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Agriculture, Land Tenure and Land Law to 1971.

Peter. T. Quinn
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Editor:

Donald Denoon & Catherine Snowden,
University of Papua New Guinea,
Box 4820, P.O.,
UNIVERSITY,
Papua New Guinea.

CHAPTER TEN

AGRICULTURE, LAND TENURE AND LAND LAW TO 1971 (1)

Peter T. Quinn

The present land law of Papua New Guinea recognises two types of land, "customary land" and "alienated land". The latter represents roughly 3% of all land in the country but includes a much more significant percentage of the best plantation land and valuable urban property. The focus of this paper is directed towards customary land, the policies aimed at indigenous agricultural development and the land laws introduced to facilitate that development by providing for registration and individualisation of title to customary land.

The term "customary land" appears simple and self explanatory. It describes land subject to customary laws of occupation, usage, inheritance and other rights which may exist. There is, however, an underlying uncertainty as to the legal status of rights and root of title in customary land. This derives from the principles implied in the exercise of sovereignty, at various times, by Britain and Australia in Papua and by Germany and Australia under the Mandate and Trusteeship agreements in New Guinea. Although such complexities must influence the courts, in practical terms the various administrations all recognised a form of customary title to land approaching "absolute ownership" but subject to sovereign rights of what Lalor (1969: 138) describes as "administrative interference".

The land laws of the territories affected customary land prior to 1952, primarily in relation to the provisions for acquisition by purchase, by "waste and vacant" declaration, and by compulsory acquisition for a public purpose. The administration assumed exclusive rights to acquire land and forbade dealings between "native and non-native". Dealings between "natives" were legally sanctioned only when they complied with custom. (This provision was of course complicated by the difficulty of defining "custom" and by the fact that "custom"

changed with, for example, the introduction of cash cropping). The laws were in part designed to protect the villagers' interests in land.⁽²⁾ Land could not be acquired unless it was established that the purchase would not deprive the villagers of land necessary for their future needs (as determined by the administrations). There always existed, however, a strong pressure for the provision of land for expatriate settlement and often the requirements of law proved inadequate or were not respected so that land shortages for production by Papua New Guineans occurred in some areas such as the Gazelle peninsula. Generally plantation development did not match the extent of land alienation, due largely to the shortage of indigenous labour (Legge, 1956: 153-4; Mair, 1970: 141-2).

While the land laws of the territories were thus used to "protect" customary land from excessive alienation, other measures were adopted to enforce, in the name of 'native welfare', the use of customary land for cash cropping by the villagers, (Joyce, 1971: 198). Both the Native Regulations of 1894 in Papua and the Planting Ordinance of 1887 in New Guinea made it compulsory for villagers to plant and tend economic crops - primarily coconuts - where directed by administration officers. This led to considerable planting but in Papua there was no provisions for the marketing of the produce, so that apart from the planting under compulsion there was little entry into the cash economy. In New Guinea a Regulation of 1900 forbade the sale of whole coconuts to traders - a measure designed to encourage indigenous processing (Rowley, 1958: 188-9).

In 1918, Sir Hubert Murray, the Lieutenant-Governor of Papua from 1906-40, concerned at the lack of 'native' welfare, education and economic development introduced two new Ordinances designed to stimulate development and to complement the Native Regulations. These were The Native Taxation Ordinance 1918 - the proceeds of which were to be devoted to indigenous welfare - and the Native Plantation Ordinance 1918. The new Ordinances were strongly opposed by the settlers who believed that they would result in a drop in available plantation labour (West, 1968: 184-5).

The Native Plantation Ordinance 1918 Section 3 (2) provided that customary land acquired or resumed under Part

III Section 58(7) of the Land Ordinance 1911 for the purpose of a Native Reserve could be deemed to be a Native Plantation. While this provision was continued in the Native Plantation Ordinance 1925 by Section 4(1), the latter Ordinance also provided at Section 4(2) for the establishment of a Native Plantation on customary land "with the consent of the native owners". 60 days work on the plantations provided exemption from the Native Tax. One half of the proceeds from the plantations were to be taken by the Administration, the rest to be distributed, on the basis of the number of days worked, to those who worked the plantations.

Further research would be required to establish why the original Ordinance presumed the need to remove land from custom for the establishment of a plantation whereas the latter Ordinance assumed the Administration's right to establish a plantation on customary land. Some 37 plantations were declared under Section 4(1) and 113 under Section 4(2) of the Ordinance. Apart from these formally declared plantations however, there seems to have been widespread planting of coconuts throughout Papua on the instruction of Administration officers and a fairly loose reference to village "plantations". Much of this planting was enforced by the threat of gaol under the Native Regulations, rather than the Native Plantation Ordinance, so that the actual extent of compulsory planting of cash crops is difficult to establish (See West, 1968: 251-3). While coconuts were the most common cash crop there were schemes to encourage rice, coffee, rubber and other crops. The latter crops were experimented with especially on extensive communal schemes such as the Mekeo rice scheme (Stephen, 1974). Even there the nature of communal organisation is not clear, and while West (1968:252) refers to 32 plantations, only two were formally declared under the Native Plantation Ordinance.

The provisions of the Papuan Regulations and Ordinances were also applied by the Australian Administration in New Guinea (Cheetham, 1962-3: 68). In the Sepik there were the mixed rice, coffee and peanut schemes while more generally Administration officers encouraged or persuaded villagers to plant coconuts (Connell, 1978: 50-1). (3)

The plantation schemes "encountered every possible difficulty" (Mair, 1970: 118). The purpose was generally not understood and it was commonly believed by the villagers that they were solely for the benefit of the Government. It is clear that they depended largely on the whims and abilities of the officers who controlled them and owed little to - in fact possibly inhibited - indigenous initiative. Nevertheless some groups such as the Mekeo (Stephen, 1974) and the Tolai (Epstein T.S., 1968; Salisbury, 1970) were able to generate considerable income from the production (on customary land) of rice and copra respectively.

The immediate post-war period saw a radical change in policy relating to indigenous economic development and the use of customary land. Eddie Ward, Minister for Territories in the Labor Government, and Colonel Jack Murray, the Administrator of Papua New Guinea both stated that the new policy was directed towards preparing the Papua New Guineans for their full participation in the wealth and government of their country (Ward, Parliamentary Debates, 4.7.45; Murray, 1946; 1968). As early as 1946 Murray pointed to the need for anthropological and economic research to assist the Administrator in land and agricultural matters, noting that although customary land tenure may "permit a considerable degree of individual tenure of holding" the Papua New Guinean was "midway between a peasant farmer and a communal cultivator". In view of the intricate nature of customary land tenure systems, he believed that there would be a need for the "development of new forms of production".

Murray did not elaborate on what forms of production he had in mind though he referred to enterprises based on co-operative principles as being appropriate in some situations, while in others he foresaw an increasing tendency towards individualisation. W. Cottrell-Dormer, Director of Agriculture, proposed a policy of "...mixed farming on individual small-holdings capable of producing adequate subsistence for a man and his family and, in addition, sufficient cash crops to obtain the money necessary for him for the satisfying of other wants and for the payment of taxes". (Cottrell-Dormer, 1946 - quoted in McKillop, 1976: 71). However, David Fenbury, a senior

official in the then Department of Native Affairs, doubted that "...western concepts of private land ownership and usage are necessarily best for all peoples and for every type of land usage." (Fenbury, 1947: 5-6). Equating the "small-scale individualistic" stage of economic production with peasantries, he noted the plight of such societies in China and elsewhere. British policy in Africa had, he believed, produced a similar situation and he warned against the promotion of individualisation in the Australian territory. Instead he suggested the fostering of communal elements in the indigenous societies in the form of co-operatives which would merge "the administrative and economic aspects of the group into an integrated collectivist whole."

Although the policy of encouraging indigenous economic development was clear, there was little indication of the detailed planning needed for its implementation. Field officers and planners within the Administration, who devised forms of indigenous economic agriculture, acted within the context of Australia's responsibility for "native welfare" - the policies were not subject to public debate as political issues. What was a political issue however was whether expatriate agriculture was to form the basis of the agricultural economy.

The planters had a powerful lobby in Port Moresby and Canberra. Their demands that more land be alienated and made available for expatriate settlement reached a peak during Percy Spender's brief period as Minister for Territories. The Pacific Islands Monthly pressed the planters' and Returned Soldiers' League demands for increased expatriate settlement. "...The more Europeans we can settle in Papua New Guinea, the greater will be our economic strength..." and hence also Australia's security against "Asiatics" and "Muscovites" (P.I.M. Vol XXI, June, 1951). Expatriate settlement and land alienation was a major issue which persisted until 1964 when, as we shall see, the planters in response to the World Bank Report shifted their demands from alienation to provisions for direct leasing of customary land.

Spender responded to settler demands in June 1950: The present procedure for obtaining land in the Territory and the machinery for the administration of the laws of the Territory relating to land will be over-hauled with^a view to facilitating the taking

up of land by the people who wish to settle in
the Territory.

Parliamentary Debates, 1 June 1950 (my italics). In 1952, the Native Land Registration Ordinance 1952 was enacted. It was based on Figian legislation (Bredmeyer, 1975: 29) and would seem to have been part of Spender's 'overhaul' rather than a Hasluck initiative (Paul Hasluck had succeeded Spender as Minister for Territories in mid-1951).

Under the Ordinance, a Native Land Commission was set up to determine the ownership of land where requested, and was empowered to settle land disputes between Papua New Guineans (but not between 'natives' and 'non-natives'). The villagers were to mark out the boundaries of the land for the Commission and when the "owners" of each plot had been recorded, the land was to be registered in a Native Lands Register under the names of the owners as determined by the Commission. The ownership so determined could be individual or communal and the entry in the Register was required to show only the name of the individual or of the community (not the names of the individual members of the group). There was no provision for updating the Register as the land changed ownership under custom. Land registered under the Ordinance could not be mortgaged or charged. It could, however, be dealt with subject to any other laws in the Territory provided that a District Commissioner certified the deal to be "clear and reasonable".

Apart from determining the ownership and boundaries of customary land, the Ordinance did not facilitate the alienation of customary land. Such alienation was still subject to other land Ordinances. Significantly, however, it included a "miscellaneous" provision that any land that was not deemed to have indigenous owners by the Commission after investigation should, on the recommendation of the Commission, be declared to be Crown Land under the "waste and vacant" provisions in force.

It would seem that the main intention of the Canberra planners was to provide the machinery for establishing which land was not customary land so that it could be declared Crown Land under the "waste and vacant" provision of the Ordinance. Spender intimated as much in his June 1950 policy speech:

It is proposed to carry out investigations of the land holding of natives with a view to determining what further areas could be made available for non-natives development without injury to the interests of the natives. (Parliamentary Debates, 1 June 1950).

There was little reaction to the Ordinance except from the anthropologists K.E. Read (1952) and J. McAuley (1952) both of whom were critical both of the policy of encouraging European settlement and of the Ordinance which they claimed ignored the 'complexity and obscurity' of customary land tenure. Read concluded that any attempt to register the land as proposed was doomed to failure.

Customary land tenure is based on principles of "inheritance, use and social obligation" (Narakobi, 1978). Large social units such as clan or tribe usually exercised minimal control over land, for example insisting that outsiders not be permitted to use clan land, or that land-controlling groups contributed land for gardens for ceremonial occasions. The main land controlling groups were the co-resident lineage or other smaller kin-based groups. An individual, although deriving land rights through descent from the original person to clear and use a plot of land, could only activate such rights with the consent of the land controlling group. That consent depended on the person's meeting the obligations required by membership of the group and attaining full acceptance into it. The extent of individual rights varied in different societies depending largely on whether individual or group gardening was practiced.

While the pattern of land tenure and the traditions or customs supporting land rights varied from society to society, it could be said that in all cases there existed a complex dynamic interplay between individual and various group interests (i.e. the interested groups included several forms of kin-based groups such as lineage, clan, tribe and may have included residence groups). Individual rights did not exist in isolation of group rights nor did group rights preclude the possibility of an individual's assertion of individual rights on group land. Land could not be classified as "individual" or "communal";

rather there existed some situations where individual rights and control were prominent, others where such rights were weaker—there always existed some form of group interest and control over land.

Customary land tenure was also complex in that a person could have rights in widely dispersed plots and he could trace descent through different lines so that he had a wide choice of possible rights which could be activated. At the same time any plot could have a number of potential claimants. Also an individual or group could at any time grant another individual or group the right to use land. Rights to land were often distinct from the rights to produce from the land.

The processes governing access to land were flexible in that they enabled mobility and the possibility for an active person to increase the amount of land under his control. A person could activate rights in one area at the same time as relinquishing rights in another. Rights to use land could also be transferred to full rights of control by uninterrupted occupation, acceptance to membership of the host group, by adoption or the establishment of fictive kinship links with the original land user. (Forms of land purchase could also be introduced into the existing processes). The activation of such rights was largely a political process depending on the person's ability to mobilise group support for his or her claims and actions.

The nature of customary land tenure, staff shortages and the complexity of the procedures involved in recording extensive genealogies relating to the 'ownership' of small plots of customary land contributed largely to the failure of this legislation to achieve its objectives. In 10 years of operation no systematic recording of ownership was undertaken and of 472 applications for individual registration 176 only were determined and none registered (Bredmeyer, 1975: 269). On the positive side however it could be said that the experience of the Commission did contribute considerably to a greater understanding of the complexities and true nature of customary land tenure systems.

By 1953 Hasluck was concerned by the extent and methods of land alienation in the Highlands, dissatisfied with what he called the "inadequate" and "token" efforts of the Native Lands

Commission, and under pressure from settler groups demanding more land. He reacted by threatening to halt all land acquisition "unless in the meantime I could be convinced that effective action was being taken for agricultural extension work amongst the native villagers and for the registration of native lands" (Hasluck, 1976: 121-2; quoting a Ministerial Memorandum of 1953). Hasluck had also realised that the Native Land Registration Ordinance was inadequate and that better provisions were required for the investigation and registration of customary land. Thinking in terms of a new Land Ordinance, he instructed C.P. Lambert, Secretary of the Department of Territories in Canberra, and the Department of Lands in Port Moresby to begin studies on the land issue as a matter of urgency (Ibid: 124).

By this time important changes had occurred in the approach to development. Immediately after the Pacific War, the Administration had placed emphasis on the development of communal cash cropping on supposedly "communal" land (Mair, 1970: 130; Cheetham, 1962-3: 68-9). Full co-operatives were to be developed from loosely formed organisations such as the Rural Progress Societies which had been initiated for the Mekeo rice schemes. However, disputes arising from the use of land for the schemes, problems of leadership and the flagging interest of groups unaccustomed to the new bases of economic co-operation, led to the redirection of emphasis towards family rather than communal enterprise. This policy of encouraging individual family farming was firmly established by 1956 (Cheetham, 1962-3:68).

The shift to individual family farming was the result of experience gained by officers as they tried to develop and encourage village projects in areas often remote from communications with Port Moresby. In areas such as the Gazelle Peninsula and the Northern Province the projects were closely associated with the development of Local Government Councils and in the Gazelle, experimental schemes designed to establish individual family farms were started from 1952. These schemes, as we shall see, received considerable attention from planners and policy makers. Lambert (1956) drew on the experiences of these early Gazelle schemes.

Individualisation of tenure, he claimed, would be necessary ultimately but could not be "engineered" in one action. He believed that it would come about by choice when Papua New Guineans recognised the advantages commonly attributed to individual enterprise. At that point, the Administration should be prepared, and suitable provision for legal individualisation should be ready. When the time came, the Administration should resume the land already under cash crops and lease it to the individual users, and suggested that the right time was when individualisation had already been established de facto by the work of field officers. He thus recommended that tenure change be concentrated on land under cash crops rather than all land; land for subsistence agriculture and bush land could be left under customary tenure.

The process envisaged by Lambert amounted to the establishment of a cash crop project, its eventual demarcation into individual plots under the Native Land Registration Ordinance, resumption by the Administration, and ~~re-~~allocation to the owners as individual registered leasehold. He also believed that considerable areas of 'ownerless' land would be found and should be declared to be Crown land under the provisions of the existing Ordinance.

In response, Fenbury (1956) stated clearly that in his view the objective was for the administration to establish control over customary land use to prevent chaotic development. He saw little possibility that 'ownerless' land would be found, and he expected that the winning of the villagers' consent for the transfer to individual title would present a major obstacle. In general however, he agreed with the propositions as outlined by Lambert, emphasising the role of local government authorities in integrating the economic, social and political development of villagers. Control over individualised land tenure for cash crop areas should, he asserted, be vested in local government bodies (subject of course to administrative guidance).

These discussions assumed that for effective cash cropping, land had to be removed from customary tenure and individualised, for only then would land use come under effective

administrative control and provide a secure base for credit. Several schemes implementing these ideas had in fact been initiated at Keravat (Rabaul L.G.C.) in 1952, Ambenob (Madang) and Vunamami (Gazelle) in 1956, (Cheetham, 1962-3: 70-3). These individualised land development schemes were started on alienated land which was leased to the Councils on 99 year agricultural lease.

In 1957 another scheme was started at Higaturu (Oro Province) this time on customary land. There an area of land was selected and, subject to clan agreement, a chain and compass survey was made and in the presence of the clan elders, local councillors, applicants and a Native Affairs officer, written declarations were made as to the allocation of each plot. One hundred and fifty such plots were registered in the Higaturu council register before the District Commissioner, Mr. Haynes, halted the process because it was on customary land and because the Native Land Commission, was, under law, the only body entitled to determine the ownership of customary land (Crocombe & Hogbin, 1963: 90). But by the device of shifting the focus of the agreement from ownership of the land to the ownership of the trees on it, the Council was able to continue with the registration (Ibid; Lynch, 1959).⁽⁴⁾

The schemes were not successful in the way the planners had hoped. The villagers were reluctant to cultivate plots of a size considered to be economically viable, and opted for smaller plots (Lynch 1959; Conroy 1958). W. Conroy, an officer of the Department of Agriculture, considered that the schemes had been initiated prematurely, and that they were "over-directed" by the Administration staff and "excessively planned".

He suggested greater autonomy for the councils and more tolerance towards "evolving" forms of indigenous cash cropping within a customary framework. Fenbury, apparently reversing his views of 1947, attacked these views strongly saying that the whole point of the schemes was to establish cash cropping outside the traditional land tenure systems and within an individualised system, and that a "laissez faire" approach could only lead to poor peasant farming (Fenbury, 1958).

The question of customary land tenure and land use was studied at a District Commissioners' Conference in 1958. The

discussion contributed little, but in his analysis of the Commissioners' Resolutions, W. Watkins, the Secretary for Law, referred to three draft bills which were in preparation - the Land (Tenure Conversion) Bill, the Land Bill and a Land Development Board Bill. Notes on the draft Land (Tenure Conversion) Bill by Fenbury (1959) were critical of the fact that the Bill applied an excessively sporadic approach to tenure conversion contrary to the recommendation of the East African Royal Commission.⁽⁵⁾ The Report of that Commission had emphasised that tenure conversion be applied systematically - area by area - rather than sporadically, in isolated instances where and when requested.⁽⁶⁾

In 1959 C.J. Lynch, Assistant Secretary for Law, visited Higaturu and considered the scheme to be a success in getting economic development under way even if not in strict accord with administration policy. He also noted that the role of the Local Government Councils had been of fundamental importance in achieving the co-operation and interest of the villagers in the scheme. The scheme, he said, whether legally or not, was a tenure conversion process, and its success in promoting economic development prompted him to "have doubts as to whether our whole approach (to registration in general) has not been far too legalistic". Tenure conversion, Lynch continued, was assumed to encourage economic development, to facilitate field extension work and most significantly, by taking land out of custom, "to avoid a subsequent chaotic situation, particularly as regards fragmentation and devolution". "But" he added "it is perhaps overlooked to some extent that merely removing land from custom does not in itself solve these problems (of development, fragmentation, etc) and indeed goes no further than clearing the ground and establishing a situation where we may be able to solve them" (Lynch, 1959).

Lynch argued that the Higaturu and other schemes were facilitating individualisation within custom, and were increasing economic production even if not in strict accord with the law, nor on blocks which the Administration considered to be large enough to be economically viable. Such a trend should, he felt, be

allowed to continue: "Technical efficiency must frequently be sacrificed for the sake of hard political and social facts." It was wrong, he concluded, for the Administration to stop such developments. He further noted that the villagers did not think so much in terms of land ownership but rather in terms of the ownership of trees and produce and how the land was used. This insight took him perhaps further than most officers in appreciating that customary land tenure systems could accommodate the registration of individual ownership rights to the produce from, or trees on, a plot of land the title to which need not itself be registered. The Certificate of Ownership he proposed for the Higaturu Scheme would have guaranteed individual rights to the produce of land but left ownership of land vested in the group and control over its economic use exercised through the Local Government Council.

What was emerging from the practical experiences of Higaturu and other schemes was the recognition that demarcation and control over the economic use of customary land on an individualised basis could be effected through Local Government Councils. It was further shown that security of access to plots could be guaranteed by the local body through clan agreements and that genuine economic development could take place on plots which the villagers felt were of adequate size to suit their needs.

In view of Lynch's comments, Hasluck's new policy, when enunciated, might have provided for decentralised land control and for a form of registration which did not have as its fundamental purpose the removal of land from custom. He might also have proposed some form of group title to land with further provision for registering occupation rights or issuing of certificates of occupation to individuals.

Hasluck presented a policy statement on land tenure in Papua New Guinea (Parliamentary Debates, 7 April 1960) in which he outlined the proposed new Bills. In 1961 shortly before the Bills were presented to the Legislative Council, John Guise made a statement on land in which he proposed that "All village-owned land should be registered by the Native Land Commission to the clan, family or individual owners as soon as possible"

and that "Local Government Councils must be granted more authority in native land matters." (Legislative Council Debates, 11 April 1961). But Guise was no better placed to influence Hasluck's policy than were the officers who had already recommended decentralised control and provisions for group title.

The comprehensive package of land bills legislated in 1962 and 1963 were the Land Titles Commission Ordinance 1962, the Land (Tenure Conversion) Ordinance 1963 and the Land Registration (Communally Owned Land) Ordinance 1962.

The Land Titles Commission Ordinance established the Commission and defined its functions. Under Section 15, it was given sole jurisdiction to settle disputes over customary land. It was also made the sole authority to determine rights in customary land and to determine whether land was or was not customary land. Second, it was empowered to declare adjudication areas, to appoint demarcation committees to determine the boundaries of customary land and to determine, under Section 22, the ownership of each piece of land so demarcated. From the record of these proceedings the Land Titles Commission was required to prepare a demarcation plan and an adjudication record which was to be forwarded to the Registrar. The Commission was also required to enquire whether the villagers were interested in converting their tenure under the provisions of the Land (Tenure Conversion) Ordinance.

The findings of the Land Title Commission under Sections 15 and 22 of the Ordinance were to be registered under the Land Registration (Communally Owned Land) Ordinance. Entry in this register was deemed to be conclusive evidence only of the facts recorded therein at the date of the finding. Thus the Register of Communally Owned Land was not a Torrens Register and registration on it did not constitute tenure conversion. Basically this Ordinance was a continuation of the provisions of the Native Lands Registration Ordinance 1952 and was designed to record decisions of the Land Title Commission for safe keeping when conversion was not immediately implemented. It was not part of Hasluck's new scheme (Bredmeyer, 1975).

The Land (Tenure Conversion) Ordinance provided for the registration of land, the ownership of which had been determined under Section 22 of the Land Titles Commission Ordinance, on a special Torrens Register, if the owners so determined requested conversion and had the agreement of all other persons with interest in the land. (7) Such land was removed from customary control and although designed for individual tenure, provision was made for up to six co-owners to be registered. Fragmentation of the land was to be avoided by limiting the number of successors to any registered plot to six people. In the case where there were more than six heirs according to the laws of the Territory, provision was made for a ballot to determine which six would inherit, or alternatively, for the sale of the land and distribution of the proceeds among the heirs.

The assumptions underlying the Ordinances were that agricultural development would be promoted by the individualisation of title to land, and that where cash cropping was introduced on customary land there developed a natural desire for individualisation of ownership. The policy adopted was to provide for rapid and final decision as to the ownership of customary land by a judicial tribunal, the Land Titles Commission, and for the guarantee of such decisions by registration.

The extensive discussions which had gone on among officers such as Fenbury, Lambert and Lynch were ignored and Guise's voice also went unheard in the formulation of the new Ordinances. In particular the Ordinances made no allowance for localised control, no allowance for residual customary rights, no allowance for group control over land and no allowance for the emergence of individual patterns of land use on customary land as was advocated by Lynch and (seemingly) by Guise. Hasluck had opted for an Australian system of individual title, centralised registry and centralised control over dealings. He had chopped off what, with Lynch, was emerging as fruitful discussion. Hasluck had, in an uncharacteristic and seemingly contradictory move rejected the trends emerging from local experience in favour of a policy of individualised registered title as recommended by the East Africa Royal Commission. (8) But in doing so he took little account of the African experience with this policy and in the

end the new laws owed little to the Kenyan legislation which provided the African model (Bredmeyer, 1975: 271).

By 1965, the process of Tenure Conversion had not begun. Already in 1964 the World Bank Report, although approving of the general policy of individualisation of tenure, expressed concern that the policy was being too rigidly pursued, that it could inhibit economic development on customary land, and that there was no provision for Local Government Council responsibilities in land matters. The Report also noted that the procedures adopted in the new Land Tenure Conversion Ordinances would be no more effective in demarcating and recording the 'ownership' of customary land than those of the previous Ordinance. It further stated that there was an "urgent need for the Administration to review its present land tenure policies and procedures with the basic objective of accelerated economic development" (World Bank Report 1964: 177). Confusion continued.

The ordinances were designed primarily for use in areas where there was a need or desire for individualisation; but Kelliher, on appointment as Chief Commissioner of the Land Titles Commission in 1965, promptly declared almost 500 adjudication areas covering nearly the whole country. Kelliher disregarded the existing policy of gradual implementation of tenure conversion, concentrating initially on the Popondetta area (Cleland, 1965). His position was complicated for, in his role as Chief Commissioner, he had sole judicial authority to declare an adjudication area; this authority also involved an administrative act. In his judicial capacity he was not bound by policy, whereas to the extent that a declaration was an administrative act, he was bound by policy. He was, as D. Whalan (1969) put it, "in a judicial vacuum". "The extent of his declaration of adjudication areas was also contrary to the intention of the Legislation" (Bredmeyer, 1975: 267).

The appointment of 'demarcation committees' lagged well behind the declarations. They were, on the whole, organised by officers of the Department of District Administration and the activity of the committees depended largely on the extent to which those officers could assist and guide them (Hide, 1973). By 1969 there were 536 adjudication areas, and demarcation committees appointed to 349 of them. Generally the committees

failed to achieve the aims of demarcation basically because the form of individualisation sought, with the complete extinction of group and secondary interests in the land, was incompatible with the existing Papua New Guinean attitudes to land tenure and the interrelation between land tenure and kin-based social structures. There were also practical problems of the inaction of committees, lack of supervision and a shortage of Commissioners to hear disputes and adjudicate the areas demarcated. The exercise did show, however, that in some areas the process could be implemented and that these areas were those where trends towards individualisation had already emerged and been accommodated within custom (Bredmeyer, 1975: 273).

A number of academic studies on land use began to appear in the sixties and their findings questioned many of the assumptions underlying the policy of tenure conversion. These studies questioned the need and desire of the villagers for individualisation of tenure (Ploeg, 1971: 25) and pointed to the positive benefits and possible economic development which could accrue from the adaptation of traditional groups to commercial enterprise and to the entrepreneurial role of the "big-man" (Finney, 1969; Crocombe, 1965). They also showed that the individualisation of tenure in settlement schemes had not necessarily removed from the minds of the people the association of the land with the forebears who had cleared it (Crocombe, 1965; Ploeg, 1971). There was much evidence too that with cash cropping there was a tendency for customary systems of inheritance to change towards a more definite patrilineal system, despite resistance from more traditionally inclined villagers (Ogan, 1972).

More recent studies have shown that from the early 1950's whether the policy in vogue was towards 'communal' or individual family farming, the actual consequence of agricultural schemes was towards individualisation in an entrepreneurial sense. In the Highlands for example the introduction of coffee by DASF officers in the early 50's simply encouraged 'progressive' individuals to plant coffee on any customary land to which they had access (McKillop, 1976: 4). This encouraged an ad hoc approach to individualisation through an 'evolutionary' process

which Fenbury so passionately feared. It led to the emergence of 'big peasants', as did the later introduction of cattle to the Highlands. These were the 'big men' who could plant coffee as individuals on land which they controlled rather than owned. Gerritsen (1975) also points out that many so called 'communal' developments in fact depended on outstanding individuals for their support, these men often becoming de facto individual businessmen at the expense of the group, through their ability to control the land allocated to the schemes, as well as the funds and profits.

Such evidence illustrates even more clearly Lynch's insight that the individualisation of economic production need not **wait** for the prior individualisation of land tenure, but could be based on the exercise of control over the trees and produce on the land. Unless group rights were protected by some form of legal title, however, individualised land tenure could emerge at the expense of other group members, producing a class of land short or landless villagers.

The early studies, and the Land Titles Commission hearings, illustrated that custom was not static. As pressure for change developed within the societies, the institutions and mechanisms through which land rights were validated, were manipulated in new ways, and new systems of land tenure, inheritance and land use could continue to be validated.

Indigenous agricultural development and individualisation of economic production in Papua New Guinea proceeded not through the application of the land tenure conversion process but almost in spite of it. Other measures designed to assist local development were the Model Land Use Rules which were incorporated in the Local Government Ordinance from 1963 to 1968, and which seem to have been ineffective, and the Clan Land Usage Agreement which was designed by the Papua New Guinea Development Bank (established in 1967) as a security for lending money to individuals for projects on customary land. The success of the Clan Land Usage Agreement shows that the individualisation and registration of land is not an essential prerequisite for the granting of credit to village farmers. It shows too that security of tenure can be guaranteed on customary land.

During the latter part of the 1960's expatriate settlers shifted their demands from alienation to provisions for direct dealing (leasing) between "native and non-native" in accordance with the recommendation of the World Bank Report 1964. The prohibition of direct dealing had been fundamental to land policies since the very establishment of the colonies. It had always been the Administration's belief that direct dealing would result in land that was needed for subsistence being effectively alienated to outside interests thereby producing de facto landlessness. Experience in other countries had also shown that to allow direct dealing in land was a sure way to deprive villagers of their land unless there were strict government controls over such dealings. Papua New Guineans for their part focussed their attention increasingly on unused alienated land, on land which they believed had been unjustly alienated, on land shortages in some areas and on land acquisitions for the Bougainville copper development. Little attention was given to customary land legislation.

In 1966 a special section was created in the Department of External Territories in Canberra to deal exclusively with the troublesome areas of customary land tenure and existing laws. By 1969 there was a sense of urgency developing as the possibility of self-government approached. S. Rowton Simpson was invited to Australia and prepared a report on registration of customary land, and a team from Papua New Guinea (all expatriates) visited Kenya to study the registration processes in operation there. After their return a decision was made to draft new customary land legislation, and Don Grove, the Secretary for Lands, sought public discussion on the proposals though he gained little response. The Bills prepared incorporated many of the proposals which had been discussed prior to the 1962-3 legislation. They also incorporated a great deal from the Kenyan legislation which officers in Papua New Guinea had been led to believe had proved successful. Nevertheless the Bills were withdrawn from the House of Assembly amidst considerable controversy on the eve of elections for the House.

The Administration blocked motions asking for a Commission of Inquiry into Land matters hoping to reintroduce the package of Bills to the Third House.

In this opening speech to the Third House of Assembly, the Governor General, Sir Paul Hasluck, (the architect of existing Customary land legislation) stated that: :

The prosperity of Papua New Guinea as a whole and the well-being of individuals and small communities depend to a large extent on making productive use of land. Members will be asked to consider legislation to give greater security in land ownership and thus encourage better use of the country's land resources.

To which Michael Somare replied:

The Governor-General in his speech told us that land legislation will soon be introduced. But I would like to assure the country that there will be no new land laws without a very extensive committee of inquiry to look at the new proposals and to seek the view of Papua New Guineans in the first instance. Sir, land is the most important thing to the people of Papua New Guinea. We want the best possible land laws for our country according to the wishes of the majority of Papuans and New Guineans after the committee of inquiry has sought the views of Papuans and New Guineans.

The House later agreed to Somare's proposal and the Commission of Inquiry into Land Matters submitted its final report in October 1973.

FOOTNOTES

- (1) This paper is based on an Honours Thesis prepared under the supervision of Dr Alan Ward and presented at La Trobe University in 1978. The author wishes to acknowledge his debt to Dr Alan Ward, Mr Jim Fingleton and Mr C.J. Lynch who read and commented on the early drafts of this paper. The author also accepts full responsibility for the final form of the paper.
- (2) Commodore Erskine's proclamation of the Protectorate over Papua asserted, among other things, that the Papuans' land would be "secured" to them. The Imperial Charter for the New Guinea Kompagnie of 1885 required that the Kompagnie "enact those regulations necessary to protect natives."
- (3) Note that while Connell does not link the Papuan provisions with the Administrations requirement that coconuts be planted by villagers in New Guinea he states that a law "probably" did exist. It would seem that this "law" was in fact the application of the Papuan provisions in New Guinea as stated by Cheetham. There was a Regulation under the Native Administration Ordinance 1921-2 (New Guinea) which elinated ... " a District Officer shall order that every able bodied native shall plant such crops as the District Officer may direct.." (Diggins, 1978: 55).
- (4) The recording was done under the Local Government Ordinance and not under current Land Legislation. A Model Land Use Rule was incorporated into the Local Government Ordinance in 1963 and revoked in 1968.
- (5) These same criticisms were levelled in 1969 by S. Rowton Simpson, land tenure expert with vast experience in Africa who had been invited to report on Papua New Guinea's customary land registration laws and procedures. (Simpson 1969).
- (6) In 1957 Simpson had also prepared a brief on customary land tenure for Hasluck who was then visiting the Colonial Office and no doubt this material had been considered by the drafters of these Bills.
- (7) As presented to the Legislative Council, the Ordinance had provided for conversion with the agreement of the majority of persons with interests in the land. The amendment was prompted by the opposition of Papua New Guinean Members of the Council and its implementation was, in the view of some officials, sufficient to render the whole programme of Tenure Conversion unworkable.
- (8) Hasluck normally rejected the value of experience in other colonies and discouraged his officers from studying development elsewhere on the basis that PNG was unique. He was also generally committed to establishing Australian institutions in PNG (See Oram, 1973: 5).