holding that title.

As for promoting group enterprises, the relevance of the Bill has already been considered in sections (i) and (ii) of this part 4 of the paper.

Jan 3, 1973

A Suggested Reformulation of New Guinea Concepts of Land Use and Ownership.

by Margaret Mead
The American Museum of Natural History, New York.

At the recently held Seventh Waigani Seminar a student participant raised a point which suddenly illuminated for me the whole question of land rights in New Guinea. He said "In Papua New Guinea the boundaries are fluid". This was first interpreted in the following discussion as the need for more precise boundary markers, a need which has been repeatedly emphasized during the last forty years or so. But I think what the student meant was something more profound. With European law, it is believed to be possible to settle for all time, the ownership of a piece of land, to establish title in an irreversible and unchallengeable way This is so in spite of the fact that European National boundaries may be redrawn after every war, and that areas like Alsace Lorraine or parts of Poland remain in continual dispute.

In Papua New Guinea I believe that we need a concept of potential rights, which can apply both to adjacent clans and to warring enemy tribes, in which the land is thought of as legally disposable among them, as one or more of the involved groups waxes and wanes in strength. In the case of such multiple clan village, or tribal joint claims, we have the situation where the stronger one of the historical claimants may drive another group off the land but with a full expectation by all concerned that at a later date, the temporarily dispossessed group, now grown strong again, may take the land back. This is the familiar situation in the Highlands today where people feel that it is a gross injustice to freeze tribal rights at a point in time when an area was brought

under control. They claim that in some ten or twenty or more years they would have got it back again. The related situation is one found within groups in which changes in the clan population size are equalized by the more numerous clan giving individual male children to the smaller group to build up its strength and "take care of the land" (Mountain Arapesh), or inviting others, cognates or affines, to build or garden on the land of a clan whose members cannot utilize all their resources at the moment. Neither type of settlement is final, as the recipient clan becomes more numerous they can ask for their land back - and whole immigrant communities may be evicted after a generation of hospitality, or land gained in warfare may be regained after several generations. Who owns these lands? I suggest that our concepts of ownership are inadequate. The way European international treaties have permitted redrawing of boundaries on the basis of ancient claims, or transfers or exchanges of populations between nation states is a closer approximation of PNG intra tribal and inter tribal conditions than European laws of individual ownership. What is needed is a way of distinguishing between different degrees of core land, of either a tribal group, clan or lineage and interstitial or peripheral lands which have been, and can continue to be, potentially the legal property of any one of two or more groups who have occupied that land at some point in the past. If fighting is to be eliminated as a method acquiring or reacquiring such temporary occupancy and use rights, then possibly options on leasing part or all of such disputed lands, as soon as the present occupants became too weak to use it, might be one method of keeping "in ~~free~~ bona" such joint claims which no claimant really believes can ever be finally resolved.

M. Mead
for TOK TOK
Jan 3. 1972

for 3.

It is becoming widely recognized that the future of mankind depends upon the way land is managed, both urban land and land which yields agricultural and mineral products. This in turn depends upon the attitudes of the people towards land and their willingness to take the necessary steps to protect it for future generations. In Europe and America the control of land for the benefit of present and future generations has been interpreted as meaning extension of state ownership, essentially of the rights of the sovereign. In Papua New Guinea, however, where there has never been such a concept of sovereignty, the Government is seen as one and only one of a group of those with claims to and responsibility for the land. The idea of conservation, of providing people to care for the trees as well as trees to provide for the people is already present. If Papua New Guinea is to enter the modern world prepared to protect its rich and beautiful natural environment, government control of land must be subjected to the same limitations and periodic review and renegotiation as must the putative and partial control accorded the other groups who claim an interest over time. It would be wasteful of already developed conservational and ecological attitudes to neglect this constellation of attitudes and permit government to exercise the kind of irresponsible and unscrutinized sovereignty which has been exercised in both Eastern and Western Europe, by socialist and capitalist governments alike.

The American Museum of Natural History

New York. NY 1002

May 22, 1973.

Mr. Sinaka Goava,

Chairman, Commission on Enquiry into

Land Matters - PNG.,

P. O. Box 2459,

KONEDOBU. PNG.

From : Dr. Margaret Mead

At the session on Land Tenure Problems, May 4, 1973, of the Seventh Waigani Seminar, Mr. Sinaka Goava requested those of us who were interested to address written communications to the Commission. This submission is being made in response to that request and is based upon 45 years of research in Papua New Guinea and considered experience with problems of land tenure in other parts of the Pacific.

Papua New Guinea shares with the other indigenous peoples of the Pacific a conception of land which differs radically from that which underlies present day legal arrangements in those parts of the world where land laws have developed from English Common and Constitutional Law where the vesting of land in the crown, and the right of the crown to vest ownership in individuals, are the basis of the contemporary arrangements. The basic attitude towards land in Oceania is that land may be assigned from time to time, by agreement, by the results of warfare, by disinterest on the part of those groups who have some claim over it, to different users, but that all land remains the potential possession, over time, of groups of users, whether these be lineages, clans, villages, or tribes who are often at war with one another. No occupation or use of land is regarded as permanent, irreversible or no longer subject to negotiation.

Furthermore, Papua New Guinea, in almost all areas, differs from the rest of Oceania, in lacking any form of overarching sovereignty, either of chieftainship, monarchy, council of elders or village authority, which is super-ordinate to the groups of various levels who are in continual or intermittent competition for the use of particular pieces of land. There is no authority which the authority of the Crown, or of the Government, can replace within the indigenous system. Therefore, when the Government acquires land by the orderly processes of purchase, the Government is seen as only one of the potential contenders for the land, and it is not infrequent for a group who have "sold" land to the Government to demand a re-opening of the case, further payments or return of the land.

Given these two deeply entrenched beliefs about land - the impossibility of permanent alienation and the need to arrive at temporary settlements by negotiations among the claimants - with no provision for any super-ordinate power with ultimate authority to decide among them - it would be wise to arrange for the periodic review of all land settlements, so that change of use, changes in demographic strength, changing economic situations, can all be taken into account in periodic re-negotiations. This applies to situations like those in the Highlands where people feel that drawing fixed boundaries at the moment of pacification is grossly unfair, and to such modern arrangements as the purchase of the Hoskins Bay area for palm oil development where the local previous owners are now threatening the small holders with a withdrawal of their consent to what they regard as an essentially temporary arrangement.

Although various devices may be used to satisfy non-urgent claims, such as payment of rents or royalties, or formalities of consultation

with those who are making no monetary claim - as when Butibam village in Lae demands consultation with changes in town planning .. it seems unlikely that Papua New Guineans will feel that any fixed commutation of claims for a specific sum is ever just.

Law as interpreted in English speaking countries must be founded in a public consensus about justice and is otherwise unenforceable except by force.

In the discussions of land tenure in PNG emphasis has been placed on establishing more clearly marked boundaries in the belief that if these boundaries were properly surveyed and delineated, disputes would be less frequent. But the essential point is not the vagueness of boundary markings but rather the insistence on the "fluidity of boundaries" <u>over time</u>. Tremendous amounts of time and expense have been devoted to trying to establish boundaries which would stand over time when the people themselves do not recognise any such possibility.

Clearly when the new Constitution is made, some invention must be made of the order to a U. S. Trust Fund which will recognise the continuing rights of those who will continue to feel that they have a claim upon the lands that at some time within human memory have been occupied or used by their forbears. The most essential element seems to be recognition of an inalienable claim which can be satisfied by consultation, in many cases, and some sort of adjustable royality payments if the productivity of the land changes radically. Experience in North America where the same attitudes towards land prevailed have demonstrated that no sort of commutation or compensation payment is ever felt as final. But in North America the indigenous inhabitants were a small minority; in Papua

New Guinea they constitute the people of the country in its entirety and their feelings need to be given a suitable political expression if harmony and progress are to prevail.

THE AMERICAN MUSEUM OF NATURAL
HISTORY.

NEW YORK. NY 10024

June 3, 1973.

Dr. R. J. May,
Field Director,
ANU New Guinea Research Unit,
Box 1238,
Boroko
PAPUA NEW GUINEA.

Dear Dr. May,

I enclose a memorandum on what could be, I feel, a very important piece of research, one in which the Unit could make a very substantial contribution to the future productivity of Papua-New Guinea. A tremendous amount of money has already been spent in the Hoskins Bay area and it would be a pity if the research remained so conspicuously one sided and incomplete.

I have undertaken some exploration of possible research workers at present resident in PNG or at Canberra and I have become convinced that there is no-one presently available to undertake this research.

With many thanks for your hospitality and the hospitality of the unit, now and in the past.

Sincerely yours,

(MARGARET MEAD)

ON THE NEED FOR FURTHER ANTHROPOLOGICAL RESEARCH WORK AT THE HOSKINS BAY PALM OIL SMALL HOLDERS SETTLEMENT

From Margaret Mead,
Curator Emeritus,
The American Museum of Natural History, and Adjunct Professor of Anthropology, Columbia University, New York.

As part of the American Museum of Natural History Second Jane Belo Expedition to New Guinea, I have recently paid a visit to the Hoskins Bay Oil Palm settlement as a follow up on my 1931-1932 ethnographic work on the Arapesh of Alitoa, East Sepik District. The descendants of the original Alitoa village, after an initial stay of two decades on the Wewak Coast, where they experimented with the cultivation of rice, coffee, [illegible], copra and peanuts, are now settled at Hoskins and represent the only closeknit, previously acquainted and closely related ethnic group of settlers. I also had occasion to have long consultations with Mr. C. J. Buere, Agronomist in Charge of the Oil Palm Research Station. I had available to me manuscript results of the very extensive socio-economic study done by Dr. Anton Ploeg of the ANU New Guinea Research Unit, in the period 1969 to 1971, and one of the manuscripts prepared by Mr. B. T. Strand and Mr. W. F. Straatmann. Furthermore Dr. Ploeg accompanied me on the visit to Hoskins so that I had the benefit of his extensive knowledge of the people and situation throughout my stay.

In the light of the immense investment in the Hoskins Bay oil palm experiment and the great future possibilities inherent in oil palm cultivation in Papua New Guinea, it seems imperative to me that further research should be undertaken at once on the relationship between the requirements and peculiarities of oil palm cultivation and the traditional capacities, work habits, and response to the oil palm, as a crop, of the peoples of Papua New Guinea. The opportunities for research may never be so propitious again.

There are several aspects of oil palm cultivation which must be considered: the tight, machine like schedule, with only hours' leeway,

.../2

for the pollination and harvesting of the palms; the nature of the work itself in terms of difficulties of harvesting, thorns, weight, density of planting; the need for specific and careful use of fertilizer, and the extraordinarily complex procedures of importation of pollen, growing suitable full hybrid plants, and the continuing collection of pollen, refrigeration testing and composition of the redistributed pollen, and the relationship between these processes and the settlers' understanding of why they are necessary. Nothing as complicated is part of either Papua-New Guinea subsistence cultivators' experience nor of the education which is at present available for the less trained of the agricultural extension workers.

The situation at Hoskins is exceedingly propitious for research for the following reasons: it is the first experiment of its kind in Papua-New Guinea, and plantation, mill and research station are all actively committed to the success of the scheme; new facilities for research are being installed at Dami, and completely new machinery is being installed in the mill. The settlements, in their different sections represent all stages of clearing, planting, ablation, first and later harvesting, and response to fluctuating performance on the part of the palms, the mill, and the world market. Furthermore the settlers come primarily from three ethnic groups on which a great deal of ethnographic work has been done: Arapesh, (Mead and Fortune 1931-1932); Tolai (Salsbury, Epstein and others); Chimbu (Brown, Blackman and others and currently Anton Ploeg against the background of his Hoskins experience). Furthermore there is material available on the Lakenai, who represent one group of the indigenous population of West New Britain, who form the social environment within which the settlers have been introduced and on which they are partly dependent for food. (Goodenough, Chowning, Valentine, 1953-54.) All of these research workers are available for interview and help.

A mature cultural anthropologist with training in the use of projective tests, depth interviewing, behavioral filming and film analysis and a fluent knowledge of pidgin, should be able to make an extensive contribution in a period of six to nine months, if this had been preceded by a study of the oil palm biology and cultivation and processing of the oil palm, which would involve a visit to Malaysia,

.../3

the center of the industry to see oil palm settlements there. Provision should also be made for interviews with some of the abovenamed ethnographers, some of whom are presently in Australasia and one in America and U. K. If the new settlement at Bialla, W. New Britain, is underway this should be included.

.../4

Proposed Hoskins Bay Research

In addition to the normal expenses of a research project in Papua New Guinea, for a competent post doctoral student who had done previous work in New Guinea and so was fluent in the use of neo-Melanesian pidgin and the appropriate research tools, financing should provide for:

- A transport vehicle, preferably a Land Rover, (work without a vehicle is impossible).
- Housing near a community center (not the extreme isolated and time wasting housing provided previous ANU-NGRU research workers).
- Travel funds and maintenance for time spent in consultation with previous ethnographers, specialists in the oil palm industry in Malaya and visits to oil palm settlements there, consultation with previous officers DASF who helped inaugurate the scheme and are now located elsewhere, and/or short visits to the areas of the largest ethnic groups, Arapesh, Chimbu and Tolai, for on the spot comparisons with former and required ways of life.

Unless there is to be imported labor, the success of the venture will depend upon the willingness and efficiency of the small holders who are being offered the opportunity to acquire and work these blocks in virtual perpetuity. A great deal of imaginative effort went into many aspects of the preparation for the settlers: attention was given to selection and preparation of land; provision for subsistence during the period before the blocks began to yield; arrangements for the loans and their liquidation. Compatible attention has not been given to the following problems: the layout of the settlement (and orderly establishment of the settlement); provision of Schools, Aid Posts and Community Activities; methods of traditional work group behavior; the desirability of importing groups of families with existing ties, transport within the settlement arranged for human beings as well as trucks of oil palm fruit; attitudes towards individually owned leases; understanding of the complex breeding and reproductive processes of the oil palm; understanding of the pollination and fertilization and

.../5

cultivation processes essential to a high yield crop; the type of sanctions and incentives including opportunities for occupations for children, access to sources of protein, and ability to break the monotonous grind of continuous attention to the palms.

COMMISSION OF INQUIRY INTO LAND MATTERS

LAND

MEMBERS OF THE HOUSE OF ASSEMBLY REALIZE THAT LAND IS OF GREAT IMPORTANCE TO THE PEOPLE OF PAPUA NEW GUINEA. MANY OF THE PROBLEMS FACING PAPUA NEW GUINEA TODAY ARE DIRECTLY CONCERNED WITH LAND.

A SPECIAL COMMITTEE, CALLED "THE COMMISSION OF INQUIRY INTO LAND MATTERS", IS TO BE FORMED SO THAT MEMBERS OF THE HOUSE OF ASSEMBLY MAY BETTER UNDERSTAND THE PROBLEMS OVER LAND WHEN THEY ARE MAKING LAWS AND DECIDING QUESTIONS ABOUT LAND.

THIS SPECIAL COMMITTEE WILL BE TOURING PAPUA NEW GUINEA FROM MARCH TO AUGUST THIS YEAR HOLDING PUBLIC HEARINGS AND ASKING PEOPLE ABOUT THEIR PROBLEMS AND OPINIONS OVER LAND.

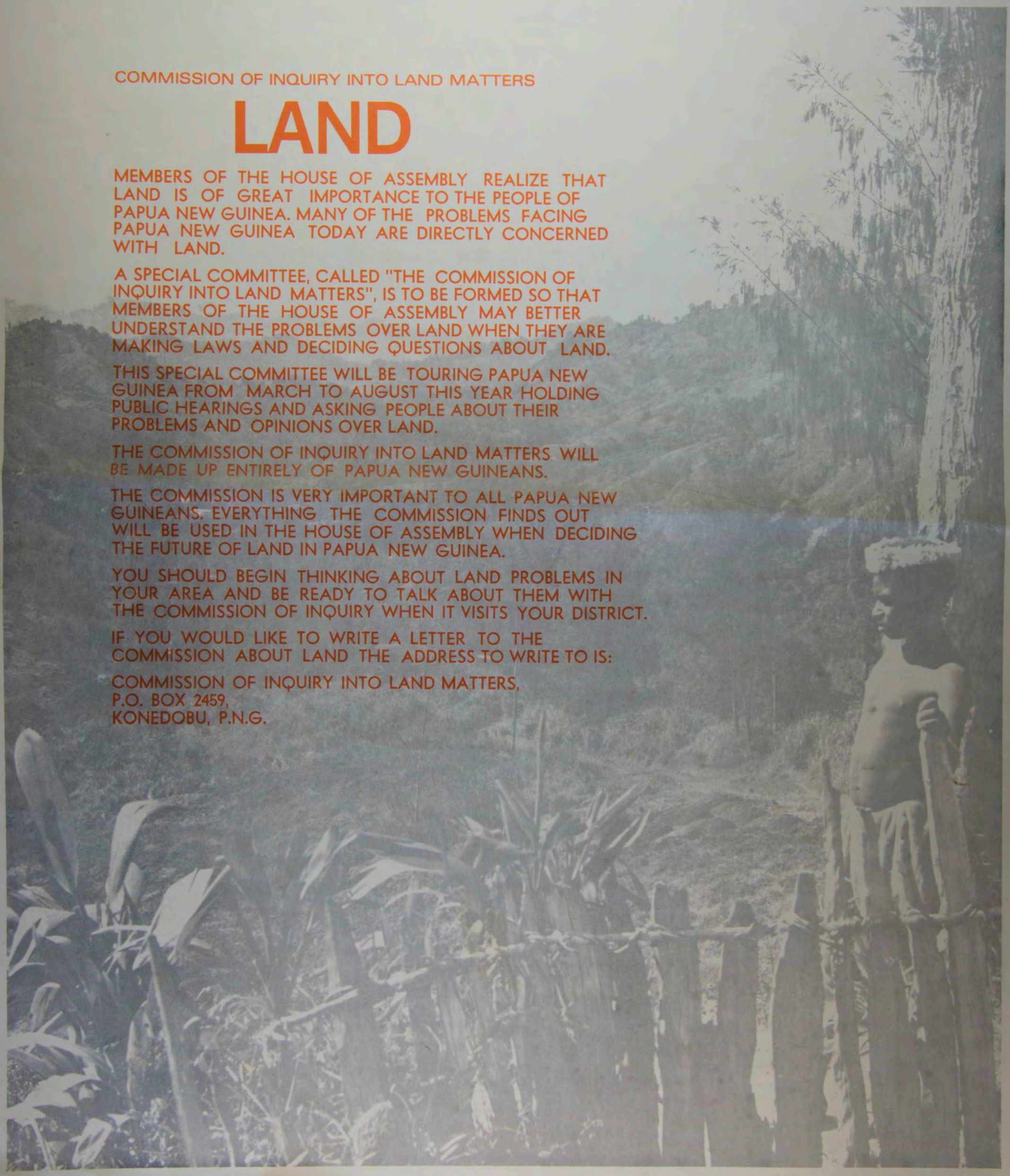
THE COMMISSION OF INQUIRY INTO LAND MATTERS WILL BE MADE UP ENTIRELY OF PAPUA NEW GUINEANS.

THE COMMISSION IS VERY IMPORTANT TO ALL PAPUA NEW GUINEANS. EVERYTHING THE COMMISSION FINDS OUT WILL BE USED IN THE HOUSE OF ASSEMBLY WHEN DECIDING THE FUTURE OF LAND IN PAPUA NEW GUINEA.

YOU SHOULD BEGIN THINKING ABOUT LAND PROBLEMS IN YOUR AREA AND BE READY TO TALK ABOUT THEM WITH THE COMMISSION OF INQUIRY WHEN IT VISITS YOUR DISTRICT.

IF YOU WOULD LIKE TO WRITE A LETTER TO THE COMMISSION ABOUT LAND THE ADDRESS TO WRITE TO IS:

COMMISSION OF INQUIRY INTO LAND MATTERS,
P.O. BOX 2459,
KONEDOBU, P.N.G.



COMMISSION OF INQUIRY INTO LAND MATTERS

GRAUN

OL MEMBA BILONG HAUS OF ASSEMBLY OL I SAVE PINIS LONG GRAUN I WANPELA NAMBA WAN SAMTING BILONG PAPUA NEW GUINEA. OL MEMBA OL I SAVE PINIS GRAUN EM I AS BILONG PLANTI TRABEL NA TINGTING KRANKI INSAIT LONG PAPUA NEW GUINEA.

TASOL, WANPELA KOMISIN, OL I KOLIM "COMMISSION OF INQUIRY INTO LAND MATTERS", NAU BAI I KIRAP LONG KISIM SAVE LONG OLGETA SAMTING BILONG GRAUN. DISPELA KOMISIN EM BAI I WOKIM WANPELA RIPOT NA SALIM I GO LONG HAUS OF ASSEMBLY NA BIHAIN SAPOS I GAT WANPELA TOKTOK BILONG GRAUN I KAMAP INSAIT LONG HAUS OF ASSEMBLY OL MEMBA I KEN LUKIM NA KISIM SAVE LONG OL FASIN BILONG GRAUN.

DISPELA KOMISIN BAI I RAUN LONG MUN MAS I GO INAP LONG MUN OGAS LONG OLGETA DISTRICT LONG PAPUA NEW GUINEA. LONG DISPELA TAIM KOMISIN BAI I KIRAPIM PLANTI MITING LONG HARIM OLGETA TOKTOK NA WARI LONG GRAUN.

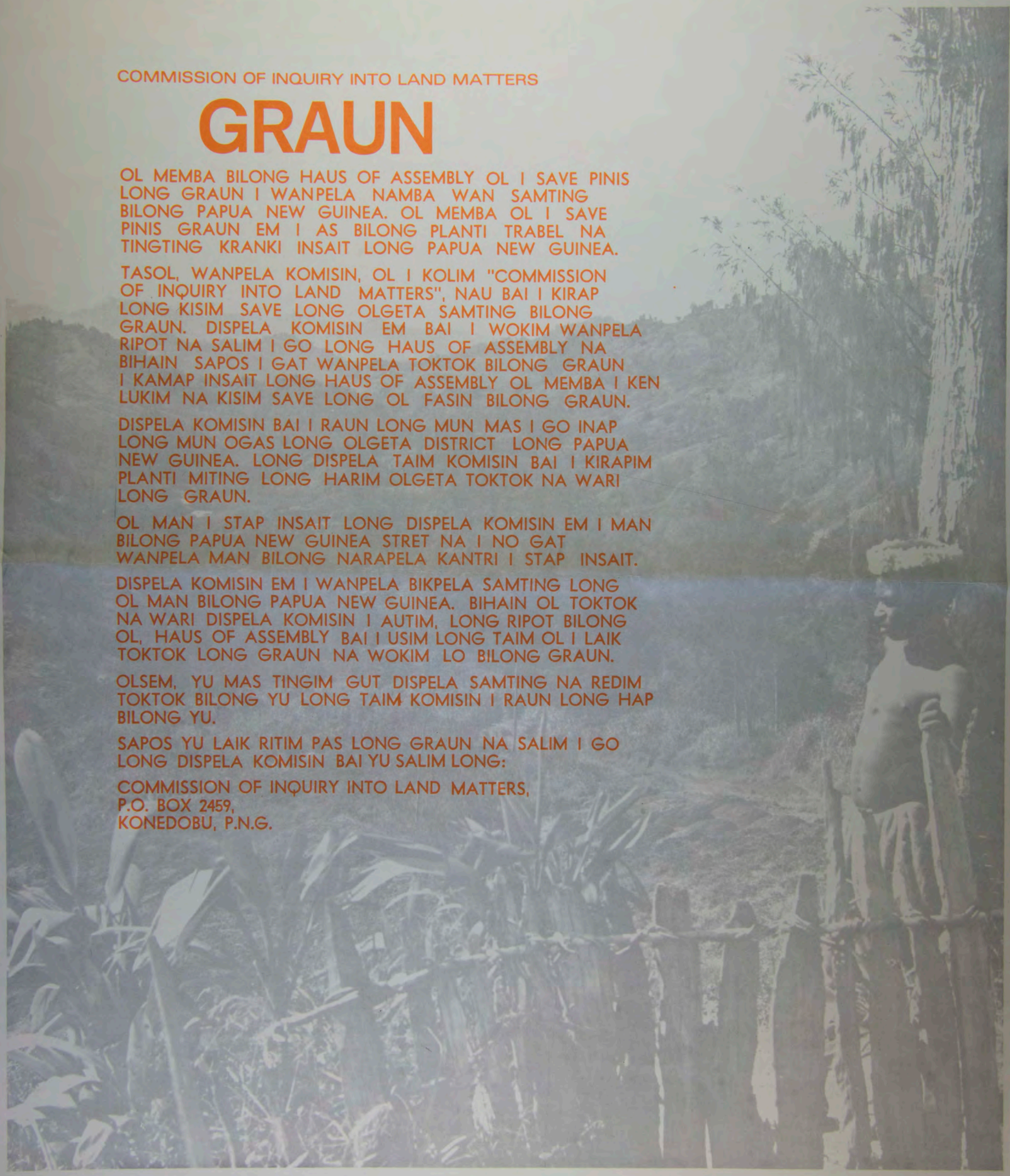
OL MAN I STAP INSAIT LONG DISPELA KOMISIN EM I MAN BILONG PAPUA NEW GUINEA STRET NA I NO GAT WANPELA MAN BILONG NARAPELA KANTRI I STAP INSAIT.

DISPELA KOMISIN EM I WANPELA BIKPELA SAMTING LONG OL MAN BILONG PAPUA NEW GUINEA. BIHAIN OL TOKTOK NA WARI DISPELA KOMISIN I AUTIM, LONG RIPOT BILONG OL, HAUS OF ASSEMBLY BAI I USIM LONG TAIM OL I LAIK TOKTOK LONG GRAUN NA WOKIM LO BILONG GRAUN.

OLSEM, YU MAS TINGIM GUT DISPELA SAMTING NA REDIM TOKTOK BILONG YU LONG TAIM KOMISIN I RAUN LONG HAP BILONG YU.

SAPOS YU LAIK RITIM PAS LONG GRAUN NA SALIM I GO LONG DISPELA KOMISIN BAI YU SALIM LONG:

COMMISSION OF INQUIRY INTO LAND MATTERS,
P.O. BOX 2459,
KONEDOBU, P.N.G.



COMMISSION OF INQUIRY INTO LAND MATTERS

TANO

HOUSE OF ASSEMBLY MEMBA TAUDIA IDIA DIBA TANO BE PAPUA NEW GUINEA TAUNIMANIMA ENA GAU BADANA TA, PAPUA NEW GUINEA ENA LALO HEKWARAHI TANO DEKENAI IA NOHO.

GAVAMANI IA URA OREA TA HAGINIA. BADINA IA URA HOUSE OF ASSEMBLY TAUDIA DURUA HENIA, EDIA TANO TARAVATU MATAMATA KARAIA NEGANAI, BONA TANO ENA DALA HANAMOA DAINAI. INAI OREA LADANA BE COMMISSION OF INQUIRY INTO LAND MATTERS.

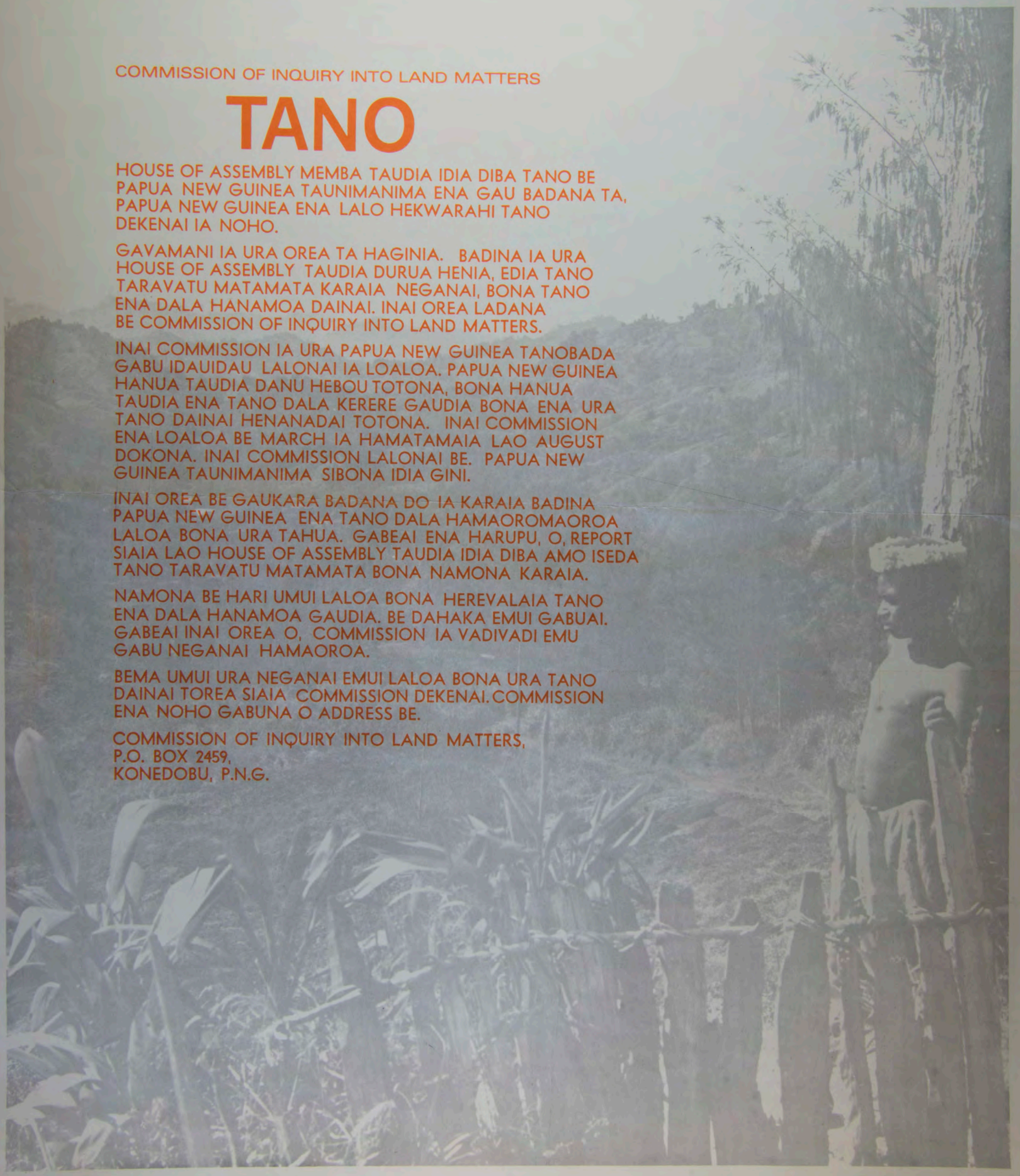
INAI COMMISSION IA URA PAPUA NEW GUINEA TANOBADA GABU IDAUIDAU LALONAI IA LOALOA. PAPUA NEW GUINEA HANUA TAUDIA DANU HEBOU TOTONA, BONA HANUA TAUDIA ENA TANO DALA KERERE GAUDIA BONA ENA URA TANO DAINAI HENANADAI TOTONA. INAI COMMISSION ENA LOALOA BE MARCH IA HAMATAMAIA LAO AUGUST DOKONA. INAI COMMISSION LALONAI BE. PAPUA NEW GUINEA TAUNIMANIMA SIBONA IDIA GINI.

INAI OREA BE GAUKARA BADANA DO IA KARAIA BADINA PAPUA NEW GUINEA ENA TANO DALA HAMAOROMAOROA LALOA BONA URA TAHUA. GABEAI ENA HARUPU, O, REPORT SIAIA LAO HOUSE OF ASSEMBLY TAUDIA IDIA DIBA AMO ISEDA TANO TARAVATU MATAMATA BONA NAMONA KARAIA.

NAMONA BE HARI UMUI LALOA BONA HEREVALAIA TANO ENA DALA HANAMOA GAUDIA. BE DAHAKA EMUI GABUAI. GABEAI INAI OREA O, COMMISSION IA VADIVADI EMU GABU NEGANAI HAMAOROA.

BEMA UMUI URA NEGANAI EMUI LALOA BONA URA TANO DAINAI TOREA SIAIA COMMISSION DEKENAI. COMMISSION ENA NOHO GABUNA O ADDRESS BE.

COMMISSION OF INQUIRY INTO LAND MATTERS,
P.O. BOX 2459,
KONEDOBU, P.N.G.



SEVENTH WAIGANI SEMINAR

LAW AND DEVELOPMENT IN MELANESIA

Warfare, Leadership and Law in the Highlands

by Bill Standish

Summary of Paper

Recent scattered outbreaks of fighting in the Chimbu District and Western Highlands have reached levels unprecedented in the colonial era, although there is no general breakdown of law and order. High levels of social and economic tension in Highlands societies have followed twenty years of intense economic and social change during which the influence of traditional leaders has been greatly reduced. There are now many more contacts with members of other clans and tribes, all of which carry the potential for the accidental and sudden eruption of violence. These groups themselves are bigger than precolonial groups, and the possibility for larger scale violence is thus greater. So far, warfare in the highlands has mostly been between traditional enemies, using traditional weapons and is not directed against the government.

Introduced political institutions such as local government councils have been largely unsuited to the Highlands environment, and disappointing to the people there. They have been on a scale too large to follow pre-colonial leadership patterns, have not provided satisfaction in their community services programme, and have not always fulfilled the much-needed village court function to reduce social tensions within clans and sub-clans.

Similarly, there is developing a lack of contact between central government institutions and village people who charge of inadequate performance, and feel a sense of insecurity surrounding the future of government. The simple methods of colonial pioneers are no longer possible in a society undergoing transition, and the colonial power is initiating a withdrawal sooner than many Highlanders want, or expatriate officials feel is demanded. Unsure of their respective roles in this period of transition, they both risk losing their grip on events at the local level. With a lack of surety about the pace and direction of political developments, the Highlanders feel they are no longer able to rely on outsiders

to control affairs. But neither are they prepared to let their fellow countrymen (and especially their neighbours) gain ascendancy. Some fear that "another country" will take power with self-government, others fear a breakdown of the peace when an indigenous government takes full power.

The present inadequacies of the government reinforce these fears. Police and District Administration personnel are having less and less contact with the people at village level, and in the case of the police this means that contacts are only likely to be in situations of conflict, where good relations cannot be quickly established, Indeed, some police misbehaviour in and around the towns have exacerbated the tensions, and an apparent misunderstanding of the dynamics of inter-group conflict has led to accusations of bias. Not trusting the police, or indeed the slow processes of law and land settlement, many Highlanders have reached a situation where they feel they have no choice but to fight to achieve justice for their group, or to restore its good name. In doing this, especially where compensation procedures break down, they are following the law of ancient custom.

Traditional group consciousness has been lowered during the colonial intrusion, and, since there has been no satisfying replacement, the conditions exist where appeals to primordial small group loyalties are quite compelling. Older men are particularly concerned with the breakdown of group identity, and the inadequacy of the younger leadership. These feelings are symbolised in land disputes, especially near towns where land alienation has led to the clans feeling that they cannot ensure the continuity of their group's identity or economy without gaining ground at the expense of old enemies. The old men have used appeals to group pride, firstly to unite the group, and secondly to bolster their own leadership position relative to the younger men. The most convenient way for old men to assert the group's collective consciousness is to encourage young men to fight when inter-group tensions become unbearable. In fighting, the clan is reunited, the older men's position is at least temporarily boosted, and fighting thus serves a political function in the short-term, as well as increasing group solidarity for the uncertain period of decolonisation. Such small-group loyalties can potentially, of

course, be channelled into more positive avenues of community government and development.

Certain legal and political implications emerge from this analysis. One is the likely ineffectiveness of individual capital punishment or imprisonment as a deterrence to fighting, which is a corporate activity, and when defence of the group's name involves a stronger obligation than that of obeying the introduced law. Group pig fines may be a deterrent. Another is the need to fill a leadership vacuum by bolstering the local indigenous leaders and giving the people the feeling that they have some control over their destiny at a district and even national level. Economic, educational and even social development programmes need to be reoriented to incorporate village level communities. At present the government has the potential goodwill of the Highlanders, but mishandling of both national political change and actual fight situations could well turn Highlands people's resentments from each other onto the government. At present the police are untrained and unable to control some of the larger battles. The problem raises major issues of national security which cannot be ignored when allocating roles to the police and the army. The roots of the tensions which are exploding in the occasional resurgence of traditional conflicts are basically political, and leadership rather than armed force or heavy punishments can provide the only means to their resolution.

LAND TENURE AND DEVELOPMENT BANK LENDING

R. J. Gunton

The Papua and New Guinea Development Bank is taking a multi-million dollar gamble in one aspect of its lending. The Bank has been in existence for about five years and in that time has made loans totalling approximately $4 million under what it calls Clan Land Usage Agreements. This type of lending has expanded rapidly and it is hoped that the high rate of increase can be maintained in the future.

Most of the land in Papua New Guinea, about ninety-six percent, is owned by the clans - that is, held according to native custom. It is worth devoting a little space to discussing in fairly general terms what this entails, the Highlands region being taken as the extreme example. The local people have discovered over the centuries that the forest regeneration cycle is relatively constant. Depending on the type of country and climatic conditions, it ranges from about seven years to twenty years. Suppose the cycle is fifteen years and that the individual gardener in any one year will work three small plots of land. Commonly, one of these will be close to water, another, probably also of reasonable fertility, removed from the water and the third on a hillside, possibly very steep and not very fertile, used mainly for growing sweet potato. In the fifteen year period the individual may therefore use as many as forty five separate pieces of land. Obviously this single fact makes for great complexity of use rights and can lead to much dissention within the clan. However, there are other complicating factors.

While one man may have the usufructuary rights to the land, another may have the right to gather sticks when the land is not being cropped. A third may own the pandanus palms growing there. These, incidentally, have an almost holy status in some parts of the Highlands where, for centuries, the diet has been grossly deficient in oils and fats and disputes over the ownership of the pandanus and the right to gather its nuts still lead occasionally to bloodshed. And the right to cross the land in the course of their affairs may be reserved to some members of the clan and not available to others.

The consent of many people may be required if one person is to have exclusive right to the land for a project such as the raising of beef cattle or the planting of tea, coffee, pyrethrum and so on. Of course, this makes a very strong argument for the demarcation of the clan's land and subdivision and tenure conversion into freehold lots. However, it is still quite common that the borders of the land of adjacent clans are in dispute so that the first step in the long process of tenure conversion cannot be taken.

...../2,

The Development Bank would not contemplate lending for projects on disputed border land but has decided that, if its rural lending is to proceed at an acceptable pace, it must lend on land that is not subject to inter-clan dispute. In taking this extremely bold decision, the Bank was aware that it had established something of a world-wide precedent; exhaustive enquiries failed to reveal another development bank rural lending programme which could serve as a guide to avoiding the pitfalls assumed to be inherent. World Bank and United Nations Development Programme missions have professed astonishment, not to say dismay, on first learning that the Papua and New Guinea Development Bank lends for rural ventures on land over which it can take no charge. To date, it has proved possible to reassure these people because no major problems have arisen from the clan land lending programme. The future may tell another story and this will be discussed briefly below.

The Bank's network of branches, representatives and agents is spread widely across Papua New Guinea and used actively to promote rural lending. The Bank makes extensive use of the facilities of the Department of Information and Extension Services, particularly in such radio programmes as "Toktok long Didiman" which is the rough equivalent of the Countryman's Session on the A.B.C. Also, schools and vocational centres are visited regularly for talks about the Development Bank, its functions and objectives and its lending policies. Some fairly limited use is made of the popular press. In all of this it is made clear that the Bank will lend for projects on land held according to native custom. Notwithstanding these efforts, the Bank is not as yet beseiged with an unmanageable flood of applications for loans. Indeed, many applicants have to be persuaded of the desirability of borrowing.

When an individual, whether by persuasion or of his own volition, has approached the Bank for a loan to start, say, a small-holder cattle project on clan land, the first step is to establish with the local demarcation (council) that the land in question is not subject to inter-clan dispute. Given that it is not, the process of drawing up the Clan Land Usage Agreement is begun. Clan leaders are consulted and it is made clear to them that the clan must confer on the borrower the right to sole use of the land during his lifetime. The leaders having consented, they are then required to advise everyone who has any claim whatsoever to the land of what is proposed. This may be a tedious and long drawn out business because the Bank officer or the agent handling the application will not have the Clan Land Usage Agreement signed or marked by the clan leaders until he is sure that what is being proposed is fully understood and accepted.

...../3,

There are three factors here. The first is the well known communication problem in Papua New Guinea; there are over seven hundred languages spoken in the country, all of them by comparison with English, having a very restricted vocabulary. If the man, not necessarily a European, processing the loan does not speak "place talk" - that is, the local language - he must use an interpreter and many repetitions will be necessary before he accepts that what is proposed is understood. The second factor is that in most rural communities not much importance attaches to the passage of time, the people enjoy thrashing out things in the minutest detail and the whole affair is momentous enough to be savoured as long as possible. The third is that the loan applicant generally will have to make arrangements with those whose land will be incorporated into his lifetime holding. This will involve the exchange of gardening rights, stick gathering rights and all the rest.

In the course of the foregoing, the Bank's man will have been conducted repeatedly over and around the boundaries of the project land. Of course, the boundaries themselves are not normally surveyed but are typically defined in the following fashion.

> "From the bend in the creek to a given tree to a well known rock shaped like a man's head to the big tree with three forks, and so on, back to another point on the creek."

The polygon so defined sometimes has a great many sides but it seems to be generally accepted that these must be straight lines. In cases where it is suggested that the boundary should run from point A to point B but not include something which lies within the boundary, an additional apex excluding the object or area in question is sought. The form of the Clan Land Usage Agreement is as follows:-

...../4,

When no legal title to land held, this Agreement is to be executed and forwarded to Bank.

CLAN LAND USAGE AGREEMENT

Date.....,19.....

To the Papua and New Guinea Development Bank.

We, the undersigned, being representatives of the..... Clan, hereby acknowledge that..... has the right under native law and custom for the whole of his lifetime to use the land known as .....(or more particularly described in the plan on the reverse hereof) for the purpose of..... .....with the right to receive the proceeds of crops, trees and palms grown, livestock grazed and/or business conducted on the said land. We certify that all members of the said clan agree to the truth of this certificate and that we are the persons authorised by the clan to sign it.

.....	.....	.....
Witness	Full name of Clan Leader	His Signature/Mark
.....	.....	.....
Witness	Full name of Clan Leader	His Signature/Mark

When term of loan exceeds 5 years one of the sections below must be completed in addition to the above.

As Chairman of the.....Demarcation Committee, I am of the opinion that the above Clan is not prevented under native law and custom from giving the above certificate and that the signatures/marks are made by persons authorised to commit the Clan.

.....	.....	.....
Witness	Full Name	Signature/Mark

OR

As Clerk of the.....Local Government Council, I am of the opinion that the above Clan is not prevented under native law and custom from giving the above certificate and that the signatures/marks are made by persons authorised to commit the Clan.

.....	.....	Affix stamp of Council here
Witness	Signature/Mark	

OR

As Clerk of the.....Local Government Council, I certify that a formal record of claimed rights in accordance with the above certificate has been recorded by the Council under the provisions of its Land Use Record Rule.

.....	.....	Affix stamp of Council here
Witness	Signature/Mark	

...../5,

Note that the form requires a sketch plan of the piece of land. Sometimes this is omitted but it can be safely assumed that, when the form is signed, the clan knows the specifications of the land to the square yard.

As something of an aside, it is interesting that the Bank may require no cash equity on the part of the borrower for a small-holder cattle project; small-holder implying indigenous without exception. Once the land is defined, the borrower makes his contribution in the form of "sweat equity", a most expressive term borrowed from IBRD people. If the borrower will clear the land, erect fence posts and build yards, the Development Bank will provide the rest including, of course, the cattle. In respect of tree crops a somewhat different procedure is followed, namely, the "4½ to 1 rule". If the individual plants up two acres of, say, cocoa or coconuts, the Bank will finance a further nine acres. Nothing very significant attaches to the ratio; it arose from long discussion about what constituted an acceptable equity and probably is a compromise between 4 to 1 and 5 to 1 on the basis that the former was a bit too liberal and the latter a bit too stringent. In the case of both sweat equity and the 4½ to 1 rule, the Bank is seeking to satisfy itself of the borrower's capacity for work and willingness to undertake it.

To date there have been no major problems arising from clan land lending. For any bank, the main problems in lending are substantial arrears of repayments and outright default. Clan land borrowers certainly have a record no worse in these respects than the Bank's other clients and in fact one that compares very favourably with rural lending in other less developed countries. Nevertheless, from a conservative banking point of view, the security is atrocious and amounts to nothing more than a stock mortgage. If a small-holder cattle borrower made the decision to default and slaughtered his stock before the Bank became aware that the loan was in jeopardy, the chances of the Bank's recouping would be slight. What is quite evident is that it has absolutely no power of disposal of the land because the borrower has no legal title to it, nor does the Bank have the power to dismantle and remove any structures erected on the land. However, clan land projects typically are a source of pride and prestige to the entire clan as well as to the borrower who is therefore under some pressure to meet his repayment schedule.

* International Bureau for Rural Development?
" Bank for Reconstruction + Development (?)

...../6,

Two problems can arise in the future, both concerning the successful borrower. On the one hand, the very successful small borrower who wishes to expand his project may, because of the jealousy and envy of the clan, be refused access to additional land. On the other hand, the borrower who has grown large by his own efforts and with further financial assistance from the Bank may find his possessions and even his person at risk. Probably it will depend largely on the successful man's willingness to share his affluence but there may be other factors. Sorcery is still very much a part of the lives of the great majority of Papua New Guineans and the Bank is aware of instances in which it has been claimed that the prospering small-holder has had supernatural assistance, and of other cases where sorcery has been invoked against the man thought to be enjoying undue success. In one Sub-District the house of a man who was obviously doing much better than his neighbours was put to the torch, part of his fences destroyed and some of his trees damaged, while threats were made against his person. In another part of the country an indigenous borrower who had developed to a very large scale of operations travelled and slept with a loaded shotgun at his side.

As a general rule, it is probably true to say that the "big man" who shares his success with the clan in what is regarded as a satisfactory way will be a source of pride and relatively little discontent. However, there is mounting evidence in Papua New Guinea, as in other less developed countries, that while the extended family system is acceptable in conditions of more or less uniform poverty, the person whose larger income must be shared among distant relatives and unrelated clan members, together with the person whose accumulation of assets is severely inhibited by the extended family are becoming increasingly disenchanted. There are two forces here, working in the same direction to restrict development, namely, resentment of the individual who does not adequately share his greater income and wealth and the individual's resentment of a social structure that obliges him to share.

The Development Bank is well aware that sometimes the brother's coffee or the cousin's cocoa helps to pay off the cattle loan. Where the individual's affairs have grown large, and particularly if he has not discharged his social obligations to the satisfaction of the clan, assistance with repayments is not likely to be forthcoming. In these circumstances it may be that the clan will have no difficulty forgetting that the borrower was once a source of pride and may actively seek his downfall. This is only to suggest the possibility, not to prophesy the certainty, of greatly increased problems of default and arrears of repayments as some borrowers expand their operations. The experience to date is encouraging but cannot be taken as a firm guide to the future, and it probably is true that no-one knows how individuals and groups will react to failure of large ventures on clan land.

...../7,

In respect of land tenure in this country, the Bank's lending programme on clan land may be held to be both a good thing and a bad thing. As it becomes accepted that the Bank cannot lend on land which is in dispute, there will be a stronger inducement for neighbouring clans to settle their differences. The highly ritualized, inter-clan warfare typically is carried on in the valleys while, for security reasons, the villages are built on hilltops. This normally means that the most fertile land is the scene of fighting and, of course, is the land in dispute. Realization that the most fertile areas cannot be the basis of Bank lending could lead to fairly rapid decisions on permanent clan boundaries. This obviously would be desirable. Working against it is the knowledge that it is possible to borrow for projects on some clan land and therefore there is less pressure to demarcate and subdivide to individual freehold title. If all land in Papu New Guinea were crown land or freehold, then the Bank's security could be greatly enhanced by taking a charge over the land and, presumably, the already high rate of increase of rural lending could be accelerated, subject only to the availability of adequate extension services.

In Kenya, Jomo Kenyatta had the prestige and courage necessary to force a programme of tenure conversion. It is difficult to believe that rationalization of land tenure in this country can be postponed indefinitely but it will be a brave House of Assembly that initiates the process. Taking a very long ~~new~~ run view, the Bank must accept that the developmental effect of its clan land lending may be partly counteracted by reversion of land to the original users on the death of borrowers. The man who travelled with the shotgun died recently and it is said that there are several hundred claimants to his estate.

The Development Bank believes that its innovatory clan land lending is in the best interests of Papua New Guinea and, hopefully, the future will judge it so.

LAND DISPUTES IN THE NEW GUINEA HIGHLANDS

- a personal view -

by

M.B. Orken

Senior Commissioner

Land Titles Commission

Goroka.

- - - -

When I was leaving Port Moresby in May 1959 to take up my appointment as Native Land Commissioner(1) in the Eastern Highlands, the then Chief Commissioner, the famous Ivan Champion said to me in his quiet way "There are a lot of disputes over land up there and the people sometimes get quite angry over them".

I had known, and worked with, Ivan Champion for many years and I was fully aware of his calm and undramatic ways, but surely what he said to me must have been the understatement of that year, because I soon realized that there were literally thousands of disputes over land and that the parties to these disputes not only "sometimes got angry" but they more often than not engaged in pitched battles resulting in deaths, serious injury, destruction of property and much social unrest, inhibiting the peaceful and orderly development of the area.

Why is it that the Highlands districts of Papua New Guinea have become notorious for the frequency and the virulence of their land disputes? In this personal narrative I shall attempt to analyse this situation, in the light of my 13 years experience of the people and the area in which they live. I will also discuss some of the several attempts which have been made by the Legislature to provide a legal framework within which disputes over land can be resolved with consequent benefit to the economic, social and political progress of the people.

I suppose the quick answer to the question of why people in the Highlands fight with such frequency and ferocity over disputed land would be that there must be a grave shortage of arable land, and this factor plus the spectacular population growth over the past 20 years or so has produced tensions and rivalries which culminate in bloody and serious breaches of the peace.

These conditions are certainly present in such areas as most of the Chimbu and in the Wabag sub district of the Western Highlands District and undoubtedly they contribute a lot to the land dispute problem.

But there are two other circumstances which, whilst they have been known for many years, do not appear to have the attention focused upon them which their importance justifies. They are as follows:-

(1) The inherent physical aggressiveness of the people:-

I believe that there is a marked cultural emphasis, in all Highlands groups, on physical aggression. In pre-contact years, and for many years thereafter - if indeed it has ever ceased - inter tribal warfare was the most constant and popular social activity. An early Kiap in the Chimbu area, the late Leigh Vial, used to say that "they fight for fun" and in the light of the history of these people over the years, that was not the superficial judgement it might at first glance appear to have been.

They find their "fun" in fighting because physical aggression is the "warp of the cultural pattern" as Dr. K.E. Read[(2)] has pointed out. "Both men and women are volatile, prone to quarrelling and quick to take offence at a suspected slight or injury. They are jealous of their reputations, and an undercurrent of tension, even latent animosity accompanies many interpersonal relationships. Dominance and submission, rivalry and coercion are constantly recurring themes and there is an unmistakeable aggressive tone to life. The majority of social rewards go to the physically strong and self assertive, to the proud and the flamboyant, to the extroverted ex warrior and orator who demands, and usually obtains, the submission of his fellows. As a result we find that people are markedly aware of themselves as individuals and the majority of social situations reveal a high degree of ego involvement".

Read wrote these comments about the Gahuku Gama in 1953 and in all my dealings with the people in the hearing of land disputes I am constantly coming across individuals with all the characteristics enumerated above.

These then are some of the people who were presumably in the minds of the legislative draftsmen when they were writing the preambles to the Land Titles Commission Ordinance 1962 and the Land(Tenure Conversion)

Ordinance 1963. It is sad to have to write that hopes of "expeditous and final determination of disputes as to rights in land[3] "are as far off as ever; and that the "universal recognition" given to "judicial authorities independent of control by the Government of the day, doing justice to all parties in accordance with the law[4] is seldom extended in the Highlands where, very often, the unsuccessful parties to a land dispute threaten the Commissioner with violence[5] and where during the actual hearing there is always an air of tension and apprehension of violence.

(2) The growing realisation that land is an economic asset:-

Despite the fact that "conquest" and the quest for more favorably situated land was an important element in the incessant tribal wars in the Highlands of the pre-contact period, I am convinced that it was not until the early 1950's (and in some areas of the Southern Highlands until the early 1960's) that land came to be regarded by the people as a source of money i.e. as an economic asset rather than a magico-religious entity in which the concept of ownership rights has been described as "something enjoyed by the living, in trust for the yet unborn, in order to propitiate the feelings of the dead."[6]

The stimulus to the change in native attitudes to land came when the idea of indigenous participation in cash crops such as coffee, market garden vegetables, peanuts and timber was introduced into the area notably when Ian Downs was D.C. at Goroka in the early 1950's.

The quarrels and the disputes which attended the early alienations of land were largely, in my opinion, more a matter of maintaining and establishing prestige as the group with whom the Administration was dealing, than issues aroused by the wish to acquire sums of money by the sale of land although of course, there were individuals who right from the start were aware that the sale of land and the presence of European farmers could add to the money income of the people.

It is important to realise that in pre-contact days there was very little permanent settlement on or utilisation of the land situated on the valley floors. Most groups lived a hamlet like existence on ridges or elevated river flats and the group itself was almost invariably an extended family one or patrilineage.

John Black, who was Jim Taylor's companion on the Hagen/Sepik patrol of 1938/39 and who was in the Bena area before that date told me in a personal communication shortly after I came to Goroka in 1959 that "land was not at a premium then (in 1936) as it is today (1959)". He further stated that "in my view it is only because of Government power that anyone has come down from the ridges and the hills to live on the valley floors" and even at this very time (1972) there are still very considerable areas of open land which are not occupied in any way, save for the adventurous few who have cautiously infiltrated into the area and made subsistence gardens and a few pig houses there following upon the opening up of roads and patrolling of the area.

And should these adventurous people wish for example to establish a cattle project, or plant coffee, or start a trade store, then it is certain that members of a rival group will violently dispute their right to do so.

The following figures will I hope make clear the point I am trying to make here regarding the increased awareness by the natives of the economic (i.e. money) value of land over which they claim ownership:-

In 1949/50 some 911 acres of what is now part of the Town of Goroka was purchased from the adjacent Gahuku/Gama groups for £1541.

Jim Taylor was the District Officer at the time of this purchase and all those who know this remarkable man would unhesitatingly agree that he would not have gone ahead with the purchase had there been the slightest reason to believe that any injustice was being done to the native controllers of the land or that they were being paid anything other than a fair price.

Last year in 1971, an area of native land of not more than 1 hectare (2½ acres) in extent, in close proximity to the western town boundary was offered to the Administration for $13,000! And I know of other slightly irregular dealings by some Europeans with native controllers of other land near the town boundary, where sums of more than $1500 per acre have been paid over(7).

We now have what I consider to be the three main reasons why disputes over land occur with such frequency, and are pursued so bitterly, in the Highlands.

They are:-

(1) the growing pressure of increasing population on available arable land

(2) the natural aggressiveness of the people who but a scant 40 years ago (and in some areas only 15 years ago) found an outlet for their aggressiveness in incessant tribal fighting

(3) an appreciation of the amount of money that can be obtained for the sale, lease, or cash cropping use of land if ownership rights to it can be established and recognised.

The typical dispute over land arises out of broadly two main circumstances e.g.

(1) an attempt by a group to assert control and ownership rights over portion of the GA'ME MIKASE (lit. 'No Mans Land') or Buffer Land which separated the limits of the territory of rival groups

(2) an attempt by a group to regain control and ownership rights over land from which they had been driven away in pre-contact days.

In the first example, these areas of no mans land were seldom occupied or utilised for any length of time apart from a dominant (for the time being) group burning the kunai on it, collecting nuts and hunting rats, snakes and small marsupials. Groups on each side of this sort of land have in the past 25 years gradually infiltrated into it. The value of these buffer lands has become greater for each disputing group and conflicting claims to control and ownership rights are pressed with increasing bitterness and violence. Each group regards the other as an interloper, neither is prepared to yield an inch, no compromise is acceptable, and both groups advance reasonably good arguments in support of their respective claims to the land.

The sort of evidence one receives during a hearing which attempts to unravel the tangled skein of conflicting claims to the GA'ME MIKASE is concisely expressed in the following lines composed by a young Kiap who has often assisted me in my work in the Highlands:-

"I'd like to ask a question", the Land Commissioner said
'Who owns this tract of land?
It's mine, it's mine, all of it's mine
My grandfather's blood spilt on that hill
My mother washed me in that creek
My brother's buried 'neath that bamboo
I walked with Taylor here and gave him a pig
I helped Mick Leahy look for gold
Old Sergeant UBOM seduced my sister here
It's mine, it's mine
All of it's mine
And the other people are all liars"!

And in Read's view "Those who attempt to decide ownership of the buffer lands....face an impossible task. They cannot, I feel sure, give a decision which will satisfy everyone concerned"(8)

The other typical land dispute is concerned with land from which a group was dispersed or lost control over in the period before effective administration control was established in the area. In other words, can recognition be given to the acquisition of land by right of conquest, remembering the context of the situation in the Highlands as I have described it.

The argument and counter argument in these cases can be summarised shortly as follows:-

Group A:- "We were strong and we defeated and dispersed the other side in the many fights that took place before the Government came. We have controlled and utilised this land ever since that time and we were in control of it when Taylor(9) and other white men came into the area. We have established gardens on the land, planted trees there and we have houses on it. Our burial and ceremonial grounds are situated there. In recent years we have planted coffee and peanuts

on the land and we have disposed of some of it to the Administration and we were the only ones to get paid for it. It is ours, and has been ours ever since the white man came."

Group B:- "It is true that Group A dispersed us from this land before the white man came. But we would have recovered this land if it had not been for the Kiaps who came and stopped us from fighting and defeating our enemies(Group A). That is our traditional way. The other side have only been on this land since the Administration came. We had been on it for many years before that time. We also have burial and ceremonial places on the land and we also planted many of the trees on it".

How does one resolve this sort of dispute? Again, in the overwhelming majority of cases, neither side is prepared to compromise, yield any of their alleged rights or concede any virtue in the arguments of their opponents.

When I first commenced hearings in the Highlands and I was confronted with the sort of situation described above, I inevitably found in favour of the group which could prove their occupancy and control over the subject area since the time of effective Administration influence.

This was not an arbitary step on my part. It was settled (if unwritten) Administration policy to so act, and from the point of view of the practicabilities of the situation, it is difficult to criticise e.g. no less an authority than the late Sir Beaumont Phillips C.J. once commented "it is not sufficient proof of ownership I consider, for claimants merely to show that certain land was once occupied by their ancestors years ago"(10).

And surely, in the name of common sense, a start must be made at some specific time and what better time to select than the time of effective Administration control, i.e. when tribal fighting has been put down, census taken, missions and private enterprise permitted to come into the area and in general, when the PAX AUSTRALIANA was established and recognised.

Yet one must admit that the fixing of tribal boundaries as at the date of effective Administration control can work some hardship on certain groups. It means, in effect that some groups will have comparatively little land and of course it does nothing to solve the problem as to who should be regarded as having controlling rights over the "No Mans Land" or buffer areas. My reply to this is that these are particular cases and "particular cases make for harsh law." Perhaps in time, groups which are at present short of land will benefit by re settlement in other areas.

I now turn to a discussion of the several attempts which have been made by the Legislature of Papua New Guinea to introduce a legal framework within which it is hoped disputes over land will be resolved with as little dislocation as is possible to the existing social order.

What needs to be stated first is that there seems to be little clear legal definition comprehensible to the native people, of what constitutes "Native land", either in the form of statutory provisions or judicial pronouncements. It is true that Sec.6(1) of the Ordinances Interpretation Ordinance 1949-1964 defines native land as "land which is owned or possessed by a native or native community by virtue of rights of a proprietary or possessory kind which belong to that native or native community and arise from and are regulated by native custom". This is no doubt perfectly explicable to their Honours of the Supreme Court and the legal profession generally. It may well be that the majority of Kiaps know what the Section means and I hope all Land Commissioners do also, but try to explain (in Pidgin or the Vernacular) what is meant by "rights of a proprietary or possessory kind" to a crowd of angry Wabagas and see how much they comprehend!

The pronouncement of the High Court of Australia, with all respect to the members of that august tribunal in Geita Sebea's case[11] that native "interests in customary land are no smaller in scope and no less beneficial than the rights of ownership possessed by Europeans owning freehold land" and that native title to land is "a communal usufructuary occupation with a perpetual right of possession in the community equivalent to full ownership" is of little help to a Land Commissioner trying to resolve land disputes of the nature I have outlined earlier in this paper.

Again, as far as I know, there are no legislative provisions or judicial pronouncements in Papua New Guinea dealing with the acquisition by natives of rights to native land by either conquest or prescription and as the Land Titles Commission is a judicial body (albeit "it is not bound to observe strict legal procedure or apply technical rules of evidence but shall admit and consider such evidence as is available")(12) surely the first question it must decide when hearing a dispute is whether or not, according to the tests enumerated above, any of the groups involved qualify as having legal rights to the disputed land, and indeed, in some cases whether the land is in fact native land as defined above.

In a hearing by the Commission(13) held at Goroka in 1963 concerning an area of buffer land known as YAHILIBIGA, the then learned Chief Commissioner (Mr. C.P. McCubbery) who presided at the hearing found that "in this particular matter....there were no interests by way of customary tenure existing in the land at any of the relevant dates, there was no effective occupation at the time of the assumption of German Sovereignity, there was none at the time of the first administration patrols and there was none up until the outbreak of World War 2.... The position in strict law then is that the only permanent interest existing in the land is the basic or radical title of the Administration, as successor to the original sovereign, the Government of German New Guinea. Nevertheless it is clear that the Administration does not desire to press for its full legal rights in the vast majority of cases and is content to allow "the Commission to declare native interests even where there is considerable doubt whether such interests exist in strict law" (my emphasis).

In the event the learned Chief Commissioner divided the land by delineating a boundary between the territory claimed by the disputing parties which was, in his opinion "based on substantial justice to the parties and in accordance with the rules of natural justice".

It may be added that periodically the boundary has been violated by the respective groups, and there have been numerous brawls and disturbances following these violations(14).

Referring now to the existing legislation under which the Land Titles Commission operates.

The Land Titles Commission Ordinance 1963 (and the amendments thereto enacted over the past 9 years) has been the subject of much detailed examination and criticism by some highly regarded authorities such as Rowton Simpson[15], the Advisor on Land Tenure to the U.K. Ministry of Overseas Development and Professor R.G. Crocombe[16] of the University of the South Pacific.

The Ordinance was due to be repealed by one[17] of the four Land Bills introduced into the House of Assembly last year but these measures were deferred because of the 1972 elections. It appears that consideration of these Bills will be one of the most urgent matters the new House of Assembly will have to consider during its lifetime, but whether they will be accepted without substantial amendment is open to doubt, and whether they will be passed this year is also doubtful.

Both the present Ordinance and the proposed new Ordinance are the products of much detailed study and imaginative thinking by capable, experienced and dedicated legal draftsmen and administrative officers. The proposed new Bill was only brought down after a study group had visited Kenya where it had the advantage of consultation with Mr. J.T. Fleming, Land Tenure Advisor to the Kenyan Government and also the benefit of seeing the Kenyan legislation in operation.

But in my respectful view neither the new legislation nor that which it is proposed to repeal contains anything which will shatter the rock of native intransigence so far as the settlement of disputes, particularly in the Highlands, are concerned.

With all the goodwill and legal ingenuity in the world it is possible to draft legislation which is impeccable from the point of view of a community imbued with respect for the Rule of Law and therefore prepared to accept, all other things being equal, the decision of the tribunal hearing the matter in dispute.

But, as I have endeavoured to show in this paper, that is just not the situation in the Highlands of Papua New Guinea. Apart from the vaguenesses and complexities of the legal issues involved, even if by some magic all these could be cleared away in a manner comprehensible to the people, I fear that for many years to come it will only be on very rare occasions that the parties to land disputes in these areas will show the qualities of reason and compromise so necessary if a decision acceptable to all is to be brought down.

When this happy state of affairs will come about is anybody's guess. Undoubtedly spreading education; the realisation that economic growth is being retarded by non use of good land because of disputes over ownership; the growth of a sense of national unity - all these factors and others will cause a change in the thinking and attitudes of the Highlands people to their land.

It is too late now for an expatriate dominated Administration to legislate for all land to be regarded ultimately as the property of the State, and at the disposal of the State, but perhaps an indigenous government of an independent Republic of Papua New Guinea will not shrink from this step.

Land reform in this country, including methods to resolve disputes in the Highlands will be as traumatic an experience to the people concerned as were the Enclosure Acts of the 18th century to rural dwellers in England and the collectivisation of agriculture to the Kulaks in Russia in the early years of the Soviet regime.

One hopes that totalitarian government and its methods will not be resorted to by future independent governments of Papua New Guinea, nevertheless if the land problems of the country in general and of the Highlands in particular are to be solved to the ultimate benefit of the country as whole, all the circumstances preventing this solution must be eliminated as ruthlessly as the situation requires.

NOTES:-

(1) The Native Land Commission was established under the provision of the Native Land Registration Ordinance 1952 "to enquire into and determine (a) what land in each district of the Territory is the rightful and hereditary property of natives and native communities by native customary right and (b) the natives or native communities by whom and the shares in which that land is owned". It was replaced by the Land Titles Commission in 1963, following the introduction of the Land Titles Commission Ordinance 1962.

(2) Read carried out field work in the Eastern Highlands in 1950-52 and has written extensively about the GAHUKU-GAMA an Eastern Highlands group. I believe what he describes of these people to be substantially true of all Highlands groups in my experience. He was one of the first people I contacted when I started work in Goroka in 1959 and he was of great assistance to me and has allowed me to quote from his writings. He is now, and has been for some years, an Associate Professor of Anthropology at the University of Washington, Seattle, U.S.A.

(3) & (4) Preamble to the Land Titles Commission Ordinance 1962-68 lines 1 and 7-10.

(5) From 1960 to 1971, whilst engaged either in preliminary investigations into disputes or holding actual hearings I was involved on 15 occasions with acts of violence committed by one or both of the parties concerned.

(6) I do not know the source of this statement and I am quoting it from my recollection of having heard James McAuley use it when he was my lecturer at A.S.O.P.A. in 1950.

(7) It is not my purpose here to condemn these arrangements. In my view they transgress the Land Ordinance, but the native parties and the Europeans concerned seem quite happy about the deals which have taken place. And so the natives should be, for if any dispute arises then the European involved could not enforce the agreement he has paid so dearly for.

(8) K.E. Read:- "Notes on the Asaro, Jameguka and Laruepe peoples of the Goroka Sub District" (1953). Manuscript in my possession.

(9) J.L. Taylor who established the Upper Ramu Patrol Post (now Kainantu) in 1932. In 1933 he and M.J. Leahy led a combined administration and private enterprise expedition from Bena Bena to Mt. Hagen and in 1938/39, he and J.R. Black led a patrol from Mt. Hagen to the headwaters of the Sepik River. His name has become a symbol for every whiteman who first penetrated a Highlands area, e.g. I have heard it used in connection with the first patrols around Ialibu in the Southern Highlands in 1952/53, some years after Taylor retired from the Administration. He is still alive and lives near Goroka. He has been of tremendous assistance to me in my work.

(10) These comments were made in the early 1920's when His Honour was then a Land Commissioner in the British Solomons and was reporting on native claims against Lever Bros. in respect of their Certificate of Occupation over certain waste lands. They were published in Colin H. Allan's work "Customary Land Tenure in the British Solomon Islands Protectorate".

(11) (1941) 67. C.L.R. 544.

(12) Sec.29(1) Land Titles Commission Ordinance 1963

(13) YAHILIBIGA No. 45/46 of 1963.

(14) I believe that an appeal against Mr. Chief Commissioner McCubbery's decision was lodged in 1964, but so far as I am aware, the Supreme Court has not yet heard it.

(15) See "Land Problems in Papua New Guinea" by S. Rowton Simpson; New Guinea Research Bulletin No.40, Mar. 1971.

(16) See "Land Tenure in the Pacific (ed. R.G. Crocombe) O.U.P. Melbourne 1971. P.316-317).

(17) "A Bill for an Ordinance to provide for the establishment of a Land Titles Commission of Papua and New Guinea for the expeditious and just determination of disputes as to the ownership of land".

Custom and Land Law in Papua New Guinea.

C.W. Kimmorley

I. Introduction

There are people who will assert that native society in Papua New Guinea has few institutions, and that these that do exist should be done away with and replaced by better ones. By better ones the person with this attitude usually means those ones familiar to him, of which he approves.

Even where this attitude is not expressed or held, in practice it or something very like it seems to have prompted some of the makers of Government Policy for that country, for administrative officers have often been intent on introducing new institutions and ways of life, with little regard for those already in existence. They have mostly done this with the best of intentions, "for the good of the people", and because existing institutions have been considered of small value, it has been assumed that they can be discarded with little effect on the lives of the natives.

But native institutions affecting land tenure, marriage, sanctions for maintaining order and so on are not things of little worth, and the people are loathe to let them go. They have practical and emotional value to them and they are integrated but usually the new thing offered is isolated from the other things. They are not well understood by Europeans, because among other things, they differ from the ideas of Europeans and so are not readily apparent to them. This is unfortunate because it has been known for a long time that in governing people, whether the government is an outside one, or of the people themselves, the greatest degree of acceptance of new ideas will be achieved if they seem familiar.