Law Reform Commission of Papua New Guinea

CORPORATE SOCIAL RESPONSIBILITY IN PAPUA NEW GUINEA

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**NOTE:** All opinions, observations, or recommendations are entirely those of the author, and do not purport to reflect the collective view of the Law Reform Commission.
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I. PREFACE

Few would deny that the government corporation and the transnational corporation are the two corporate entities with the greatest potential for impact on the social and economic problems of Papua New Guinea. Therefore, I focus attention on the nature and deficiencies of each and discuss the developing concept of corporate social responsibility and the problems of obtaining finance and technology for development before proffering some recommendations to better enable each of these corporate bodies to achieve the economic and social aims of the Independent State of Papua New Guinea.

The real emphasis of corporate social responsibility in Papua New Guinea should be on private sector investment by transnational corporations and on loans channelled through such international financial institutions as the World Bank, the International Monetary Fund, and the Asian Development Bank; and on the government corporations which often deal with the transnational corporations and the international financial institutions and which exercise substantial control over important sectors of the P.N.G. economy.

Corporate social responsibility involves the self-interest of transnational corporations to help Papua New Guineans solve their social and economic problems. It also involves the realisation on a global scale, that the world's population will increase more than 50% in the last 25 years of the 20th Century - from 4 billion in 1975 to 6.35 billion in 2000. Roughly 90% of that growth will occur in the developing countries, thus widening the gap between rich and poor nations. More important is the fact that the energy resources and raw materials of a country like Papua New Guinea are as vulnerable to the disruptions of national and provincial politics as they are essential to the economies of the industrialised world. Therefore, helping Papua New Guinea to avoid social and economic disruptions is not just a humanitarian ideal, but a matter of harsh reality.

As Shridath Ramphal, Commonwealth Secretary General, stated:
"The current international dialogue is no longer about 'whether' but about 'what' — what kind of new order shall take the place of the old, what shall be its quality, what ends shall it serve, what means shall it employ? It is a dialogue about the character of fundamental change — not about the need for change itself. It is a dialogue to which the best minds of our time must be addressed; for upon its outcome will depend the character of our world society, will depend the quality of our human condition, will depend the basis of our planetary survival.

The distinguished Prime Minister of Canada (Mr Pierre Trudeau) has given particularly felicitous expression to these perceptions of the current international dialogue. Shortly before the Kingston meeting, after receiving the freedom of the City of London in the ancient hall of the Mansion House, he said:

The human community is a complex organism linked again and again within itself and as well with the biosphere upon which it is totally dependent for life. This interdependency demands of us two functions: first, the maintenance of an equilibrium among all our activities, whatever their nature; second, an equitable distribution, worldwide, of resources and opportunities.

The proper discharge of those functions calls for more than tinkering with the present system. The processes required must be global in scope and universal in application. In their magnitude, if not in their concept, they must be new. Of their need, none can doubt.

We know in our hearts what has to be done even if we have not yet found in our minds the way it can be done.

Let us begin the search, and let us do so with boldness and with excitement, not with hesitancy and uncertainty.

At Kingston thirty-four Commonwealth governments agreed to begin that search. Their leaders accepted in their hearts what had to be done. They have entrusted to you the finding of the ways in which it can be done."

This occasional paper is an attempt to find the best way for Papua New Guinea.
II. INTRODUCTION

Papua New Guinea faces a dilemma in the 1980's that will not be easy to resolve. On the one hand, public enterprise especially in the form of the government corporation, has grown so rapidly at the national and provincial levels in the past decade, that almost no one in the Government or the private sector knows exactly how to cope with it. In the words of Sir Julius Chan, Prime Minister of Papua New Guinea: "Government is big business - perhaps our biggest and perhaps our most ineffective." On the other hand, private enterprise in the form of the transnational corporation continues to play an all-important role as the major provider of finance capital and technology for Papua New Guinea's economic development. But foreign exploitation is often suspected as the main reason for the transnational company's involvement in Papua New Guinea.

In addition, both corporate entities often seem to operate at cross purposes. There is what may be called an "abrasive interface" between government and private enterprise which results from differences in thought processes. Business executives and government officials often do not agree on strategy or tactics for a particular development project because they do not understand each other; they do not hear or listen to each other, they do not appreciate the purposes of, or the constraints on each other. They may be highly suspicious of the other's motives. Their differences in age, perceptions of power and authority, and relations to public processes are all factors exacerbating the friction. When a problem is confronted, the economic thinking of the business executive says: "What is the efficient way of solving it?" But the political thinking of the government official says: "What is the fair and equitable solution?" In the search for equity, economic considerations are too often overlooked by the special pleading of individual interest groups who have curried favour with a particular Minister
INTRODUCTION ... cont.

and/or other overzealous Government officials. Yet both questions are equally valid and must be answered, and any incompatibility between the two must be resolved as soon as possible.

These corporations cannot exist in a vacuum. To control the economic and social development of this country, it is necessary to co-ordinate and control, to some reasonable extent, the business strategies and administration of both government and transnational corporations. The necessary co-ordination and control are lacking at present. Only recently has the Government begun to make a concerted effort to co-ordinate and control the growth of both the public and private sectors, while giving sufficient recognition to the National Goals and Directive Principles of the P.N.G. Constitution and the Eight Aims of Economic Development.

Both government corporations and transnational corporations must consider the economic and social development needs of the nation in planning their respective business strategies. Corporate social responsibility is the duty of these corporations to serve the public good: i.e. the nation's needs.

There must be a triangular community of interest between government corporations, which represent the best laid plans of a young developing country, the transnational corporations which represent the owners and managers, and the people of Papua New Guinea for whose benefit corporate social responsibility has become an issue of major importance. The National Goals and Directive Principles of the P.N.G. Constitution, and the Eight Aims of Economic Development require it.

The public and private sectors of this country are inextricably intertwined and inexorably bound to each other. No economic or social problem in Papua New Guinea can be categorised as a problem of the public sector as opposed to the private
INTRODUCTION ... cont.

sector. Both sectors face the same problems and the same responsibilities. Therefore, corporate social responsibility in the context of Papua New Guinea is the same for both the government corporation and the transnational corporation. Yet social responsibility is somewhat of a problem for both of them. The government corporations solve the problems of the relation between shareholders and managers by abolishing shareholders. So too, they may appear to have solved the problem of social responsibility. But problems remain. In the last five years, many government corporations have been able to make little, if any profit, thereby creating a tension between profit-seeking and social objectives which, while not identical, is analogous to that felt by the private sector transnational corporations. As for the managers, the statutes creating government corporations often have provided for control by the relevant Minister. Unfortunately, the powers of the Minister have at times raised grave constitutional difficulties concerning the relationship between the Government and the corporation.

The government corporation is a very popular legal method of extending the area of public control or state intervention in industry. Perhaps the same objective can be obtained by acquiring shares in a company, and appointing government nominees to its board. These methods, among others, are employed at present in Papua New Guinea. These activities suggest that the number of "mixed enterprises" in this country will increase, and that the relationship of the larger private transnational companies to the Government is likely to change, even if the Government does not take a very large shareholding in the particular joint venture. The focus on corporate social responsibility will grow sharper in the 1980's as the international economic turmoil of the industrialised world continues to be felt within Papua New Guinea.

Port Moresby, P.N.G.  EDWARD F. GRAZIANO
APRIL 1981
III. A PROFILE OF THE TRANSNATIONAL CORPORATION

A simple but essential definition of a transnational corporation might be that it is a corporation based in one country with subsidiaries in two to five other countries, each of which the parent company controls either by the requisite share ownership, such as 50 percent or more, or by comparable arrangements. Its principal production, sales, and financial policies and activities are co-ordinated to some degree, and the volume of its business is substantial, whether in the respective domestic markets of the parent and subsidiaries or through export to other markets.\(^{11}\)

Hereafter the United Nation's term, "transnational corporation" shall be used rather than the older term "multinational corporation" although their respective meanings are inter-changeable. Transnational corporations (hereafter referred to as TNCs) operate across or over national boundaries. Almost all TNCs have headquarters in the advanced industrialised nations. Management and ownership of the TNCs is still expatriate-dominated throughout the Pacific Island nations.\(^{12}\)

In the context of Papua New Guinea, TNCs in terms of profits, sales, and assets, like Burns Philp,\(^{13}\) the Carpenter Group,\(^{14}\) or several other lesser known Australian and New Zealand based companies do not compare with the really massive TNCs on a global scale. But although some of the world's largest TNCs do have operations in or around the Pacific Basin - (e.g. Bechtel, Fluor, Royal Dutch Shell, Mobil Oil, British Petroleum, Unilever, Conzinc Riotinto of Australia, a subsidiary of Riotinto Zinc of the U.K.) - none of them have extended activities into so many different sectors of the Pacific Islands as the Australian-based TNCs, W.R. Carpenter Holdings Ltd. and Burns Philp Ltd. The possibility of take-overs of these companies by any of several huge TNCs increases because of the economic significance of the Pacific Basin in the last two decades of the 20th century and into the 21st century.\(^{15}\)
The main sources of foreign investment in Papua New Guinea continue to be Australian and New Zealand based. However, the actual investment may have originated in another country under certain circumstances. Other sources of investment are based in Britain, Japan, the U.S.A., the Philippines, South Korea, Singapore, Hong Kong and the E.E.C. (mainly Germany). Papua New Guinea has been referred to as an "Australian neo-colony" and to some extent the label fits. But the Japanese and the Americans have yet to make their presence felt as long-term partners in the economic development of this country. Until that level of understanding is reached between Papua New Guinea and the U.S.A. and Japan, Australia and New Zealand will continue their dominance of foreign private investment in this part of the world.

Most TNCs that invest in the Pacific Islands, including Papua New Guinea, concentrate on engineering and metal working, mining, quarrying, banking, finance, oil and mineral exploration, chemicals and allied products, founding, primary produce dealing, commerce, timber, and fisheries. Tourism is practically undeveloped in Papua New Guinea, but quite developed in places like Fiji and Tahiti.

To a Papua New Guinean, the fact that a company or investor is foreign (i.e. expatriate) may be the key to defining the TNC in P.N.G., especially when linked with largeness. Yet local economic planners and politicians may be more troubled by the business consequences that seem to flow from the TNC's legal structure. What is most significant is the common strategy of the transnational enterprise, co-ordinated across national borders and having significant impact within them.

As L.C.B. Gower so lucidly points out: "We live in a world where the giant company has already assumed international proportions, either by way of trading agreements or mergers with foreign companies or by operating subsidiary companies or branches in other countries."
One of the central theses of this paper is that the TNC should not be viewed as merely a profit-maximising entity. It should be viewed as a coalition of persons with varied objectives and differing capacities to influence corporate policy rather than as a single-minded surrogate-entrepreneur. Even a single-minded group of managers in the 1980s would find direct pursuit of profit maximisation difficult in dealing with complex international problems, especially in the Pacific Basin where there is increasing competition and conflicts, where the ecosystem is in danger of being irreparably harmed, and where cultures rich in custom and tradition are being eroded and Europeanised. In today's Pacific where scarce natural resources exist in abundant quantity, and are often obtainable only from developing countries with many socio-economic problems, managers of transnational corporations must also aim at goals unconnected with short-run financial profit. For example, in Papua New Guinea, their perceptions must be coloured by clear conceptions of socially and economically useful activity or the national interest. Of course, there are others who claim that: "... global corporations, as they themselves like to say, are neither charities nor welfare organisations, although some devote modest resources to good works ... The claims of the (transnational) corporation rest instead on a theory of the marketplace which says in effect that by enriching themselves they enrich the whole world." 

The latter notion is bolstered by Robert Stauffer, who has identified three "major ideological clusters of contemporary capitalism" that describe the motivations of the TNC: 

"The first of the ideological clusters is the overarching fixation on growth, on the persistent need of corporations to expand, to penetrate markets, to show progress, etc. This relentless drive for growth is mirrored in the business media as well as in the annual reports of corporations: the cumulative impact from reading the literature over an extended period of time is almost visceral. There is a massive aggressiveness in this relentless drive to expand, to grow — and in the case of transnational corporations, to do so throughout the world — that is at best only a thinly disguised version of earlier Western expansionism."
Closely allied with the mystical belief in growth is the corporate dedication to profit as the central goal toward which all activities must contribute. Milton Friedman has said: 'There is one and only one social responsibility of business — to use its resources and engage in activities designed to increase its profits.' What is being objected to here is not the need for profit but rather the elevation of that need to a position beyond debate, to a position approaching a sacred object. A dollar earned selling a product to a near-beggar is the same as a dollar earned selling it to a millionaire, a dollar earned from selling a destructive product the same as one from selling a life-saving one.

Finally, and following closely from the profit-market arguments is the role of consumerism in corporate world views. Like growth and profits, consumerism takes on an ideological coloration as it is used to claim that corporations are simply giving people what they want, simply providing them with choices, simply improving their lives. TNCs brag of their successes year after year in opening up new product markets, in devising new advertising strategies to sell in hitherto untapped countries, in studying "local" cultures to find out better how to employ idiosyncratic (peculiarities) values to break down sales resistance, etc. There is both a total sensitivity to local conditions — the better to manipulate the "market" — combined with a total lack of sensitivity to the cultural genocide that the TNCs are engaged in.22

Whatever view one may have concerning the main responsibilities of the TNC in the developing world, it is generally agreed that:

1. The TNC has a structure and orientation which allow it to develop a strategy that is more nearly global in perspective than that of any previous entity known to 20th century business; and

2. The TNC is the major supplier of technology, which makes it both a formidable competitor or antagonist, and a highly desirable guest; and

3. The TNC is a large scale enterprise with many readily available financial resources and frequently a commanding market position.

One might say that the TNC is basically a coherent economic institution with a narrow range of economic motivations. It is an effective and swift machine, particularly in comparison to most Third World national governments, beset with complex
and malfunctioning bureaucracies and conflicting goals, with which it must deal.23 One might visualise a world map on which each nation (including P.N.G.) zealously safeguards its own national borders while the TNC conducts its operations on an overlay which highlights international mobility, thereby blurring national boundaries. The TNC may be viewed as a decisionmaker dealing with individual nations, not necessarily as an equal, but as an independent force pursuing independent objectives which are not necessarily totally compatible or incompatible with the economic development goals of a particular developing country.24

A clear indication of the difficulties Papua New Guinea faces in dealing with the TNC is its failure to articulate its various concerns about TNCs. Instead, inflammatory language about foreign exploitation often substitutes for careful analysis.25

These problems grow when the National Parliament or the Law Reform Commission or any other statutory body reacts through legislation, legislation which is vague and frequently incapable of development through specific cases or through negotiation, and hence only able to produce agreements that neither settle critical issues nor endure changes in conditions for the long term.26

IV. A PROFILE OF THE GOVERNMENT CORPORATION

Government, generally speaking, involves two functions - law-making (i.e. the formulating of public policy) and public administration (i.e. the implementation of that policy). Under the system of government in place in this country, the National Parliament makes the laws which are carried forward by the executive branch and the national public service. Both functions, legislative and executive, are directed by the governing coalition through Cabinet. The Government collectively, and the Ministers of the
Government individually, must account to the National Parliament (and presumably to the People of Papua New Guinea at election time) for governmental action under their control.

The courts in Papua New Guinea function independently as legal arbiters in accordance with certain fundamental constitutional relationships which have yet to evolve, but have been inherited from the Anglo-Australian legal tradition. More fundamental is the "rule of law" which basically states that society will be governed through fair and reasonable decisionmaking rather than by the arbitrary or capricious fiat of an individual or group. While the National Parliament, in its capacity as legislator working within the given constitutional framework, is supreme in the sense that it can repeal or amend any ordinary law, in practice it feels compelled to respect the basic laws and constitutional directives about such matters as the relationship between the legislative, executive, and judicial branches of the government. These generally accepted propositions lead us to a less well-defined area between law and politics - public administration.

The involvement of Government and its employees with the judicial process takes many forms in Papua New Guinea: a citizen may be injured by the negligence of a public servant, the Government as tax collector may sue for customs duties or income tax, a government contract may be breached or customary land may be expropriated by a public authority. Therefore, a constitutional, contractual, or jurisdictional problem may have to be decided. And many of these claims come before the courts for resolution.

However, in the last ten years, an important legal form has developed almost as a phenomenon in an otherwise traditional legal environment. It is known as the statutory or government corporation. It has the four standard attributes of corporate personality, i.e. perpetual succession, a common
seal, the ability to own property and the capacity to sue or be sued in its own name. The big difference is that there are really no shareholders per se. Yet it also seems to fall in the penumbra between law and politics so that lines of public accountability and financial responsibility in several of the P.N.G. government corporations have become obscure. Part of the problem seems to be that the government corporation cuts across traditional legal definitions. It is a public enterprise with its own enabling legislation, but often operates through the medium of private law – i.e., the rules of common law and equity. It takes different forms and functions sometimes from the realm of public law, and sometimes from the private. It determines, and is in turn influenced by, the legal environment for private enterprises.

The creation of a public enterprise by Act of Parliament distinguishes the government corporation from a public enterprise which may be established under the COMPANIES ACT 1963 though the Government provides the entire capital and holds all or only part of the shares. This latter type of public enterprise is not really a government corporation proper, but actually either a form of joint venture with foreign private capital or a wholly-owned (by government) limited company with responsibility for management entrusted to expatriate managers on a contractual basis. However, our focus herein is upon wholly-owned government corporations with their own enabling legislation and with a management structure fairly well separated from the purview of any Government Ministry.

The increasing scope of activities of government corporations in Papua New Guinea since Independence is a very significant event in the economic development of this country. It is significant because it has blurred the traditional distinction between socialism and capitalism, as government corporations supposedly make every effort to operate efficiently on the profit motive and to bargain effectively with the TNCs for fair and equitable deals. But do they actually serve the
purposes for which they were created?

Government corporations set up by special statute exist to achieve a variety of vital national goals. As more and more areas are opened up to the control of government corporations, the issues of efficiency and democratic control over them become critically important for the long-term economic development and indeed the viability of the entire socio-economic structure of Papua New Guinean society. And yet experience in the last decade in Papua New Guinea indicates that the record of government corporations with respect to efficiency and democratic control has not been good.\textsuperscript{31} In many instances not only have they failed to generate surpluses, but have been known to squander scarce public funds,\textsuperscript{32} while at the same time (in direct proportion to the degree of financial success achieved) they could tend to become "empires unto themselves [which] resist any public accountability and become a breeding ground for corruption and nepotism."\textsuperscript{33} On the other hand, the government corporation can be looked upon as a form of "state capitalism". That label is an adequate designation for government allocation of capital, which is a collectivist component of a mixed economy which is what Papua New Guinea, the U.K., and the U.S.A. have.

Papua New Guinea must sooner or later face up to the painful realisation that many of its politicians pay only lip service to the political principles which supposedly guide their actions. The National Goals and Directive Principles of the P.N.G. Constitution and the Eight Aims of Economic Development often seem irrelevant.\textsuperscript{35} A lot of state capitalism is in place in the P.N.G. economy, but at this point in time its real value may be outweighed by its rhetorical value. To a large extent government corporations might be said to reflect the weakness of the P.N.G. economy and its inability to achieve autonomous growth.\textsuperscript{36} And on the other hand, they could become the local partner with the TNCs in large and costly economic development projects. That is why it is important to consider corporate social responsibility in light of both entities.
Government corporations exist for a variety of reasons in a developing country like Papua New Guinea:

* To fill the gaps left in the economy by private enterprise
* To provide a basic infrastructure for the economy
* To promote greater national economic independence
* To provide some measure of check over, or at least competition with, the private sector
* To obtain greater control over the national economy
* To ensure a more balanced distribution of industry and its rewards

Government corporations also serve to bring about greater governmental control when there is no particular initiative for a certain project developing in the private sector.

Government corporations when coupled together with private business in the form of a joint venture may also provide a better basis for the control of the private sector. The P.N.G. Government could obtain increased access to important business data. It could minimise opportunities for over-invoicing, transfer-pricing and tax evasion in general. National capacity – whether in respect of finance capital or technology (either in the form of technical and research expertise or high level manpower) – depends on a host of decisions at the transnational corporate level. It therefore behooves Papua New Guinea to work closely with the TNCs.

There is also the counter-argument that joint ventures not only result in the private partners making the key decisions in the context of a weak framework of control, but the National Government's potential for control, which might exist by virtue of capital available to it, is lost through the effective de-nationalisation of government capital. Be that as it may, on the whole, government corporations created by Act of Parliament can be seen as the
mechanisms which offer control by providing alternative and competing institutions to those of the private sector. Arguably, government corporations have a social responsibility to promote greater efficiency and competitiveness and to evoke a greater positive reaction on the part of the private sector, to the National Goals and Directive Principles of the P.N.G. Constitution and to the Eight Aims of Economic Development. If the responsibility is theirs, they have failed to meet up to it. In fact, it must be conceded that there is a considerable range of activities which in the normal course of a government corporation's daily business is not subject to judicial review or ministerial direction: for example, the internal management of several P.N.G. government corporations and departments or sub-departments and how they deal with the public and how they exercise their discretion within the limits of statutory authority. It appears that substantial areas of government in Papua New Guinea are managed by officials who are only remotely responsible to Ministers or to the National Parliament and who have little direct contact with the public.\textsuperscript{1}

The time has come to re-establish public accountability and financial responsibility. There is no "quick fix" that can act as a panacea for the ills of government bureaucracy. But if there is a clear concept of corporate social responsibility it should be enunciated and made applicable to the public as well as the private sector.

V. THE CONCEPT OF CORPORATE SOCIAL RESPONSIBILITY

The concept of corporate social responsibility has had somewhat different meanings over time and in various places. Initially, in the industrialised world, the focus of corporate social responsibility was almost exclusively on the role of the managers.\textsuperscript{2} It was acknowledged that the managers had a great deal of discretionary control which became less subject to restraints as the corporation became larger and
the shareholders grew more distant from the decisionmaking process. Hence, managers had to adopt a professional, almost diplomatic, posture with respect to their role in running the corporation.43 Unfortunately, this perspective, which impliedly rests corporate social responsibility on the shoulders of the managers collectively, completely ignores the reality that a corporation is first and foremost an economic institution. Although the breadth of a corporation's power may mean that the corporation plays a highly significant social and political role, its legitimacy traditionally rested with its role as an economic institution.44 Thus, profit making, and not the collective morality of the managers, has remained until recent times the guiding criterion.

The concomitant of corporate social responsibility has always been corporate power.45 Those managers who have the greatest responsibility in the corporate hierarchy also control and wield the power of the corporation - the power of the "owners" who supply capital and that of the workers who "create". And they control through their decisions a great number of the economic interests of the consumers who give value to the products of the enterprise. In fact, day-to-day managerial control - and not majority share ownership - is the most important component of corporate power.

Writers from Galbraith to Toffler discuss the significance of the rise of a managerial elite.46 Classical economics from Marx to Ricardo indicated that whoever owned the tools and technology (i.e. the means of production) would control the society. But history proved the economists wrong.47 Marx and others argued that ownership of the "means of production" created power, and that human labour is the sole source and real denominator of economic value. In the final analysis, however, neither the "owners" nor the "workers" came to power. In both capitalist and socialist nations, it was the corporate manager who took command - "the integrators who rose to the top."48
The new power of the "integrators" (i.e. corporate managers) has been best described by W. Michael Blumenthal, former U.S. Secretary of the Treasury. Before entering government, Blumenthal was Chief Executive Officer of Bendix Corporation. Once asked if he would some day like to own Bendix, Blumenthal replied: "It's not ownership that counts - it's control. And as Chief Executive that's what I've got! We have a shareholders' meeting next week, and I've got ninety-seven percent of the vote. I only OWN eight thousand shares. Control is what's important to me ... To have control over this large animal and to use it in a constructive way, that's what I want, rather than doing silly things that others want me to do." 49

Such a concentration of power in a managerial elite raises the issue of corporate power and its regulation - in whose interest and for whose protection. A constant battle has been waged over the last fifty years between managers who wield corporate power, in whatever form, and the subjects of that power. If there is a continuous desire for power, there is also a concomitant desire to make that power the servant of the bulk of the individuals it affects. Slower but surer in Papua New Guinea, is the development of social pressure which forms the heart of the concept of corporate social responsibility demanding that corporate power should be used for the benefit of all concerned. This pressure, constant throughout the Western world in the last fifty years, has already made its appearance in many guises in the economic realm. In Papua New Guinea in the last decade the government corporation, the business group and the land group have developed as corporate entities which are in significant part the embodiment of this pressure.

One can observe throughout the world in varying degrees of intensity the increasing demand for wider and more equitable distribution of corporate power for the greater good of the general public. 50 This is the essence of corporate social responsibility.
Until now we have talked only about shareholders and managers. Little so far has been said concerning the general public. The concept of corporate social responsibility includes the notion that the modern corporation must serve not only the owners and the managers but all of society. Neither the claims of ownership nor those of control can stand against the paramount interests of the whole community because there is a triangular community of interest that is best served by considering the people's values as embodied in the legal and economic framework of the country. This community of interest derives from the National Goals and Directive Principles of the Papua New Guinean Constitution and the National Parliament whose predecessor, the House of Assembly, was responsible for the drafting of the Eight Aims of Economic Development.

Corporate social responsibility in a democratic society is no longer a matter of voluntarily deciding to do what is moral, ethical, or socially useful. The only real choice corporations have today is to choose between acting responsibly of their own free will or doing so because the National Parliament tells them they must, and sets down exactly how they must act. Now, long-term profit maximisation must be considered a form of "enlightened self interest". The implied suggestion that the corporation which acts in a socially responsible manner is necessarily doing something that it would not do if it were concerned solely with profits is incorrect.

Voluntary, responsible behaviour is not antithetical to maximum profits. On the contrary, because irresponsible behaviour leads to governmental regulation, social responsibility and long-term profit maximisation more often than not dictate similar actions. In the case of Papua New Guinea, the TNC and the government corporation alike must look beyond an annual profit to shaping an environment which will permit "economic growth" to continue for many years. Economic development must be a primary focus of
all corporations doing business in Papua New Guinea.

The economic development aims of Papua New Guinean society have been enunciated with clarity and force in three basic sets of guidelines:

* The National Goals and Directive Principles\textsuperscript{54} of the P.N.G. Constitution
* The Eight Aims of Economic Development\textsuperscript{55}
* The Terms of Reference concerning the Review of Economic Laws\textsuperscript{56}

After perusing these, one is led to conclude that with respect to all corporations in Papua New Guinea - especially foreign enterprises - the following long-term objectives and assumptions must apply:

A. Long-Term Objectives\textsuperscript{59}

All three sets of the above guidelines could be distilled into five overriding long-term objectives with respect to business/commercial activities in an Independent P.N.G.:

1. Increased local, indigenous control of the economy; and localisation of many forms of economic activity; (and this is the highest priority bar none).

2. Major increases in the opportunities for employment and, better yet, for income-generating self-employment.

3. Emphasis on growth of income among the citizens of Papua New Guinea while at the same time avoiding great disparities among groups in terms of local income distribution.

4. Greater emphasis on rural development, including food-producing industries like poultry farms, piggeries, on cash-crop expansion through the proliferation of small-scale coffee, cocoa, copra, citrus, tea (and other fruit and vegetable) plantations and upon the development of the smaller urban centers throughout the country.
5. Adaptation of the P.N.G. economy so that it becomes progressively (yet gradually) less dependent upon Australian grants-in-aid (yet perhaps dependent to some degree on a variety of foreign aid from many different countries for some time to come) and, ultimately, less and less dependent on the foreign investment capital of the TNCs.

B. Assumptions

To be meaningful, any choice of objectives implies a set of assumptions concerning the relationship between TNCs and Papua New Guinean society as a whole, and the desires of P.N.G. citizens with respect to the social and economic development of their country. Since these assumptions have had to be made, they should be made explicit:

1. The P.N.G. Government always regards its highest priority to be the welfare of its own people (and the concomitant assumption that it must eliminate in the present (and prevent for the future) any form of economic exploitation especially of the foreign type). Indeed, the acceptability or otherwise of foreign residents within P.N.G. should depend almost exclusively upon the contribution which they can make to the welfare (which broadly defined includes educational opportunities and health care) of the citizenry.

2. National and social cohesion are regarded as important aims of economic policy. Therefore, there is good reason for developing a mixed approach to economic development that combines a concentration of resources in the areas of maximum financial returns with the need to distribute the benefits of government expenditures more evenly among the provinces. A high degree of distributional equity among the people and the provinces is a constant aim.

3. A given increase in income contributes most to the welfare of the people if its effect is to even up living standards among a given population; and, conversely, it is necessary to avoid gross inequities of income distribution between P.N.G. nationals.

4. Rapid changes in social organisation are often disruptive and painful; and, therefore, it is
desirable to achieve economic advances through the adaptation of traditional or existing forms of organisation (if and when possible).  

5. Encouraging citizens to enter the cash economy merely to increase the size and volume of activity within the cash economy is without merit. Instead, the approach should be to seek to create conditions which will facilitate the earning of incomes by employment or self-employment for the satisfaction of those wants for which money is required.

6. Since Independence, the management of the modern sector of the P.N.G. economy has been shifting ever so slowly from foreign-based corporations to locally-controlled groups; and yet, without causing serious disruptions of production and employment, more effective means should be found to encourage this transfer.

7. Insofar as foreign capital and personnel are to be welcomed to aid in the economic development of P.N.G., perhaps more and better preferences (in the form of tax or trade concessions, etc.) should be extended to those foreign businesses that emphasise the development of training programs - both intensive and permanent.

8. The continued existence of the "dual economy" which perpetuates the continuation of large income disparities in close juxtaposition to each other is a constant source of economic ill-being because it gives rise to wants, dissatisfactions and a feeling of inferiority which the person with the lower income will normally be unable to rectify; and more invidious yet is the fact that many of the wants which P.N.G. nationals learn to acquire are derived directly from the expenditure pattern of the expatriates resident within P.N.G. which is heavily oriented toward imports. Therefore, incentives must be created to develop substitutes within P.N.G. for many of these imports; or disincentives should be created to slow down the flow of "non-essential" imports.

9. There is developing within P.N.G. the ever-increasing awareness of the fact that business corporations (especially of the transnational variety) have what the late Wolfgang Friedmann has described as a "direct and decisive impact on the social, economic and political life of the nation."
10. All businesses operating in Papua New Guinea must pay more and continuous attention to the social, economic and political interests of the society at large when making corporate decisions even to the short-term detriment of financial profits. In other words, the vast majority of the P.N.G. people, whose lives are influenced by the development (or lack) of corporate social policy, must be taken into account as the highest priority. That means carefully reviewing the entire structure of the business corporation - the management, the owners, the employees - to see who actually receives what benefits both in the long and short terms.\(^70\)

VI. P.N.G.'s ECONOMIC DEVELOPMENT NEEDS

From analytical studies of the development process\(^71\), it is possible to suggest a number of broad economic requirements for the maintenance of sound socio-economic development. They are:

1. Finance Capital
2. Appropriate Technology
3. Natural Resources
4. Population
5. Resource Flexibility\(^72\)

In Papua New Guinea, natural resources, population, and resource flexibility are not serious problems. But the TNC remains the sole source of finance capital and technology for many developing countries throughout the world.

A. The Problem of Finance Capital

The problem of finance capital for a developing country like Papua New Guinea manifests itself in three forms:

1. **THE BUDGET GAP**
   In other words, there is insufficient local revenue to pay for total government expenditures.
2. **THE BALANCE OF PAYMENTS GAP**

This is the situation where earnings derived from P.N.G. exports are insufficient to cover the costs of imported goods.

3. **THE SAVINGS-INVESTMENT GAP**

This is the problem of insufficient local savings to pay for investment in P.N.G.-based projects.

There are two processes that occur when TNCs do business in a developing country like P.N.G. On the one hand, there is an increasing inward flow of foreign capital which allows for increased investment, increased government expenditure, increased production, incomes and employment and, perhaps, a higher level of perquisites presumably for both labour and management (i.e. health care benefits, group life insurance, child care facilities, more and better housing, educational opportunities, etc.) Yet, on the other hand, the increasing flows (except for those unrestricted grants-in-aid which will become scarce over time) tend to increase the scope and nature of the TNC's control over the particular industry in a particular Third World country; tend to increase payments to other subsidiaries of the TNC outside of P.N.G.; tend to increase the inward flow of alien labour and payments thereto at a rate even faster than payments to local labour are increasing; and tend to impose upon the future an increasing level of interest and dividend payments and debt repayment obligations. And so what do these processes accomplish? These two concurrent processes create a dilemma: the same measures and investments which appear to be necessary and desirable to increase the local standard of living in the short term may make it very much more difficult for P.N.G. nationals to be given the opportunity to structure or control the economy in the long term.

More specifically, the Government in contemplating any proposed foreign investment, is caught in the dilemma between the desire to utilise foreign investment as a means of achieving certain national goals and the very real fear
that various national values, customs and traditions will be threatened by it. The pros and cons are always difficult to quantify or to balance in any satisfactory way. Perhaps once, the temptation to allow a *laissez-faire* economic policy to take its course may have been great, but as the Government became more aware of discrepancies between national and business interests and more intent on bringing economic development under conscious co-ordinated control, it became difficult, if not impossible, to leave matters to the vagaries of private business choice.\(^7\)

The involvement of the TNC sharpens the horns of the dilemma. The TNC can mobilise manpower, finance capital, equipment, and technology in a manner and at a rate that no other mode of operations can match. However, Papua New Guinea has articulated a comprehensive and fairly detailed plan for the development of its economy,\(^7\) and may fear that its strategy will not mesh well with the particular TNC's global program. For example, the TNC may want to build infrastructure in an urban part of the country, while the P.N.G. government may desire it in a deprived, troubled, and underprivileged province. In addition, the TNC could draw so heavily upon local resources of talent, credit, and material, as to block the entrepreneurial plans of nationals and retard basic industrial development.\(^7\)

Balance of payments considerations comprise another significant economic concern of Papua New Guinea in determining the worth of foreign investments. Estimates of the effect of foreign investment must consider not only the inflow of the investment against the likely outflow of dividends and other returns, but also the possibilities of import substitution, export stimulation, and the effect of increased national income on Papua New Guinea's propensity to import. The repatriation of earnings by a TNC is often greater than its importation of finance capital.\(^7\)
Papua New Guinea must weigh and balance the benefits from the increased inflow of finance capital (and technology) into the country against the threat of TNC monopolisation or oligopolisation, which, if it were to occur, would stunt development of nationals in the same industry. This can occur if the local market is too small to support several large producers or if the Government bars competitive imports, either under general protectionist policies or under an agreement with a TNC. This danger is greatest when the TNC acquires existing local businesses.

Most important is the fact that foreign investment in extractive industries involving minerals, energy, timber, fish, etc. may cause great anxiety in Government and among the general populace. It often gives rise to visions of a small developing country being stripped of its natural heritage while the real benefits are exported. Some TNCs have caused disturbances in the past, more than small firms might, because of their scale of production, their tendency to exclude rival producers, and their ability to combine downstream activities in a way that arouses suspicions that they are somehow avoiding the intent of the Eight Aims of Economic Development and the National Goals and Directive Principles of the P.N.G. Constitution. And, of course, TNC investment may produce anxieties about "control" and foreign influence.

B. The Problem of Appropriate Technology

It has become clearer now than ever before that no lasting solutions to development problems can be achieved without continuous technological and social innovation based on research and experience. But what does "technology" and "social innovation" really mean? In a general sense, technology means "knowledge systematically applied to practical tasks." This knowledge usually grows out of analysis and discovery through research. To be applied to serve human needs, technology must be embodied through invention and innovation.
in goods and processes or techniques. Innovation often is used to mean any set of technological and social (including managerial) changes by which resources are put to more effective use.

Technology and innovation refer not just to goods and processes employed by industry, but also to those used in agriculture, commerce, transportation, communications, health care and protection, education, administration, etc.

Technology has become recognised as a vital force if not the greatest resource - in the development of the modern world. Joseph Schumpeter states that "Development consists primarily in employing existing resources in a different way, in doing new things with them, irrespective of whether these resources increase or not." Technology can create new options and expanding horizons, new market forces, and new social and ecological problems as well.

James Quinn puts technology at the center of development in concluding that "Technology is the vital growth component in each of the four traditional economic input factors: land, labour, capital and education." Technology can create new options and expanding horizons, new market forces, and new social and ecological problems as well.

During the 1970's and into the 1980's the politics and economics of the Independent State of Papua New Guinea lead to one crucial question: Where will many thousands of unemployed or underemployed human beings find jobs? The problem is not new, but the alarming dimensions of the problem are forcing a redefinition of the minimum goals of economic development. Job creation has begun to challenge per capita income growth as at least a co-equal target and test of development strategies.

The local urban population of Papua New Guinea, has been growing at a much faster rate than the number of local urban jobs available. Nevertheless, cities like Port Moresby, continue to attract more ill-equipped migrants from backwater
villages and marginal farming areas. This mass of unemployed persons for whom the system offers only frustration disputes the misleading statistical evidence of developmental progress. The unemployed will become a potentially explosive mass unless workable solutions are found soon. But is there a solution through invention or use of labour-intensive technology?

Economies like P.N.G. with a potential surplus of labour and a real shortage of capital are frequently advised to concentrate on capital-saving processes throughout industry and to expand efficient labour-intensive industries whenever and wherever possible. This process depends on both a capacity to know and project real social costs and an incentive to select the right technology for economising on the scarcest local factors of production - usually capital, skilled technicians, and production managers. Either condition for practical application of these policies is very difficult to find in Papua New Guinea.92

Policy makers in this country for too long have paid lip service to capital-saving or labor-intensive technology, but government policies and institutions have typically encouraged investment in capital-intensive processes appropriate to quite different economies. Exchange rates and preferential tariffs have made it possible for businesses to import underpriced equipment. Import substitution policies have created protected markets where innovation is unnecessary, production often small, and equipment oftentimes obsolete. Foreign aid and local development bank loans (with very low interest rates) have lowered investment costs for capital goods but not for labour. Research and development institutions have done little to reduce Papua New Guinea's dependence on imported technology.93

The transfer of technology has often occurred under licensing agreements that specify product characteristics that only the foreign investor's capital-intensive equipment can achieve.
These agreements frequently involve arrangements for trademarked consumer goods in which the licensor expressly and strictly forbids any alteration in the production processes that might change the style or quality of the product.

Where a local entrepreneur is fully responsible for selecting or adapting technologies, he usually must employ a professional consultant who, whether local or expatriate, is unlikely to have been trained to search for labour-intensive innovations. For example, equipment salesmen reinforce the plant owner's natural urge to keep up with the Joneses; and certain tied loans are often constricting. Uncertainty about the availability of spare parts may make it impossible to predict the real costs of using simpler yet older types of machinery which may be appropriate in the particular locale.  

True labour costs are never easy to determine. National employees who are not well-nourished, who are indifferent to machine maintenance, or who require extensive on-the-job training may truly be more expensive than a labour-saving (unemployment-generating) machine in the short term. Single-purpose machines require lower levels of skills to maintain and repair than complex or automated ones.  

But what of the negative side of labour-intensive technologies? Are labour-intensive technologies the panacea for all the woes of economic development? It can be argued that although labour-intensive technologies may produce a spurt of jobs in the short run, "it is far from certain that they lead to rapid development and thus to full employment in the long term." However, there is evidence that a number of labour-intensive industries in Asia have proved to use capital more efficiently than the capital-intensive ones; and "the argument that labour-intensive industries consume more capital per unit of output, therefore, is untenable."
Obviously, the choice of technologies requires a discriminating judgment. Public and private concerns often conflict. And the government official or policy maker seldom has clear facts to work with. However, the Government, the international development agencies and foreign private investors, especially in the form of the TNC could reduce the prejudices against socially rational choice of capital-saving means of production by collaborating on measures to facilitate the creation and adaptation of the technology appropriate to each given situation. This should be happening a lot more than it has been in Papua New Guinea.\(^{98}\)

On the other hand, TNCs have argued that for P.N.G. to remain competitive in world markets it is essential to adopt processes of production which yield outputs per acre as good as the best in the world, and for good business reasons: maximisation of profits and to allow companies to withstand a reduction in world prices (whether due to temporary fluctuations or long-term trends). But this argument has a fatal flaw: By emphasising the traditional, Westernised, industrialised mode of economic analysis and planning, the TNCs doing business in P.N.G. (as well as the multinational banks) are forcing P.N.G. to compete with high-cost / high-output producers of primary products around the world - while much of the benefit of export earnings from the primary commodities is being lost because the high cost of the imported inputs, particularly machinery, significantly reduces the net income earned within Papua New Guinea. In addition, the objective of employment creation is not satisfied even in the agricultural sector which remains the best source of increasing employment opportunities for the greater majority of Papua New Guineans both because of its total size and scope for labour-intensive techniques. Furthermore, production processes which demand the use of imported technology tend to be associated with large-scale production and ownership. This in itself encourages the use of capital-intensive technology and leads inevitably to a reduction in potential employment.\(^{99}\)
The regulatory tools available to Papua New Guinea are limited. Although the Government could deny patent protection or require a TNC to license its patents to applicants willing to pay reasonable royalties, such a policy is doomed to failure from the start if domestic rivals lack the managerial competence (i.e. know-how and technical skills) to enter production. Papua New Guinea requires the TNC to train local personnel to take over functions within the TNC, hoping that employment mobility will spread that training throughout the economy. Or, perhaps, the Government could try to limit the impact of the TNC by prohibiting direct manufacturing investment and seeking instead, indirect access to technology through licenses or joint ventures. Of course, taxation and exchange controls are popular mechanisms of controlling the TNC's return on its investment. Whatever the regulatory scheme might involve, the TNC through its technology often has a stranglehold on the PNG economy which is often more apparent than real. Arguably, appropriate technology would create more and better jobs for Papua New Guineans and, unlike much of the current imported technology, not despoil either the culture or ecology of this nation. Therefore, technology must become appropriate if the relationship between TNCs and the Government in Papua New Guinea is to remain strong over the long term.

VII. THE ROLE OF NIDA IN THE CONCEPT OF CORPORATE SOCIAL RESPONSIBILITY

NIDA is the acronym in Papua New Guinea for the National Investment and Development Authority which came into existence after enactment in December 1974 of the National Investment and Development Act 1974 (hereafter referred to as the NIDA ACT). NIDA has both a promotional and regulatory function in relation to foreign investment. The main objective of the NIDA ACT is to reconcile the Eight Aims of Economic Development, and the National Goals and Directive Principles of the P.N.G.
Constitution with its own investment guidelines "not only by encouraging the right kind of investment, but by ensuring that once it has taken place, it continues to operate consistently within the national guidelines," NIDA is the one organisation charged with the duty of acting as a "watchdog" not only for the Government's dealings with the TNCs but also for the government corporations operating within P.N.G. It is in effect the potential monitoring and enforcement mechanism for corporate social responsibility in Papua New Guinea. Of course, such tasks require control and supervision on a continuing basis. And therein lies a large part of the problem that NIDA has had to face on a daily basis since its inception.

Under the Act, NIDA is a statutory authority with a heavy promotional function but a rather tenuous regulatory one. The only real control function effectively within the ambit of NIDA's operations is NIDA's "recommendation" to the Minister for National Planning and Development to have him attach conditions to the registration of a foreign enterprise. NIDA itself readily admits "that the difficulties so far encountered stem to a large extent from inexperience and administrative shortcomings." However, the problem is more deep-rooted than that. The enabling legislation, the NIDA ACT, gives no power of control or real effective supervision to NIDA. In fact, the Act specifically states at Section 13(2) that "NIDA has no power of direction or control of any Department or branch of the Government or any instrumentality of the Government." Yet NIDA does purportedly co-ordinate and monitor:

"(i) Government planning for investment and
(ii) Action approved by the Government for the promotion of investment and
(iii) Evaluations and negotiations concerning proposals for foreign investment and any other proposals that require registration under this Act; and
(iv) Supervision of the performance of any conditions to which any investment is subject by virtue of this Act."
In reality, co-ordination of supervision among the several government departments involved, for example, in a particular joint venture involving a few TNCs, is impossible for the NIDA staff of some thirty people. The actual "supervision of the performance of any conditions" has been difficult (if not impossible) in almost all cases because decentralisation of the monitoring function is difficult, and staff size is woefully inadequate.\textsuperscript{108} NIDA has the power to delegate functions to provincial government but implementation of that delegation is a long time in coming because the problems of NIDA in Port Moresby are compounded in the hinterlands of this country where regional offices might be established. Therefore, although everyone agrees that decentralisation of the monitoring function of NIDA should proceed, no one has been able to agree on a formal plan for implementation thereof.\textsuperscript{110}

NIDA's enabling legislation needs to be reconsidered and amended to increase NIDA's regulatory authority, to decentralise its monitoring function, and to create a permanent staff capable of fulfilling its legislative mandate.\textsuperscript{111}

NIDA also purportedly plays an important role vis-a-vis government corporations. Section 76(1) of the NIDA ACT states that "NIDA is charged with the responsibility for the supervision of the activities of [government corporations]." Yet, the number and scope of government corporations have proliferated in this country since the early 1970's and NIDA simply cannot cope. In fact, NIDA finds that the registration of business activities, the promotion of foreign investment, and the co-ordination of negotiations between parties take up almost all of its time.

NIDA makes no mention whatsoever of Section 76 of the NIDA ACT in its "Report On Operation to 31st December 1978". Section 76 is entitled "Continuing Responsibilities of NIDA" and required NIDA to supervise government corporations. However, the extent and manner of supervision are totally
within the discretion of the particular government corporation under scrutiny. Presumably, if a government corporation decides that it wants to maintain less than an "open door" policy in all its dealings (and so states in its constitution), NIDA's responsibility for supervision is effectively terminated. Apparently, not many government corporations seek NIDA's supervision and vice versa. This appears to be a serious shortcoming in the development of NIDA. Perhaps, NIDA cannot be faulted for avoiding Section 76. After all, a staff of thirty would be insufficient to supervise the workings of P.N.G's major government corporations. And thirty or so persons is the full complement of NIDA staff.

The effective control of foreign investment in the forms of finance capital and technology and the effective supervision of government corporations are not easy tasks. They require technical expertise and a worldly appreciation of business and government practice that is not acquired easily or quickly.113

VIII. WHAT IS THE SCOPE FOR PUBLIC ACTION?

If the pace and quality of economic growth, especially of the industrial type, are to measure up to the need for jobs, then NIDA, as well as other government corporations, must play a more sophisticated role in the economic development process than in the past. Papua New Guinea through NIDA and its other government corporations and departments will have to face up to the necessity of reconciling the employment interests of its people with other pressures in policies affecting trade, private investment, foreign exchange, tariff rates, financial markets, development banking, technology transfer, research and development, training, labour organisation and public attitudes.
NIDA has sought the assistance of international organisations such as the U.N. Industrial Development Organisation, better known by its acronym, UNIDO with some success. But much more needs to be done to help build national capabilities for technological innovation and for training managers and skilled workers for industrial operations.

In addition to formal training for workers and post-secondary education programs in business administration and economic development, a variety of training tools could be developed in Papua New Guinea. Fellowships for overseas training of industrial managers can be provided largely by organisations like UNIDO, by particular projects financed through private investment, assistance programs, and by individual donor governments.

UNIDO has been attempting to fill the need for global statistical information and analysis of industrial development trends. It has also offered advice to NIDA on industrial strategy. The World Bank or some specialised U.N. agency ought to collaborate with UNIDO or the TNCs in offering advice to or conducting surveys in Papua New Guinea.¹¹⁴

Public research institutions in Papua New Guinea such as the Institute of National Affairs (I.N.A.) and the Institute of Applied Social and Economic Research (I.A.S.E.R.) have achieved a modicum of success in making the people of Papua New Guinea aware of the problem of economic development policy and corporate social responsibility.

The industrial TNCs have been unable or unwilling to create and adapt technologies to the particular needs of the developing countries like Papua New Guinea.¹¹⁵ The time has come for public action. Perhaps the first step in planning public action is to face the hard fact that for the most part government corporations and other public institutions in Papua New Guinea can make only modest contributions to
the total stock of knowledge and embodied industrial technology. Private (or autonomous, publicly-owned) enterprise in the form of the TNC has, and is likely to continue to play, the predominant role in creating and transferring finance capital and technology in Papua New Guinea.

IX. APPROACHES TO REFORM RE: TRANSNATIONAL CORPORATIONS

Here I explore ways in which the Independent State of Papua New Guinea might respond to the challenge of the transnational corporation, that is, ways in which the Government might seek to implement the concept of corporate social responsibility and thereby reconcile its desires to derive benefits from the TNC with its fears of its power and control.

A. Emphasise Managerial Skills in Developing More and Better Training Programs Built Around Appropriate Technology.

Managerial know-how and skills are at a premium in Papua New Guinea. Most of management is imported into this country. And, after almost six years of Independence, little progress has been made in shifting management control (not merely ownership) from expatriates to nationals.\textsuperscript{116}

Perhaps, the proposed National Occupational Training Authority (N.O.T.A.) is a good beginning.\textsuperscript{117} But it is only a beginning. Appropriate technology and appropriate training are not sufficiently emphasised in the N.O.T.A. proposal. If training is to effect the transfer of managerial control from expatriates to nationals, it must emphasise labour-intensive methods of industrial expansion. Therefore, it is recommended that N.O.T.A. (if such a body were to become a reality) in co-ordination with NIDA should require the TNCs doing business in Papua New Guinea, at every opportunity, to emphasise the development of production techniques which depend on the extensive use of land and large inputs of
labour per unit of output and which minimise the use of imported goods. Only by requiring TNCs to train their P.N.G. employees and to explore the possibilities of developing specially-tailored, labour-intensive techniques can this country begin to achieve the long-term objectives stated at the beginning of this paper. Projects must be analysed in terms of social costs as well as market prices otherwise the TNCs are likely to continue their unwitting exploitation of the human resources of this young and growing country.

Actually only a small number of firms seem to recognise the need for appropriately scaled technology in Papua New Guinea. However, it appears likely that TNCs will have to make increasing efforts to adapt their technologies of production to take maximum advantage of the cheap labour market. Companies are likely to follow both labour-dispensing strategies (i.e. increased use of automation) and labour-intensive strategies (i.e. increased use of low-wage workers). Depending upon the particular product, companies tend to emphasise one or the other. For example, industries like petrochemicals and mining have become increasingly labour-saving, while the electronics industry in many developing countries has been relocating its operations to take advantage of cheap labor. Presumably all TNCs pursue some mix of both. The crucial issue in Papua New Guinea is how much these two strategies conflict with each other.

Will TNCs in P.N.G. continue to maximise profits to the detriment of the development of a specially-tailored, labour-intensive technique? Any rational policy concerning labour developed by TNCs doing business in this country must give as much emphasis to the objective of employment creation as to that of raising minimum wage levels - if not more. This is particularly important in the rural sector of the P.N.G. economy where there is practically
always the possibility of using highly labour-intensive techniques which can make a rather large impact on employment.

In practice what is (or better put, what must be) required, is the encouragement of techniques of production which use large numbers of labourers using simple tools to work the land to substitute for technical and imported inputs such as machinery and chemical fertilisers. This could be achieved for instance, by encouraging coffee (or citrus or other types of foodstuffs) production in new areas of low opportunity cost where alternative wage employment may not exist. And, more importantly, by understanding that production based on a low yield per acre may still be considered very "efficient" economically, most particularly in terms of creating employment opportunities and minimising the need for imported resources. If wages cannot be kept low under the pressure of supply and demand, there are several ways in which companies that produce goods for consumption in P.N.G. could be encouraged to employ more labour. For example, increasing taxes on the particular industry may produce revenues which could be plowed back into the industry in terms of subsidies for the employment of labour. These subsidies may be paid to companies on a matching basis which would then employ more than a certain amount of labour per unit of output.¹¹⁸ Conditions could be added to the effect that this labour force must be employed on a permanent basis. Alternatively, if rural wages are to be increased, tax revenues can be used to subsidise certain companies which could increase wages without increasing labour costs and without reducing the labour input. It might even be possible under certain circumstances to tax imported inputs to encourage the use of labour-intensive techniques - no matter how technically "inefficient" they may appear to be.

Companies doing business in P.N.G. must be convinced that they must seek out paths of corporate expansion which will achieve increases in output by utilising more labour rather
than more imported inputs. This very admirable goal may be achieved in four ways:

1. Systems of production which depend on high labour input per unit of output (i.e., the inverse of a labour/productivity ratio but nevertheless the "appropriate technology" given the P.N.G. context) should be encouraged (or at least not discouraged).

2. Wages should be kept low in relation to the prices of the technical inputs necessary to the normal functioning of the particular industry.

3. Agricultural research and economic analysis should be utilised to develop technical production processes that are labour-intensive.

4. NIDA standard conditions of registration with respect to training\(^{119}\) and the development of "appropriate technology" should be revised to mesh with N.O.T.A.'s philosophy of training,\(^{120}\) and with the concept of "appropriate technology."\(^{121}\)

Are companies in P.N.G. willing to change voluntarily? After all, agricultural research normally concentrates on increasing output per acre by using imported technical inputs such as heavy machinery, tractors, trucks, fertilisers, insecticides, etc. And economic analysis and research ordinarily are not focused on identifying existing or new and efficient methods of production that emphasise high labour input per unit of output.

In Papua New Guinea, cash crops may vary in their degree of adaptability to a labour-intensive technology, while other industries may claim that a labour-intensive technology is totally unsuitable for good business reasons. The author is not able to resolve these problems, but is willing to argue that each problem of adaptability must be explored immediately and completely before the problem of unemployment reaches catastrophic proportions with a negative impact that causes serious social and economic lesions for decades to come.\(^{122}\)

The price of limited liability for transnational corporations doing business in Papua New Guinea has always been disclosure. But disclosure to date in Papua New Guinea has always meant limited disclosure of the financial position of the TNC's activities primarily within Papua New Guinea.\(^{123}\)

The supply of relevant data has been necessary, but insufficient to cope with the TNC. Often the local activities of a TNC are housed in a limited liability company or, if possible, in an "exempt proprietary company."\(^{124}\) Such a company is usually not obligated to make public reports, because it is organised under a law tailored for small organisations. However, even if "exempt proprietary company" status were not available, the present disclosure requirements are only the beginning. The questions to which response should be required are not easy to formulate. As a subsidiary of a TNC becomes less and less a "natural" entity in a business sense, and more a legal receptacle for fragments of transactions, the earnings and costs of the P.N.G. subsidiary become more and more artificial and are reported only for legal purposes.

There are limits to the utility of any data which Papua New Guinea can extract from the TNCs; and the suspicion persists that TNCs are juggling the books through such devices as artificial transfer prices.\(^{125}\)

C. Improve NIDA'S Standard Conditions of Registration and Increase its Monitoring and Regulatory Authority.

NIDA is both a promoter and a "watchdog" - albeit a "watchdog without teeth". NIDA uses the investment guidelines covered in Schedule 1 of the *NIDA ACT* in formulating priorities and evaluating investment proposals.\(^{126}\) But monitoring and
regulation of TNC activity after NIDA registration has been approved, are practically nil.

Effective NIDA monitoring and regulation are required to delineate and control the "social role" of the modern TNC. Apart from NIDA's investment guidelines, what influences the managers and directors of TNCs in their exercise of corporate responsibility once the short-term profits of shareholders is no longer their guiding criterion? How do they decide between conflicting social goals such as full employment or environmental conservation? Only government regulations can ensure a consistent national approach in many areas that are necessary for the successful attainment of the social and economic goals of this developing country. As Chamberlain states, a "systems solution" is required rather than piecemeal efforts by individual TNCs.

NIDA's regulatory and monitoring authority must be expanded and made effective. This requires that all agreements and general regulations be thoroughly policed, and that there be substantial penalties in store for those TNCs and TNC managers who fail to comply with them. Perhaps NIDA agreements and regulations should be policed from within the TNC by a salaried "public director" appointed by NIDA. However, in Papua New Guinea, laws covering environmental controls, workers' conditions and the quality of goods are so numerous and dispersed that no single salaried public director within a TNC could cope with policing existing regulations.

Much more stringent regulations with respect to training of Papua New Guineans into managerial level jobs in many TNCs doing business in P.N.G. should be a high priority. Perhaps, incentives for TNC commitment to training should be even greater than at present. At present, the Government offers a 200% deduction from assessable income for wages paid to apprentices registered with the Apprenticeship Board. But
does this deduction aid the rapid development of a managerial class among Papua New Guineans? NIDA and the proposed N.O.T.A. should develop a coherent set of incentives to spur the development of training programs for Papua New Guinean middle-level managers - not just blue collar jobs.\textsuperscript{129}

In Papua New Guinea where the tradition of legalism in economic matters has not yet taken deep root, one finds little attempt to formalise regulation of foreign direct investment except for NIDA. Instead, unreviewable administrative discretion, elastic delegations of legislative authority and persuasion through vague guidelines and appeals to nationalism have proliferated.\textsuperscript{130}

NIDA's emphasis on share ownership\textsuperscript{131} for reasons already stated in this paper\textsuperscript{132} is misplaced. Managerial control is the best way to transfer real control of the TNC within Papua New Guinea from foreign to national hands. More and better training is the most feasible method of achieving managerial control.

Some writers have suggested that directors and managers guilty of a dereliction of a social or economic development aim should be subject to suspension,\textsuperscript{133} just as directors and managers guilty of financial dereliction are.\textsuperscript{134} Directors and managers of TNCs, as well as the TNCs themselves, should also be civilly liable for damage caused by a failure to comply with NIDA regulations.

In the final analysis, however, it is indeed difficult to be optimistic about the prospects for improving P.N.G. government regulation of TNCs through more efficient administration. Papua New Guinea may seek to limit the particular TNC's size, or if that is not practical, attempt to limit its profitability. If more and better data and internationally accepted standards on transfer pricing were developed, P.N.G. administrators might be able to take a less fearful and more comprehensive view of the issues involved in deciding what
constitutes a fair profit for a TNC. But more accurate data alone do not make for effective regulation. Regulation and monitoring will always be difficult because TNCs are rapidly evolving operations that stretch beyond the jurisdiction of Papua New Guinea.¹³５

D. Reassess The State of The Law Regarding Directors' Duties, Good Faith and Employee Democracy Since Independence.

Section 2⁵¹³⁶ and Schedule 2.³¹³⁷ of the P.N.G. Constitution emphasise the importance of implementing the National Goals and Directive Principles. Arguably, neither the COMPANIES ACT 1963 in relevant part nor related Australian or P.N.G. case law precedent is "appropriate to the circumstances of the country"¹³⁸ in that they do not take sufficient account of the Eight Aims or the National Goals and Directive Principles in establishing duties of directors and managers or the rights of P.N.G. employees since Independence.¹³⁹

With respect to directors' duties and good faith, in light of the aforementioned constitutional framework, it is imperative that decisions of directors or managers made with a view to the TNC's long-term, as opposed to short-term profit interests, be permitted within the existing legal framework.¹⁴⁰ To date, throughout the common law world, directors or managers apparently are entitled to have regard only for the interests of shareholders, and, presumably, creditors, present and future. In the United Kingdom and Australia, the case law makes it clear that the interests of the consumers of the TNC's products, the nation as a whole, and even (at present) the employees, are legally irrelevant.¹⁴¹

But in Papua New Guinea in the 1980's this attitude is an entirely anachronistic view that is not "appropriate to the circumstances of the country." As L.C.B. Gower aptly states:
"Directors habitually have regard to these interests; indeed it has become common form for them to declare that industry owes duties to employees, consumers, and the nation, as well as to the shareholders. Fortunately, so long as the company remains a going concern, the members' interests will normally be served by having regard to the other interests; rebellious staff, hostile trade unions, dissatisfied customers, and an aggrieved public or government are not conducive to the future prosperity of the company."\textsuperscript{143}

The Australian Institute of Directors as far back as 1962 expressed the opinion that "[a] director's responsibilities extend to the company, its shareholders, its employees, customers and creditors, as well as his fellow directors and, to some degree, to the state."\textsuperscript{144}

With respect to employee democracy, the failure of company law to acknowledge the position of the worker in the corporate structure also has become anachronistic. In today's world, worker participation and employee democracy have become more than fashionable catchwords.\textsuperscript{145}

Employee democracy can take many forms. The three best known forms of worker participation in corporate decision-making could be labelled as follows:

1. **Co-partnership**

This is the system whereby employees are enabled to acquire shares in the company for which they work, and thus to become shareholders as well as employees. In Papua New Guinea, the utilisation of a procedure like that provided by Section 67 (2) (b) of the **COMPANIES ACT** would be the easiest method of implementing this form of worker participation. However, the weakness of this proposal is that it assumes that the only way to give employees a greater feeling of participation and a measure of control is by making them shareholders. But it is not clear that what the average P.N.G. worker wants or needs is share ownership which ties the worker's savings as well as his livelihood to the fortunes of one TNC. Share ownership, and with it participation, can be achieved without this.
2. Power-sharing

Another school of thought argues that employee democracy should be sought by giving an increased share of power to the workforce by an extended and improved machinery for collective bargaining. Proposals have varied from legislation compelling employers to bargain more widely or to disclose more information to trade unions, or both.

3. Worker directors

The most controversial proposal is that, either on its own or in combination with greater power-sharing at lower levels, employees should be represented on the boards of directors of their companies. Employee democracy, in the sense that workers are represented on the boards of directors, has existed in Germany and Sweden for some time. In the United Kingdom, the Bullock Report strongly advocated it. In Australia, the Australian Council of Trade Unions recently adopted a policy calling for a gradual movement towards employee democracy.

It is therefore recommended that the current law be changed by statute to compel directors to take account of the interests of employees as well as those of shareholders, and to permit them to take account of other interests, such as those of consumers, the public at large, or the nation. The proposed sections of the P.N.G. COMPANIES ACT should read as follows:

Duty In Relation To Employees

(1) The matters to which the directors of a company are to have regard in the performance of their functions shall include the interests of the company's employees in general, as well as the interests of its members.

(2) Accordingly, the duty imposed by subsection (1) above on the directors of a company, is owed by them to the company (and the company alone) and is enforceable in the same way as any other fiduciary duty owed to a company by its directors.

Interests of Employees and Members

(1) The powers of a company shall, if they would not otherwise do so, be deemed to include power to make the following provision for
the benefit of persons employed or formerly employed by the company or any of its subsidiaries, that is to say, provision in connection with the cessation or the transfer to any person of the whole or part of the undertaking of that company or that subsidiary.

(2) The power conferred by subsection (1) above to make any such provision may be exercised notwithstanding that its exercise is not in the best interests of the company.

(3) The power which a company may exercise by virtue only of subsection (1) above shall only be exercised by the company if sanctioned —

(a) in a case not falling within paragraph (b) or (c) below, by an ordinary resolution of the company; or

(b) if so authorised by the memorandum or articles, a resolution of the directors; or

(c) if the memorandum or articles require the exercise of the power to be sanctioned by a resolution of the company of some other description for which more than a simple majority of the members voting is necessary, with the sanction of a resolution of that description;

and in any case after compliance with any other requirements of the memorandum or articles applicable to its exercise.

(4) On the winding up of a company (whether by the Court or a voluntary winding up) the liquidator may, subject in the case of a winding up by the Court, to Section 236 (3) of this Act as applied by subsection (7) below, make any payment which the company has, before the commencement of the winding up, decided to make under subsection (3) above.

(5) The power which a company may exercise by virtue only of subsection (1) above may be exercised by the liquidator after the winding up of the company has commenced if, after the company's liabilities have been fully satisfied and provision has been made for the costs of the winding up, the exercise of that power has been sanctioned by such a resolution of the company as would be required of the company itself by subsection (3) above before that commencement if paragraph (b) of that subsection were omitted and any other requirement applicable to its exercise by the company has been met.
(6) Any payment which may be made by a company under this section may —

(a) in the case of a payment made before the commencement of any winding up of the company, be made out of profits of the company which are available for dividends; and

(b) in the case of any other payment, be made out of the assets of the company which are available to the members on its winding up.

(7) On a winding up by the Court, Section 236 (3) of this Act shall apply to the exercise by the liquidator of his powers under subsection (4) or (5) above as it applies to the exercise of his powers under that section.

(8) Subsections (4) and (5) above shall have effect notwithstanding anything in any rule of law or in Section 264 of this Act (distribution of property of company).

These proposed sections to be included in the P.N.G. COMPANIES ACT alter the position of P.N.G. employees vis-à-vis their companies in two ways:

(1) by requiring that the directors shall have regard to the employees' interests; and

(2) by enabling the company to make provision for its employees where it ceases to trade or transfers its undertaking.

The effect of subsection (1) of the proposed section entitled Duty in Relation to Employees is to require the directors of the company, within the context of their duty to act bona fide in the interests of the company, to consider not only the interests of the members, but also the interests of the employees as a whole when determining the manner in which to exercise their powers or perform their functions.  

If worker directors (i.e. employee representatives) are introduced into corporate management (i.e. on boards of directors) in Papua New Guinea, it will add a further class of representative directors to those which already occur when directors are appointed under the articles by a special class of shareholders or debentureholders. Of course, the proposed
section is silent as to the position where circumstances force the directors to choose a course of action which advances the interests of one of these classes to the detriment of the interests of the other class.\textsuperscript{156} It appears that the legal position of the worker director could be an invidious one, because he is liable to lose office if dismissed by an ordinary resolution.\textsuperscript{157} But there are workable solutions\textsuperscript{158} which should be explored for Papua New Guinea's benefit.

With respect to the proposed section entitled "Interests of Employees and Members", note that at present a decision by the directors of a company or a resolution of the company's general meeting to make provision for employees is open to attack on the grounds that the decision is not in the best interests of the company (especially where the company is about to cease trading or pass into liquidation), or that it amounts to fraud on the minority.\textsuperscript{159} If this proposed section is enacted into law, the statutory power to make provision for employees may be exercised even if the exercise of the power is not in the best interests of the company.\textsuperscript{160}

E. Develop Improved Negotiations.

All TNCs doing business in Papua New Guinea must negotiate a master agreement with the Government. These agreements presumably serve as the vehicle for imposing government objectives. Master agreements are negotiated between the TNC's representatives and a four-man government team composed of representatives of NIDA, the Department of Finance, the relevant technical or administrative departments, and the Office of the State Solicitor. These agreements can be rather wide ranging, and many contain numerous provisions including pricing formulae\textsuperscript{161} and investments the TNC will undertake. In some cases, these provisions may at least subjectively take into account various social objectives and market imperfections.
These agreements do not appear to be an adequate technique for the exercise of strategic control (i.e. control over goals or objectives) of the TNCs. They are rigid, and require lengthy negotiations that would restrict their use as a vehicle for transmitting evolving government policy on an ongoing basis.\textsuperscript{162}

It is evident that TNCs in the past often tried to use their bargaining skills, their clearly conceived purposes and their overall experience to outdo naive and inexperienced government officials. However, in the last decade, Papua New Guinea has learned to do better - to play the negotiating game more intelligently and vigorously. The Government has learned to get more information, to hire outside experts when needed, to broaden opportunities by drawing in competitive bidders, to foresee future developments, and to reserve to itself opportunities for future reconsideration and negotiation.

It is easy to say that Papua New Guinea, having developed more confidence in handling foreign private investors, should develop a more sophisticated bargaining stance and search for mutually beneficial solutions. But it is more difficult to propose specific reforms without knowing who the specific parties to an agreement might be. Generally speaking, concession agreements could provide for periodic review and renegotiation perhaps with outside mediation. They could also include provisions for ultimate buy-outs by the Government and the resolution of such issues as the TNC's right to withdraw its establishment, its obligation to develop exports, train local personnel (especially middle level managers) etc. The aim should be to negotiate keeping all constituencies of the modern TNC - the shareholders, managers, employees, consumers of the goods and services produced by the TNC and the general public - and the \textit{Eight Aims} and \textit{National Goals} in mind. In this way, a more balanced perspective will be maintained. Unfortunately, however, these situations in the economic sense are like negotiations
between two oligopolists. Such negotiations prove indeterminate in economic theory and presumably have no absolutely "right" solutions. Suspicions, wrangles and recriminations will continue unabated among politicians, economists, and the public.

F: Encourage Equitable Joint Ventures.

According to the P.N.G. HANDBOOK FOR INVESTORS, there are "(p)references for joint ventures. For small-scale businesses, the Government generally prefers full participatory joint ventures involving Papua New Guineans. However, in the case of large-scale ventures, the Government may agree to foreign investors taking up maximum equity although it generally prefers to have medium or long-term equity options." 163

The legal literature is replete with commendations for the joint venture with local entrepreneurs.164 Variations which have been used in Papua New Guinea are governmental participation165 and, to a limited extent, distribution of shares to the public.166 The main reason for the popularity of this form of agreement in Papua New Guinea is that it is felt that these associations would be more responsive to national planning goals, by seeking to expand the local element of research and training. But the effects of many of these joint ventures are too difficult to predict at such an early stage in their development. However, one of the potential dangers is obvious to any antitrust lawyer: it will effectively sterilise a local group that might have competed with the TNC.167

However, as mentioned earlier, joint ventures could result in the private partners, usually TNCs, making the key decisions in the context of a weak framework of control, thereby effectively de-nationalising government capital.168 This situation should be avoided at all cost, even though the TNC may feel, particularly in a country like Papua New
Guinea where the technological class is very small, that it needs considerable control in order to ensure the particular project's success (which includes earning its fee and preserving its prestige). In fact, there are many areas of investment and technology where it is unnecessary to deal with a TNC. Papua New Guinea should keep open its options, which include obtaining the data, expertise or finance capital it needs from smaller, lesser-known companies, from foreign governmental assistance programs, and from management consulting firms. The TNCs must learn in the 1980's that they are no longer the sole source of investment funds or technology for developing countries like Papua New Guinea.

X. APPROACHES TO REFORM RELATING TO GOVERNMENT CORPORATIONS

Here I propose a several-pronged approach to the problems of public accountability and financial responsibility in the P.N.G. government corporation. Corporate social responsibility in the context of public enterprise involves the introduction of institutional reforms in the field of administrative law to stem the increasing inefficiency and lack of effective financial control which pervade many of the government corporations in this country.

A. Develop Criteria For Establishment of Government Corporations.

Many government corporations are by definition set up as specialised bodies separate from departments or other ministerial services and maintain autonomy from the executive branch of government. However since, unlike the judicial branch, they are not separated from Cabinet through constitutional mandate, it is not clear how the political norms of parliamentary democracy and ministerial responsibility apply to them.
A number of reasons traditionally given for setting up government corporations are suspect. Impartiality and specialized knowledge in decisionmaking may be at least as prevalent within departments. A professional public service with established procedures with carefully determined standards of decisionmaking can act impartially. Effective specialised knowledge can be developed through committees or by using appropriate supervisory and consultative techniques. Another quality, continuity, may have been provided in the recent past to a greater degree by government corporations than by departments because of too frequent changes in top level personnel within departments. But there is no reason why executive personnel practices could not be changed to improve the performance of departments.

Under certain circumstances, the needs of government or the nature of the private interests concerned may call for the creation of a government corporation. Therefore, it is proposed that a clear set of criteria be formulated which will set guidelines for establishing the need for the creation of a government corporation. At present there is considerable uncertainty concerning the criteria for the grant of corporate status for public enterprise activity. The following reasons may serve as a starting point in the development of criteria for the creation of government corporations:

(1) Where there is a need to spur economic development, in the light of national priorities and in the absence of sufficient responsible private finance capital.

(2) Where there is a need to create a body and give it a mandate to act in response to a particular set of issues but no existing body seems quite suited for the task and the establishment of a new department to handle the matter would not be justifiable in light of the traditional functions of government departments.
(3) Where it is thought desirable to isolate an issue from traditional politics (and the possibility of political interference) and to relieve Ministers of the burden of having to account for sensitive decisions.

(4) Where there is a perceived need for a specialised body not too closely identified with the Government to deal with repetitious or continuing economic or business problems of a particular kind and to deal with goods and services which are routine and basic.

(5) Where there is a need to use non-departmental entities as the mechanisms to exercise powers cross-delegated between the National and Provincial Governments, given the state of PNG Constitutional law and the Organic Law on Provincial Government.

(6) Where the Australian and Papua New Guinean economies are largely integrated and where Australia, being the more populated country and the center of much Pacific Basin business decisionmaking, has numerous government corporations at both federal and state levels that perform tasks analogous to those which P.N.G. governmental entities are expected to perform.

B. Eliminate Broad Statutory Mandates.

A problem common to a number of government corporations, particularly those having the duty to regulate or control economic/commercial activities, is that they are asked to function as subordinate legislative bodies with broad mandates, vague goals and priorities which are not necessarily consistent with one another.174 This problem should be considered by responsible decisionmakers when legislation is at an initial planning stage.

C. Establish a Monitoring Body.

The machinery of the National Government is of such importance that it would be worthwhile to establish a monitoring body with responsibility to check for consistency in structure, powers and procedures of government corporations as well as the "mix" of their powers and procedures, for the proper performance of their work.175
Perhaps a specialist administrative law body should be created to advise national government corporations concerning the design of administrative procedures and practices and also advise the government on draft legislation and statutory instruments relating to such authorities. Such a body has been created in common law countries with legal and administrative traditions similar to Papua New Guinea. For example, the United States, the United Kingdom, Australia and Canada already have such a body. This body should be given the power to advise legislative drafters during the initial preparation of enabling legislation for government corporations.

D. Enact Freedom of Information Legislation.

In considering the interests of the P.N.G. citizenry, there becomes obvious the need in this country, as a parliamentary democracy, to encourage more open government and more opportunity for public debate on issues of importance to the polity. This necessarily calls for access to information which may be available under present government practices to government officials, but not to interested persons outside the government or to the general public.

Freedom of Information legislation would, inter alia, put national government corporations under an affirmative obligation to inform the public about their structures and operations, and to make operation manuals and internally developed rules and regulations available to the public. Government corporations ought to adopt these practices whether legislation is passed on the subject or not. Moreover, interested persons should be allowed to demand the duplication at cost of information on file with a government corporation, provided such information does not fall within limited categories of information exempted from disclosure.
It is recommended that general legislation dealing with freedom of information should be passed and proclaimed as soon as practicable. Of course, the Government should also make necessary changes in practices and legislation regarding official secrets and confidentiality and the status and use of claims to privileged information.


The major political parties in Papua New Guinea agree that the Ombudsman Commission is a necessary tool for protecting individual citizens against governmental abuses. However, the ombudsman technique should not and cannot be depended upon to deal with administrative/managerial problems to the extent that the overall systemic improvement in the review of administrative/managerial action is diminished. Generalised improvements in the assessment of decision-making quality and in arrangements for administrative review will not alone result from the operation of a mechanism designed principally to deal with single problems in isolation. While attention to individual complaints is essential and provided for by the Ombudsman Commission, more widespread change must be informed by a broader perspective and approach.

It is therefore recommended that the examination of existing discretionary powers held by government corporations and of the modes of review to which they are presently subjected be made an object of ongoing research across jurisdictional lines by appropriate governmental bodies, in order to determine what review structures might be reformed and how the review process itself might be simplified or made more effective.182

F. Decide on Ministerial Control or Independence.

As the late Wolfgang Friedmann so aptly stated, "The extent
of Ministerial and other executive direction over the activities of the public corporations is perhaps the most critical but also the most elusive of all the problems which this new form of enterprise creates.”

Some countries prefer to make the Minister or his representative a member of the board itself. Others tend to reduce the status of a government corporation to that of a government department if the Government decides that it should have a direct controlling influence over its management. Of course, in either situation, such direction may be greater or lesser depending upon the personality of the Minister, the status of the particular government corporation, the strength of its permanent personnel, etc. The real problem arises "in the great majority of cases where the corporation is supposed to be autonomous in its management but subject to general direction from the Government.”

It is recommended that the ordinary presumption should be that, in structuring government bureaucracy, administrative authorities ought to be established within departmental confines unless there are very good reasons for constituting them as government corporations. However, because Papua New Guinea's constitutional framework does not confer on a Minister per se any power of direction or control, departmental units often operate for the most part as closed forums where confidentiality reigns and little opportunity is given interested persons to submit their views on programs or policies to compete in an open forum on a merit basis.

On the whole, however, it is generally agreed that Ministerial control should be confined to matters of policy, as distinct from day-to-day management. Therefore, it is further recommended that statutory or administrative guidelines be drawn up that spell out the distinction in a clear and succinct manner.
Between the cases where administrative authorities should clearly fall within departmental structures or be entirely insulated from Ministerial controls, there remains a large spectrum of government corporations about which great care must be taken in determining their powers and the means of supervision, direction or control to retain in Ministerial hands. What is next required is an analysis of current political and financial controls over government corporations classifying model types of relationships between Ministers and government corporations along this spectrum according to the nature of Ministerial control over policy elaboration and the scope of Ministerial review of each government corporation's activities. The Floyd Report completed in February 1979 was a small step in the right direction. Unfortunately, little has happened since its publication.

Policy elaboration often involves the translation of general policy criteria as set forth by statute into regulations and other rules and guidelines. A Minister may be formally involved at this level where he has the power to make or approve regulations or to issue directives. Less formal intervention may occur through consultations between department and corporation officials, the issuance of governmental policy statements for a particular government corporation to take into account, etc.

In the final analysis, it should be recognised that government control over many government corporations, notably those with major policy functions is necessary in a parliamentary democracy and that there are many considerations that have to be weighed in selecting a particular mechanism for controlling a particular statutory authority's function. These are largely political questions which must be answered by the Government when legislation is in the planning stages, and ultimately, by the National Parliament as legislator.
G. Develop Directive Power.

There are occasions when it is important for the government to give some direction to policy mandates of government corporations. Although the step of legislative amendment is the only appropriate one when a government corporation's basic mandate is changed, parliamentary resources must be used judiciously. Therefore, often enough, government officials can reorient administrative activities by making glosses on existing legislation. The device of the ministerial directive power based on a particular statutory mandate could be developed to meet the need for changes in policy direction under such circumstances.

This author favours a more open enunciation of government policy than has sometimes been the case in the past. Directions often serve as devices for policy control. Therefore, it is recommended that the power to issue directions should be used, only sparingly and not as a general political control device, in giving policy direction over well-defined areas of activity to agencies having relatively broad mandates to elaborate and apply policy. Thus, the directive power is particularly suitable for guiding the policies of government corporations involved in regulatory activities.

However, the way in which directions are presently made lacks the degree of openness provided by the legislative process, which gives public exposure to government policy and an opportunity to interested persons to make representations. Ideally, a policy-making process should offer some means by which policy positions can be aired prior to becoming effective, so that interested persons may have an opportunity to participate in policy making.

From a governmental standpoint, directions offer the advantage of being less formal modes of policy communication
than regulations; but the greater the freedom from parliamentary constraints, the greater is the risk of executive policies not reflecting values based on the representative process found in a parliamentary democracy.

To be fair to the government corporations, the National Parliament and the general public, there need to be improvements made in the process of issuing directions.168

XI. CONCLUSIONS

The concept of corporate social responsibility is not pie-in-the-sky legal or political theory. In the private sector, it is a sound rationale for the equitable distribution of corporate profit for the long-term benefit of all of the corporation's constituencies including the TNC itself. It is a concept that has been propounded by scholars like Chamberlain and Gower, and embodied in various forms in such legislation as the U.K. COMPANIES ACT 1980 and the Ghana COMPANIES CODE 1963. This paper has attempted to graft that concept onto the social fabric of this country. With respect to the Eight Aims of Economic Development and the National Goals and Directive Principles of the P.N.G. Constitution, corporate social responsibility operates as a rationale for imposing these guidelines on corporate management in the public and private sectors both administratively and legally. Of course, the people of Papua New Guinea are the ultimate beneficiaries of this concept whether as workers, consumers, or the general public.

With respect to the TNC, if it can be said that it poses a subtle threat to the long-term economic development and freedom of the P.N.G. citizenry, it is because of its high level of effectiveness. Its ability to pursue a co-ordinated and centralised strategy removes the power of decision-making far from the bulk of the people intimately affected by it. Its financial and technological efficiency tends
to cause naive and illiterate consumers to give priority to those hard goods which it manufactures and sells so economically when less sophisticated, but more appropriate, goods and services are what they really need most. Its operations tend to overlook the real socio-economic needs of Papua New Guinea, and thereby produce strains and dislocation. But to say this is to accuse the TNC of being in the vanguard of the often painful process of making P.N.G. Western, technological, and integrated - a process that, even if inevitable, is not something that must happen without the knowledge or awareness of the people of this country. Corporate social responsibility gives the TNC the opportunity to mollify this admittedly painful process and to adapt technology to the needs of the people.

Predictions are difficult to make about the future of TNCs. If one can assume that they will continue to flourish, Papua New Guinea will have to learn to order its priorities more stringently, pool its sources of data more liberally, and smooth over the substantive differences between its major political parties in order to present the TNC with a united front.

What the role of law and lawyers in all of this will be has been well stated by L.C.B. Gower:

"The lawyer of the future will have to play a major part in shaping any reforms that are resolved upon and in advising about their practicability. Before he can do so he must understand the present law, not merely as an arid set of abstract rules, but as an essential part of the machinery of the modern State and the modern world; and he must be aware of the nature of the various reforms being advocated to change the traditional legal patterns." 183

With respect to government corporations, the problems may be intractable but not necessarily unsolvable. Corporate social responsibility in the public sector implies a set of values or principles which include accountability,
effectiveness, economy and efficiency, fairness, integrity, authoritativeness, principled decisionmaking, comprehensibility and openness. Immediate action is needed "to control the controllers". But control is difficult to achieve because, unlike the TNC, a government corporation has neither shareholders nor share capital. Indeed, it is only nominally that it has any members at all, because these are appointed and removed by the Minister and are the same people as the directorate. The dichotomy of corporate management and membership which is characteristic of the TNC has no meaning in the case of the government corporation. Therefore, the implementation of corporate social responsibility must be initiated in the public sector by the Department of the Prime Minister.

In 1970, the late Wolfgang Friedmann concluded his analysis of government enterprise in words that remain timely and relevant in Papua New Guinea more than a decade later:

"The organisation and co-ordination of a form of government enterprise that blends managerial autonomy and flexibility with public policy controls is a task of increasing urgency. The sphere of government responsibility will have to be vastly increased, as a result of the belated recognition that drastic control over economic development, over the balance of town and country, and, above all, over the uses of water, earth and air - on an international as well as a national scale - are nothing less than a condition of civilised survival. These are, of necessity, public responsibilities. In a growing number of cases, public, or joint public-private enterprises will have to carry out these functions. It is the lawyer's task and opportunity to improve and sharpen the legal tools."

Given the scope of current governmental operations and the degree of discretionary power wielded by several government corporations in this country, it is clear that sources of law additional to judicial ones will have to be relied upon if administrative law is to be bolstered to meet the existing needs and to ensure that governmental action is carried out fairly, effectively, and responsibly.
XII. ENDNOTES

1. I wish to express my deep appreciation to Ross Devere, the Acting Secretary of the Law Reform Commission of Papua New Guinea, for his notable critiques of the preliminary and final drafts of this paper, and to my Wife Eleonore for her invaluable help in final editing and typing.


3. See S. Ramphal, "Collapse of the old order" (extracts from the Secretary-General's statement launching the Commonwealth Experts' Group set up in Kingston, Jamaica on 9th July 1975) in ONE WORLD TO SHARE (1979) 9-10.

4. See excerpts from speech delivered by Sir Julius Chan on 3rd March 1981 to the National Parliament on the occasion of the first anniversary of his coalition in office; and quoted in the Editorial page of THE TIMES OF PAPUA NEW GUINEA on 6th March 1981 at 28 in section entitled, "NEWS AND VIEWS".

5. "Abrasive interface" is a term coined by George Schultz, now Vice Chairman of the American-based transnational giant, Bechtel Corporation, and former U.S. Secretary of the Treasury and Economic Adviser to U.S. Presidents Nixon, Ford, and Reagan.

6. The National Goals and Directive Principles of the P.N.G. Constitution read in pertinent part as follows:

1. Integral human development.
   We declare our first goal to be for every person to be dynamically involved in the process of freeing himself or herself from every form of domination or oppression so that each man or woman will have the opportunity to develop as a whole person in relationship with others.

2. Equality and participation.
   We declare our second goal to be for all citizens to have an equal opportunity to participate in, and benefit from, the development of our country.

   We declare our third goal to be for Papua New Guinea to be politically and economically independent, and our economy basically self-reliant.

4. Natural resources and environment.
   We declare our fourth goal to be for Papua New Guinea's natural resources and environment to be conserved and used for the collective benefit of us all, and be replenished for the benefit of future generations.
5. Papua New Guinean ways.

We declare our fifth goal to be to achieve development primarily through the use of Papua New Guinean forms of social, political, and economic organisation.

7. The Eight Aims of Economic Development which marked the first effort of the (then) House of Assembly "to outline certain fundamental guidelines for national improvement" read as follows:

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

(2) More equal distribution of economic benefits, including movement towards equalisation of incomes among people and towards equalisation of services among different areas of the country; and

(3) Decentralisation of economic activity, planning and government spending, with emphasis on agricultural development, village industry, better internal trade, and more spending channelled to the local and area bodies; and

(4) An emphasis on small-scale artisan, service and business activity, relying where possible on typically Papua New Guinean forms of business activity; and

(5) A more self-reliant economy, less dependent for its needs on imported goods and services and better able to meet the needs of its people through local production; and

(6) An increasing capacity for meeting government spending needs from locally raised revenue; and

(7) A rapid increase in the equal and active participation of women in all forms of economic and social activity; and

(8) Government control and involvement in those sectors of the economy where control is necessary to achieve the desired kind of development.


9. Popular examples of government corporations in P.N.G. are AIR NIUGINI, the Electricity Commission, and the Harbours Board.

10. Examples of this sort of participation in commercial enterprise include P.N.G. Shipping Corporation Ltd., Ramu Sugar Ltd., and New Britain Palm Oil Development Ltd.

11. An even more essential definition might be "a cluster of corporations of diverse nationality joined together by ties of common ownership and responsive to a common management strategy". (See R. Vernon, Economic Sovereignty at Bay,

12. See in particular J. E. Winkler, "Towards Understanding Transnational Corporations in the Pacific", 3-4 (a discussion paper dated 18th February 1981 prepared in relation to a Pacific Conference of Churches program to consider the impact of transnational corporations upon economic and political decisions in the Pacific).

13. Burns Philp is a major trading company with investments in transport, hotels, plantations, insurance, motor supplies, shipping and trade agencies, retailing and merchandising, etc. with operations throughout the Pacific Islands.

14. W. R. Carpenter Holdings Ltd. (i.e. W. R. Carpenter Group) is heavily involved in wholesale and retail merchandise, shipping, automotive dealerships, advertising, construction, manufacturing, tourism, plantations, timber extraction, etc. In P.N.G., W. R. Carpenter and its subsidiaries are "sole importers of a large number of foreign-made goods, among others, SONY radios and hi-fi equipment, ELECTROLUX home appliances, KENWOOD food mixers, DEWARS whisky, GORDON'S Gin, HOOVER vacuum cleaners, SANSO pumps, VICTA mowers, NISSAN and DATSUN cars and spare parts, FORD cars and tractors, GOODYEAR tyres and MASSE batteries." See E. Utrecht, "Papua New Guinea: An Australian Neo-Colony", TRANSNATIONAL CORPORATIONS IN SOUTH EAST ASIA AND THE PACIFIC, TNCs Research Project, University of Sydney, 1978 Vol. II, 29, quoted in Winkler, op. cit. supra n.12, at 4.

15. The 21st century is being touted as "The Century of the Pacific" and more often these days one hears of the increasing attention being turned from the Atlantic to the Pacific where four of the world's great powers meet - the U.S.A., U.S.S.R., Japan, and the People's Republic of China. The importance of the Pacific has been highlighted by the following developments in the recent past:

(1) Movement of some of the world's largest TNCs into seabed mining and forestry and fisheries,

(2) Japan's and the P.R.C.'s aggressive economic expansion,

(3) U.S.A.'s request of Australia to permit expansion of Pine Gap.

(4) U.S.A.'s request of Japan to increase defense operations.
(5) U.S.A.'s demands of Micronesia to allow expanded military installations.

These developments make it more than likely that TNCs like Burns Philip may be seen as necessary strategic acquisitions by the largest TNCs in expanding their "global reach" (to paraphrase the work by Barnet and Müller op. cit. supra n.11). In 1980, for the first time in modern history, the value of trade earned in the Pacific exceeded that of the Atlantic, largely due to Japan. See Winkler op. cit. supra n.12 at 7.

16. For example, a list of U.S. companies active in Fiji, available at the U.S. Embassy in Suva, Fiji, does not include the American TNC, Mobil Oil, because Mobil's Southwest Pacific operations are registered as Australian companies, which is technically correct under the Companies Legislation pertinent thereto. The same is true for certain U.K.-based companies with branches or subsidiaries in Australia and New Zealand.


18. See Gower, op. cit. supra n. 8 at 61.


21. See R. J. Barnet and R. E. Müller, op. cit. supra n.11 at 151-2.


23. My limited experience in Papua New Guinea from 1979-81 leads me to conclude that the P.N.G. Government consists of coalitions which find it much harder than the average TNC to submerge their differences in a common policy. For example, how do you formulate a common policy towards foreign investment when the following interests and concerns come into play?:

1. The interests of the Finance Ministry in greater tax gathering from greater national income or in a better foreign exchange status;

2. The concern of the Ministry for Environment & Conservation which must require the proponent of a project to draw up an environmental plan at its own cost, and must somehow ensure that the customary land tenure system is fully considered in all project planning;

3. The concern of the Ministry for Foreign Affairs & Trade in building closer ties with the country of the TNC's origin or in escaping any possible entanglement with that country;
4. The concern of the Ministry for National Planning & Development which must somehow ensure that the provisions of the NIDA ACT and the National Investment Priorities Schedule are taken into account as guidelines which ensure that Papua New Guineans have access to commercial opportunities;

5. The concern or interest of various other Ministries (including but not necessarily limited to one or more of the following: Primary Industry, Forests, Lands, Labour & Employment, Minerals & Energy, and/or Commerce & Industry) which might represent particular interests in a particular project; and

6. The competing or conflicting interests of different provinces within P.N.C. coupled with the Ministry for Decentralisation's task of aiding and expediting the shift of the "co-ordination and monitoring" from NIDA to the individual provincial governments. The plans for decentralisation and delegation may be easier to enunciate than to implement.

The choices as to what course of action to pursue are often perplexing: should a proposal be banned, subjected to conditions, burdened with extra charges, or subsidised? The dilemma of the coalition is increased by the Opposition in the National Parliament or by the opposition of the "man on the street" who can be easily aroused.

And so, the foreign investment process is far from being simple and quick in Papua New Guinea. Perhaps before Independence the "quick buck" could be easily made. But those days have long since passed in this country, and careful (if not tedious) negotiation is the accepted procedure.

24. See Barnet and Müller, op. cit. supra n. 11, who vehemently disagree with me on this point. In Chapter 7 entitled, "Engines of Development?", they state at 172:

"... Managers who serve under the tyranny of the annual balance sheet cannot afford long-term visions. Developing countries are increasingly eager to gain control over technology to increase their bargaining power and self-reliance. Companies .... are interested in maintaining tight control of proprietary rights, frustrating possible competition from local entrepreneurs, and maintaining 'managerial control and flexibility in allocating corporate resources on a global basis'.”

See also J. Baranson, "The Drive Toward Technological Self-Reliance in Developing Countries and M.N.C. Attitudes in Latin America", a paper presented to the University of Texas, Austin, Texas on 21.3.77.

25. There is a tendency to revert to sweeping generality at the political level, as in the case of the first page of the P.N.C. POST-COURIER of Wednesday, February 25, 1981 which reported the following story in pertinent part:

"PUBLIC SERVICE PAY HIKE

The President of the Public Service Association, Mr James Mileng, said '... My association is totally disgusted with
the Government in allowing multi-national corporations
and other companies to rape the community". (emphasis mine)

26. The P.N.G. Law Reform Commission's own *Fairness of Transactions
Bill* (Report No. 6 of Nov. 1977) is a case in point. If enacted,
the bill would have created more issues than it purported to
settle. It would have also sent shock waves throughout the
international business community, and warned potential investors
that in P.N.G. the common law rules of contract would be judged
in the light of "fairness", such fairness to be determined by
the courts of Papua New Guinea. Note in particular Clause 3
of the aforementioned bill which defines fairness as relating to
"the principle of the just and equitable distribution of
the rights, duties, benefits, and disadvantages of a transaction."

Another example is the *National Investment and Development Act
1974*, which gives certain co-ordinating and monitoring functions
to NIDA, but makes the observance of NIDA "directives", a voluntary matter. This voluntariness in large measure has
emasculated any attempt by NIDA to co-ordinate effectively
the Government's dealings with private investors and businessmen.

27. See once again Gower, op. cit. supra n. 8.

28. See in particular the *Report on Selected Nonfinancial Public
Enterprises in Papua New Guinea* (February 16, 1979) prepared
by Robert H. Floyd under the auspices of the International
Monetary Fund (Fiscal Affairs Department) at 2 (and hereafter
cited as the *Floyd Report*).

29. See generally W. Friedmann and J. F. Garner (eds.), *Government
Enterprise, A comparative study*, (British Institute Studies in
International and Comparative Law No. 5) (1970), and see in par-
ticular Chapter 16 for comparative analysis by Professor Friedmann.

30. For a more complete breakdown of the various types of public
enterprise operating in Papua New Guinea, see n.165 *infra* and
Appendix A *infra* at 112 which shows a breakdown of registered
limited companies in which the Government has either a direct
equity participation, or indirect equity participation through
the Investment Corporation (hereafter cited as ICPNG). There
are approximately thirty companies registered under the
*COMPANIES ACT* as limited companies in which the Government
directly owns an equity interest. It also indirectly owns
equity in about fifty limited companies through the portfolio
holdings of the ICPNG with a majority interest in only six.

31. See the *Floyd Report* cited supra n. 28 at 2 which reads in
pertinent part as follows:

"A review of existing institutional arrangements for
monitoring and controlling the public enterprises
indicates that supervisory responsibility is fragmented
and scattered over various government agencies, and
often there is apparently no clear understanding of
which responsibilities and controls should be exercised
by which agencies."
32. Id. at 2 which reads in pertinent part as follows:

"None of the public enterprises organised as government companies have been profitable, and all of the public enterprises (which include Electricity Commission, Air Niugini, and Harbours Board) reviewed in this report were net recipients of financial resources from the Government."

33. A recent example of the Government's efforts to make certain government corporations more accountable was reported on the first page of the P.N.G. POST-COURIER which carried the following story on Tuesday, 6th January 1981:

"ELCOM HIT FIRST IN P.S. REVAMP

BY: Susuve Laumaea

The Government is reportedly planning major structural changes in the top management of statutory authorities.

The changes are a flow-on of the Government's recent efforts to revamp the Public Service.

The proposed structural changes in statutory authorities are aimed at making them more effective and responsive to political direction, according to a senior public servant yesterday.

The official said the Government was not pleased with the performance of statutory authorities. He said under the proposed new changes the Government would "plant" up to about four of its representatives on the board of commissioners of each statutory body to ensure that the Government's policies and directions were implemented.

'The Government strategy is to make the statutory authorities toe the line,' the official said.

The Electricity Commission is the first semi-government institution to feel the brunt of the Government's shake-up strategy. Changes in Elcom's top management are to be made in the first quarter of this year.

Other statutory authorities to be affected by changes later in the year will be the National Housing Commission, the PNG Harbours Board and the National Broadcasting Commission.

(emphasis mine)

Elcom's New Way

Legislative amendments to the Electricity Commission Act are being drafted to effect a new management structure already approved by the National Executive Council.

The amendments will be presented to Parliament next month for approval.

Under the proposed changes, Elcom will be run by a general manager. The positions of Electricity Commissioner and five associate commissioners will be abolished.

New positions would be created for a chairman of Elcom's board of commissioners, five other commissioners, and a general manager.
The general manager will be responsible for the daily management of Elcom, but he will be answerable to the board of commissioners.

Under the new proposals, members of the board of commissioners will be the secretaries of the Departments of Finance, Minerals & Energy and Lands, the director of the National Planning Office and two representatives from the private sector."


35. It is clear that the National Goals and Directive Principles and the Eight Aims demand that the greatest number of Papua New Guineans be served by the expenditure of public monies. And yet at the time of publication of this paper, many articles in the local press illustrate that these guiding principles have nothing to do with the everyday activities of many political leaders in this country. See, for example, the many stories in the P.N.G. POST-COURIER during the months of March and April 1981 concerning the purchase of a K6 million Government jet and the multi-million kina lease of Dash 7 aircraft. One wonders how in a country with essentially no road network to speak of, where the overwhelming majority of citizens cannot even afford a plane fare, and where politicians talk about "serving the needs of the people" the purchase of high technology aircraft can possibly serve the needs of the average Papua New Guinean - even indirectly.

36. See Ghai, op. cit. supra n. 34 at 43 n. 2 which reads as follows:

"It can be said in general that there are two schools of thought on why public enterprise has been largely unsuccessful. One looks at the structure of the enterprises, the lack of managerial capacity, and governmental interference and political corruption. For examples of this approach, see Pozen, "Public Corporations in Ghana: A Case Study in Legal Importation", in 1972 Wisconsin Law Review 802-844; and the essays on public enterprise in A.H. Rweyamu and G. Hyden, A Decade of Public Administration in Africa, 1975. The other school attributes the failure to the negative influences of foreign capitalist interests and the dependency of the third world countries on the international economic system. Examples of this approach include Issa Shivji, "Capitalism Unlimited: Public Corporations in Partnership with Multinational Corporations", Vol. 3 The African Review (1973) 359-381; Kweisi Botchwey, "The Dynamics of Public Corporate Activity in Contemporary Africa" (unpublished paper)."

37. Either because the size of the investments necessary to make the individual project economically viable are unavailable, or because the project has been considered unprofitable by the private sector interests.

38. As Ghai aptly points out in his book, op. cit. supra n. 34, in Kenya or Malaysia, government corporations have been used to allocate resources on a differential or preferential basis


40. See Ghai, op. cit. supra n. 34 at 20-21 and 44 (n.15); and also see J. Soul, "The Political Aspects of Economic Independence," in Ghai (ed.), op. cit. supra n.39; Shivji, op. cit. supra n.36; and see also G. F. A. Sawyerr, "Multinational Corporations and Development: The case of the Rubber Industry in Ghana" in Ghai, op. cit. supra n.34 at 267.

41. The National Public Expenditure Plan 1980-1983 (dated November 1979) reads in pertinent part (at chapter 13 entitled, "Public Institutions" at 69 (the Floyd Report) is that the 'Government's economic and financial objectives have not been effectively communicated to the managers of the various public enterprises.' This has led to the situation where managers are guided primarily by their view on how their corporations should operate and their concern for development priorities reflects mainly their own ideas of how their enterprises should evolve. It can also mean that an enterprise can become involved in activities far beyond the original intention of the Government for which the enterprise was established." (emphasis mine)

42. In a famous debate in the pages of the Harvard Law Review, Professors Dodd and Berle argued about what exactly was the fiduciary duty of managers: Were they fiduciaries of the shareholders? (Berle's original view) or were they fiduciaries of the corporation itself? (Dodd's view). See Berle, "For Whom Corporate Managers Are Trustees: A Note" (1932) 45 Harv. L. Rev. 1365; Dodd, "For Whom are Corporate Managers Trustees?" (1932) 45 Harv. L. Rev. 1145.

43. See Dodd, cited supra n.43; and Berle, "Modern Functions of the Corporate System" (1962) 62 Colum. L. Rev. 433.

44. This emphasis was placed by Manne, "The Higher Criticism of the Modern Corporation" (1962) 62 Colum. L. Rev. 399 and reflected in the views of those economists who argue that the economic market place is the determining factor: M. Friedman, "The Social Responsibility of Business is to Increase its profits", The New York Times Magazine, 13 September 1980; and most recently, M. and R. Friedman, "Free to Choose: A Personal Statement" (Harcourt Brace Jovanovich: 1980) 338 pp.

45. See Berle and Means, "The New Concept of the Corporation" in The Modern Corporation and Private Property (revised edition - 1967) at 313 which reads in pertinent part as follows:
"In still larger view, the modern corporation may be regarded not simply as one form of social organisation, but potentially (if not yet actually) as the dominant institution of the modern world. In every age, the major concentration of power has been based upon the dominant interest of that age. The strong man has, in his time, striven to be cardinal or pope, prince or cabinet minister, bank president or partner in the House of Morgan. During the Middle Ages, the Church, exercising spiritual power, dominated Europe and gave to it a unity at a time when both political and economic power were diffused. With the rise of the modern state, political power, concentrated into a few large units, challenged the spiritual interest as the strongest bond of human society. Out of the long struggle between church and state which followed, the state emerged victorious; nationalist politics superseded religion as the basis of the major unifying organisation of the western world. Economic power still remained diffused.

The rise of the modern corporation has brought a concentration of economic power which can compete on equal terms with the modern state - economic power versus political power, each strong in its own field. The state seeks in some aspects to regulate the corporation, while the corporation, steadily becoming more powerful, makes every effort to avoid such regulation. Where its own interests are concerned, it even attempts to dominate the state. The future may see the economic organism, now typified by the corporation, not only on an equal plane with the state, but possibly even superseding it as the dominant form of social organisation. The law of corporations, accordingly, might well be considered as a potential constitutional law for the new economic state, while business practice is increasingly assuming the aspect of economic statesmanship."


47. The biggest problem with Marxism lies in its economics. Such at least has been the opinion of many would-be Marxists, especially in the English-speaking countries. Marx's economic inquiry is characterised by three assumptions. First, that political economy is the science of the distribution of wealth in society and of its rationale; that the aim of economics is to find out "who gets what and why". Second, that the introduction of machinery, i.e. industrialisation, constitutes the decisive fact of modern economy, around which all the forces of the modern economy resolve. Industrialisation is a decisive break with the previous pattern of economic development and will lead to an entirely different relation of man to material forces.
Third, that the economic development of England, roughly in the first half of the nineteenth century, is a preview of eventual economic development everywhere; that the observable data about the economic behaviour of various classes there, have a fairly universal validity. See Adam B. Ulam, The Unfinished Revolution, (1979, revised ed.) at 16.

In the business world the earliest managers were the factory proprietors, the business entrepreneurs, the millowners and ironmasters. Since, in that period, the owner and manager were one and the same, it is not surprising that Marx confused the two and laid so heavy an emphasis on the importance of ownership. See Toffler, op. cit. supra n.46 at 78.

Marx firmly believed that capitalism is doomed because it cannot accommodate technological progress to the profit motive. It is doomed, according to Marxist theory, because it actually creates socialism in the sense of concentrating the means of production in huge units, thus making the notion of private property an absurdity as well as a fetter on the productive system. It is finally doomed because in its fight for survival it has to bring increasing misery, exploitation, and unemployment to the mass of the population.

Such is Marxist economic theory in the nutshell. Economists have written voluminously about its obvious weak points: the inconsistencies concerning the relationship of value and price and the belief that industrialism under capitalism is bound to make the working class more and more miserable. The latter point, Marx's "immiseration" theory, as Joseph Schumpeter called it, is a tenet of Marxism which has been most decisively refuted by history. See once again Ulam, op. cit. supra at 26.

48. See again Toffler, op. cit. supra n.46 at 78.

49. W. Michael Blumenthal is quoted from M. Korda, Power! How to Get It, How To Use It (1975) at 40.

50. In its most extreme form this is exhibited in the communist Marxist/Leninist economy which in its purest form is an insistence that all of the powers and privileges of property shall be used only in the common interest. In less extreme forms of socialist dogma, transfer of economic powers to the state for public service is demanded. In the strictly capitalist countries, demands have grown that the managers controlling the great corporations be made to accept the responsibility for the well-being of those who are subject to the organisation, whether workers, investors, or consumers.

51. This long-term profit maximisation or "enlightened self interest" approach is adopted by Blumberg, "Corporate Responsibility in a Changing Society" [1972] 6 66.; and Rostow, "To Whom and for What Ends is Corporate Management Responsible?" in Mason (ed.) The Corporation in Modern Society (1960) 49 ff., at 67, 68; and also see N. Chamberlain, The Limits of Corporate Responsibility (1973) at 4.
52. At least in the U.S.A., Richard G. Darman and Laurence E. Lynn Jr. of the J.F.K. School of Government (Harvard University) estimate that 40% of all decisions involving corporate capital investment now are determined by considerations other than profits or the best interests of shareholders and employees. Instead, the determining factor is government policy. In P.N.G., it is difficult to know what the percentage would be. But I would estimate that at least 50% of all decisions involve considerations other than profits.

53. This is Blumberg's term for long-term profit maximisation. See generally Blumberg, op. cit. supra n.51 at 7.

54. See once again the National Goals and Directive Principles of the P.N.G. Constitution as listed at n. 6 supra.

55. See once again the Eight Aims of Economic Development as enumerated at n. 7 supra.

56. The Terms of Reference concerning the Review of Economic Laws read in pertinent part as follows:

"Because

a) Papua New Guinea's economy is rapidly developing; and

b) our Constitution provides that economic development must lead to rural improvement, an egalitarian society in which the benefits of development are evenly divided among all the people, and an emphasis on Papua New Guinean forms of business organisation; and

c) the economic legislation borrowed from Australia and the common law of England make it impossible to reach these aims:

Enquire into and report to me on:-

a) the current state of the law in regard to contracts, commercial transactions, creditors rights and hire-purchase, corporations and business organisation, and any related economic legislation; and

b) the changes needed in these laws if the economy is going to develop in the direction specified by our Constitution."

In many respects, this occasional paper is a specific response to the terms of this reference.

57. Section 2 of the NIDA ACT defines "foreign enterprise" as follows:

"(a) in the case of an enterprise that is a corporation - an enterprise that -

(i) does not have its central management or control in Papua New Guinea; or

(ii) has its voting power controlled by persons who are not Papua New Guineans; or

..."
(iii) is incorporated or established by or under the
law of a place outside Papua New Guinea; or

(iv) is the subject of a declaration under Section 6,
and, without limiting the generality of those provisions,
includes —

(v) an enterprise in which 26 per centum or more of
the voting power is held or controlled by persons
who are not Papua New Guineans; and

(vi) an enterprise in which 26 per centum in number
or value of the shares are beneficially owned
by persons who are not Papua New Guineans; and

(b) in the case of an enterprise that is a co-operative
society or a savings and loan society — an enterprise
one or more of the members of which is not a Papua
New Guinean; and

(c) any other enterprise one or more of the partners or
members of which is not a Papua New Guinean.

and includes —

(d) subject to Subsection (6), an enterprise in which the
management or control is in the hands of persons who
are not Papua New Guineans; and

(e) an enterprise that is a natural person other than a
Papua New Guinean; and

(f) an enterprise that is a public authority or an instru-
mentality of the Government of a place outside Papua
New Guinea,

but does not include —

(g) an enterprise that is licensed under the Central
Banking Act 1973, as in force from time to time, or
the Banks and Financial Institutions Act 1973, as
in force from time to time; or

(h) the Government or a Government-controlled corporation; or

(i) in relation to any provision of this Act — an enterprise
that is exempted from the operation of that provision
under Section 7;"

58. The assumptions stated herein are based in part on a conception
of economic development elucidated upon in A Report on Development
Strategies For Papua New Guinea prepared by the Overseas Development
Group (University of East Anglia) for the IBRD (a.k.a. the World
Bank) acting as executive agency for the UNDP and dated February
1973 at 5. The report reads in pertinent part as follows
at 11(para. 2.24):

"Economic development, in its narrower meaning, involves
more production, more employment, more real income, higher
consumption — all as a means of procuring greater economic
welfare. And these needs impose severe, one might say,
classical requirements of which the most important are the
provisions of savings and opportunities for remunerative
investment, the education and training of manpower but —
equally important - the creation of an environment where
even relatively untrained people can establish and run
their own farms and businesses, and sufficient political
stability and efficiency in the despatch of public
business to enable private citizens to work without
unnecessary harassment but with a good expectation of
being able to enjoy the rewards of their industry.
But development in a wider sense entails other things
as well - a harmonious society, an income distribution
that is recognised as being relatively fair between
different regions of the country and between individuals,
and increasing national self-reliance in terms of manpower
needs, financing requirements, and - ultimately - the
capability to direct and control the economy."

59. The long-term objectives stated herein are based on the same
objectives stated in the Report by the Overseas Development
Group (University of East Anglia) id. at 4 (para. 2.2) but
updated accordingly.

60. Having reviewed the final draft just before publication, I now
realise that I have given short shrift in the main body of this
paper to a set of assumptions concerning the workings of govern-
ment corporations and what the guiding principles or values are
behind the concept of corporate social responsibility in the
context of the public sector. After all, corporate social res-
ponsibility implies a somewhat different set of values (than
that for TNCs) to which the structure and functions of government
corporations in Papua New Guinea should conform in order to
maximise the benefits available to the people of this country
and to fulfil the intent of both the National Goals and
Directive Principles and the Eight Aims. Since these values
or principles have been assumed to be applicable to Papua New
Guinea, they should be made explicit:

1. Effectiveness, economy and efficiency - Without getting
bogged down in semantical difficulties, I simply mean that
activities carried on by government corporations should achieve
their stated goals or intended effects. Operations should be
organised economically with an appropriate mix of human and
material resources. They should be run efficiently with a
maximum production of administrative services in relation to
the amount of resources employed.

2. Accountability - Accountability to both the National
Parliament and the Government for the exercise of governmental
authority; accountability to the courts for excess or abuse of
power; responsiveness to the public, in the sense of making
decisions based on the inclusive representation of relevant
interests and an appropriate consideration and weighing of
those interests.

3. Fairness - If a government corporation does not operate
fairly pursuant to proper procedures, it becomes incapable of
performing its functions and attaining its objectives in a
society which basically depends on the voluntary cooperation
of citizens. Fairness can produce by-products such as trust
and credibility which, in turn, increase social cohesiveness, belief in the legitimacy of governmental institutions and cooperation with them.

4. Authoritativeness - Citizens in this country have a right to authoritative decisionmaking from governmental bodies designated to have particular powers. Except for specific and limited appeal or review procedures, decisions should have the quality of finality.

5. Integrity - The integrity of administrative processes must be respected. If an enabling act grants a power to a government corporation, it should really exercise the power; the government of the day should not be pulling hidden strings. Those charged by law with making decisions in accordance with certain norms and procedures must make those decisions without unduly bowing to external pressures or improperly using information not on the record.

6. Comprehensibility - Government institutions and procedures in Papua New Guinea should be structured so as to be as understandable as possible to the great majority of Papua New Guineans. Mechanisms should also be developed to make them known and understood.

7. Principled decisionmaking - Rules and decisions should be based on principles which are identified and articulated. Correctness and accuracy in decisionmaking should be the highest priorities.

8. Openness - Accessibility, which complements each of the aforementioned principles, should be the rule rather than the exception thereto. An open process is more comprehensible and more accountable than a closed one. It supports integrity; encourages fairness; and is likely to promote effectiveness by producing more accurate decisions.


61. At present the acceptability of foreign residents within this country depends upon a broadly defined idea of what contribution they can make to the welfare of Papua New Guinean citizens. The Migration Act 1978, the Employment of Non-Citizens Act 1978 and the Public Employment (Non-Citizens) Act 1978 and regulations have increased controls over the entry and employment of expatriates in Papua New Guinea.

62. Apparently, distributional equity is still a burning issue in this country. In fact, the latest debate about the purchase of Grumman and the lease of Dash 7 aircraft have exposed the Government to the criticism that the other sectoral transport programs (namely, roads and shipping) have been given short shrift by the current coalition. See also Appendix B, 1981 Sectoral Programs, Infra at 117, reprinted from The National Public Expenditure Plan 1981-1984 dated November 1980 at 200.
63. This may be more government rhetoric than reality. P. Fitzpatrick's "metropolitan" elites have returned to the boardrooms in Sydney and Melbourne, leaving their jobs, offices, and houses to be taken over by a new indigenous elite. See P. Fitzpatrick, Law and State in Papua New Guinea (London: 1980). Apparently, the educated and energetic have seized the opportunities presented by Independence to ensure their financial security in the modern sector but what happens to the rest of the people?

64. Obvious examples of recent legislative attempts to adopt traditional or existing forms of organisation in the business/commercial context include the BUSINESS GROUPS INCORPORATION ACT 1974, The COMPANIES (AMENDMENT) ACT 1974 and the LAND GROUPS ACT 1974.

65. The years of patient groundwork in the 1950s and '60s bore fruit in the '70s when continuing high prices for Papua New Guinea's exports resulted in a rapid increase in earnings for those fortunate citizens engaged in the cash economy. The former ideal of an affluent peasantry able to afford simple luxuries has been replaced by a marked enthusiasm for "bismis", with big prizes for the successful operators.

66. The sorry story of the original Plantations Acquisition Scheme should not be repeated. Recently there have been determined efforts by the Government to revive the agricultural sector, but with little success to date. For example, see article entitled, "Chan slams run-down plantations" which appeared in the P.N.G. POST-COURIER on 7th April 1981 at 9, and reads as follows:

"Run-down plantations would be given rundown valuations, the Prime Minister, Sir Julius Chan, cautioned planters on Friday.

'I compliment those plantation owners who have embarked on their own programs of replanting and development' he said in Rabaul. 'They quite obviously realise that it is in the industry's interests to maintain its profitability by maintaining its productivity and efficiency.'

Sir Julius said that at the same time, many have dropped out of the race for artificial reasons, and many properties have been milked dry deliberately, with no thought given to normal maintenance and normal expansion. 'Such an attitude is reprehensible, non-constructive and completely short-sighted.'

Sir Julius said it was to no one's credit for land to be misused and for 'certain owners to then place unrealistic values on properties they wish to flog off to those who have an emotional attachment to land.' 'My Government will not permit it to be abused' he said. 'Fair is fair, and while an honest compensation will always be paid for properties acquired, run-down properties will receive a run-down valuation.'

The Prime Minister said more could be done to pass on agricultural and managerial expertise to nationals. 'Call it an act of Christian charity, call it a public relations exercise, an investment in your own future. No matter what you call it, you as possessors of skills are expected to pass those skills on,' he said.
We expect you to become much more active in extension work, whether you do this through the National Plantation Management Agency, or the National Plantation Management Training Agency, or, in the case of large firms, through your own well-designed training programs.

This may have the unusual result of encouraging the bigger TNCs, because their training and localisation programs are superior to those of smaller entrepreneurs. In part this is due to the insistence on such programs in agreements between TNCs and the Government. Also the TNCs are more "visible" and have more to lose if they fail to live up to imposed standards than smaller concerns.

To be fair, I include herein a brief summary of current tax and other financial incentives contained in the P.N.G. 1980 budget as follows:

(1) **Accelerated Depreciation**

This incentive is available to the manufacturing, transport and communications, building and construction, and business service sectors for purchase or construction of assets with a useful life of over five years. The retail, fishing, forestry and mining sectors do not qualify for such an incentive but agricultural investment can be written off in the year of expenditure.

This incentive allows a greater claim for depreciation in the year of capital purchase. For example, eligible investors may claim 20% of the cost of the investment in the year of purchase as an additional allowance over the normal depreciation allowed. For the remaining life of the asset, normal depreciation applies. However, primary producers are allowed a full deduction of the capital cost of clearing, preparing for agriculture, and planting of crops in the year in which the expenditure is incurred. Moreover, primary producers incurring losses are not subject to the seven year limitation which generally applies. Their losses can be carried forward indefinitely.

(2) **Training**

A 200% deduction is allowed from assessable income for wages paid to apprentices registered with the Apprenticeship Board of Papua New Guinea. The purpose is to encourage employers to hire apprentices to build up the industrial and commercial skills of Papua New Guineans.

(3) **Infrastructure For General and Decentralised Industries**

The Government will provide investors with necessary infrastructure, including buildings, for new industrial projects in return for a negotiated user charge payable annually over the life of the project. This user charge is designed to yield the Government a return on its capital, and as such will not be directly related to the use made of the capital goods provided. Eligibility extends to all investors for all types of industries. The charge will reflect the following factors:

* the government's risk exposure
* the expected return to the investor of his equity
* the alternative uses to which government funds can be applied
67.  ... cont.

Repayment of the user charge will rank behind senior project debt and will be secured only by the project itself and not by its shareholders or parent company. In the event of default, however, title to the infrastructure will revert to the Government.

An additional infrastructure-related incentive will be provided to industries located outside of urban areas such as Port Moresby, Lae and Arawa-Kieta-Panguna. The Government may negotiate a lower user charge (close to its marginal commercial cost of borrowing) considering the general factors stated above, the remoteness of the area chosen for location, and the influence of infrastructure on remote locations. This lower decentralisation user charge will not apply to industries involved in export of raw materials or where location depends on nearness to an essential natural resource (for example, fish, timber, agricultural land, water). To qualify for both the general and decentralisation plan, the minimum project size will generally be K300,000 though in special priority cases smaller investments could be considered.

(4) Export Incentive For Manufacturers

This program is designed to improve the sales prospects of manufactured exports by reducing associated tax liabilities, and so expand the market potential. It exempts from company tax 50% of the increase in export income over the average of the previous three years export income. Thus, export sales growth is rewarded by reduced taxation. In addition, where companies in any year make a profit on exports but a loss on overall operations, benefits accruing under the scheme can be carried forward for two years after they are earned.

(5) Infant Industry Loans

The aim of the Infant Industry Loan Scheme is to facilitate the commercial funding of priority, higher risk commercial projects with high profit potential. It is not intended to substitute for normal commercial loans and would ordinarily contain the following provisions:

* repayment as soon as possible without rescheduling any other debts
* no dividends declared while the infant industry loan is outstanding
* interest rate marginally higher than other commercial project funds available
* the term of the loan will be the first four years of commercial production
* the amount of the loan facility will not exceed 15% of total capital funds required to implement the project.

Government will consider a standby loan facility upon project commencement for firms than can identify potential financial problems in early years. Such a standby loan, being unsecured, would not affect the raising of capital or debt financing on commercial terms and would greatly enhance the attractiveness of a project to commercial lenders.
(6) Feasibility Studies Contribution

In recognition of the high cost and associated high risk in obtaining information in advance of project decisions, the Government has initiated the Feasibility Studies Contribution Scheme. Under the Scheme, the Government will finance 50% or K100,000 (whichever is the lesser) of the cost of the feasibility study in return for an understanding that, should the initial firm decide not to proceed, the Government has access to all information gained from the study so as to attract another investor. If the investor proceeds with the project, or if a later investor goes ahead after substantially using the original study, the Government may acquire equity in the company equal to its financial contribution to the feasibility study. Alternatively, the contribution may be regarded as a loan to be repaid at commercial rates after project commencement.

To be eligible for the scheme a project/industry must satisfy the following criteria:

* it has either "priority" or "open" status, in the National Investment Priorities Schedule (NIPS), and
* it is one where the government desires feasibility information.

(7) No Import Duties

Other than a general import levy of 2½% on all goods, there are no duties on imported capital goods. Investors can also apply for exemption from the generally low rates of duty on raw materials if the latter are significant to project operations.

(8) Government Equity Participation

As a matter of policy, the Government does not usually insist on taking an equity position in new projects. It believes that adequate financial returns to the Nation from a project can be secured by an appropriate fiscal regime. If desired by the promoting investor, the Government will consider taking an equity position to reflect its commitment to that project.

Notwithstanding all of the above, more and better incentives could be developed to produce more and better trainees. See discussion at 41 supra with respect to possible NIDA - N.O.T.A. cooperation for accelerated development of a P.N.G. managerial class.

Illustrative of the attempt to create disincentives is the following excerpt from the SUMMARY OF THE 1980 BUDGET PRESENTATION - Ministry of Finance - 6th November 1979, at 25 which reads as follows:

"In other changes to import duties, imports of vegetables (canned, frozen or fresh), will now be subject to a duty of 30%. The Government would like to encourage more self-reliance in this area, and so this is an appropriate target for raising revenue." And so it remains.

See W. Friedmann, "Corporate Power, Governed by Private Groups, and the Law" (1957) 57 Colum. L. Rev. 155, 176; and see inter alia Gower, op. cit. supra n. 8 at 61, n.19; H. Hahlo, J. Graham Smith

70. In fact the private sector has recently undergone a careful reassessment of training and localisation programs in order to qualify for work permits.

It is important to note that there is an ongoing debate about the necessity of sacrificing profits of any kind at any time in the modern business enterprise. The suggestion that a company has social responsibilities implies to some right-thinking economists that profit-making is no longer its sole or primary aim. See Milton Friedman, *An Economist's Protest* (1972) at 177 who dubs the latter suggestion "pure unadulterated socialism." However, contrast Wallich and McGowan, *A New Rationale for Corporate Social Policy* (1970) at 39 where Wallich argues that "social" behaviour is essential for the preservation of the capitalist economic system. The arguments of people such as Milton Friedman stress that business should be left to the workings of the free enterprise competitive economic marketplace. According to Friedman, the hallmark of a market system is that its members cooperate voluntarily, and therefore with enthusiasm and efficiency. As Friedman uses the term, "economic freedom" means the right to pursue one's livelihood in the marketplace, and the allied right to enjoy as little public restraint as possible in that pursuit. But there is another view. Economic freedom can take the form of laws that set men free from the pressures of the marketplace, for example by enabling them to demand a legal minimum wage, or to obtain social welfare payments from the State. One may not like the effects of minimum wages or welfare legislation, but it is unfair to deny that they also provide freedom of a kind to those who benefit from them. So too, economic freedom can appear as the ability of individuals to achieve collectively ends they cannot attain singly: labour unions make men free to impose their desires, which they would not be free to do without the unions.

Friedman of course recognises that labour unions can win special benefits for their own members, but he draws our attention to the constraints they impose on others. It never seems to occur to him that the rights of property and of managerial prerogatives also enhance the freedom of large corporate enterprises while limiting the freedom of the consumers of the goods and services of said enterprises. For example, in the United States of America, a four year investigation into the automotive repair industry by the Sub-committee on Antitrust and Monopoly of the U.S. Senate Judiciary Committee estimated that the American public was being "robbed" of at least U.S.$8-10 billion annually in excessive repair charges, replacement costs, and built-in design obsolescence. The average consumer had been powerless to do anything about the rip-off due to lack of information and a virtual four or five company monopoly


72. Economic development is not just a problem of increasing the capital stock, the size and quality of the population, the supply of natural resources and the level of technological knowledge. It is also the problem of utilising existing resources in an efficient manner. A particular structure of production which yields a high per capita income cannot be developed and then merely enlarged. Economic development is a dynamic process of adaptation. Changing demands and technological progress frequently involve the replacement of old capital equipment with completely different types of equipment, increasing the capital stock in one sector and decreasing it in another, training and retraining the labour force, shifting labour from one industry to another, etc.

The problems of increasing resource supplies and of utilising them in an efficient manner are closely related. An inefficient use of existing resources serves not only to keep national income below its potential level but also to retard the growth of the productive factors. Growing resource supplies, on the other hand, can improve the degree of flexibility within the economy and thus facilitate a more efficient utilisation of these resources.

73. See E. Barker, *Reflections on Government* (first published May 1942) (Oxford University Press: 1958) at 190-191 which reads in pertinent part as follows:

"Democracy was once allied, or seemed to be allied, with the cause of *laissez-faire*, because the range of persons as yet covered by its view was small. It had not gone down into the depths: its view was confined to a limited class of employers, independent producers, and traders, which seemed capable of managing for itself; and the members of this class were given a virtual monopoly of personal freedom — necessarily prejudicial, but not yet recognised as prejudicial, to the personal freedom of the members of other classes — because they were regarded as possessing a virtual monopoly of personal capacity. The suffrage was a limited suffrage: economic independence was the independence of a limited class; and both limitations were connected with, and derived from, a limited view of the range of personal capacity. No intervention seemed necessary to secure the freedom of a small and limited class, whose members seemed competent, and certainly desired, to act for themselves: on the contrary, the absence of intervention could be held to be the one thing necessary. It may seem curious, and even self-contradictory, that respect for the rights of personality should stop so soon, so short, and at so limited a circle of persons; but it is a lesson hard to learn that every man — and every woman — is a full person, and that personal freedom, if it belongs to any, belongs by the same title to all. As soon as the democratic State began to learn this lesson, and to recognise that personal freedom was not the monopoly of a
section, but the universal right of all, it moved inevitably towards intervention. If the worker was to be a free agent in his work, there had to be intervention with the employer in the contract of employment; and the measure of that intervention would extend and grow with the extension and growth of the worker's idea of freedom. The freedom of all the members of a community is an arduous reconciliation of many freedoms; and the greater the reconciliation to be achieved, the greater will be the intervention which it demands. By the same title by which it had abdicated, when it concerned itself with a limited circle, the democratic State assumed full sovereignty when it began to deal with the whole circle of all its members."

74. See once again n. 70 supra.

75. In Papua New Guinea, the National Investment Priorities Schedule (NIPS) embodies the economic development plans of the Government. See Chapter 1, Introduction of Fifth National Investment Priorities Schedule (August 1979), which reads in pertinent part as follows at 5:

"The National Investment Priorities Schedule (NIPS) is the official publication of the Government of Papua New Guinea which is prepared to inform potential investors and persons and bodies responsible for planning, promoting, or encouraging investment of the priorities attached by the Government to investment in particular areas and fields.

The NIPS is published in accordance with the provisions of the NATIONAL INVESTMENT AND DEVELOPMENT ACT and is revised each year. It lists activities in which the Government wishes to attract more investment, particularly foreign investment, and it sets out guidelines for new foreign investment. Certain activities are reserved for local enterprises. These are defined in Chapter 4, Reserved Activities. Foreign Investment is welcomed in all other activities. Of these, the Government places most emphasis on those activities outlined in Chapter 2, Priority Activities."

See Chapter 2 of the NIPS, id. at 5-10 for discussion of PRIORITY ACTIVITIES as follows:

* Minerals and Petroleum
* Agriculture (i.e. growing of legumes and grain crops)
* Forestry and Integrated Forest Industries
* Fishing and Integrated Fishing Industries
* Integrated Shipbuilding and Ship Repair Industry
* Hotels

See Chapter 3 of the NIPS, id. at 12-15 for discussion of OPEN ACTIVITIES as follows:

* Agriculture and livestock (i.e. food crops, fruits and vegetables, oil palm and rubber, cocoa, seed and spice growing)
* Wildlife
* Forestry (i.e. integrated timber development)
* Fishing (i.e. pearl, prawn, and eel farming etc.)
* Secondary Industries (i.e. processing, manufacture and assembly of various products)
75. ... cont.
* Construction
* Tourism, Restaurants and Motels
* Trading
* Other services (i.e., technical and professional services)

Chapter 4 of NIPS, id. at 16-18, discusses **RESERVED ACTIVITIES** as follows:

* Minerals and Petroleum (i.e., small scale alluvial gold mining)
* Agriculture and Livestock (i.e., coconut, coffee and orchid growing, poultry farming, and sericulture)
* Wildlife (i.e., hunting and farming of crocodiles)
* Fishing (i.e., inland fishing)
* Secondary Industries
* Trading

Chapter 5 entitled, *Guidelines For New Foreign Investment"* lists general guidelines, id. at 19, as follows:

* The investor's past record both in Papua New Guinea and overseas
* Creation of additional employment and income earning opportunities
* Contribution to equalising income distribution
* Contribution to decentralisation
* Generation of additional government revenue
* Generation of net additional foreign exchange earnings
* Transfer of technologies and skills suitable for P.N.G.
* Contribution to training of Papua New Guineans
* Contribution to economic growth
* Encouragement and assistance to Papua New Guineans in establishing related businesses
* Impact on the physical and social environment
* Contribution to consumer welfare

See also Paragraph 4 which reads as follows:

A foreign enterprise wishing to engage in a new priority or open activity may be required to agree to conditions of registration relating to all or any of the following:

(a) Government or Papua New Guinean equity participation;
(b) Training of Papua New Guineans for all levels of employment under a specific program;
(c) Encouragement and assistance to Papua New Guineans in establishing related businesses;
(d) Utilisation of supplies and services available within Papua New Guinea;
(e) Environmental control including measures to minimise harmful environmental effects, and payment for the cost of restoring the environment where it is damaged through the enterprise's operations; and
(f) Fair trade practices.

The following article concerning NIDA's sixth NIPS appeared in the P.N.G. POST-COURIER on November 10, 1980 at 3:

"NIDA PLAN ON INVESTMENT MORE DETAILED

Investment priorities listed in the sixth edition of the (sic) national investment priorities schedule put out by NIDA remain essentially the same as those in the previous schedule—
but the latest is more detailed.

Import replacement industries in agriculture and fisheries, and minerals and petroleum, and integrated shipbuilding and ship repair industries continue to be the four areas of high priority. But unlike the previous schedule, the new schedule spells out the investment climate, taxation and investment incentive schemes in greater detail.

The new schedule was announced last Thursday by the National Planning and Development Minister, Mr Kwarara. He said foreign investment was essential to Papua New Guinea's development resources. 'It is not only in our interest to encourage foreign participation in our economic development process, but it is also in the interest of foreign investors to explore the investment potentials and participate in developing industries based on the natural resources of the developing countries,' he said.

'Social and human development naturally complements this.' The national investment priorities schedule lists business ventures where foreign investment is needed and reserve activities where foreigners will not, as a general rule, be allowed to establish new businesses or take over existing ones. The new schedule contains no changes to either area.'

It is not clear that foreign TNCs are more resistant to national economic planning than domestic firms might be. See C. Kindleberger, AMERICAN BUSINESS ABROAD (1969) 145-78. Note also that Paragraph 11 of Chapter 5 of the Fifth National Investment Priorities Schedule (August 1979) reads as follows:

"Foreign investment proposals should not adversely affect the development of Papua New Guinean owned businesses."

But the fact that they shouldn't does not necessarily mean that they will not. In fact, who determines whether it will or it won't? And when is such a determination actually made? What is an "adverse effect"? If their mere existence potentially precludes the entry of nationals into the market, is that an "adverse effect"?

Such computations are difficult. To understand just how difficult, see once again C. Kindleberger, op. cit. supra n. 76 at 169-173.

No specific data were available to the author concerning the situation in Papua New Guinea at the present time. But generally speaking, concern about this is great for several good reasons:

(1) The sheer size of the TNC's earnings. (An excellent example is the General Motors Corporation's achievement in Australia.)

(2) The speed with which TNC managers can switch large volumes of currency from one country to another makes countervailing government measures difficult.

(3) The intricate integration of the TNC's local activities with its external ones leads national officials to suspect that currency shifts are achieved less conspicuously through changes in transfer prices than through naked cash transfers.

P.N.G. faces difficult issues in this regard: Will it discourage foreign investment if it sets a maximum rate on the repatriation of earnings? If it decides to set a rate, how high should it be? If the rate is set at a level low enough to be acceptable to local critics, will it be high enough to compensate for the other risks involved? Would such controls somehow undermine international confidence in P.N.G. currency, or create difficulties in relationships with the International Monetary Fund? Each of these questions must be asked and answered before a viable policy can be developed.

79. See once again n. 76 supra.

80. In P.N.G., Burns Philp, the Carpenter Group, and Steamships Trading Co. appear to have a stranglehold on at least the retail market — and probably a good part of the wholesale market as well. (However, Steamships Trading Company Limited, technically speaking, is not a TNC.)

81. In P.N.G., the NIPS includes *Guidelines For Specific Industries re: exploration for mineral and mining development, for (and development of) petroleum resources, agriculture, forestry, fishing, construction, technical and professional services and shipping*. See in particular the *Fifth NIPS at 24-28*. Unfortunately, a copy of the Sixth NIPS was not available to the author.

82. The great irony is that this last characteristic is what converts a simple large-scale mining or drilling operation into a TNC with its special aspects of integrated international operations and product diversity.

83. See once again n. 25 supra.


85. It was recognised early by Jonathan Swift, *Gulliver's Travels* (1726) as follows:

    "And he gave it for his opinion, that whoever could make two ears of corn, or two blades of grass to grow upon a spot of ground where only one grew before, would deserve better of mankind, and do more essential service to his country, than the whole race of politicians put together."


89. Poats was predicting this in 1972, but in fact the current reality - at least in P.N.G., has surpassed even his expectations. See once again Poats, op. cit. supra n. 84 at 51. Job creation and training are burning issues in several fields in this country. And the fires of debate have just been lit. More and better data should be made available to more people sooner, so that everyone's input can be had on these urgent issues. Unfortunately, statistics are difficult to obtain in this country, as illustrated by the following story which appeared at 12 in the P.N.G. POST-COURIER on Wednesday March 18th, 1981:

"NPO LACKS VITAL STATISTICS

The Government's National Planning Office does not have statistics on professional national manpower it employs at present, National Planning and Development Minister, Mr Kwarara has revealed.

The National Planning Office also lacked statistics on how many professionals P.N.G. would need in five years, and how long it would take to train them, Mr Kwarara said. Mr Kwarara told a management seminar in Port Moresby on Monday there were no statistics on how many doctors, lawyers, engineers, teacher 'and you name the lot'. Planning had been handicapped by the fact that each department was doing its own, he said.

'When we ask each department to give us statistics for planning purposes, they fail to provide us with the data we require,' he said. Mr Kwarara said a submission for the formation of a task implementation unit was being prepared by his department for Cabinet next week. He said the unit within the National Planning Office would 'check and report back to me on progress of approved projects'.

The unit will also be responsible for providing data on manpower resources, (sic) make assessment and focus on manpower requirements for the next five years,' Mr Kwarara said. Mr Kwarara said the submission, if approved by Cabinet, would empower him to 'discipline on the spot Ministers and departmental heads' who failed to see that approved projects proceeded."

90. The Port Moresby unemployed and underemployed have been a critical mass of explosive potential since at least 1969 and urban drift remains a serious consequence of rapid economic development.

91. It appears that semantics invariably cloud the determination of how many unemployed and underemployed people there are in Port Moresby and elsewhere in other urban centres throughout this country. However, a careful "guesstimate" is that 40% of the local labour force are doing either no paid employment, or less than twenty hours paid employment per week.
The training necessary to deal in these sorts of economic/commercial computations has not been imparted to Papua New Guineans in sufficient numbers to have made more than a negligible "dent" in the statistics concerning the development of a managerial or business elite in this country — and certainly not amongst the elected representatives in this country. There have been experiments with labour-intensive industries, but it has generally been easier and cheaper for TNCs, especially those based in Australia, to continue pre-Independence Australian practice which did not involve heavy emphasis on labour-intensive practices.

These bald-faced assertions are subject to change without notice depending on who happens to disabuse the author of his admittedly limited observations of the workings of the P.N.G. Government from April 1979 to April 1981. But to date, the author has discovered little evidence to change his opinions.

A simple domestic story from the Sepik: In 1977(?) there were lots of stories about no spares for outboard motors on the Sepik. On investigation it turned out that spares were available but very expensive, and the people couldn't repair their motors as easily as before because they were high performance Yamahas, etc. — not low performance Listers which they had previously used. The best ones now are low performance "SEAGULLS" out of a Devon factory.


Labour-intensive technologies may not be the complete answer, but they really haven't been tried out very much in P.N.G. For example, many people believe that if a simpler telephone system had been adopted nationwide in the 1960's, not only would this nation be less dependent upon foreign technology and technicians now, but a great number of citizen-technicians would have been trained to a level sufficient to smooth the introduction of TV. As it is, the introduction of TV will mean another influx of foreigners to install and maintain the system.

One might argue that my perceptions of the problem are not totally accurate; that, perhaps, I have overstated the case for making employment creation the top priority. But I really don't think so. In fact, I remain convinced that something must be done to create jobs for the unemployed and underemployed and sooner rather than later. This issue must be faced straightaway in Papua New Guinea, while economic and social stability is, relatively speaking, well-maintained, because before too long, only drastic economic (and other) measures will help to ameliorate the situation. Perhaps, it is time to resuscitate the Somare Government's plan for a National Youth Service Act which would attack frontally the most pernicious socio-economic problem of the decade in this country, chronic unemployment, by creating apprentice programs, etc. Of course, the first query becomes: who must finance this
grandiose scheme for employment creation? Perhaps, both the Government and the private sector must foot the bill. But whatever the financing mechanisms may happen to be, both the Government and the Opposition in 1981 would agree that job creation must always be a high priority in any government.

The Chan Government's most recent attempts to increase training opportunities without actually enacting a National Youth Service ACT include the creation of the National Occupational Training Authority (N.O.T.A.) which is described in the Act at n. 117. Funding of N.O.T.A. is explained in the Act at n. 118. In addition to N.O.T.A., the Chan Government plans to introduce a trade testing and certification scheme. Such a scheme would allow anyone with skills, no matter how they are acquired, to obtain recognition of those skills. N.O.T.A., perhaps, would be given the power to prescribe tests of skill and issue certificates of competency.

The P.N.G. POST-COURIER, on Wednesday, December 17th 1980, reported the following story at 13:

"10-YEAR PLAN TO BOOST SKILLS

P.N.G.'s shortage of technical skills will be boosted under a 10-year education plan for technical training being drawn up by the Government.

The move was revealed by the Minister for Science, Culture, and Tourism, Mr Tago, when he addressed guests and finalists of the annual Apprentice of the Year function in Port Moresby. The plan was the basis of a Government bid to limit the number of tradesmen brought into the country. "We do not want to be faced with the situation that every time where a major developmental project starts, skilled workers from overseas must be brought in due to lack of tradesmen," Mr Tago said.

P.N.G. had a great need of skilled tradesmen for rural development and industrial factors of the economy, the minister said. "We have people who with the right training can do the job, and we are going to see they are going to get the training," he said. The Government also spent K1.5 million for the expansion of technical training this year he said. Three new trades have been introduced to the apprenticeship scheme.

The chairman of the P.N.G. Apprentice Board, Mr Gabriel Ikupu, said small engines mechanic, coach builder and maintenance fitter classifications were introduced this year. He said the small engines mechanic was a trade which could make a real contribution to rural development in the field of outboard motor and motorbike maintenance. But Mr Ikupu also said tax incentives announced last year by the Government were of little help. The intake of apprentices had not risen, he said.

Private employers only took 47 more apprentices this year, compared with last year's figure. Government recruitment had increased with 160 more apprentices than last year."

100. The Ok Tedi Project is fast becoming the "talk of the town" amongst those social scientists (i.e., anthropologists, sociologists, economists, et al.) concerned with the socio-economic effects of large scale development projects on small village enclaves in the primitive wilds of Papua New Guinea. Some informed persons
talk of the adverse consequences upon local people, but the books have yet to be written which describe the long-term benefits and disadvantages in real terms that can be understood by the average informed citizen.

I firmly believe that Papua New Guinea is potentially in the forefront of the "techno-rebellion" to paraphrase Toffler op. cit. supra n. 46 at 165-170 which reads in pertinent part as follows:

"The basic questions asked of new technologies during the past three hundred years, in both capitalist and socialist nations, have been simple: do they contribute to economic gain or military clout? These twin criteria are clearly no longer adequate. New technologies will have to pass far stiffer tests - ecological and social as well as economic and strategic. (emphasis mine)

The techno-rebels have not as yet formulated a clear, comprehensive program.

The techno-rebels start from the premise that the earth's biosphere is fragile, and that the more powerful our new technologies become, the higher the risk of doing irreversible damage to the planet ....

The techno-rebels argue that either we control technology, or it controls us ....

The techno-rebels contend that technology need not be big, costly or complex in order to be 'sophisticated'. The heavy-handed technologies of the Second Wave seemed more efficient than they actually were because corporations and socialist enterprises externalised - transferred to society as a whole - the enormous costs of cleaning up pollution, of caring for the unemployed, of dealing with work-alienation. When these are seen as costs of production, many seemingly efficient machines turn out to be quite the opposite. (emphasis mine)

Thus the techno-rebels favour the design of a whole range of 'appropriate technologies' intended to provide humane jobs, to avoid pollution, to spare the environment, and to produce for personal or local use rather than for national and global markets alone. The techno-rebellion has sparked thousands of experiments all over the world, with just such small-scale technologies, in fields ranging from fish farming and food processing to energy production, waste recycling, cheap construction, and simple transport.

... Experiments with appropriate or alternative technologies, especially in the energy field, suggest that simple, small-scale technologies can be as 'sophisticated' as complex, large-scale technologies when the full range of side effects is taken into account, and when the machine is properly matched to the task.

Out of their conflict with the First Wave fantasizers and the Second Wave advocates of technology ubel alles will come sensible technologies matched to the new, sustainable energy system toward which we are beginning to reach. Plugging the new technologies into this new energy base will raise to a
wholly new level our entire civilisation. At its heart we will find a fusion of sophisticated, science-based 'high-stream' industries, operating within much tightened ecological and social controls, with equally sophisticated 'low-stream' industries that operate on a smaller, more human scale, both based on principles radically different from those which governed the Second Wave techno-sphere. Together, these two layers of industry will form tomorrow's 'commanding heights'.


103. See in particular W. Kanawi, "The Role of Foreign Investment in Papua New Guinea Development" in Report of the Seminars (1980) at 10; and see also Section 76 (1) of the NIDA ACT.

104. See Sections 54 (4) and 56 (5) of the NIDA ACT for "the recommendation" provisions pertaining to the registration of "existing activities" and "new activities" respectively.

105. See op. cit. supra n. 102 at 3.

106. Id. at 16 which reads in pertinent part as follows:

"Thus NIDA can only operate effectively in its role (sic) of a coordinator and monitor of planning if this role is accepted by the other parties concerned."

107. See Section 12 (2) (d) of the NIDA ACT.

108. See op. cit. supra n. 102 at 6 which reads in pertinent part as follows:

"Indeed it is quite obvious that a small body of some 30 people with many other duties imposed upon it cannot possibly carry out the functions of supervising every enterprise on which conditions have been imposed. This must be done at the provincial or local level."

109. See Section 36 (1) of the NIDA ACT and n. 102 supra at 6 which reads in pertinent part as follows:

"At the Provincial Premiers' Conference which took place in Wewak in July 1979, a number of issues relating to the controlling and monitoring of business ventures were considered. In particular, the valid criticism was made that the attempt by NIDA to work through the Office of Business Development in each province had not been very effective. After the debate on the subject by the Premiers' Conference, the following resolution was passed recommending delegation of some of NIDA'S functions:-

'This council considers control and monitoring of business ventures vitally important, and it recommends the following action:-

(a) That the National Investment & Development Authority should delegate some of its functions to Provincial Governments."
(b) That the Provincial Governments establish appropriate administrative arrangements to assume the delegated functions.

(c) That registration fees collected be shared between Provincial and National Governments.

A Cabinet decision has now been made that decentralisation of the monitoring function of NIDA should proceed, but with overall policy control of foreign participation in investment remaining nationally coordinated, and that a review of NIDA should be undertaken with a view to more effective implementation of government policy and responsiveness to provincial government concerns.

NIDA welcomes these decisions, which coincide with its own views. At the time of writing this report it has already had discussions with the East New Britain Provincial Government, which initiated the debate at the Premiers' Conference, and worked out a detailed scheme, including cost estimates, for the establishment of an office for a NIDA Regional Representative."

110. To the best of my knowledge, at the time of publication of this paper (April 1981), little has been done to implement delegation or decentralisation of the co-ordinating or monitoring function of NIDA.

111. See recommendations concerning NIDA contained herein infra at 39-42.

112. The author presumes that since nothing was said, nothing in fact happened.

113. There are said to be only nine international accounting firms with the ability to understand effectively the economic and financial ramifications of the TNCs in a country like Papua New Guinea.

114. The following article appeared at 28 in the P.N.G. POST-COURIER of Friday, September 19th, 1980:

"BIG FIRMS AGAIN LINK WITH U.N.
For the past year some of the world's leading multinational agri-business companies have been quietly regaining a firm foothold within the corridors of the United Nations system.

In June last year, the United Nations Development Program (UNDP) entered a formal relationship with a group of multinational companies known as the Industry Council for Development (ICD). Bradford Morse, the UNDP administrator, said that 'the management, technological and other industrial expertise available through ICD could be an important resource in helping us make the development process more effective in the years to come.'

This is the role which UNDP envisages but what is in it for the companies? Even within the minutes of ICD's first annual report there is clearly a contradiction within the aims it
sets itself. On the one hand ICD claims that 'its activities will be carried out for the purpose of encouraging economic and social development in developing countries and not to promote the commercial interests of its members'. But at the same time such assistance can be provided only if, according to ICD, governments 'have a realistic understanding of the "trade-offs" involved and the incentives necessary for success'.

It is this latter motive which deserves scrutiny by any Third (sic) World country entering into an arrangement under the new UNDP-ICD initiative. Experience has shown that major multinational companies are not interested in co-operative ventures with Third World countries unless there are substantial benefits for them. This includes a return on their investment and protected ownership.

The UNDP is an ideal organisation from which companies can gain valuable insights into potential profit-making arrangements within developing countries. With voluntary contributions of close to K500 million annually and Third World contributions of the same magnitude to UNDP projects, the organisation is 'the major financial and operational arm of the U.N. system's development arm'. It also operates within 109 countries.

ICD in fact is the successor to the Industrial Co-operative Program (ICP). ICP was established under the umbrella of the U.N. Food and Agriculture Organisation in 1966, and before its link with the FAO was broken in 1978 its membership included close to one hundred of the world's major agri-business companies. The reason for the break was Third World criticism of its activities.

Now ICD is rapidly taking over where ICP left off. In its first year of operation its membership, with the exception of two companies, includes thirty of those involved with ICP. According to the ICP annual report it is a stronger organisation since it has the added 'selling point' of including sectors other than agri-business.

The members are well known firms such as Unilever, Shell, Nestle, Fiat, Booker-McConnell, N. V. Philips and Tate and Lyle. Their association with UNDP allows them to 'institutionalize and expand' their 'assistance to developing country governments.' On the surface the concept of trilateral co-operation between industry, governments and the United Nations appears to be an ideal working relationship. ICD covers agro-chemical projects, agricultural machinery, seeds development and housing.

A major criticism of multinational companies operating in Third World countries is that they are not interested in producing food - that is the basic staples such as beans, corn, rice, wheat and millet. It is claimed they are more interested in exporting luxury crops to rich countries - asparagus, cucumbers, strawberries, tomatoes etc. One of the first projects which ICD took up was to evaluate 'the potential economic and social viability of fruit and vegetable processing and marketing in Lesotho.'
There is no reason to expect that what happened at the FAO will not happen at UNDP. In many cases U.N. officials became no more than brokers linking up a developing country with a multinational agri-business firm.

Two years ago the chairman of Unilever applauded in his annual report what has become known as 'Operation Flood' in India. This is a scheme attempting to develop large scale dairy factory and farming industries in parts of India. It requires increased use of agricultural machinery, butter and skimmed milk powder from Europe and increased quantities of animal feed.

Operation Flood involves growing fodder rather than food and it tends to displace small farmers and put in their place large landholders who can afford the agricultural inputs and increased imports. It is difficult to see how it can provide any substantial benefits to the poor in India.

There is no doubt that the world's poor countries are desperately short of management, and technological expertise which multinational companies have to offer but the terms for acquiring such assets may well prove counterproductive in their attempts to alleviate poverty."

115. See once again n. 114 which is a sad illustration of the truth of this statement.

116. See once again W. Michael Blumenthal's quotation concerning the importance of managerial control at n. 49 supra (i.e. at 17 of text herein).

117. A Report entitled "National Occupational Training Authority" dated December 1980, which was prepared for the Minister for Labour and Employment, the Hon. Jacob T. Lemeki, M.P. by a Tripartite Working Group chaired by D. J. Dennis (and hereafter referred to as the Dennis Report) recommends the creation of a central body to encourage and co-ordinate specific job training in the P.N.G. private sector. It states the objectives of N.O.T.A. as follows:

- to increase the understanding of trainees so that they can reach their full potential in the workplace
- to assist in the localisation process by encouraging training which will allow citizens to assume greater responsibility in the workplace
- to encourage and co-ordinate the upgrading of job specific skills throughout the workforce and so increase national productivity
- to ensure that the best use is made of available training resources

The Dennis Report recommended the following:

- The central co-ordinating body should be called the National Occupational Training Authority (N.O.T.A.).
- N.O.T.A. should be a statutory authority with both advisory and implementation functions.
117. ... cont.

- The N.O.T.A. Board of Directors should be tripartite with three representatives each for government employers and employees plus a Chairman nominated by the Minister responsible.

- N.O.T.A. should be advised by Industry Training Boards each of which would be comprised of an equal number of employee and employer representatives from the relevant industry.

- The structure of N.O.T.A. should involve an Executive Board, an Industry Training Co-ordination Committee and Industry Training Boards. There should also be a Directorate to provide advice to these bodies and to administer N.O.T.A. Board decisions.

- N.O.T.A. should, as much as possible, restrict its role to co-ordination, administration and encouragement of training. It should only involve itself in direct training in occupations where such training cannot otherwise be made available.

- N.O.T.A. should concentrate on short job specific courses and short upgrading courses at all levels of skill. It should [sic] liaise with other bodies providing more extensive formal training to avoid duplication and waste of resources.

- For the purpose of disbursing financial assistance and giving recognition of its training, N.O.T.A. should have the power to prescribe tests of skill and issue certificates of competency.

- N.O.T.A. should ultimately be funded by a uniform wage percentage levy applied equally across all industries. Government funding should only be involved where N.O.T.A. training is undertaken for government staff or in the national interest.

- For the time being, N.O.T.A. should be funded from the K100 Work Permit levy.

- N.O.T.A. should operate on a levy/grant basis with grants being paid to firms providing approved training.

- N.O.T.A. should commence operations in a small way with two Industry Training Boards – Hotels and Catering, and Building and Construction.

- N.O.T.A. staff should be physically located close to industry. Port Moresby is not considered to be a suitable site.

- Following the decision to establish N.O.T.A. an Interim Board should be appointed and a Papua New Guinean Director should be chosen. International assistance should then be sought to assist in making N.O.T.A. operational.

This report was preceded by a study conducted in April 1980 by a World Bank-funded consultant, A.E. Dowding. His study was entitled, "Study on the Feasibility of Setting up a National Training Council.

Apparently neither the Dowding Report (April 1980) nor the Dennis Report (December 1980) considered anything but the most general guidelines concerning training. The Dennis Report only concerns itself with private sector activities which include most all of the TNCs doing business in P.N.G. The specific concept of "appropriate technology" is never mentioned "per se". However, the Dennis Report does state in pertinent part as follows at 7:
"Constantly changing technology means that there will always be a need for training and retraining. The two basic aims of N.O.T.A. — to increase the job satisfaction of workers by giving them a greater understanding and control over their work environment; and to increase national productivity by improving the on-the-job skills of the workforce — reflect a long-term concern with meeting training needs."

But does this statement really address the problem of "appropriate technology" or emphasise "labour-intensive" techniques of job creation? Not really.

The Dowding Report was not available to the author so no comment about its exact contents can be made.

118.

The Dennis Report’s tenth and eleventh detailed recommendations read in pertinent part as follows at 20-22:

"10. N.O.T.A. should ultimately be funded by a uniform wage percentage applied equally across all industries. Government funding should only be involved where N.O.T.A. training is undertaken for government staff or in the national interest.

Funding for N.O.T.A. should be kept simple so that collection costs can be held down. It should also be seen to apply equally across all industries. A straight percentage levy on wages meets both these objectives, but still allows N.O.T.A. to distribute training funds so that wealthy industries with a low training requirement would effectively subsidise poor or new industries with a high training requirement.

A percentage levy on wages also has the effect of encouraging localisation as the higher salaries of expatriates will mean that a greater amount will have to be contributed to N.O.T.A.

A percentage levy will enable the private sector to clearly identify N.O.T.A. as the receiver and spender of training funds. As the N.O.T.A. Board will be predominantly private sector this should lead to strong private sector identification with N.O.T.A. and a close scrutiny of how effectively private sector funds are spent on private sector training through N.O.T.A.

The Working Group recognises that there could be expensive administrative problems involved in the collection of the levy from small firms and for this reason recommends that firms with less than five employees have the option of not paying the levy. Firms who take this option would not be eligible to receive N.O.T.A. grants but could make use of N.O.T.A. training on a fee for service basis. Firms with five or more employees would remain liable for the levy even if their business contracts and their numbers fall below five.

The Working Group also recommends that under certain circumstances there should be provision to exempt firms and industries from paying the levy. This exemption would be exercised by N.O.T.A. when it considered that a particular firm or industry was meeting all its training responsibilities through its own efforts.

Should the Government wish to make use of N.O.T.A. arrangements to provide specific job training for its staff then N.O.T.A.
118. ... cont. could provide such training on a fee for service basis. Government funding of N.O.T.A. should only occur when government personnel are being trained or when the Government has directed that certain training should be undertaken in the national interest.

11. For the time being, N.O.T.A. should be funded from the K110 Work Permit Levy.

While the Working Group recommends that N.O.T.A. should ultimately be funded by a percentage levy on salary, it recognises that this method of financing may not be acceptable to employers at this time. This is because of the imminent starting up of the National Provident Fund with its 7% salary levy on employers.

To impose a further levy at this time could easily arouse opposition to N.O.T.A. Employer support is vital for N.O.T.A. particularly in the early stages of its existence when it will still be learning its way and seeking to benefit from private sector experiences in training.

However, as mentioned in Recommendation 4 and 10 above, it is desirable that the funds available to N.O.T.A. should be clearly identifiable as coming from the private sector to ensure that sector's scrutiny (sic) that the funds be spent effectively.

The Working Group recommends that the expenditure of N.O.T.A. for the first few years should be geared to the money received from the Work Permit Levy.

When the new Work Permit system was introduced under the Employment of Non Citizens Act (1978), there was an understanding with the private sector that K100 of the Work Permit levy would be set aside for training purposes. This was accepted by the private sector.

N.O.T.A. would be the ideal body to administer those funds, and the private sector, through the operations of N.O.T.A., could ensure that their contributions are put to good use.

The Working Group recognises that N.O.T.A. could not hope to usefully spend all the revenue from this source in its early years and that the balance remaining should go into consolidated revenue to meet other government priorities. However the Working Group recommends that monies equivalent to this balance should be released to N.O.T.A. in later years when its expenditure increases. Thus, over a period of years, K100 would go into N.O.T.A. funds for each Work Permit issued.

This approach of course has the disadvantage that the funding is borne entirely by those firms who employ expatriates, and to this extent firms who are wholly localised will not identify closely with N.O.T.A. However, this second group of firms will still be eligible for N.O.T.A. grants (Recommendation 12 below) and this fact should ensure their interest in N.O.T.A. operations."

119. Perhaps, NIDA should reintroduce a condition of registration with respect to training which has now been dropped for reasons unascertainable by the author. This condition read as follows:
119. ... cont. "The Enterprise will comply with all and any obligations and conditions relating to the training of employees and the localisation of its staff (including both employees and officers of the Enterprise) which may from time to time be laid down by the Department of Labour and Industry (or any other Department which succeeds to the functions of that Department) or prescribed or declared under the Employment (Training and Regulation) Act 1971 as in force from time to time or under any other Act dealing with training and localisation of employees."

Other possible conditions of registration could read as follows:

"The enterprise shall make the maximum practicable use of facilities, and services available from enterprises owned and controlled by Papua New Guineans,

The enterprise shall make the maximum practicable use of Papua New Guinean labour and in particular shall make appropriate provision for the employment of women, and shall make every effort rapidly to increase the general level of skill of its Papua New Guinean work-force.

As rapidly as practicable, the enterprise shall cause Papua New Guineans to replace others at all levels of employment in the enterprise, particularly in managerial, professional and technical positions at the highest levels, and, if at any time suitable qualified Papua New Guineans are not available to fill any position, shall make provision for training with a view to having the position filled by a Papua New Guinean within a reasonable time.

As practical and appropriate, provision shall be made by the enterprise for Papua New Guinean investment in, and participation in the ownership, management and control of the enterprise. Control of the enterprise shall be transferred to Papua New Guinean hands as soon as practicable and reasonable, having regard to the nature of the enterprise and its activities."

120. N.O.T.A.'s philosophy of training can be briefly stated as follows:

1. Training should promote self-respect and self-reliance and enable Papua New Guineans to have greater control over national development and their own personal development.

2. Training should lead to an improvement in the economic progress of Papua New Guineans by enabling increased productivity so that more goods and services are available for distribution to the nation.

3. Training should recognise the constantly changing social backgrounds by taking into consideration the various modes of organisation existing in Papua New Guinea.

4. The intelligence of people world-wide follows a normal pattern. The optimal use of this intelligence is governed by opportunity and motivation.

122. Unfortunately, N.O.T.A.'s plans call for only training programs of no more than three months' duration. The original Somare Government's idea of a National Youth Service Act called for training programs of no less than twelve months' duration. Apparently, plans to combat unemployment and to increase training significantly are still "on the drawing board" and have not yet been implemented by the Chan Government. At present, expatriates employed in this country are carefully monitored, but to little avail. Controlling expatriate employment does not necessarily create jobs for Papua New Guineans. More serious thought needs to be given to the funding of legislation for fairly comprehensive training which would require at least twelve months attendance in order to qualify for certification. In this way, the problems of unemployment and underemployment would be attacked frontally and not peripherally or casually. Of course, there is a ten year training plan that has not been completely revealed by the Chan Government. See once again P.N.G. POST-COURIER article cited supra n.99.

123. See Division 1, Part VI of the P.N.G. COMPANIES ACT in general and in particular Section 162 relating to annual accounts and also Sections 37-47 regulating the issue and content of prospectuses.

124. In P.N.G. and in all Australian jurisdictions (except Tasmania), the privilege of not having to file copies of financial statements with the annual return to the Registrar of Companies is confined to

(a) an exempt proprietary company which is an unlimited company; or

(b) an exempt proprietary company whose accounts for the financial year covered by the return were audited and in either case the status of the company did not change throughout that financial year.

See in particular Section 5(8) of the P.N.G. COMPANIES ACT.

125. See once again P. Roumeliotis, op. cit. supra n. 78 and also A. Finnie, op. cit. supra n. 78.

126. See once again n. 75 supra for listing of general conditions and conditions relating to new priority or open activities sought after by the Government. NIDA uses the investment guidelines covered in Schedule 1 of the NIDA ACT. Also note that the following rights and guarantees are granted to foreign enterprises once they are registered with NIDA:

1) NO NATIONALISATION OR EXPROPRIATION EXCEPT:
   • in accordance with law, or
   • for public purpose defined by law, and subject to payment of compensation as defined by law,

2) Subject to any law relating to taxation and exchange control, foreign investors shall be allowed to:
   • remit overseas earnings and repatriate capital
   • remit amounts necessary to meet payments of principal, interest and service charges and similar liabilities on foreign loans, and the costs of other foreign
obligations approved by government, at the prevailing exchange rate under law of Papua New Guinea at the time of remittance or repatriation.

3) Subject only to the exchange rate prevailing under the Papua New Guinea law at the time, the enterprise and its investors shall be allowed the right to remit overseas all or any compensation received in accordance with the guarantee set out in paragraph (1) of these guarantees.

4) Subject to any agreement between the government and the enterprise, no rate, tax, rent, charge, duty, tariff or other levy, and no related procedures or practice shall discriminate against the enterprise or its investment on grounds of its origin.

127. See Chamberlain, op. cit. supra n. 51 at 4.

128. See once again proposed conditions of registration supra n. 119.

129. Unfortunately, in Papua New Guinea it appears that emphasis seems to be given only to the numbers or quantity of jobs and training programs created and not to the quality and depth of the individual programs.

130. However, to be fair it should be noted that the P.N.G. private sector is undergoing the first "great schism" since Independence. National businessmen like Andrew Kei and Michael Mel form the nucleus of a new "managerial elite" composed solely of Papua New Guineans. And so, for the first time, nationals have decided to give Papua New Guineans an alternative to the traditionally expatriate-dominated Chambers of Commerce. See P.N.G. POST-COURIER of Thursday, September 18, 1980 at 15 which reads in pertinent part as follows:

"NEW BODY TO FIGHT FOR P.N.G. BUSINESS

A Mount Hagen businessman has plans to establish an organisation dedicated to promoting business opportunities for Papua New Guineans.

Mr Andrew Kei said a number of business groups had shown interest in the organisation, which would be known as the Western Highlands Business Peoples' Association. Mr Kei wants to form the association into a company with its own executive officer and secretary. Shareholders would be companies which were 100 percent nationally-owned.

He said he believed the Government was more willing to accept comments and recommendations from Papua New Guineans than expatriates, and said such an association would be more effective in promoting business for local people than the Chamber of Commerce.

He said there was often suspicion in the Government that expatriate dominated chambers spoke only for their own benefit.

Mr Kei said his association would encourage, assist and safe-guard small and medium local businesses. Specific aims would be:
- 100 -

- To safeguard them from unwarranted competition, from powerful national, provincial and local government businesses and big international companies;
- To fight unhealthy aspects of trade unionism;
- To fight for tax concessions, mainly designed to allow for expansion; and
- To assist its members financially where difficulty was found obtaining bank loans for business ventures.

Only those with credibility in the community would be accepted as shareholders, Mr Kei said, as it would be important for the association to be recognised as a reliable body of integrity. The president of the Western Highlands Chamber of Commerce, Mr Roger Stapleton, said the chambers were intended to devise the most effective environment for all private enterprise.

He said it seemed a pity, with the same main aims in common, the Western Highlands business people could not work together to achieve them."

131. Even NIDA itself has come to realise that a requirement of national share ownership by a certain time after commencement of the particular project is both unrealistic and ineffective. See NIDA'S "Report on Operations to 31st December 1978" at 8-10 which reads in pertinent part as follows:

"One of the statutory purposes of the NIDA ACT is to facilitate Papua New Guinean participation in investment and in the ownership management and control of foreign enterprises. NIDA has attempted to achieve this through conditions of registration recommended to the Minister, in particular a condition to the effect that Papua New Guineans shall take over a specified percentage of equity in a project by a specific future time. These conditions are passive in effect and there is a world of difference between helping someone to stand on his own feet by setting up and running his own business, and helping him to reap what he has not sown by making it easy for him to take over a business set up by someone else. Moreover, what he reaps may be very different to that which he has expected, since the analysis of the value of a business prior to any takeover is a complex operation, and if this analysis is not done, the takeover may merely be a prelude to bankruptcy. Neither NIDA nor any other government institution can effectively pass on this problem to foreign investors by imposing on them the obligation to find Papua New Guinean participants in their business.

It is by no means always desirable - nor, unless certain statutory requirements are complied with, even legal - for foreign enterprises to be promoting the sale of their shares in this way. We have to take a more realistic look than this at the economic development situation. Major economic development requires the creation of a sizeable group of skilled businessmen. This is the case under any political system, whether such a class operates within the framework of state control or whether it operates through private
enterprise. Such a group is not at all the same as a small elite into whose hands the wealth of a country may rapidly concentrate, leaving the rest of the population at or below their original economic level. There is a danger of such an elite emerging if in the early years of independence in any developing country a sufficient number of citizens is not available to take over businesses relinquished by expatriates. Papua New Guinean participation in economic activity is not in any full and true sense facilitated by a policy which does not take these facts into account. Recent Government policy decisions have, fortunately, emphasised the necessity for the creation of preconditions for more people to participate in their own economic development by such means as the National Investor Scheme and the provision of managerial and technical assistance for the establishment of businesses by Papua New Guineans. In the light of these, and of its own experience, NIDA is devising a new approach to the imposition of conditions on foreign businesses. The objective of this is to provide the power of continuous control through such methods as options and rights of first refusal over shares realistically negotiated where the situation admits such an approach. This will avoid pre-empting by an inflexible condition imposed years in advance, a decision as to what percentage of Papua New Guinean participation it is realistic to require in respect of a particular business, or giving encouragement to "quick kill" methods of doing business and deterring long-term responsible investors by imposing arbitrary time limits as general conditions of registration."

132. See main text herein supra at 16-18 and supra n. 49.

133. See Jacobs, "Pollution, Consumerism, Accountability" (1972) 1 The Center Magazine 43 (who stresses the need for structural change if the corporation is really to be socially responsible) at 47.

134. See Sections 117 and 122 of the P.N.G. COMPANIES ACT.

135. In the last few years, the idea of international monitoring of and legislation for TNCs has become a reality. For example, the International Bar Association (IBA) has formed a new committee on "Codes of Conduct for Transnational Corporations." It is responsible for the monitoring of the developments affecting that area. And, of course, U.N. sponsored organisations like UNCTAD and others like the O.E.C.D. and I.L.O. have established orders, guidelines, and declarations respectively concerning the activities of TNCs. The fourteen papers presented at the I.B.A. Berlin Conference in August 1980 included the following topics:

- International Transfer of Technology
- Recently Adopted U.N.C.T.A.D. Code on Restrictive Business Practices
- Transfer Pricing within Multinationals
- Manager/Director Responsibility under Multinational Codes: The position in Belgium, Germany, The Netherlands, Switzerland
Tax Avoidance/Evasion within the Transnational Corporations

Codes of Conduct for Transnational Enterprises: Their Relevance to the Law Concerning Energy and Natural Resources

Resource Investment Litigation between TNC and Host country


Mandated and Voluntary Disclosure by Transnational Corporations

Perhaps the time has arrived for P.N.G. to consider becoming a signatory to an International "Code of Conduct For TNCs". In this way, extra-jurisdictional activities could be monitored and controlled via the Code of Conduct. And see once again Wallace, op. cit. supra n. 11, who concludes otherwise.

136. Section 25 of the P.N.G. Constitution reads as follows:

25. IMPLEMENTATION OF THE NATIONAL GOALS AND DIRECTIVE PRINCIPLES

(1) Except to the extent provided in Subsections (3) and (4), the National Goals and Directive Principles are non-justiciable.

(2) Nevertheless, it is the duty of all governmental bodies to apply and give effect to them as far as lies within their respective powers.

(3) Where any law, or any power conferred by any law (whether the power be of a legislative, judicial, executive, administrative or other kind), can reasonably be understood, applied, exercised or enforced, without failing to give effect to the intention of the Parliament or to this Constitution, in such a way as to give effect to the National Goals and Directive Principles, or at least not to derogate them, it is to be understood, applied or exercised, and shall be enforced, in that way.

(4) Subsection (1) does not apply to the jurisdiction of the Ombudsman Commission or of any other body prescribed for the purposes of Division III.2 (leadership code), which shall take the National Goals and Directive Principles fully into account in all cases as appropriate.

137. Schedule 2.3 of the P.N.G. Constitution reads as follows:

Sch.2.3. DEVELOPMENT, ETC., OF THE UNDERLYING LAW

(1) If in any particular matter before a court there appears to be no rule of law that is applicable and appropriate to the circumstances of the country, it is the duty of the National Judicial System, and in particular of the Supreme Court and the National Court, to formulate an appropriate rule as part of the underlying law having regard -

(a) in particular, to the National Goals and Directive Principles and the Basic Social Obligations; and
(b) to Division III.3 (basic rights); and
(c) to analogies to be drawn from relevant statutes and
custom; and
(d) to the legislation of, and to relevant decisions of
the courts of, any country that in the opinion of
the court has a legal system similar to that of
Papua New Guinea; and
(e) to relevant decisions of courts exercising jurisdic-
tion in or in respect of all or any part of the
country at any time,
and to the circumstances of the country from time to time,

(2) If in any court other than the Supreme Court a question
arises that would involve the performance of the duty
imposed by Subsection (1), then, unless the question is
trivial, vexatious or irrelevant:-
(a) in the case of the National Court - the court may;
and
(b) in the case of any other court (not being a village
court) - the court shall,
refer the matter for decision to the Supreme Court, and
take whatever other action (including the adjournment
of proceedings) is appropriate.

138. Id., especially Section (1).

139. See once again notes 6 and 7 supra. After some meditation, one
begins to realise how little either the current COMPANIES ACT or
the extant case law precedent has to do with either the Eight Aims
or the National Goals etc.

140. See Blumberg, op. cit. supra n. 51, at 48-52; and 1948 investigation
into Savoy Hotel Ltd., reported in L.C.B. Gower, "Corporate Control:

141. The interests of creditors are frequently ignored in statements of
what "the interests of the company" means. But clearly, account
must be taken of them, and when the company is insolvent the members
have no remaining financial interests to consider. And see Walker
M.L.R. 226. See also Gower, op. cit. supra n. 8 at 578.

he argues that the position in Australia in view of Peter's American
Deli Co. v. Heath [1939] 61 CLR 457 is that "the company is the
totality of members viewed in light of their organisation and
corporate objects." Ford states (at para.1507) that "(a)lthough
the duty to use a power only for a proper purpose is owed to the
company as a corporate entity and any proceedings for breach of
duty must be brought on behalf of the company, when courts speak
of benefit to the company as a whole they do not mean the abstract
corporate entity but the members as a whole in their capacity as
associated persons." See also R. Lansdowne and J. Segal, "The
Social Responsibility of Modern Corporations" [1978] Vol. 2 No. 4
U.N.S.W.L.J. at 343 n.36.
who states that "this may mean in Australia directors are less free to take account of long-term profit from socially responsible acts which are detrimental to the short-term profit of shareholders."
In the United Kingdom, see Parke v. Daily News [1962] Ch. 927; following Hutton v. W. Cork Ry [1883] 23 Ch. D. 654, C.A.

143. See once again Gower, op. cit. supra n. 8 at 578.


146. In Sweden: see Folke Schmitt, Law and Industrial Relations in Sweden (1977) and the Act on Joint Regulation of Working Life, 1976 in Appendix I thereto. See also Gower, op. cit. supra n. 8 at 68, n.53.

147. In the United Kingdom, see the EMPLOYMENT PROTECTION ACT 1975 which provides for legal machinery to enforce recognition of independent unions recommended by the Advisory Conciliation and Arbitration Service. See also Gower, op. cit. supra n. 8 at 68, n.54.

148. See D.F. Vagts, "Reforming the 'Modern' Corporation: Perspectives from the German" (1966) 80 Harv. L. Rev. 23, 66; and see also Batstone and Davies, Industrial Democracy: European Experience (H.M.S.O.1976) - two reports prepared for the Bullock Committee; and see infra n. 149 about the Bullock Report.

149. In the U.K., in August 1975 the Government announced that a Committee of Inquiry was to be established with the following terms of reference:

"Accepting the need for a radical extension of industrial democracy in the control of companies by means of representation on boards of directors, and accepting the essential role of trade union organisations in this process, to consider how such an extension can best be achieved, taking into account in particular the proposals of the Trades Union Congress report on industrial democracy as well as experience in Britain, the EEC and other countries. Having regard to the interests of the national economy, employees, investors and consumers, to analyse the implications of such representation for the efficient management of companies and for company law."
149. ... cont.

Not surprisingly, these terms of reference were widely attacked as constraining the Committee to produce proposals that followed the TUC line and it took until the following December to recruit an acceptable membership prepared to serve on these terms. They were asked to report within 12 months, so as to enable the Government to fulfil its undertaking to introduce legislation in the 1976-77 session, and this they succeeded in doing despite the fact that this was a remarkably short time in which to solve some of the most intractable problems facing company law since the introduction of limited liability in 1855. The report referred to here, and in the public debate, as the Bullock Report, after the Chairman, Lord Bullock, was published in January 1977. The main proposal of the Bullock Report was that worker representation on the board consist of equal numbers of elected employee and shareholder directors, with a third group of directors to be co-opted by agreement of a majority of each of the other two groups. This third group should consist of an uneven number (greater than one) of directors forming less than one-third of the total board to break a deadlock where necessary, and generally acting as an influence against block voting by the employee and shareholder representatives. The Bullock Report also argues that this "2X + Y" board (where X equals the number of elected employees and the number of elected shareholder directors and Y equals the number of co-opted directors) would allow persons to be co-opted onto the board who have special expertise or can give a broader view of the company's affairs and express the wider public interest. It also recommended substantial changes in company law. Some were virtually essential to the system they proposed, such as the recognition that directors owe legal duties to employees as well as members, and appropriate modifications to Section 184 of the COMPANIES ACT 1948 to prevent members from removing employee directors. They also proposed that the responsibility and power of the board to run the company should be established by law, not as now in the articles of association; and that the power of the shareholders to initiate changes in the constitution or capital structure or to initiate a winding-up of the company should be removed, though the board would still need to secure the shareholders' approval to these changes in a system not unlike some corporation laws in the United States.

The main issues dividing the Committee and public opinion have at least become more clearly defined. They are:

1. Should worker-directors be on a unitary board or on the supervisory board under a two-tier structure?
2. What should be the proportion of worker-directors?
3. Should they be elected through single channel trade union machinery or by all employees, whether union members or not?
4. Should worker-directors be introduced, hoping thereby to encourage participation at lower levels, or should grass roots participation through mandatory works councils come first?

See the Report of the Committee on Industrial Democracy, Cmnd 6706 (1977) [a.k.a. The Bullock Report]. And see Gower, op. cit. supra n. 8 at 72-75 for a fuller exposition (from which the above summary was composed).

150. At the 1977 Australian Council of Trade Unions Congress, 16.9.77.

152. These sections are adaptations of the U.K. COMPANIES ACT 1980 at Sections 46 and 74.

153. See Gower, op. cit. supra n. 8 at 579, n.54 which reads as follows: "cf. cl. 53 of the 1973 Bill which said 'may'."

154. Id., n.55 which reads as follows: "Should not or creditors' be added?"


156. For example, the directors of a wholly-owned subsidiary may be required by the directors of its parent company to wind up the subsidiary. Although in an appropriate case the subsidiary might make provision for its employees, the proposed section does not settle the question as to whether the directors of the subsidiary would be liable for breach of their fiduciary duty. If, in the performance of their functions, the directors of a company prefer the interests of the members to those of the employees or vice versa, it appears to be an arguable consequence of the wording of subsection (1) of the proposed section that they would thereby act in breach of their fiduciary duty to the company. However, provid that the directors could show that they had acted honestly and reasonably and that they ought fairly to be excused their breach of duty, it is likely that the Court would grant them relief pursuant to Section 365 of the P.N.G. COMPANIES ACT. Furthermore, insofar as a breach of duty on the part of the directors of a company may be ratified by the general meeting (see, for example, Barnford v. Barnford (1970) Ch. 212), there seems to be no reason why the general meeting should not be able to ratify conduct amounting to a breach of the provisions of subsection (1) of the proposed section. Id. at para. 12. 103.

157. See Section 120 of the P.N.G. COMPANIES ACT.

158. For a legislative attempt to deal with this problem, see the Ghana COMPANIES CODE 1963 (Act 179), at Section 203 (3): "In considering whether a particular transaction or course of action is in the best interests of the company as a whole, a director, when appointed by or as a representative of, a special class of members, employees or creditors, may give special, but not exclusive, consideration to the interests of that class." And see also Gower, op. cit. supra n. 8 at 580.


160. See subsection (2) of the proposed section. For a thorough discussion of Section 74 of the U.K. COMPANIES ACT 1980 after which the author's proposed section is modelled, see once again Joffe, op. cit. supra n. 155 at paras. 12.101-113.

161. As in the oil palm industry joint ventures.
See once again the Floyd Report cited supra n. 28 at 15.


Besides government corporations and departments, public enterprise in P.N.G. takes the form of the limited company as defined by the P.N.G. COMPANIES ACT. There are twenty seven limited companies operating in this country in which the Government directly owns an equity interest. Twelve are wholly owned by the Government, and four enterprises in the oil palm industry are equally owned by the Government and private interests. The remainder involve the government as a minority shareholder. See Appendix A infra at 112 for details of all limited companies in which the Government either directly or indirectly (through I.C.P.N.G.) owns an interest.

In P.N.G., the distribution of shares to the public is supposed to be effected by a government corporation known as the Investment Corporation of Papua New Guinea (I.C.P.N.G.). The present operations of this public enterprise are twofold. The Investment Corporation has a portfolio of equity holdings in about fifty companies that is held both on behalf of itself and on behalf of the Investment Corporation Fund. The Fund is a separate entity to which citizens of Papua New Guinea subscribe, and to which the Investment Corporation in turn sells selected equities. On June 30, 1977, only about 13 percent of the combined portfolio was held on behalf of the Investment Corporation Fund.

The Investment Corporation is a government corporation established by the INVESTMENT CORPORATION ACT 1971 with the object of providing for equity ownership in private enterprise by Papua New Guineans and P.N.G. institutions when and where appropriate. For this purpose it was authorised to buy and sell shares in enterprises and to establish or manage unit trusts or mutual funds if this were necessary to sell the shares. In past years the Investment Corporation received capital grants for investment through the National Government's budget, but no budget funds have been received since the 1974/75 financial year. New investments are now financed from earnings on I.C.P.N.G.'s portfolio and sales to the Investment Corporation Fund. The Investment Corporation has not so far paid a dividend to the Government, although in principle it could be directed to do so by the Minister for Finance. The portfolio investments are not subject to review or approval by the Government, but the Investments Branch of the Loans, Investments, and Coordination Division has recently been monitoring the portfolio holdings. The management of the Investment Corporation maintains that investments are based on both financial viability and national objectives and priorities. However, there are only ad hoc arrangements by which national objectives and priorities can be made known to the management, and there have apparently been cases when government directors have been voted down by other outside directors.
The *Floyd Report*, cited *supra*, n. 28 at 48, reads in pertinent part as follows:

"It is clear that the Investment Corporation has been only partly successful in achieving ownership by Papua New Guinea citizens and institutions. In particular, it has made only limited sales of the equity it has acquired, and there have been no direct sales to the public. Since all sales have been to the Investment Corporation Fund, all equities that have been purchased by the Investment Corporation still remain under its management. As a result, the Investment Corporation appears to have evolved into a holding company wholly-owned by the Government that is effectively independent of government control but is also a large user of public resources."

167. See *United States v. Monsanto Co.*, 1967 Trade Cas. para. 72,001 (W.D. Pa.).


170. More fundamentally, three questions need to be answered:

(1) Should there be a form of public enterprise?

(2) Should that form have corporate personality?

(3) What forms of control should be exercised over it?

171. The *National Public Expenditure Plan 1980-83* (PNG: Nov. 79) reads in pertinent part at 199 (ch. 13, "Public Institutions"):

"Policy guidelines are currently being considered to regulate the formation of government companies to ensure that there is no unnecessary disruption to private investors, and to ensure that any such companies perform the tasks for which they are established." (What has happened since then?)

And see once again n. 60 herein *supra* at 74.

172. See Friedmann and Garner, op. cit. *supra* n. 29 at 303 et seq. This is the main reason for the creation of a "public enterprise", according to Friedmann.

173. Traditional functions of government include defense, foreign affairs and trade, taxation, treasury, education, science, etc.

174. A case in point would be Sections 74 through 76 of the *NIDA ACT* which empower NIDA to supervise the activities of and recommend to the Minister the creation of government corporations. In a sense, NIDA has been given the authority to establish criteria for creation of government corporations within the broad mandate of Section 75 subsections (a) through (e).

Section 75 reads in pertinent part as follows:

(1) It is the responsibility of NIDA, in conjunction with other appropriate authorities, to maintain a continuous survey of the national economy and of business development and
requirements in order to ascertain if, and in what areas and fields, it is desirable that a Government-controlled corporation be established —

(a) in order to ensure or to assist further private development; or

(b) because adequate private investment is not available for an industry or proposed industry that is considered by the Government to have a high priority for development; or

(c) because an industry needs to be established, maintained or expanded to meet the needs of an area; or

(d) because the creation of a Government-controlled corporation is the appropriate method for the Government to take part in a venture with private enterprise, another Government (including the Government of a place outside Papua New Guinea) or an international agency; or

(e) in the national interest.

175. True: P.N.G. has an Auditor-General who is required under Section 214 of the Constitution to inspect, audit and report at least once in every fiscal year to the National Parliament on the Public Accounts of Papua New Guinea, and on the control of, and on transactions with or concerning the public monies of Papua New Guinea. But this is not enough. We are not talking about just financial control but administrative and political control as well. Furthermore, the Auditor-General has his hands full dealing with the audits of government departments. At present there is a serious backlog of audits due in great part to the increasing workload and the continuing shortage of professional staff. See Fifth Annual Report Of The Auditor-General In Terms of Section 19 of The Organic Law On Certain Constitutional Office-Holders (1979-80) at 10-12.

176. The permanent Administrative Conference of the United States, which had two temporary predecessors, was created under the ADMINISTRATIVE CONFERENCE ACT, August 30, 1964, Pub. L. 88-499, 78 Stat. 615, and is presently codified under 5 U.S.C. 571-76 (1976).

177. The Council of Tribunals, the U.K. monitoring body, was created under the TRIBUNALS & INQUIRIES ACT 1958, 6-7 Eliz. II c.66, s.1 (U.K.).

178. The Administrative Review Council, the Australian monitoring body, was created under the ADMINISTRATIVE APPEALS TRIBUNAL ACT 1975, Comms., stats. (Australia) No. 91 of 1975.

179. The Statutory Powers Procedure Rules Committee, the Canadian monitoring body, was established pursuant to the STATUTORY POWERS ACT, S.O. 1971, c. 47, pt. II, ss. 26-34.

180. Freedom of Information legislation is currently being considered by both the Australian and New Zealand Parliaments. This type of legislation involves the major issue of accessibility to government
documents by members of the general public. To date, the United States of America is the only major nation to have enacted far-reaching legislation on the subject.

In Papua New Guinea, Section 51 (3) of the Constitution mandates the creation of Freedom of Information legislation.

181. Section 51 of the P.N.G. Constitution reads as follows:

"51. RIGHT TO FREEDOM OF INFORMATION

(1) Every citizen has the right of reasonable access to official documents, subject only to the need for such secrecy as is reasonably justifiable in a democratic society in respect of:-

(a) matters relating to national security, defence or international relations of Papua New Guinea (including Papua New Guinea's relations with the Government of any other country or with any international organisation);

(b) records of meetings and decisions of the National Executive Council and such executive bodies and elected governmental authorities as are prescribed by Organic Law or Act of the Parliament; or

(c) trade secrets, and privileged or confidential commercial or financial information obtained from a person or body; or

(d) parliamentary papers the subject of parliamentary privilege, or

(e) reports, official registers and memoranda prepared by governmental authorities or authorities established by government, prior to completion; or

(f) papers relating to lawful official activities for investigation and prosecution of crime; or

(g) the prevention, investigation and prosecution of crime; or

(h) the maintenance of personal privacy and security of the person; or

(i) matters contained in or related to reports prepared by, on behalf of or for the use of a governmental authority responsible for the regulation or supervision of financial institutions; or

(j) geological or geophysical information and data concerning wells and other bodies.

(2) A law that complies with Section 38 [general qualification of qualified rights] may regulate or restrict the right guaranteed by this section.

(3) Provision shall be made by law to establish procedures by which citizens may obtain ready access to official information.

(4) This section does not authorise:-

(a) withholding information or limiting the availability
of records to the public except in accordance with its provisions; or

(b) withholding information from the Parliament."

182. Australia is a good example of a common law country which in recent memory has undertaken radical reforms in the review of administrative action. Australia created in 1975 a single administrative tribunal comprised of a General Administrative Division as prescribed under the ADMINISTRATIVE APPEALS TRIBUNAL ACT 1975, cited supra. n.178. It can and does review the exercise of statutory discretionary powers on the merits as well as on the law. Anyone aggrieved by a decision made pursuant to a statutory power scheduled to the Act is entitled to apply to the Tribunal for a "de novo" review (i.e., the Act places the Tribunal in the same position as the initial decider to exercise any power which would have been exercised by the initial decider.) The Australian Law Reform Commission in its Report No. 10. (1978) indicates that the Tribunal is taking a fairly activist role and is not reluctant to review government policy even at the highest level. Papua New Guinea could implement the same type of procedures after consultations with their Australian counterparts.

183. See Friedmann and Garner, op. cit. supra n. 29 at 325.

184. Id. at 325-26.

185. See Section 148 of the P.N.G. Constitution.

186. See Friedmann and Garner, op. cit. supra n. 29 at 327.

187. See once again the Floyd Report cited supra n.28.

188. See the recommendations of the Law Reform Commission of Canada, Working Paper No. 25 cited supra n.60 at 84-86.

189. See Gower, op. cit. supra n. 8 at 93.

190. See once again n. 60 supra.

191. "The Minister" is here used to describe whichever of the departmental heads is appropriate.

192. See once again Section 148 of the P.N.G. Constitution.

193. See again Friedmann and Garner, op. cit. supra n. 29 at 336.
APPENDICES
### APPENDIX A.

**PAPUA NEW GUINEA LIMITED COMPANIES OWNED DIRECTLY BY THE GOVERNMENT OR THE I.C.P.N.G.***

<table>
<thead>
<tr>
<th>Enterprise</th>
<th>Percent of Government Ownership</th>
<th>Legal Form</th>
<th>Mode of Ownership</th>
<th>Technical Ministry</th>
</tr>
</thead>
<tbody>
<tr>
<td>Baiyer River Alcohol Co. Pty. Ltd.</td>
<td>100%</td>
<td>Limited Company</td>
<td>P.N.G. Government direct</td>
<td>Minerals &amp; Energy</td>
</tr>
<tr>
<td>Energy Development Corporation Pty. Ltd.</td>
<td>100</td>
<td>&quot;</td>
<td>&quot;</td>
<td>&quot;</td>
</tr>
<tr>
<td>Food Marketing Corporation Pty. Ltd.</td>
<td>100</td>
<td>&quot;</td>
<td>&quot;</td>
<td>Primary Industry</td>
</tr>
<tr>
<td>Higaturu Transport Co. Pty. Ltd.</td>
<td>100</td>
<td>&quot;</td>
<td>&quot;</td>
<td>&quot;</td>
</tr>
<tr>
<td>Kagamuga Natural Products Co. P/L</td>
<td>100</td>
<td>&quot;</td>
<td>&quot;</td>
<td>&quot;</td>
</tr>
<tr>
<td>National Plantation Management Agency P/L</td>
<td>100</td>
<td>&quot;</td>
<td>&quot;</td>
<td>Lands</td>
</tr>
<tr>
<td>North Fly Highway Development Corp. P/L</td>
<td>100</td>
<td>&quot;</td>
<td>&quot;</td>
<td>Minerals &amp; Energy</td>
</tr>
<tr>
<td>Ok Tedi Development Co. P/L</td>
<td>100</td>
<td>&quot;</td>
<td>&quot;</td>
<td>&quot;</td>
</tr>
<tr>
<td>P.N.G. Shipping Corporation Pty. Ltd.**</td>
<td>100</td>
<td>&quot;</td>
<td>&quot;</td>
<td>Transport</td>
</tr>
<tr>
<td>P.N.G. Fish Marketing Corporation Pty. Ltd.</td>
<td>100</td>
<td>&quot;</td>
<td>&quot;</td>
<td>Primary Industry</td>
</tr>
<tr>
<td>P.N.G. Timber Holdings P/L</td>
<td>100</td>
<td>&quot;</td>
<td>&quot;</td>
<td>&quot;</td>
</tr>
<tr>
<td>Sea Park Pty. Ltd.</td>
<td>100</td>
<td>&quot;</td>
<td>&quot;</td>
<td>Tourism</td>
</tr>
<tr>
<td>Bougainville Copper Limited</td>
<td>20</td>
<td>&quot;</td>
<td>&quot;</td>
<td>Minerals &amp; Energy</td>
</tr>
</tbody>
</table>
## APPENDIX A ... cont.

<table>
<thead>
<tr>
<th>Enterprise</th>
<th>Percent of Government Ownership**</th>
<th>Legal Form</th>
<th>Mode of Ownership</th>
<th>Technical Ministry</th>
</tr>
</thead>
<tbody>
<tr>
<td>Celcure P.N.G. Pty. Ltd.</td>
<td>26%</td>
<td>Limited Company</td>
<td>P.N.G. Government direct</td>
<td>Primary Industry</td>
</tr>
<tr>
<td>Davara Services Pty. Ltd.</td>
<td>10</td>
<td>&quot;</td>
<td>&quot;</td>
<td>None</td>
</tr>
<tr>
<td>Gogol Reforestation Co. Pty. Ltd.</td>
<td>49</td>
<td>&quot;</td>
<td>&quot;</td>
<td>Primary Industry</td>
</tr>
<tr>
<td>Hargy Oil Palms Pty. Ltd.</td>
<td>50</td>
<td>&quot;</td>
<td>&quot;</td>
<td>&quot;</td>
</tr>
<tr>
<td>Higaturu Processing P/L</td>
<td>50</td>
<td>&quot;</td>
<td>&quot;</td>
<td>&quot;</td>
</tr>
<tr>
<td>Higaturu Oil Palms P/L</td>
<td>50</td>
<td>&quot;</td>
<td>&quot;</td>
<td>&quot;</td>
</tr>
<tr>
<td>New Britain Palm Oil Development Limited</td>
<td>50</td>
<td>&quot;</td>
<td>&quot;</td>
<td>&quot;</td>
</tr>
<tr>
<td>Open Bay Timber Pty. Ltd.</td>
<td>20</td>
<td>&quot;</td>
<td>&quot;</td>
<td>&quot;</td>
</tr>
<tr>
<td>Ok Tedi Mining Limited</td>
<td>20</td>
<td>&quot;</td>
<td>&quot;</td>
<td>Minerals &amp; Energy</td>
</tr>
<tr>
<td>Pacific Forum Line Pty. Ltd.</td>
<td>10</td>
<td>&quot;</td>
<td>&quot;</td>
<td>Transport &amp; Finance</td>
</tr>
<tr>
<td>Ramu Sugar Limited</td>
<td>48</td>
<td>&quot;</td>
<td>&quot;</td>
<td>Primary Industry</td>
</tr>
<tr>
<td>South Pacific Tuna P/L</td>
<td>40</td>
<td>&quot;</td>
<td>&quot;</td>
<td>&quot;</td>
</tr>
<tr>
<td>Stettin Bay Lumber Co. P/L</td>
<td>25</td>
<td>&quot;</td>
<td>&quot;</td>
<td>&quot;</td>
</tr>
<tr>
<td>Trans Pacific Palm Oil Pty. Ltd. *</td>
<td>25</td>
<td>&quot;</td>
<td>&quot;</td>
<td>&quot;</td>
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* in liquidation... cont.
### APPENDIX A  ... cont.

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<th>Mode of Ownership</th>
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※ in liquidation

... cont.
## APPENDIX A  ... cont.

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<th>Enterprise</th>
<th>Percent of Government Ownership***</th>
<th>Legal Form</th>
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<th>Technical Ministry</th>
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* in liquidation  ... cont.
Appendix A... cont.

End Notes

* There are other government corporations (e.g. P.N.G.B.C. or P.N.G. Development Bank or Bank of P.N.G.) that have equity in various limited companies. According to its annual report 1980, the P.N.G. Banking Corporation, a government corporation, owns the following:

- Resources & Investment Finance Ltd. .... (33%)
- Lira Enterprises Pty. Ltd. .... .... (74%)
- I.A.C. (New Guinea) Limited .... .... (100%)
- Monidata Pty. Ltd. .... .... (20%)

Of course, the P.N.G. Development Bank (and presumably the Bank of P.N.G.) and other government corporations also have their own lists of holdings in limited companies. To put together an entire list of each and every holding of each and every government corporation is beyond the scope of this paper. However, it is obvious from all of the foregoing that "the public and private sectors of this country are inextricably intertwined and inexorably bound to each other." See main text herein at 4, last paragraph.

** The Papua New Guinea Shipping Corporation Ltd. owns the following:

- Highland Containers Terminal Pty. Ltd. (20%)
- Mainport Cargoes Pty. Ltd. .... .... (100%)
- Port Services P.N.G. Pty. Ltd. .... (14%)
- P.N.G. Off-shore Tug & Salvage P/L .... (100%)
- Rabaul Stevedores Ltd. .... .... (30%)

*** For equity holdings of the I.C.P.N.G., the proportion held on behalf of the Investment Corporation Fund is shown in parentheses.

+ As of June 30, 1980 the name became P.N.G. Forest Products Pty. Ltd., and equity holdings were taken over through the purchase of shares by the Department of Finance.

# A.C.I.-New Guinea Extrusions Pty. Ltd. was this company's former name.

@ My thanks to Stan Sismey for providing the latest figures on I.C.P.N.G.'s holdings.
### APPENDIX E. 1981 SECTORAL PROGRAMS

#### Allocations by Subject Matter

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**TOTAL**                | **882,500**    | **3,069,000**       | **1,331,900**| **3,000,000** | **300,000**      | **1,000,000**  | **500,000**   | **1,232,000** | **2,298,265** | **500,000** | **3,500,000** | **17,612,663** |

**RESERVE FUNDS** - Allocations held at H.Q. to facilitate the administration and operation of programs, e.g. K225,000 Health at H.Q. to purchase pharmaceutical supplies for provincial projects.
* Indicates new high school. **K244,900** balance of allocations are for blocking up existing schools (K744,900).
* Indicates funds partly indicative and does not necessarily reflect programme.
Any comments, suggestions, or criticisms of this paper would be welcomed, and should be directed to:

EDWARD F. GRAZIANO
PRINCIPAL PROJECT OFFICER
LAW REFORM COMMISSION
P.O. WARDS STRIP, WAIGANI