

THE FUTURE OF INSURANCE IN PAPUA NEW GUINEA

MICHAEL NOONE*

The insurance business in Papua New Guinea was, until very recently, virtually free of governmental controls. It is a profitable business. The annual premium income in the non-life sector is in excess of eleven million dollars,¹ and almost all this income has, in the past, been invested overseas, without benefit to Papua New Guinea.²

The purpose of this article is to review recent recommendations³ and changes in the law relating to insurance,⁴ to examine the direction these are seeking to propel the industry and to make a number of fresh proposals for reform.

* Senior Lecturer in Law, University of Papua New Guinea.

- 1 A conservative estimate for 1972-73. Prior to the *Insurance Act 1974*, there was no requirement for insurers either to publish or to provide statistics or accounts. Source of information: Papua New Guinea Department of Finance.
- 2 ". . . one insurer is known to possess local investments of about 11% of its premium income, but most are substantially below this level, confining their investments to perhaps a few houses, cars and office equipment." J. Rutherford, *Report on Non-Life Insurance in Papua New Guinea* (1973) para. 7(a), p.6.
- 3 The Queensland Insurance Commissioner, Mr. J.G. Rutherford, was appointed in 1973 to make recommendations to the Minister for Finance on a framework appropriate to the non-life insurance industry in Papua New Guinea; see footnote 2 *supra*. This document will hereinafter be referred to as the *Rutherford Report*.
- 4 *Motor Vehicles (Third Party Insurance)(Basic Protection Compensation) Act 1974*. *Motor Vehicles (Third Party Insurance) (Basic Protection Compensation)(Amendment) Act 1974*. *Motor Vehicles (Third Party Insurance)(Basic Protection Compensation) Regulations 1974*, Statutory Instrument No. 28 of 1974. *Insurance Act 1974*. *Motor Vehicles (Third Party Insurance) Act 1974*.

I. INSURANCE INDUSTRY SHORTCOMINGS

A. Discrimination

Discrimination is not unusual in the insurance business. It is well known that certain occupations and foreign nationalities are looked upon with disfavour by insurers.⁵ A more worrying situation would be an insurance industry which was open to a charge of general discrimination against the nationals of the country in which it operates.

Serious complaints were made to Rutherford during the six weeks he spent in Papua New Guinea that insurers discriminate against Papua New Guineans in various ways, but his report states comfortingly that "no *real* evidence of discrimination was produced."⁶ The report is inconsistent on this point, however, as one of its major recommendations is for a statutory pooling system for motor insurers.⁷ This system will soon be implemented. In the past it was sometimes difficult or impossible for a Papua New Guinean to find any insurer willing to accept the risk of giving him the third party cover required by statute.⁸ As the accompanying table shows, compulsory third

5 For example, actors, bookmakers and most foreigners. Cases illustrating insurers' prejudice: *Horne v. Poland* [1922] 2 KB 364 (Roumanian Jew); *Holmes v. Cornhill Insurance Co. Ltd* (1949) 82 Ll. L. Rep. 575 (bookmaker); *Carlton v. R. and J. Park Ltd* (1922) 10 Ll. L. Rep. 818 and 12 Ll. L. Rep. 246, CA. (alien). Just complaints have been made by the West Indian Community in England to the Race Relations Board of discrimination by insurers; see Lester and Bindman, *Race and Law* (1972) 54 - 6, 125 - 6, 157, 171, 190 and 263. In Papua New Guinea, the courts at present cannot require insurance companies to do business without discrimination, for at common law everyone is free to contract or not to contract as he pleases.

6 *Rutherford Report*, para 6(a), p. 3. My emphasis.

7 *Ibid.* paras 17 to 21, pp.15 to 17.

8 And thus not be able to register his motor vehicles. The old *Motor Vehicles (Third Party Insurance) Act 1952 - 1972* provided for an appeal to the Administrator in the event of an insurer's refusal to issue a policy. It is doubtful that this right was widely known, and the provision was, in any case, unsatisfactory as hard legal protection against discrimination.

party motor premiums in Papua New Guinea are comparatively low.⁹

COMPULSORY THIRD-PARTY MOTOR INSURANCE PREMIUMS IN PAPUA NEW GUINEA						
	1959	1.9.61	1968/9	1970/1	1971/2	1973/4
	\$ A	\$ A	\$ A	\$ A	\$ A	\$ A
PRIVATE CAR	6.00	10.00	10.00	12.00	17.00	15.00
BUSINESS CAR	9.00	9.00	9.00	25.00	30.00	50.00
GOODS-COMMER- CIAL	12.00	16.00	24.00	54.00	59.00	50.00
GOODS-PRIMARY PRODUCER	6.00	10.00	15.00	36.00	41.00	41.00
PRIVATE UTILITY	6.00	10.00	10.00	16.00	21.00	30.00
HEARSE	6.00	6.00	6.00	6.00	16.00	16.00
P.M.V. AND HIRE CAR	30.00	30.00	30.00	88.00	108.00	80.00
OMNIBUS	30.00	30.00	30.00	50.00	70.00	70.00
DEALER'S PLATE	30.00	30.00	30.00	30.00	40.00	40.00
SMALL MOTOR CYCLE	9.00	9.00	9.00	9.00	19.00	10.00
LARGE MOTOR CYCLE	7.50	7.50	7.50	7.50	17.50	10.00
DEALER'S PLATE (MOTOR CYCLE)	13-50	13.50	13.50	13.50	23.50	10.00
OTHER	9.00	9.00	9.00	9.00	19.00	10.00
TRAILER	1.50	1.50	1.50	1.50	11.50	10.00

⁹ Compared with Australia, the United Kingdom, Canada and the United States, rates are low for private vehicles. (Footnote 9 continues).

Motor insurance is not the most profitable area for insurers, and in the past some insurance offices in Papua New Guinea would issue compulsory third party policies only to good risk clients who also wished to take out comprehensive motor policies or who happened to have other insurance placed with the office. The expatriate car driving population in Papua New Guinea is generally good risk material, the bad-risk categories of over sixty-five and under twenty-five being a small proportion of the total. When Papua New Guineans began to become vehicle owners they did not fit well into this motor insurance landscape. New categories of indigenous vehicles such as PMV's were simply refused cover by some insurance companies, whilst other companies met the problem by forming *ad hoc* pooling arrangements. There was no compulsory scale of premium rates, and insurers sometimes set higher premium rates for Papua New Guineans than those required from expat-

9 (cont.)

The Table shows that rates have actually dropped for almost all classes of insurance in 1973-74. This is due to the work of the premiums fixing advisory committee. The Department of Finance has decided that three per cent per year profit margin is suitable for compulsory third-party motor insurance.

It is interesting to note that the only rises in premium rates in 1973-74 are in the categories "business car" and "private utility." The utility is a favourite form of transport among Papua New Guineans, and the high rates may be due to accidents arising from the dangerous practice of carrying passengers in the back of utilities. The rate for PMV's has fallen by \$28 from the high rate of \$108 in 1971-72 to \$80 in 1973-74. It is also interesting to note that until 1973 large motor bikes paid a smaller premium than small motor bikes.

riates for equivalent vehicles.¹⁰

The Motor Vehicles (Third Party Insurance) Act 1974 provides for the establishment of a single, compulsory motor vehicles insurance fund and a trust to administer it.¹¹ Each motor insurer in Papua New Guinea has an annually-fixed percentage interest in the fund.¹² In this way each insurer is responsible for a specific share of the total business. No matter how much bad-risk business an insurer takes on, he can be sure that he will be liable only for his pre-set specific share of the total risk. Motor vehicle owners may now go to any insurer and compulsory cover will not be refused. Premium levels have also been brought under greater control.¹³ In future, binding premium rates and classifications of vehicles shall be set.¹⁴

"A complaint that some indigenous fishing fleet owners could not obtain insurance was found to be related to the high

10 The rates in the Table are merely "usual" rates fixed by the premiums fixing advisory committee under the old *Motor Vehicles (Third Party Insurance) Act 1952-1972*. Insurance companies were not bound by them and did not always follow them. In a class project, Law students at UPNG in 1972 collected numbers of cases of unusually high premium rates in compulsory third-party motor insurance. Papua New Guineans living in the major towns may still find it difficult to arrange comprehensive motor cover at reasonable rates.

11 Part II and Part VI.

12 *Motor Vehicles (Third Party Insurance) Act 1974*, sec. 33, (duty to participate), sec. 40(1) and (2) (percentage interest of licensed insurer in the fund). Where a dispute arises as to the percentage interest of an insurer the Insurance Commissioner's decision is final. see sec. 40(3).

13 Part V, sec. 26 - 31. The High Commissioner in Council may, after receiving a report from the Minister, by Regulation, *fix* the level of premiums payable and the classification of vehicles in respect of the issue of third party insurance cover either generally or in relation to a class or classes of motor vehicles.

risks and high premiums involved. A complaint that native-owned houses were uninsurable was not substantiated, as some insurers will provide cover if the circumstances are reasonable."¹⁵ For these reasons, Rutherford finds these complaints of discrimination unfounded. It would be interesting to have more information about what insurance companies would regard as "reasonable circumstances." Must the "native-owned houses" be built of non-native materials before they become a reasonable risk? It is true that most traditional materials are more flammable than corrugated iron, yet they sometimes last for many years. Most dugout canoes take water and would not be classified as A-one at Lloyds yet are, in their way, quite seaworthy. The Development Bank requires cover for its loans and has therefore introduced a large number of unconventional proposals relating to development loans. Some insurers have shown themselves willing to provide cover but have encountered difficulty in respect of things with which they have had little experience and no statistics. The consumers of insurance in Papua New Guinea have been the expatriate community and as Rutherford points out, "Policies and premiums are not suited to local conditions . . . Many of the classifications of risk used in the calculation of premiums have been taken direct from Australia."¹⁶

There is no Papua New Guinean insuring public and no attempt has been made to develop one. The various networks of kinship relations known as the *wantok* system¹⁷ fulfil the need met by some forms of insurance in western societies.¹⁸ However, the *wantok* system cannot cope with nascent mercantile enterprises. The entrepreneurs, enmeshed with the problems of motor vehicles, fishing fleets, glass breakage, livestock, burglary and the introduced law relating to the liability of property owners and business men for accidents to members of

15 *Rutherford Report* para. 6(a), pp.3-4.

16 *Ibid.*, para 6(c), p.4.

17 There is no "system" as such. The term covers a multiplicity of systems based upon a variety of kinship relations, where there is reciprocal recognition of obligations between relatives. In the towns, the term may be used in an even wider sense to encompass workmates or drinking comrades.

18 Life and accident insurance, unemployment insurance.

the public, to give just some examples require the insurance principle for their protection and prosperity. Furthermore, it is becoming apparent that the *wantok* system is not working well in the large towns. Reciprocity aspects of the system are often difficult to manage in town.¹⁹

The insurance industry in Papua New Guinea has made little attempt to publicise the idea of insurance.²⁰ Insurance companies have been content to remain based upon the reliably profitable expatriate market. The companies and the brokers have also failed to train Papua New Guineans to fill responsible positions in the industry.²¹ These failures constitute the real discrimination.

What could private insurance companies do in the direction of education and training? Something more is required than the distribution of leaflets in Pidgin or Motu. The insurance companies could design materials for schools.²² But what is really required, if the present structure of private insurance companies is retained, is the establishment of insurance information centres to which people can go with basic enquiries about insurance, about how to pursue their complaints and where they can be given access to simple comparative information about alternative companies and policies. It may be that such centres could be set up and operated successfully by the insurance industry itself but in my opinion they would better come under the aegis of the Insurance Commissioner.²³

19 The police in Port Moresby in 1974 claimed that the *wantok* system was breaking down.

20 Some insurance companies have published explanatory material. The government Consumers Advisory Bureau and the Department of Business Development have published information about insurance in leaflet form.

21 " . . . insurers have failed to train indigenous officers . . . there is a tendency to confine indigenous employees to routine tasks and a belief in some quarters that they are incapable of assuming positions of responsibility." *Rutherford Report*, para 6(d), p.5.

22 In the form of kits, containing documents and explanatory material. There are now facilities in Papua New Guinea for the production of 16 mm instructional films.

23 This would overcome any problems of partiality. See *Insurance Act 1974*, Part II.

The centres would not require elaborate staffing but they would need to be well sited in the major towns and their facilities well publicized. The running costs of the centres could be met by a levy on licensed insurers.

Under the *Insurance Act 1974*, the Commissioner now has the power to make it a condition of conducting business that insurers make real progress every year with localization and training schemes.²⁴ The Insurance Institute of Papua New Guinea, an all but moribund insurers association, has proposed a six-week insurance course, but this has yet to be offered. Australian Insurance Institute examinations remain the basis of the small amount of formal training which takes place. These should be replaced by a system of assessment, whether by test or other means, which has direct relevance to Papua New Guinea. The inclusion of insurance courses in high school and tertiary institutions should be given priority attention by the Department of Education.

B. Servicing

Effective servicing of insurance policies requires prompt investigation and payment of claims, with a minimum of correspondence and delay and the regular examination of policies by insurers, in particular those due for renewal, to see whether the circumstances have changed and call for modification in the policies.

Delays in settlement of insurance claims are not peculiar to Papua New Guinea. In every country, there are frequent delays due to the consumer's own misunderstanding as to what he is entitled to under the policy, or to the company's attempt to take advantage of some technical escape from liability,²⁵

24 The Commissioner can refuse to renew the insurer's license to operate in Papua New Guinea, if the Commissioner is of the opinion that for *any* reason the licence should not be continued. Sec. 22(1)(d) *Insurance Act 1974*. It is regrettable that the provisional policy guidelines, drawn up pursuant to the licensing powers, say nothing about progress in localization.

25 It is not suggested that insurance companies in Papua New Guinea often take advantage of technicalities. On the contrary they appear to have a good record in making *ex gratia* payments.

or to administrative inefficiency in the company's claims department. These usual delays exacerbated in Papua New Guinea, however, by the difficulties of communication with parties, by constant reference back to decision making by foreign head offices, by the fragmented organization of the industry and, not the least, by the problem of payback.

In the case of claims arising in country areas and involving Papua New Guineans, the insurance companies investigate and negotiate the claim through the officers of the Division of District Administration. Assistant District Commissioners are generally overworked, and they are certainly not experts in insurance. In consequence, serious delays sometimes occur.²⁶ One cannot blame either the companies or the division for this state of affairs, but it is clear that the long-term solution must be for insurers to get closer to the people by means of decentralization and localization.

There are too many general insurers permitted licenses to operate in Papua New Guinea.²⁷ Some of these insurers are little more than posting bureaus for foreign head offices, staffed by clerks with insufficient experience to be permitted any rein. At every stage of even relatively small contested claims, these insurers are required to refer back to a foreign parent company. It is probable that under the *Insurance Act 1974*, licensed insurers will be required to show that their offices are controlled by a person with adequate experience in general insurance business.²⁸ It is to be hoped that the Insurance Commissioner will be strict on this point. Unless insurers are forced to send experienced personnel to Papua New Guinea (who will be required when here to pass their practical expertise on to local officers) not only will delays continue in the servicing of policies, but also localization of the industry will be tardy.

The present fragmented insurance industry, consisting of a large number of private insurers, means that, in cases where

26 Insurers and legal practitioners interviewed agreed that this was a major source of delays.

27 Including life offices there are in excess of thirty. Pure non-life offices number ten to fifteen.

28 See *Provisional Policy Guidelines* under sec. 25 *Insurance Act 1974* guideline No.6.

several insured jointly bring about an event commonly insured against, all of whom have policies with different companies, needless disputes between insurers relating to contribution arise.²⁹ Potential delays and heavy costs of investigation and litigation could be saved by a more rational organization of the industry.³⁰ The statutory pooling arrangements, where all claims are met out of a single fund, has ended this cause of delay in the area of motor insurance.

In many parts of Papua New Guinea, delays in the settlement of claims can result in physical retaliation against the insured and his clan or kin by the victim's clan or kin group, who have an expectation of and desire for immediate compensation or retribution. I do not here wish to reopen the question of the full non-fault system of compensation.³¹ I merely wish to provide a summary of recent legislation and to suggest other small accommodations which the law might make to pay-back. The *Motor Vehicles (Third Party Insurance) (Basic Protection Compensation) Act 1974*,³³ in the terms of its long title, introduces a system of

. . . speedy payment of a limited amount of compensation to the dependants of persons whose deaths are directly or indirectly attributable to the use of motor vehicles without regard to any concept of negligence. . .

Assessment officers are appointed under the Act,³⁴ and in

29 Insurers in Papua New Guinea and elsewhere do of course have formal knock of knock agreements and other informal arrangements amongst themselves to settle such disputes. But contribution problems still cause delays and litigation.

30 See discussion below.

31 O'Neill, "Liability without Fault," Campbell, "Compensation for Personal Injury," Gabi, "Accidental Injury and Death Kepore, "Compensation, Crime and Relatives," in P. Bayne and J. Zorn (eds.) *Popular Justice in Papua New Guinea: The Need for Village Courts* (To be published, 1975).

33 No. 44 for 1974, as amended by No. 57 for 1974.

34 Sec. 5, and definition of "assessment officer" in Sec. 1.

turn have the power to appoint assessors.³⁵ These officers together may, either of their own volition or at the request of a person entitled to compensation, make a full but informal enquiry into deaths caused by motor car accidents.³⁶ After this the assessment officer may make an order for payment to entitled persons.³⁷ Section 20 provides that the award be paid by the trust established by *Motor Vehicles (Third Party Insurance) Act 1974*.³⁸ The establishment of the trust means that the old nominal defendant machinery is no longer necessary.³⁹ All claims in uninsured vehicle or hit-and-run cases are made against the trust. The payment of an assessment officer's award by the trust in no way affects the right of an entitled person to bring an action in law.⁴⁰ I would suggest that this scheme of speedy compensation be extended beyond the area of compulsory third party motor insurance to all cases of injury or death where there is a possibility of payback and where there is in fact a liability policy of any sort in existence which covers the event. At present, such an extension beyond the compulsory categories of third party motor and workers compensation would not result in many additional awards. The type of case I have in mind would be where V is injured whilst on the premises of A as an invitee. In such cases, assessment officers should have the power to ask A whether he has a policy, and if so, to produce it in order that it might be established whether the cover extends to occupier liability

35 *Statutory Instrument* No. 28 of 1974, Reg. 1 and 2.

36 *Motor Vehicles (Third Party Insurance) (Basic Protection Compensation) Act 1974*: Sec. 8 (establishment of the inquiry); Reg. 4 (request to conduct inquiry); Reg. 4 (report on progress of inquiry); Reg. 6 and *Schedule* (record of inquiry).

37 Sec. 17 (entitlement to compensation); sec. 20 (payment of compensation); *Schedule* (form of payment of compensation). The maximum amount of compensation payable under the Act is \$A2000 in the case of dependent child or wife and \$A1,500 in any other case.

38 *PARTS* II and IX (claims from the trust).

39 In the case of uninsured vehicles or hit-and-run cases, see sec. 54(1) and (2) *Motor Vehicles (Third Party Insurance) Act 1974*.

40 *Motor Vehicles (Third Party Insurance) (Basic Compensation) Act 1974*, sec. 25.

claims.⁴¹ An interim award could then be made. It would be "interim" in the sense that as an exercise of a ministerial power it would not preclude either party from taking the matter to court.

Perhaps the simplest measure to combat delays in the present system would be to limit the grant of licenses to three or four of the largest and best administered companies and demand that in return for their increased business, they establish a wider national network of offices. The industry, without compulsion, might achieve a similar national organization and reduction in overall costs by mergers.

II. CONTROL OF THE INDUSTRY

Before turning to the subject of possible future changes in the industry, I shall look at its present position in order to evaluate the substantial changes already taking place.

The *Insurance Act* 1974⁴² is a major reform. Before this Act, with the exception of compulsory insurance,⁴³ no supervision whatsoever was exercised over the operation of insurers in Papua New Guinea.⁴⁴ The new act establishes the office of Insurance Commissioner and provides for a licensing scheme for insurers and brokers.⁴⁶ It also establishes the principle that insurers must submit reports and accounts to the Commissioner regular intervals.⁴⁷ An Acting Insurance Commissioner has been

41 Many household policies cover this sort of risk.

42 No. 52 of 1974.

43 *Motor Vehicles (Third Party Insurance) Act* 1952-72. *Workers Compensation Act* 1958-1971.

44 Insurers did have to comply with the provisions of the *Insurance (Reports) Act* 1932-1973 of the Commonwealth of Australia, which related to lodging deposits in Australia. There was no other supervision.

45 *Insurance Act* 1974 Part II.

46 Part III. An unlicensed insurer who attempts to carry on business is liable to a A\$5000 per day fine, sec. 19(1).

47 Sec. 27 and 28 (accounts and reports). The Commissioners is given wide power of inspection, sec. 29.

appointed.⁴⁸ He has four broad duties. First, he will ensure that companies meet the requirements relating to minimum assets and minimum investment of assets within Papua New Guinea. Section 25 of the Act⁴⁹ states that the Insurance Commissioner and the Minister of Finance shall establish policy guidelines have been drawn up.⁵⁰ They provide that the minimum amount of shareholders' funds or assets held by a insurance company seeking a license shall be \$200,000.⁵¹ The company must also have situated in Papua New Guinea assets of \$100,000 of 15% per cent of net premium income during the previous financial year.⁵²

Second, the Commissioner will ensure that existing insurance companies conduct their operations satisfactorily and remain stable and secure organizations. To this end the Act provides that licensed insurers must have their balance sheet and profit and loss account audited annually and submitted to the Commissioner.⁵³ A copy of the annual report must also be submitted.⁵⁴ The Commissioner has the power to demand other financial information, in particular ". . . the insurer's underwriting account and any other account; and the insurer's premium income, loaned premiums, provision for unexpired risks, claims paid, claims incurred, claims and expenses, and the insurer's assets, liabilities and investments in Papua New Guinea."⁵⁵ There are also extensive powers of inspection given

48 Sec. 13. Acting Commissioner of Insurance, Department of Finance, Government offices, Waigani.

49 All references in this section her are to the *Insurance Act* 1974.

50 "In the exercise and performance of their powers and functions under this Part the Commissioner shall operate within the framework of policy laid down from time to time by the High Commissioner Council," Sec. 25. Draft guidelines have been drawn up.

51 *Draft guidelines*, para. 2 and 3.

52 *Ibid.*, para 2 and 4. Whichever is the greater, in excess of liabilities.

53 Sec. 27.

54 Sec. 28 (1)(a).

55 Sec. 28(3). **Financial information must be submitted to the Commissioner not later than three months after the end of the insurer's financial year, sec. 28(4).**

to the Commissioner.⁵⁶ The provisional policy guidelines are even wider in their terms: "The Commissioner may require . . . [insurance companies]. . . to provide information with respect to the value of an asset of that company *and any other matter that the Commissioner considers necessary*, relative to the issue of a licence."⁵⁷ It is to be hoped that the Commissioner makes full use of these generously framed powers. The Commissioner should be able to develop a central bank of insurance statistics.

56 Sec. 29: "(1) The Commissioner or any person authorized by him for the purpose may at any time during the ordinary hours of business (a) *enter any land* or place where any person is acting as or carrying on, or is reasonably suspected by him to be acting as or carrying on business as an insurer or broker; and (b) make such examination and inquiries as may be necessary to ascertain the manner in which any business referred to in paragraph (a) is being carried on and, in particular, whether the provisions of this Act have been or are being complied with in respect of that business; and (c) *examine any person* engaged or apparently engaged, whether as principal or employee, in the business, and require such person to answer any questions put to him and to sign a declaration as to the truth of any answer given by him; and (d) *inspect and examine any accounts books* or records relating to, or reasonably suspected by him to relate to any business referred to in paragraph (a) and for that purpose require - (i) the holder of a licence under this Act; and (ii) any person carrying on or reasonably suspected of carrying on any business to which this Act relates; and (iii) any person who has possession, custody or control of any such accounts, books or records, to produce those accounts, books and records to him, and may make copies of or take extracts from any of them."

There is a \$200 penalty for failure to cooperate with the Commissioner's exercise of his powers under this provision, sec. 29(2).

57 *Draft Guidelines*, para 4, emphasis added.

The Commissioner will, thirdly, initiate and administer an system of licensing of insurance brokers.⁵⁸ The provisional policy guidelines state that the Commissioner may require a broker who is making an application for a license to provide information that he is a person of good fame and character; that he is experienced and competent in the insurance business; that he has a suitable financial record and that he is covered by a professional indemnity policy to a cover of not less than \$75,000.⁵⁹ If a place for brokers is retained in the industry in Papua New Guinea it should be as expert professional insurance consultants and not merely as intermediaries who are paid commissions by the companies for introducing clients and for doing some of the clerical and administrative chores that could be more efficiently done by the companies themselves.⁶⁰ I think the guidelines should be tougher at this point and require hard professional qualifications and a minimum period of service in the industry as a prerequisite to the granting of a brokers licence.⁶¹

Finally, the Commissioner will provide a place at which consumers' problems and complaints might be received. This is not one of functions of the Commissioner specifically set down in the legislation nor is this function advertised. The Acting Commissioner assured me that he regarded it as one of his duties to investigate complaints on behalf of the insuring public. Advice is also given to persons encountering difficulties and disputes over insurance.⁶² Much more emphasis should be given to this aspect of the Commissioner's

58 Part III.

59 *Draft Guidelines*, para 7.

60 Should the insurance industry be nationalized in the future, it would still be desirable to allow Lloyds brokers to operate in Papua New Guinea to cover large marine, aviation and other special risks in which Lloyds are experts.

61 I suggest six years would be an appropriate apprenticeship.

62 People of small means and with real legal problems are referred to the Public Solicitor for advice. Unfortunately the Public Solicitor is understaffed and is turning away civil litigants.

work.⁶³ It is the other side of the coin to the control of insurance companies. A complaints procedure should be formalized by statutory instrument and the Commissioner be granted power to make interim settlement and restraining orders against insurers.⁶⁴ Discrimination has been effectively overcome in the area of compulsory third-party motor insurance. It is difficult to frame legislation to close off all possibility of discriminatory dealing in other branches of insurance. The best solution is probably the one adopted in the Act where the Commissioner can refuse an insurer a license if he is of the opinion that "for any reason. . . the insurer . . . should not be licensed."⁶⁵ Policy guidelines should be drafted to make it clear to insurers that any evidence of discriminatory practices will lead to loss of their licences.

III. THE STRUCTURE OF THE INDUSTRY

There are three broad ways in which the insurance industry could be structured: As a private industry, as a combination of a government insurance office in competition with private companies, and as a single government insurance office. Rutherford recommended the retention of a purely private industry.⁶⁶ He found it unnecessary to consider the last alternative because he had formed the definite opinion "that the economic growth of Papua New Guinea will be based upon private enterprise."⁶⁷

I am in favour of the establishment of government office which would eventually have a monopoly over all insurance business in Papua New Guinea. Before I outline this proposal in detail I shall review the other two alternatives.

A. A Reformed Private Industry

The Rutherford recommendations now in force constitute

63 Insurance commissioners in some of the United States, notably California and New York, advertise themselves as complaint offices. An alternative scheme would be to set up an effective consumers organization. This is discussed below.

64 Subject, of course, to judicial review.

65 Sec. 22(1)(d).

66 *Rutherford Report* para 10, p.9.

67 *Ibid.*, para 3(a) p.2.

a marked improvement.⁶⁸ However, the report is a vindication of the pre-existing framework. He does not want any insurance company to leave the country,⁶⁹ although, as I have mentioned, the large number of companies presently operating in Papua New Guinea represents a misuse of resources.⁷⁰ The Insurance Commissioner does have the power to give preferential treatment to Papua New Guinean owned companies.⁷¹ At the moment there is only one such company and is in such a prospering state that it does not require preference.⁷² This is a valuable power but should be used with discretion so as to avoid the problem of weak indigeneous companies.

B. A government insurance office in free competition with private insurance companies

This system operates to some of the Australian States.⁷³ I agree with Rutherford that it is not a desirable framework for Papua New Guinea:

My understanding of the position is that the Government has neither the finances nor the trained staff available. As regards the latter, the office could only be established by importing experienced insurance personnel at a high cost and it would be many years before indigenes could be trained to take over the responsibilities involved. The final point to consider is whether or not a Government Insurance Office can obtain a reasonable share of the country's insurance business. We must here remember that a

68 Discussed *supra*.

69 *Rutherford Report*, para. 9, p.9.

70 Discussed *supra*.

71 Sec. 26(1)(c).

72 New Guinea Insurance Corporation Pty. Ltd. of Lae is totally Papua New Guinean owned. Sec. 21(1) forbids the use of the name "New Guinea" by a private insurer. The Central Insurance Company Ltd. will also be required to charge its name if the consent of the Minister of Finance is withheld.

73 For example, the Government Insurance Offices of Queensland and New South Wales.

large proportion of the existing insurance business is held by expatriates and that it is not unreasonable to think that they will wish to remain with the Australian and other overseas insurers. In these circumstances and until such time as indigenous insurance needs become more prominent, a government insurance office's scope for business will most likely be rather limited.⁷⁴

These opinions of Rutherford can easily be attacked. Why should not the government close some of the private insurers and take the staff for its own office from there? Why should not the government office compel expatriates to insure with it in certain forms of insurance? But to make such objections, misses the main point of Rutherford's argument. A government office trying to operate in free competition with private insurers is an unworkable system.

C. A single, monopolistic, government insurance office

It would be impracticable to introduce a government insurance industry overnight. I advocate a gradual encroachment by the government office; over several years separate fields of non-life insurance could be taken over *en bloc*, according to a planned programme. The most obvious starting point is re-insurance. The provisional policy guidelines already state that insurance companies should have arrangements, satisfactory to the Commissioner, for re-insurance of liabilities in respect of risks against which persons are, or are to be, issued by the corporation in the course of its carrying on insurance business.⁷⁵ The reason underlying this guideline is obviously to establish a limit on the amount of step beyond this to require all companies to reinsure a prescribed percentage of all their other types of business with a government insurance office. This should be done at once. Re-insurance business is one of the safest and most profitable areas of insurance and would provide the financial foundation for building the government office. The next obvious areas for the government to take over *in toto* would be the compulsory forms of insurance, that is, third-party motor vehicle and workers' compensation insurance. Gradually, all the other areas of non-life insurance would be subjugated to the government office. During this process of nationalization, many private insurers would decide that it was no

74 *Rutherford Report*, paras. 8 and 9, p.8.

75 *Draft Guidelines*, para.5.

longer profitable to continue business in Papua New Guinea and quietly pack up shop, but it is important to note that my proposal does not include life insurance operations.⁷⁶ Since this is a lucrative field, private companies will continue to offer life insurance in Papua New Guinea. The government insurance office should eventually enter the field of life insurance with policies specially designed for the needs of Papua New Guineans; it should also publicize the investment benefits of life insurance. But for most Papua New Guineans in the foreseeable future, traditional welfare systems will continue to make life insurance irrelevant.⁷⁷ Transient expatriates should not be compelled to write their life insurance with the government office.

The establishment of a government office of this sort would have many benefits. The government's Eight-Point Improvement Plan stresses the need for government control and involvement in those sectors of the economy where control is necessary to assure the desired kind of development. A nationalized insurance industry should be a powerful aid in the development of small-scale artisan, service and business activity and in the general aim of localizing the economy. Only a government office operating in the spirit of the Eight-Point Improvement Plan can fully use the principle of insurance in furtherance of the nation's aims.

As well as being the most efficient and economic structure for the industry, a government office would render unnecessary the complicated and costly supervisory machinery necessary for

76 Life companies should however, be governed by a licensing scheme. At the moment the *Insurance Act* 1974 does not apply to life and accident insurance. In particular, those "fly by night" life insurers who maintain no offices or assets in Papua New Guinea but who come in from time to time to write and service policies should be banned.

77 One can foresee that, at a certain stage, the government may decide it is time to promote life insurance through the government insurance office. The highly decentralized Indian government life insurance scheme and life insurance as it operates through the government office in Tanzania would be worthy of study at this time.

the proper control of a private, foreign-based insurance industry. As the government office would be a non-profit making organization, profits could accrue for the benefit of the policy holders. The Papua New Guinea government has a vested interest in setting up a government office to compel or encourage the spread of insurance among its citizens because of the advantages such cover confers on the national economy itself. These are considerable: they include economy in tying up reserves; promotion of investment and trade by enhancing security against loss; reduction of waste by encouraging preventive practices against fire and accidents; stabilization of the economy by ensuring conformity of receipts from taxes and rates and by preventing dislocations of production (e.g. through bankruptcies); promotion of saving (through life insurance), benefiting both individuals and the economy; assistance to state, public authorities and industry by the investment in loan of large accumulated funds within the country; reduction of charges that could fall on public funds but for the security provided for policyholders and their kin. All this can best be achieved by a government office. It would not be difficult once a government office was established to extend the areas of compulsory insurance. The argument that the insurance consumer should be left free to make his own decisions as to the nature and extent of his insurance provision does not make sense in Papua New Guinea where most of the population is not yet insurance conscious. Even usually some forms of compulsory health, unemployment, pensions and insolvency indemnity insurance could be introduced. The government office could also look at special problem areas, such as the tourist industry to consider whether tour operators should be compelled to take out fixed minimum cover personal liability policies.

D. Consumer Commission

The establishment of an independent Consumer Commission is the second essential requirement for full reform in the insurance area. At present, the Department of Finance has a section called the Consumers Affairs Bureau, whose main work is in the field of price control. Giving general advice to consumers in respect of entering into contracts is part of the Bureau's mandate. However, apart from some press statements and pamphlets, little has been done. Officers of the Bureau are available to discuss consumers' problems, but the Bureau is limited in staff and this service has not been advertised.

A Consumer Commission, independent of the government, should be established with an adequate staff and offices in the major centres. Such an organization could provide advice

in all areas of consumer law. In the field of insurance, part of its work would coincide with that of the Insurance Commissioner and the insurance information centres.⁷⁸ The Consumer Commission would (a) promote the idea of insurance; (b) provide information about the government insurance office and other insurance facilities (a particularly important function in the period of transition from a private to public industry); (c) help consumers take out policies best related to their needs and assist them to full awareness of policy implications; (d) hear and follow up complaints, help consumers in making claims and advise them of their rights of redress against the government insurance office and other insurers. The Commission would also be active in initiating reform legislation as necessary.⁷⁹

IV. REFORMS IN INSURANCE LAW

Changes in the structure of the industry will not achieve justice for the consumer unless there are also important changes in the law of insurance. It is not within the scope of this article to review the whole of insurance law. I shall mention only a few serious inadequacies:

A. Insurance Documents

There is no standard style required for proposal forms and policies in Papua New Guinea. At present most of them are cramped and confusing documents--policies full of numerous sub-headings, proposals with sub-questions which depend on involved exclusions and qualifications.⁸⁰ It is true that these documents are legal instruments and, as such, must be sufficiently specific and exact in defining the commitments of the insurer and the insured. Even so it seems to me that effort should be put into the drafting of simple standard

78 Discussed *supra*.

79 By direct submission of draft legislation to the legislature. It could also work in co-operation with the Law Reform Commission.

80 The best policy I have seen in Papua New Guinea is the household policy of one of the largest companies, which is neatly set out in large type. Some effort had been made to adopt it to Papua New Guinean needs, yet it was still couched in traditional legalise. Most policies are identical with Australian policies.

documents suitable to Papua New Guinea needs. At the very least a summary in simple English of the exact cover provided should appear on the face of the policy. A second step would be the enactment of a rule for insurance documents equivalent to that applying to hire-purchase contracts which provides for translation, at the request of the consumer, into Pidgin or Motu.⁸¹ There are, of course, general laws protecting unsophisticated persons entering contracts in Papua New Guinea.⁸²

B. Utmost good faith

The archaic common law doctrines of *uberrima fides* (utmost good faith) and freedom of contract apply with full force in the insurance law of Papua New Guinea. The principle *uberrima fides* means that anyone who wants to insure his life, car, house or any other property must tell the insurers all the facts that they as "prudent insurers" ought to know.⁸³ If something the insurers consider a material fact is not revealed, even though there was no specific question about it on the proposal form, they may refuse to meet a claim on the ground that the contract is unenforceable. The non-disclosure cases show that at present it is too easy for insurers to establish materiality.⁸⁴ I would suggest that the test for materiality be changed to that of the "ordinary Papua New Guinean from

81 *Hire Purchase Act* 1966, sec. 54.

82 *Transactions with Natives Act* 1958. An excellent article on this problem is Seddon. "The Duty of sensitivity: The Problem of Non-communication in Contract Law," 48 *ALJ* (1974) 126.

83 *Western Australian Insurance Co. Ltd. v. Dayton* (1924) 35 CLR 355, *Anglo-African Merchants Ltd. v. Bayley* [1970] 1 QB 313, [1969] 2 AER 421. There is a slight difference in the formulation of the test in Australia and England. The Australian test is slightly more favourable to the insured, but both are based upon the "prudent insurer's" view of things.

84 Hasson, "The Doctrine of *Uberrima Fides* in Insurance Law - A Critical Evaluation" 32 *MLR* (1969) 615. See esp. p. 632 for a review of unsatisfactory cases on this point.

the same background as the particular insured."⁸⁵

C. Basis of the contract clauses

Most insurance proposal forms in Papua New Guinea contain "basis of the contract" clauses.⁸⁶ Insurer and insured are deemed by the law to be free agents in agreeing to these clauses, whose effect is to incorporate the insured's answers to various questions into the policy, although neither questions nor answers are set out in the policy. An incorrect answer to any one of the questions is fatal to the insured's claim.⁸⁷ This is so, whether he answered the questions in good faith, to the best of his knowledge, or indeed whether his response related to a material fact. So, even if the matter is completely immaterial to the risk or if the true state of affairs lessens the risk,⁸⁸ insurers may avoid just claims. As it stands the "basis of the contract" clause is a trap. It should be outlawed.

D. Arbitration Clauses

To end on a happy note: most insurance policies in Papua New Guinea contain arbitration clauses, usually of the *Scott v. Avery*⁸⁹ variety, which make a submission of disputes to arbitration a prerequisite to maintaining a suit at law. These have long been recognized as mischievous devices which delay settlement of claims and work generally in the insurers favour. It is gratifying to note that the *Insurance Act 1974* has

85 This is the test which has been developed by the Supreme Court of Papua New Guinea in respect of the defence of provocation in criminal law. See *Zariai-Gavere* [1963] PNGLR 203 and *Iawe-Mama* [1965-66] PNGLR 96 for typical formulations.

86 "I declare that the particulars and statements made by me above are true, and I agree that they shall be the basis of the contract between the Company and myself" is a typical formulation.

87 *Mackay v. London General Insurance Co.* (1935) 51 Ll L R 201.

88 *Dawsons v. Bonnin* [1922] 2 AC 413. The fact stated incorrectly in this case (the location of a garage) lessened the risk for the insurer. Nevertheless the insured lost the case for breach of the "basis" clause.

89 (1856) 5 JLC 811.

rendered these clauses no longer binding on the insured.⁹⁰

V. SUMMARY OF MAIN PROPOSALS

- A. A government insurance office should be established with a monopoly of all non-life insurance business. It should also design life policies suitable to the needs of Papua New Guineans and consider the feasibility of extending compulsory insurance to other areas.
- B. If a private industry is retained, it must make rapid steps towards decentralization and full localization. The organization of the industry must be rationalized by limiting licenses to three or four of the most nationally committed and efficient companies. "Posting-bureau" and "fly-by-night" insurers must no longer be tolerated, and Papua New Guinean owned companies should be given preference by the government and its agencies.
- C. Stricter requirements should be demanded of brokers. Licenses should be granted only to experienced persons with hard professional qualifications. Lloyds brokers should be permitted to continue to operate if the industry is nationalized.
- D. Urgent attention should be given by the industry and the Department of Education to the training of local officers for responsible positions in the insurance industry. If Insurers do not co-operate in this work, their licenses should be cancelled.
- E. The Insurance Commissioner should be given power to make settlements and restraining orders against insurers.
- F. The principle of insurance should be widely publicized either by "insurance information centres" run by the Commissioner or as part of the work of a new Consumer Commission. Consumers should also be able to seek advice and redress for wrongs at such centres.
- G. The principle of "basic protection compensation" should be extended beyond the compulsory third-party motor category to apply to all personal liability insurances.

90 Sec. 32.

- H. Insurance documents should be simplified and standardized and made available in Pidgin and Motu translations.
- I. The doctrine of *uberrima fides* should be modified in favour of the insured, and unfair clauses in policies should be outlawed.