

# BUSINESS AND THE LAW IN PAPUA NEW GUINEA

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A striking anomaly in Papua New Guinea is the extent to which economic activity on relatively low levels remains in the hands of persons who are culturally distinct from the majority of the people. Just as political activity was until recently the monopoly of the Australian colonialists, economic activity remains dominated by expatriates, and it is only in the last year or so that a glimmer of hope for locally-owned economic interests has appeared.

One factor responsible for the difficulties Papua New Guineans encounter in trying to enter commercial activity is the complexity of the laws relating to mobilization of capital and, to a lesser extent, to credit. There exist in Papua New Guinea large reserves of capital that could be mobilized. Indications are that savings from cash-cropping alone amount to tens of millions of dollars. However, even when the people are motivated to mobilize this capital, the legal apparatus designed for a totally different economic and cultural framework stands in their way.

This paper will not deal with current forms of business organization in Papua New Guinea, which, in general are owned or controlled by expatriate individuals or companies. The laws of Papua New Guinea relating to business organisation resemble closely the laws of the Australian states, and while reform in this area may be desirable, it is not appropriate to discuss it here. The problems in relation to businesses owned by Papua New Guinean people will not be solved by tinkering with existing laws,

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but by devising new forms of legal organization that correspond to the ways Nuiginians in fact organize themselves for activities of a commercial or partly commercial nature.

My conclusions are the result of observations of Nuiginian business groups over the period May 1970 to February 1973, and of discussions with various officers of the administration, especially of the Business Advisory Service. The observations were not an exercise in sociology. I was not concerned so much with the way in which traditional societies give rise to business enterprise, nor to the effects which business (in the Western sense, rather than in the sense of the Pidgin term "*bisnis*") has on traditional societies.<sup>1</sup> I have neither the sociological skills nor the resources to do what others have already done well.<sup>2</sup> I examined the suitability of the forms of business organisation available under imposed (i.e. Australian) law for the types of business carried on by Papua New Guineans, and the need these businesses have for legal services of the type normally provided by solicitors for small and medium-sized businesses in a more developed economy.

#### I. The Number and Type of Businesses Owned by Papua New Guineans

It was impossible to make a study of every commercial activity operated by Nuiginians. No exhaustive study was made of any one business, though more attention was given to some than to others. Nor was the study much concerned with business operating in the large urban centres of Port Moresby, Lae and Rabaul, as it was assumed that in those places entrepreneurs are more sophisticated and to some extent removed from traditional social organisations.<sup>3</sup>

Almost all businesses owned by Nuiginians are either service industries of one kind or another or cooperatives which operate

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1 In Mihailic, *Grammar and Dictionary of Melanesian Pidgin* (1958) "*wok bisnis*" is defined as "any business enterprise for making money." The cargo cult connotations of the word are discussed in Ogan, "Business and Cargo" (1972) *New Guinea Research Bulletin* No.44, especially at 164.

2 See for example Finney, "New Guinean Entrepreneurs" (1969) *New Guinea Research Bulletin* No.27;  
T.S. Epstein, *Capitalism, Primitive and Modern* (1968);  
R.F. Salisbury, *Vunamami* (1970);  
A.L. Epstein, *Matupit* (1969); Ogan, *op.cit.*

3 A study conducted by Dr. Lesley Andrews in Port Moresby may show whether this assumption is justified.

primarily in the rural sphere. The most common activities are transport, trade and other retail store operations, and construction and painting. There are also furniture factories, weaving operations, tourist promotions and some other activities. There are some companies formed to carry on farming, timber collection and market gardening.

TABLE I

Forms of Business assisted by the Business Advisory Service in Papua New Guinea, June - September 1971.

Sole Trader	146
Partnership*	48
Company	25
Group *	51
Association*	6

\* It is not certain to what extent these three classifications overlap: probably the degree of overlapping is considerable.

The types of business organisation adopted follow a pattern. Few of the businesses observed are incorporated, though there are several companies. The majority of Nuiginian businessmen are sole traders; there are a few partnerships in the accepted legal sense, some of which carry on business under registered business names.<sup>4</sup> In almost every area there are groups of people related or bound by traditional clan, family or village ties, who have pooled their resources for a common business purpose. Sometimes this purpose appears to be purely profit but more often it appears to be at least in some measure, the provision of a service to a community which otherwise would go without. Occasionally, the sole purpose of the enterprise might be said to be the prestige of the individual involved.

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4 Table I. is compiled from figures made available by Mr Paulias Matane, Secretary of the Department of Business Development, showing the types of businesses employing the Business Advisory Service during 1971.

What was obvious was the relatively small number of Papua New Guineans who are engaging in any form of economic activity except as an adjunct to subsistence farming activities. Almost all wholesale trade manufacturing, retail trade other than in trade goods, agency work and service industries requiring technical skills (such as motor workshops) are owned by Europeans, although a large part of the staff is local. Any larger-scale activity is rarely apparent.

Towards the end of 1972 another form of commercial organization began to emerge. The largest and best known of these is the New Guinea Development Corporation Ltd. (NGDC) based near Rabaul. This company is the brainchild of Mr John Kaputin M.H.A. who is chairman and managing director. It is closely associated with the Mataungan Association and the Warkurai Ni Gunan, an all-Tolai local government body. All three bodies sprang from the discontent of the well-educated and relatively wealthy Tolai people of the Gazelle Peninsula with political and economic domination by Europeans. Three years of educational activity and consciousness - raising were required before the corporation was formed. It has, so far, purchased interests in trade stores, transport businesses, cocoa fermentaries and plantations. The leaders of these movements realize that progress may be slow and mistakes may be made, but that only a self-help movement based on strong grass-roots support can succeed in giving the people control of the economic activity of their area.

Another self-help organization is the Tutukuvul Isukal Asosiesn (United Farmers Association)(TIA) which has operated in the New Hanover sub-district of New Ireland since 1966. The members of this association are almost without exception subsistence farmers, whose cash-cropping activities are minimal, and whose income and savings are low. TIA is, unlike NGDC, not profit-motivated, but aims to make life easier for the people of New Hanover, while they continue their present life-style. To some extent it is also an expression of dissatisfaction with the Australian administration, as it had its origins in the so-called "Johnson cult" which was not a cargo cult, but the expression of a wish that the Americans would replace the Australian administration and do something tangible for the people. TIA has planted over 100,000 coconut trees, and operates trading vessels, road building equipment, and a sawmill.

These two groups, together with similar groups being proposed or organized in the Trobriand Islands and the Eastern Highlands District, suggest that forms of economic grouping unknown in the West will be increasingly important in the economic and commercial future of Papua New Guinea. This form of organization will enable Niuginians to pool their resources, both labour and capital, to take economic activity into their own hands. It is quite different from - even opposed to - the economic organisations of expatriates

that have dominated the economic scene in Papua New Guinea.

## II. The Social Background

The majority of people in Papua New Guinea still live in rural areas and are basically dependent on subsistence agriculture. Traditional social pressures shape their lives, which centre generally around a clan, extended family or village. There exists still a good deal of pressure to conform to the traditions of such societies, and not to adopt new ways of living. Conversations with university students and others suggest that only the belief that education will bring great material wealth to the traditional group, induces some families to allow their children to leave the village for higher education. On the whole, the people have enough to eat from their subsistence activities and there is pressure on the young to remain within the community. In some rural areas in the Highlands, some of the most successful business people were social outcasts in their own communities.<sup>5</sup> Since these people were not faced with the pressure to perform traditional tasks or to conform to other social norms, they have more time to devote to their business activities.

Even in the more remote villages, there is a demand, though often limited, for consumer goods. Tinned meat and fish and imported rice have virtually become part of the staple diet. People want tobacco, cloth, metal tools, blankets and other trade goods. These goods were introduced by the missions, the planters and the administration, and many of the stores which sell such goods are still operated by plantations or missions. If there is no trade store in the immediate vicinity, people often wish to start their own, rather than face the need to walk for several hours every time they wish to purchase trade goods.

With the development of a road system in various parts of Papua New Guinea, there is also an increasing demand for transport services. The demand is due partly to the increase in cash-cropping (the source of much of the funds used for the purchase of trade goods), since cash crops must be transported to an urban

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5 At the Makia Model Village, near Goroka, a number of women who for one reason or another can find no place in their own agricultural communities have established cottage industries (belt and string-bag making, etc.). The village also includes the main workshop and store of Highland Weavers Pty Ltd. Many of the weavers who own shares in and market their goods through this company are also people who no longer fit into their traditional societies.

centre for sale or processing. Village people wish to have their own transport, to save cost, for convenience, and for prestige. One of the first moves of the TIA in New Hanover was to purchase a boat to transport copra to Kavieng, the nearest commercial centre.

Any business activity requires some sort of rudimentary record-keeping to operate successfully, especially where, as in a store, there is constant movement of stock. Record-keeping requires some education but literate and numerate people are likely to want to live in towns and able to find urban employment. Not only is the town-dweller more likely to have more skills, and better education, but he is also more likely to be free of traditional pressures.<sup>6</sup> The pressure in towns is directed to the gaining of wealth; the social aims are modelled as much on imported, as on traditional patterns. There is also a larger reservoir of skills - former clerks in the administration or private (expatriate-owned) enterprise. There are business advisory officers in some centres, and in the larger centres solicitors, accountants and other professional people who can assist a businessman.

Thus, Nuiginian businesses in the urban environment will differ in nature and also in structure from rural enterprises. The rural business is much more likely than the urban business to be organised on the basis of traditional kinship structures.

### III. Available Forms of Business Organisation

The forms of business organisation recognised and permitted by the present law of Papua New Guinea do not suit the nature and needs of Nuiginian businesses.<sup>7</sup> This study was conceived as a means of ascertaining the most pressing needs for law reform in the area, as well as examining the need of Nuiginian businessmen for legal services.

The Business Advisory Service classifies the businesses which are its clients as either sole traders, partnerships or companies.<sup>8</sup>

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6 N.D. Oram, University Extension Lecture delivered at the University of Papua New Guinea (1972). See also *House of Assembly Debates* (1970) 3223-3225 and 3295.

7 Nash "Legal Structure and Indigenous Business Enterprise: The Need for Change (1970) *New Guinea Research Bulletin*, No.35, 27.

8 See Table I.

In addition, some Niuginian business activity is carried on through cooperative societies organised under the *Cooperative Societies Act* and supervised by the Cooperatives Division of the Department of Business Development.

Only the more developed of the Niuginian owned businesses are operated as companies.<sup>9</sup> Many of these have considerable expatriate shareholdings, or at least advice from expatriates. Perhaps the most notable is Namasu Limited, a substantial trading company operating throughout New Guinea, which has a large native shareholding (and which advertises itself as 'kampani bilong yupela'). However, the Lutheran missions still play an important part in the operation of the company, and have contributed to its capital.<sup>10</sup> The New Guinea Islands Produce Company which was formed by some members of the Gazelle Peninsula Local Government Council is apparently advised by the Local Government Adviser. Other companies such as Palnamadaka Pty Ltd and Highland Weavers Pty Ltd are almost wholly owned by Papua New Guineans.

The company is the form of business organisation most often used when an expatriate transfers an interest in his business or land to a group of Papua New Guineans. In the Highlands such companies have been formed to carry on gravel quarrying, cattle raising and other forms of business.<sup>11</sup> In Madang a bakery is owned by a company with substantial Niuginian shareholding.<sup>12</sup> In Bougainville local shareholders have a majority interest in a company that operates a market garden and milk supplier, managed by an expatriate who has a small equity interest.<sup>13</sup> Some Niuginian tradesmen, particularly builders and painters, have formed companies.<sup>14</sup>

The minimum cost (excluding legal fees) of incorporating a company--including registration fees, stamp duty, printing costs, expenses concerned with the initial meeting, stationery, etc.--would exceed \$100. Since \$20 per week is a fairly high salary

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9 O'Connor, "Indigenous Shareholding" (1970) *New Guinea Research Bulletin* No. 35, 13; Fairbairn, "Namasu" (1969) *New Guinea Research Bulletin* No. 28.

10 *Ibid.*

11 Records of Business Advisory Service, Mt. Hagen.

12 Discussion with Business Advisory Officer, Madang, November 1971.

13 Records of Business Advisory Service, Arawa.

14 Records of Business Advisory Service, Mt. Hagen, Madang, Arawa.

for a Niuginian, the costs of incorporation make it feasible only for larger and more successful businesses, even when the basic documents are prepared by a Business Advisory Officer at a nominal charge. However, incorporated bodies have advantages by way of convenience in certain activities, such as making and enforcing contracts, holding and dealing in alienated land and borrowing money. Their great disadvantage in the Papua New Guinea context is the excessive complexity and formalism required by the *Companies Act 1964*, which is a version of the Uniform Companies Acts of the Australian states. This document runs to about 300 pages and if the amendments recently adopted in New South Wales and Victoria are also adopted in Papua New Guinea, the total will be nearly 500 pages of complicated statutory English, virtually incomprehensible even to lawyers and accountants whose first language is English. One wonders how meaningful all this language would be to a Papuan carpenter with four years of primary education - a relatively well-educated person in Papua New Guinea.

Cooperative societies have existed in Papua New Guinea since the early 1950s and have achieved varying degrees of success. In Madang, New Ireland and East New Britain many cooperative societies have been or are being wound up.<sup>15</sup> Others, such as the Enga Cooperative at Baiyer River, near Mount Hagen, are efficient and profitable businesses.<sup>16</sup> Almost all cooperatives in Papua New Guinea are rural primary cooperatives, which buy primary produce from members and re-sell it, either to a cooperative marketing society or in the open market. Such societies also commonly operate trade stores. Secondary societies, such as the Wholesale Cooperative Society Ltd serve the needs of the primary societies by providing wholesale goods, services and transport.

The general impression I have formed from discussion with officers of the Cooperatives Division in Port Moresby and elsewhere is that the cooperative movement has not been as successful as might have been hoped. There could be several reasons for this lack of success. One may be the structure of the cooperative movement as imposed by the *Cooperative Societies Act 1965*. Under this act the Registrar is given a wide range of

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15 Discussion with Assistant Registrar of Cooperatives, Goroka, November 1971; he is liquidator of many of these societies.

16 Records of Cooperatives Office, Mount Hagen; discussions with Cooperatives Officer, Mount Hagen, November 1971.



powers and discretions relating to the affairs of individual societies.<sup>17</sup> These were designed to enable the Registrar to supervise, guide and assist the societies in activities which might be completely novel to most of the members. However, the effect seems to have been to place a bureaucratic dead hand on some of the activities of cooperatives, with a markedly adverse effect on the societies' business activities.<sup>18</sup> Another problem may be that, despite hard work by cooperative advisors and officers and enthusiasm by all the staff of the Division of Cooperatives, the philosophy of cooperations has not received much support from Australian governments after 1949. Had a concerted effort been made to organize and support cooperative activities, especially at grass-roots level, cooperatives would have been much more successful.

In the case of both company and cooperative, the social and the formal aspects of commercial reality do not coincide, at least for the majority of businesses owned by Nuiginians.<sup>19</sup> The formal structure of a company or cooperative, with a board of

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17 See e.g. Division 3, Part II of the *Cooperative Societies Act 1965*.

18 In November 1971, the adviser to a cooperative in the Highlands, who should not be named, stated that the cooperative in question, which had considerable assets, wished to seek a revolving credit from a commercial bank in order to obtain working capital to purchase coffee in rural areas, in competition with private coffee-buyers. Approval of the registrar to such credit arrangements was required under S. 42 of the Act. The approval was not given by the beginning of the season and in order to have cash with which to purchase any coffee at all, the society entered into an arrangement with a private company, under which the cooperative was in effect appointed agent to buy coffee for cash (provided by the company) and to re-sell it to the company at a fixed price. Because of the level of the re-sale price, and the prices paid by competitive coffee-buyers for coffee at the roadside, the profit margin for the cooperative was minimal, business was not possible and the cooperative withdrew from the activity. The Adviser suggested that had the bank credit been available, and as a result the cooperative had been able to re-sell the coffee in the open market, instead of being forced to re-sell to the company, the activity would most likely have been successful.

19 M. Nadkarni, UN Adviser to the Department of Business Development, Address to the Papua New Guinea Society (1970).

directors elected by the members, is an artificial structure. This of course is equally true in Western society.<sup>20</sup> But whereas in a large Western corporation the artificiality occurs because the management dictates the affairs of the corporation, in Papua New Guinea there is artificiality because the policy decisions are either made by an expatriate or, alternatively, settled in traditional manner, by lengthy discussion on traditional lines, ending in a compromise solution which is more or less satisfactory to all the participants.<sup>21</sup>

Because of their means of making policy decisions and of apportioning liability for the business, it is probably true to say that partnership is the legal form of business organisation most closely approximated by groups of Niuginian businessmen. In at least some cases a person who has contributed to the business by providing capital, goods or labour feels entitled to a voice in the management of the business and perhaps to a share in the profits.<sup>22</sup> It appears that family or clan members are bound, by traditional rather than business ties, to meet the obligations of the business from such personal resources as they have available. Some anthropological research into the extent of personal obligations to meet business debts would, in my view, be worthwhile. Such attitudes appear common even where, as in most cases, the members of the group are content to leave the actual management in the hands of one or two of their numbers who may have education, skill or experience, perhaps in expatriate-owned businesses or cooperatives.

However, two things prevent many of the businesses operated with clan-group participation or capital from being regarded as partnerships in the proper sense. First, section 14(3) of the *Companies Act* prohibits the association of more than twenty persons for business purposes, unless they are incorporated either under the *Companies Act* or under some other legislation. Many of the businesses recorded on the files of the Business Advisory Service as partnerships have up to 35 members, and some have more.<sup>23</sup> Second, in some cases at least, the groups are not

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20 A.A. Berle and G.C. Means, *The Modern Corporation and Private Property* (1932).

21 Discussion with Business Advisory Officers, particularly in Mt. Hagen and Kavieng. One of their functions has been to mediate in disputes between the participants in various businesses.

22 Records of Business Advisory Service, all centres.

23 *Ibid.*

associated for the purpose of gain even in the rather broad sense in which that term is used in the *Companies Act*.<sup>24</sup> Whether a trade store or truck makes a profit may not be a matter of concern to people for whom the social need is greater than the monetary one; if the losses are not too great, the members of the group are prepared to bear them. The profit motive as such is absent.<sup>25</sup> While there are a great many businesses carried on by Niuginians where the profit motive is dominant, others are motivated by social objectives.<sup>26</sup> The TIA in New Hanover is an example.

Even where a business is carried on for gain, records on occasion show a distribution of profits in accordance with the custom of the group.<sup>27</sup> In some cases, members expect, instead of or in addition to cash profits, participation in the benefits of the business--for example, free transport of themselves and their goods, or indefinitely extended interest-free credit. The fulfillment of these expectations may lead to the failure of the business.<sup>28</sup>

Unlimited liability of each of the partners is a feature of partnership in English Law.<sup>29</sup> In some traditional Papua New Guinea societies, each member of the society is obligated to assist other members to meet their needs, even such needs as payment of instalments under hire-purchase agreements.<sup>30</sup> Dis-

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24 The expression used in s. 14(3) and s. 314 of the *Companies Act 1963* is "purpose of gain." This has been defined to mean not only pecuniary gain or commercial profit but also mutual benefit. *Re Arthur; Average Association*(1875) L.R. 10 C.P. 542, 546.

25 Personal observations and discussions in New Ireland (Nov. 1971 Eastern Highlands (April 1972) and discussions with Business Advisory Officers in several districts in late 1971.

26 Nadkarni, *op. cit.*

27 See footnote 25.

28 Papers delivered at Third Waigani Seminar (1969) by D.A. Elder, O. Oala Rarua and K. Savage.

29 See P.F.P. Higgins, *The Law of Partnership in Australia and New Zealand* (1970) 16.

30 Records of the Business Advisory Service in several centres suggest that businessmen have looked for funds to persons who have customary or kinship obligations to them.

cussions with Development Bank agents, Business Advisory Officers and others in contact with Niuginian businessmen outside the large urban centres induce me to believe that limitation of liability is not yet a concept which has much meaning for Niuginians.<sup>31</sup> Where a company is the obligee under an agreement, and it is unable to meet the obligations from its own resources, individual members of the enterprise may feel bound to contribute to the obligation from their own resources.<sup>32</sup> Even though the enterprises may be incorporated, they are in fact in the position of joint stock companies in England before limitation of liability was introduced in the nineteenth century.<sup>33</sup>

#### IV. Legal Problems of Niuginian Businesses

##### A. Hire Purchase and Credit

Many Papua New Guinean businessmen have faced problems with credit arrangements. The fact that many of them were participating in businesses which are illegal under the present law was something of which they were quite ignorant. But they were acutely aware when, for reasons they considered beyond their control, finance companies threatened to repossess goods, particularly trucks. This matter has been raised in the House of Assembly.<sup>34</sup> It very often results from the unwillingness of many motor dealers in Papua New Guinea to carry large stocks of parts for vehicles. Coupled with bad roads, inexperienced drivers, and insufficient maintenance, this leads to vehicles often being out of service

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31 I had some discussion of this matter with the Local Enterprise Development Officer of Bougainville Copper Pty, who is in effect a Business Advisory Officer employed by private enterprise. He has been involved in the establishment of business ventures by Bougainville people who have received compensation payments from Bougainville copper and have been encouraged to invest their money in businesses. He has found great difficulty in explaining the concept of limited liability to Bougainville people. Similar, though perhaps less strong views on this subject have been formed by Business Advisory Officers in other centres which I visited.

32 Records of Business Advisory Office, Kavieng.

33 L.C.B. Gower, *Modern Company Law* (1969) 25-31.

34 Such cases are common in the records of the Business Advisory Service at Goroka, Mount Hagen and Kavieng.

for some time. As the vehicle is the means, and usually the sole means, of income production for its operators, instalment payments cannot be met.<sup>35</sup> Although reform of the *Hire Purchase Act* is in order to meet this situation, an amendment along the lines of the motion passed by the House of Assembly in 1970 seems unfair to the finance companies.<sup>36</sup> It is no more their fault than it is the businessman's that vehicles or other goods are non-productive. Most offices of the Business Advisory Service report they are often called upon to advise and assist businessmen threatened with repossession in such circumstances.<sup>37</sup> Other problems arise when Niuginian businessmen purchase goods, particularly second-hand goods, on hire-purchase, and there are either breaches of the warranties implied by the *Hire Purchase Act* or misrepresentations by dealers. Such problems are usually referred to the Public Solicitor.<sup>38</sup>

In general, apart from hire-purchase finance on motor vehicles and consumer durables, the only institution readily making credit available to Niuginians for business purposes is the Development Bank, which has been fairly flexible in its attitudes to security (an obsession with the Australian-owned trading banks). The Development Bank has advanced money without security and has experienced a very low rate of default.<sup>39</sup> However, the official policy of the bank is to obtain orthodox security where possible. As Niuginian owned businesses become more sophisticated, it is to be expected that lenders will adopt a more conservative line towards security, and this will involve an additional area in which legal advice to the businessmen will be necessary.

By 1972 the Savings and Loans Societies in some areas, notably East New Britain, were in a position to finance some Niuginian businesses. The availability of enthusiastic officers able to explain to the people the benefits of making their

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35 *House of Assembly Debates* (1970) 3640-44.

36 *House of Assembly Debates* (1970) 3640.

37 Records of the Business Advisory Service, Goroka, Mt. Hagen and Kavieng.

38 Personal communication from the Public Solicitors Office. This problem is continuous.

39 Personal communication from Mr. K.G. Crellin, 1970. See also Mr. Crellin's paper delivered at the Third Waigani Seminar (1969).

savings work has had some effect, and Savings and Loans Societies may become a significant source of credit, especially for small businesses.

#### B. Routine business problems involving legal service

The routine legal problems of Niuginian businessmen differ very little from those of small businessmen and traders in any other community, at least so far as the running of their businesses are concerned. Thus, their legal problems usually stem from contracts, both by businessmen whose business is contracting (e.g. builders, plumbers, etc.) and also traders, who have disputes over the supply and delivery of various goods. Debt collection is also a problem. However, unlike their counterparts in more developed countries, Niuginians do not have ready access to legal advice, at least at a price within the capacity of most of them to pay. Solicitors in private practice presently operate only in the three large urban centres of Port Moresby, Lae and Rabaul. These solicitors are, in the main, expatriates, and charge fees which are based on, and in some cases higher than, comparable charges made by Australian solicitors.

Niuginian businessmen may have access to the Public Solicitor, if they are in Port Moresby, Rabaul or Mount Hagen. However, the Public Solicitor's office specialises in criminal and accident law. Some Niuginians view it (however mistakenly) as an arm of the administration, and would prefer to take their problems to a private solicitor. But the major problem with the Public Solicitor's office is an acute shortage of staff, which has severely limited its ability to take on new cases.

The lack of readily available legal advice has been a problem both for Niuginian businessmen and for Niuginians who wish to form companies or purchase businesses (or interests in businesses) from expatriates.<sup>40</sup>

#### C. Forms of Business Organization

The most significant legal problem facing businessmen in Papua New Guinea is the form of business organisation to adopt.<sup>41</sup>

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40 One such case was of a Niuginian who purchased a fish and chips business in Goroka from a European who was reputed to have incurred substantial debts. Another concerns the purchase by a group of Milne Bay people of an interest in a plantation in that area.

41 For general background see Nash, *op. cit.*

The imported form of corporate business organisation--the limited liability company, with its officers, articles and memoranda--is an artificial construct. If it does not accord with the social and economic realities in the societies in which it originated, it is even more artificial and foreign when transplanted to Papua New Guinea. For some purposes, such as the execution of contracts, it is convenient to have a corporate entity. But the cumbersome organisation is quite inappropriate to deciding the policy of the corporation or the declaration of a dividend, and the concept of limitation of liability may not be meaningful to village people in Papua New Guinea.

The present company law of Australia, which applies also in Papua New Guinea, evolved in England and Australia over a period of centuries. The legislation changed to satisfy economic demands. This was, for example, the principal reason for the introduction of the concepts of incorporation by registration and limitation of liability.<sup>42</sup> Over the past century, and particularly in the latest legislation affecting companies, the prime consideration has been the protection of the investing public.<sup>43</sup> This protection is achieved by the stringent provisions of the *Companies Act* relating to prospectuses, to furnishing audited accounts and the matters accountants and auditors must consider when preparing the accounts.<sup>44</sup> Shareholder protection is also apparent in the provisions (now more stringent in Australia than in the United Kingdom) relating to the duties of directors and officers of the company.<sup>45</sup> These provisions occupy many pages in the act. Other voluminous provisions relate to the winding up of companies, both voluntary (by resolution of the members of the company or at the request of creditors) and pursuant to an order of the court.<sup>46</sup> While both the *Cooperative Societies Act* and the *Associations Incorporation Act*, which govern the formation and activities of incorporated bodies which in many respects resemble companies, seem to be far less bulky than the *Companies Act*, in fact they include portions of the *Companies Act* by direct reference.<sup>47</sup>

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42 Gower, *op. cit.*

43 N.S.W. *Securities Industry Act 1970-71*; *Companies (Amendment) Act 1971*.

44 *Companies Act 1963* s. 161 and Ninth Schedule. *Companies (Defaulting Officers) Act 1967*.

45 *Companies Act* s. 124.

46 *Companies Act*, Part X.

47 *Cooperative Societies Act 1965*, s. 121(3); *Associations Incorporations Act 1966*, s. 33.

The *Companies Act* itself by direct reference incorporates large parts of the law relating to bankruptcy or insolvency (in Papua New Guinea the *Insolvency Act* 1951).

The need to mobilize savings and to concentrate available capital for promoting the general economic welfare of the people are considerations as important as shareholder protection. Perhaps, in Papua New Guinea, they are more important. Excessive formality and legalism in the law are serious impediments to these aims.

If savings are to be mobilised, there should be some convenient form of investment. There does not yet exist in Papua New Guinea an organised capital market, let alone a stock market, and it is not likely that there will be either for some time. Even after independence, Papua New Guinea will be dependent on the capital markets of Australia and perhaps of Hong Kong, Singapore and Tokyo for raising substantial amounts of capital. Despite a small degree of Niuginian investment in such enterprises as Collins and Leahy Ltd, PNG Motors Ltd and Bougainville Mining (all of which are listed on Australian stock exchanges) there is not, and probably will not be for some time, an investing public in Papua New Guinea, in the sense of a section of the community which uses its savings for the purchase of securities of public companies through the stock exchange.

The absence of an investing public in Papua New Guinea destroys one of the reasons for including in the *Companies Act* many of the provisions relating to prospectuses.<sup>49</sup> However, the retention of at least some of this material can be justified by the fact that there are some public companies in Papua New Guinea for whose shares the public is invited to subscribe. The New Guinea Development Corporation is one of these, and it is apparently intended ultimately to offer shares to the public in the New Guinea Produce Company Ltd, at present owned by the Gazelle Peninsula Council. Another public company, the Damuni Economic Corporation Ltd, was formed at the end of 1971 in the Milne Bay District, and it is proposed to offer shares in that company to the public in that district. It is necessary for such ventures as these to modify the law relating to share hawking, as the present Australian law is inconsistent with Niuginian ideas of raising capital before the company is formed.<sup>50</sup>

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48 *Companies Act* 1963 s. 293. See *In re Civic Constructions Pty Ltd*, Sup Ct (1971) No. 625.

49 *Companies Act* 1963 s. 37-53 and Fifth and Sixth Schedules.

50 Presently contained in s. 37-53 and 374 of the *Companies Act* 1963.



Some control is necessary. However, Niuginian enterprises raise capital by seeking subscriptions from members of the public before formal steps are taken. The NGDC and TIA are examples of two types of regional organisations where this was done. A new law could provide for a prospectus or statement of the aims of the proposed company and supervision by a government official of the collection and use of funds.

On the other hand, a need for controls remains. While expatriates--particularly Australians (who are reputed to enjoy the highest level of company fraud of any of the developed countries)--are active in business in Papua New Guinea, stringent controls will remain necessary to protect the relatively unsophisticated people of Papua New Guinea who might otherwise be tempted to invest unwisely. The word 'company' (or its Pidgin equivalent *kampani*) has cargo cult connotations in parts of Papua New Guinea.<sup>51</sup> Because of this, it would not be difficult for the sale of shares in a company to be used by get-rich-quick promoters, if the prospectus and share-hawking provisions of the *Companies Act* were repealed and not replaced by some effective substitute. There are probably many individuals, both local and expatriate, who would exploit the loopholes in any company law to separate the village people of Papua New Guinea from their savings.

On the whole it seems better not to completely forgo the protections provided in the existing company law. The cost both in dollars appropriated by unscrupulous promoters and in the distrust of the corporation as a medium for investment would be great. Yet there is need for a simplification of many of the provisions of the *Companies Act* in order to promote the satisfactory mobilisation of capital.

#### V. Possible Solutions

Any attempt to devise a new form of business corporation should involve a great deal of sociological and legal research. However, the problems exist now, and some immediate solution are required. The most pressing problem is to give legal status to the many groups numbering more than twenty who are associated for "purposes of gain."<sup>52</sup> The government of Papua New Guinea is

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51 Mihailic's *Grammar and Dictionary of Melanesian Pidgin*, *op. cit.*, defines *kampani* as 'a company, a business concern, a general team for private enterprise.' See also Ogan, *op. cit.*

52 See footnote 24 above.

attempting to solve the problem through new legislation, which would permit groups of Niuginians to register as Group Businesses. The new legislation would put no limit on the size of the group, and would establish procedures for amassing capital and for reporting activities much simpler than those in the *Companies Act*. The concept of a simplified form of business organisation received Cabinet approval in July 1973, but several government departments objected to provisions in the draft bill. In particular, the Departments of Law and Business Development believed that existing expatriate-owned companies would be able to transfer registration from the *Companies Act* to the more lenient provisions of the new bill. The departments also contended that controls over fund raising and allocation of profits were too lenient. The bill allowed businesses to organise under whatever structure they chose, subject only to the agreement of a registrar; it provided that dissatisfied members or interested parties would have recourse to local courts.

The legislation drafted to meet these complaints rivalled the *Companies Act* in size, complexity and stringency. And in February 1974, Cabinet decided that the second draft bill did not meet its original demand for simple and flexible legislation. As this issue of the *Journal* goes to press, new bills are being prepared for Cabinet approval and, it is hoped by the Minister for Commerce, for submission to the House of Assembly in June 1974. Since drafts of the new bills are not yet available, it is impossible to discuss their provisions in detail. They are intended to be a compromise between the desires for simplicity and for stringent control. The new bills establish two forms of business organisation, each open only to Niuginians. Small village or rural businesses will incorporate as group businesses under a bill similar to the original draft. Larger and more sophisticated businesses will incorporate as national companies under an amendment to the *Companies Act*. Group businesses will be permitted great freedom under the bill to devise procedures and structures that suit local conditions. Accounting and reporting requirements will be minimal, and most disputes will be settled under customary law.

The Group Businesses Act will contain provisions requiring businesses which have outgrown that category to register as national companies. These will be midway between Group Businesses and limited liability companies, exempted from some but not all requirements of the *Companies Act*. In the absence of draft legislation, it is impossible at this time to detail which provisions of the *Companies Act* would apply to national companies and which would not. Similarly, it is impossible to know the standards by which it will be determined whether a group qualifies as a Group Business and at what point it must give up that designation and

move into the more restricted ambit of national companies. However, it is evident that the government is aware of the needs of Niuginian businessmen and is grappling with potential solutions to their problems. In evaluating the government's solutions, when they become available, it will be necessary to measure the new bills against the needs of Niuginian businessmen.

An important requirement of any new legislation in Papua New Guinea is that it minimize the need for businessmen to call on professionals. The expatriate owner of a small business frequently uses professionals to provide services for his business. This small businessman, like many small businessmen in Australia and other developed countries, may choose the company as the form of his business operation. He will usually make this choice on the advice of his solicitor or accountant and will not appreciate the technical niceties of corporations, the taxation and estate planning advantages and disadvantages of the company or possibly even the fact that in the event of the insolvency of the company he will not himself become liable unless he has entered into a personal obligation to the creditor. These are matters which professionals are paid to take into account and which they will explain in simple terms if asked.

But the majority of Niuginians who want to start businesses, or, having established a business which has prospered, wish to form it into a more convenient or efficient organisation, cannot count on professional services to guide them into the corporate maze and safely out again. They are just as ignorant of legal formalities and sophisticated accounting procedures as are the Australians, but they do not have the \$350 which is the approximate charge made by solicitors for forming a company in Papua New Guinea, and especially if they are not in an urban centre, they will not have constant access to solicitors and accountants at a fee they can afford.

The operation of even a small company under the present law requires an adequate substructure of competent professionals, especially solicitors and accountants. It is unrealistic to expect that a company can be run without them. It is no doubt possible that a business may be operated with a minimum of professional services, provided the business is operated by, or employs, people who are competent at keeping records, pricing, costing, control of stock, etc., and who are able to resist pressure for credit or excessive wages from *wantoks*.<sup>53</sup> But the sophisticated

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53 Such cases are common in the experience of Business Advisory Officers with whom I have discussed the question, in all centres. See also B.R. Finney "New Guinea Entrepreneurs" (1969) *New Guinea Research Bulletin* No. 27.

and formal procedures required by the *Companies Act* dictates professionals. New legislation must be simple enough in its reporting and accounting demands to minimize the need for professionals.

New legislation must provide for cooperatives as well as for other forms of business organisation.<sup>54</sup> The *Cooperative Societies Act* lays down a relatively simple procedure for the formation and incorporation of a society.<sup>55</sup> Yet once incorporated there are still many formal requirements to be observed, and registration as a society under this act involves close and detailed supervision of the affairs of the society by the Registrar or his delegate.<sup>56</sup> It is perhaps for this reason that cooperatives are seen, even by some cooperatives officers and advisers, not as a viable form of business activity in competition with other types of business, but merely as a means of training Niuginians in business activities. One cooperatives adviser said that when the directors of a society commenced business (the nature of which they had learnt in the course of their activities in the society) in competition with the society, then the work of the cooperative was finished.<sup>57</sup> This does not seem to be in accordance with the aims of the *Cooperatives Act*. The formal requirements of the *Cooperative Societies Act* and the structure of the society dictated by the act make the cooperative society unrealistic as a form of business organisation for most Niuginian businesses, even though it may be desirable that the cooperative movement in some form be encouraged. Substantial revisions of the act are required to avoid formalism and bureaucratic control.

Submission of new companies legislation has been delayed for almost a year because government departments seem to consider that formal requirements and stringent controls are necessary. If complex requirements will be a condition, one may ask whether

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54 The Department of Business Development plans to introduce new cooperatives legislation, after the Group Businesses and national companies amendments are drafted.

55 *Cooperative Societies Act 1965*, ss. 24-28.

56 *Cooperative Societies Act 1965*, ss. 14-19, 41(2)(e) and (t) 42, 46, 50, 51, 87, 89.

57 Personal communication from adviser to a cooperative society in Goroka. Former directors of this society opened a petrol station in competition with the society and this incident prompted the remark.

incorporation is worthwhile. For reasons of business efficiency, it is, especially if the new laws do not limit the liability of members. The perpetuity of succession and the existence of a separate legal person which can sue and be sued in its corporate name, and which can enter into agreements and obligations in its own behalf as a legal entity are attributes of a corporation that offer great commercial convenience. Incorporation facilitates contracts, and especially loans, by avoiding the necessity of having to obtain the signatures or marks of 40 or more persons. It eases even more the ownership of property, interests under credit arrangements (such as hire purchase agreements) and especially ownership of alienated land.<sup>58</sup> If the owner of property is incorporated, changes in membership of the group do not entail complicated documentation (and in the case of land, registration and legal fees) or confusion in establishing who has title to land.

New laws must provide the means for Niuginian businesses to incorporate, free from large legal fees and from the formal requirements of the *Companies Act*. Many details of registration and incorporation can be simplified. For example, new laws could provide that once a business group has formed and has accumulated sufficient capital to enable it either to commence the operation of its business or to raise credit for that purpose, it could approach an official (a local court magistrate seems appropriate) who would then note a number of particulars relating to the group. These particulars would include (1) the name under which the group intended to trade, (2) the nature of the group's activities (not that this would be exhaustive - if the doctrine of *ultra vires* is inappropriate for companies, it is even more inappropriate for this type of business organisation),<sup>59</sup> (3) the intended principal place of the group's business, (4) the names of members, (5) possibly the total amount of capital and the proportions in which it is contributed, (6) the manner in which the business will be managed, (7) the way in which policy decisions are to be taken, (8) the manner of dealing with the transmission of the interests of deceased members, (9) the manner in which disputes between members will be settled. When village courts applying customary rules are established, they may be the appropriate forum in which to settle disputes involving smaller business organisations, and the organisation's statement of particulars could include a reference to the traditional procedures of the group that might be applicable in such

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58 Under the new *Land (Recognised Groups) Act 1974*, traditional groups are able to assert interests over alienated land.

59 Baxt, "Is the Doctrine of *ultra vires* dead?" (1971) 20 *ICLQ* 301.

circumstances.

The official should then issue a certificate, a copy of which should be forwarded to a central office - perhaps the registry of companies and business names - and either upon issue of this certificate or upon registration in the central registry the group should become a body corporate with perpetual succession, a common seal if desired (though this would probably be too formal) the right to sue and be sued in its corporate name and the right to own property and make contracts. Except as modified by traditional methods of decision making and dispute settlement principles, the provisions of the *Partnership Act* and perhaps those of the *Companies Act* to the winding up of unregistered companies, could apply, though it may be that such provisions would need to be modified considerably.<sup>60</sup> It should not be necessary for the group to file accounts or annual returns. However, the group could be required to file particulars of changes of membership, changes of the principal place of business (at which service of notice and process could be effected) or changes of procedural rules.

The incorporation procedure I have described is simple, effective and realistic, especially for small business groups, and would avoid the current problems created by the illegality of such groups. The availability of a simple procedure should encourage the mobilisation of savings into indigenous business activities. However, where the corporation seeks to involve persons from a wider group or to raise larger amounts of capital, stricter and more formal procedures may be necessary, as the government has recognised in proposing different corporate forms for small and large businesses.

Procedures for small businesses could be simplified even further than proposed above or in the draft bills. Some systems of law already provide for incorporated partnerships. Under Hindu law, the "joint undivided family" is for some purposes a juristic person with a separate legal personality.<sup>61</sup>

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60 *Companies Act 1963* ss. 314-318.

61 For an account of the nature of the Hindu joint undivided family I am indebted to my former colleague Mr F.M. Kassam, who discussed the matter with me, and lent me some unpublished work on the subject, and to Dr. Upendra Baxi. For a general description of the Hindu joint undivided family see J.D.M. Derrett, *Introduction to Modern Hindu Law* (1963); J.D.M. Derrett, *Religion, Law and the State in India* (1968); J.D.M. Derrett, *A Critique of Modern Hindu Law* (1970).

While the Hindu law relating to joint families is not an entirely appropriate model, it might be possible to look to it, or to other legal systems, for guidance in the formulation of a law of business organisations for Papua New Guinea. One characteristic of the Hindu undivided joint family is that each member, while having no individual rights in his family property, always has the right to demand partition. This resembles the basic principles of partnership law as laid down in the *Partnership Act 1951*.

Under the proposed "national companies" amendments, larger businesses would be incorporated under a modified version of the *Companies Act*. If the amendment maintains the act's current strict provisions in relation to prospectuses,<sup>62</sup> then promoters of a national company would be well advised to hire solicitors, for successful passage through the complex procedures requires professional assistance. It would be best if the new law could specify a procedure for forming a company that would not necessitate the employment of solicitors or accountants, as there are few in the country and their fees present a problem even for larger Niuginian businesses. However, the current strict provisions are intended to protect investors. In a situation where large amounts of capital are to be sought from the public, a way should be found that combines protection of investors with an infrastructure appropriate to Papua New Guinea.

Whatever shape the new legislation takes, Niuginian businessmen will need some professional assistance. National companies will certainly need legal and accounting assistance, and even Group Businesses may need lawyers for contract disputes or other legal problems. Thus, one needed reform to the current situation is not included in the new legislation. Niuginian businesses should be provided with inexpensive and accessible legal assistance. This could be done in two ways -- by expanding the skills of the government's Business Advisory Office and by providing legal services for Niuginian businessmen.

For the majority of Niuginian businessmen the Business Advisory office is the only source of expertise and advice; businessmen do not know any other agency that can supply assistance of this type. But Business Advisory officers are not trained as solicitors and they are not sufficiently familiar with the *Companies Act* and its regulations or with the practice of the Companies Office. They are not conveyancers and cannot be expected to have this technical knowledge. There is a need

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62 *Companies Act 1963*, ss. 35-53 and Fifth and Sixth Schedules.

for greater understanding and cooperation between the Business Advisory Service and the Companies Officer. The Companies Office is used to dealing with solicitors who are familiar with the practices of the Companies Office, not with laymen. The Business Advisory office could benefit Niuginian businessmen by adding legal and accounting assistance to their functions.

There is also a need for a legal service for Niuginian businessmen. Ideally, there should be many Niuginian accountants and solicitors practising in the various towns and district headquarters throughout Papua New Guinea. However it is likely to be a considerable time before enough professionals will be available. In the meantime a legal service for Niuginian businessmen could not only assist them with the formation of business organizations, but also with the other legal problems that businessmen invariably face. A service consisting of two or three practitioners attached either to the Business Advisory Service or to the Public Solicitor's office would suffice. A nominal charge could be made for their services. Such a service would be desirable even if a simplified form of corporate business organization were devised for Papua New Guinea, as at some stage most businesses will have to face legal problems.