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Reforming Pacific Contract Law

Asian Development Bank

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This report was prepared for the Asian Development Bank (ADB) by Professors Fred Ellinghaus and Ted Wright, Newcastle Law School and Centre for Institutional and Organisational Studies, University of Newcastle, Australia, under the supervision of Winfried Wicklein, Senior Private Sector Development Specialist, ADB, Pacific Liaison and Coordination Office, Sydney, Australia. This report was supported by the Pacific Private Sector Development Initiative (PSDI), an ADB regional technical assistance project supported by the Australian Agency for International Development.

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Asian Development Bank
6 ADB Avenue, Mandaluyong City
1550 Metro Manila, Philippines
Tel +63 2 632 4444
Fax + 63 2 636 2444
www.adb.org

Pacific Liaison and Coordination Office
Level 18, 1 Margaret Street
Sydney, NSW 2000, Australia
Tel +61 2 82709444
Fax +61 2 82709445
www.adb.org/plco

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EXECUTIVE SUMMARY

We were engaged as ADB consultants to a Private Sector Development Initiative project on contract law reform in the Pacific Islands. Phase 1 of the project required us to investigate and report on whether contract law reform would assist private sector development in Pacific countries. We completed site visits to the Solomon Islands, Vanuatu, Tonga and Papua New Guinea in the period July-November 2008. This report describes our findings.

The general law of contract in these countries is not codified. In most jurisdictions there is some legislation dealing with specific contracts, mostly adopted from the UK, and often now outdated. But the general rules of formation, performance and enforcement of contracts are to be found only in the reported decisions of courts, going back for centuries, predominantly English but also from Australia, NZ and other common law jurisdictions. The volume of these reports is massive and constantly increasing. Case law is often minutely detailed, abstract and complex. The form in which the rules are stated varies from judgment to judgment, and no single formulation can ever be taken as authoritative or final. In our view, and that of most people whom we consulted on our visits, this system of law does not serve the needs of the Pacific Islands well.

The inaccessibility of case law, the time and cost associated with applying it, the difficulty of keeping up to date, and the remoteness of English law from Pacific conditions, were universally cited as significant problems by business people and lawyers alike. These difficulties are compounded by the fact that access to skilled legal advice in these countries is limited.

Contract law is little used, poorly understood, and often mistrusted by local businesspeople. As a result there is a large informal economy, and correspondingly little participation by locals in the formal economy. Few written contracts are made, often leading to inefficient risk management, problems of non-compliance and unnecessary disputation, and spectacularly inefficient outcomes. These factors have a self-evident limiting effect on economic development.

We have concluded that a written contract law in the form of a Pacific Contract Code of 50-75 Articles, stating existing rules of common law and equity in the form of broad principles, would have many benefits for these jurisdictions. Such a Code would make contract law more accessible and efficient, and serve as an educational tool, encouraging local people to use contracts and to participate in the formal economy. It would improve legal support for local business, and help to produce a better investment environment. It could provide a uniform law throughout the region that is fully compatible with the law of the region's trading partners. The proposal to draft such a Pacific Contract Code was strongly supported by nearly everyone we spoke to, including the Chief Justices of all four jurisdictions.

We recommend that the project proceed as soon as possible to Phase 2, entailing the preparation of a draft Pacific Contract Code and Discussion Paper by the consultants, and of a final version of the Code, revised after submission to expert scrutiny and in-country consultations with major stakeholders, in a form ready for legislative adoption in each jurisdiction. A detailed indicative Phase 2 plan, with time lines, is included in Part 6 (Recommendations) of this Report.

We recognise that the implementation phase of this project will be crucial. It will involve not only the process of bringing about the enactment of the Pacific Contract Code in Pacific countries (Phase 3), but also strategies to ensure that it is brought home to lawyers, business and grass roots in the community, in other words strategies to bring about cultural change (Phase 4). We elaborate these points in para 114 of Part 6, Recommendations. However, we do not address

the details of Phase 3 and Phase 4 in this report. The project cannot go forward without first producing and disseminating a draft Pacific Contract Code. Our recommendations are limited to implementation of this next phase (Phase 2) of the project.

I. INTRODUCTION

1. We were engaged as consultants to a Private Sector Development Initiative project on contract law reform in the Pacific Islands. Phase 1 of this project required us to report on the contract environment of four Pacific Island jurisdictions, with a view to recommending legal reforms that would promote private sector development. The project is part of a broad initiative directed towards reforming the laws governing business in the Pacific Islands in ways that will foster private sector development.

2. The four jurisdictions we visited were Papua New Guinea, Solomon Islands, Tonga and Vanuatu. It is the Asian Development Bank's intention that Samoa and Fiji would be consulted in Phase 2 of this project. We believe that this report will also be of relevance to the other nations in the Pacific Island region.

3. PNG's economy is significantly larger than the others but overall they are 'small economies, not very diverse'.¹ Many of the people we spoke to remarked on this fact explicitly.

4. An important feature of all four jurisdictions is their relatively very large informal economy. In PNG we were told that between 80 - 85% of the total economy was informal.² 'The actual business sector is much larger than the official business sector.'³ We were also told that general failure of local people to use contracts, and the reliance of local business people on personal, familial and tribal relationships was a significant impediment to their participation in the formal economy.⁴ Increasing participation in the formal economy, in particular by small and medium local enterprise, is a major development strategy in the region. As one banker said, 'private sector SMEs (small and medium enterprises) are the future of the economy'.⁵

5. We have concluded that it would assist private sector development in these economies if legislation were passed adopting a contract code in the form of 50-75 short articles in simple language, stating the rules of general contract law in a form compatible both with the common law rules now applicable in Pacific jurisdictions, and with the codified rules of other legal systems, including those of the region's major trading partners.⁶ We refer to this code hereafter as the Pacific Contract Code (PCC). We recommend the production and dissemination of a draft Pacific Contract Code as the task next to be undertaken in Phase 2 of this project. Some

¹ [4](Finance VAN). Throughout this report we will refer to observations made to us by the people we consulted. We are preserving their anonymity by using a code number and generic description.

² [43](Law PNG), [1](Business PNG), [61](Finance PNG). 80% don't have bank accounts: [51](Law PNG).

³ [35](Gov't PNG).

⁴ 'Lack of understanding of contract is an impediment when an enterprise shows up and wants to do something': [47](Finance PNG). Many other statements to like effect are referred to in Part IV.

⁵ [42](Finance SI).

⁶ There is a world-wide movement towards the harmonization of contract law. European law makers are taking important steps towards the harmonization of European private law: Parisi, 'Harmonization of European private law: An economic analysis' (2007) SSRN: <http://ssrn.com/abstract=1014385>; cf. Sono, 'The rise of anational contract law in the age of globalization' 75 *Tulane Law Review* 1185 (2001); Reich, 'The WTO as a law-harmonizing institution' (2005) SSRN: <http://ssrn.com/abstract=468000>; Collins, 'Formalism and efficiency: Designing European commercial contract law' *European Review of Private Law* 1 (2000) 211. There are similar moves in other areas of commercial law: Weatherall, 'Can substantive law harmonisation and technology provide genuine alternatives to conflicts rules in intellectual property?' 11 *Media & Arts Law Review* 393 (2006) SSRN: <http://ssrn.com/abstract=958857>; Kozolchik, 'Modernization of Commercial Law: International Uniformity and Economic Development' (2009) SSRN: <http://ssrn.com/abstract=1367733>. The Convention of International Sale of Goods, the UNIDROIT *Principles of International Commercial Contracts*, and the *Principles of European Contract Law* are examples of harmonization by transnational codification.

details concerning the envisaged content of the PCC are given in paragraphs 85-87 of this report.

6. The adoption of a Pacific Contract Code would make it easier for the courts in these jurisdictions to enforce contracts consistently and fairly. While it is generally conceded that in any functional legal system relational contracting and informal enforcement mechanisms significantly complement formal contracting and legal sanctions, many commentators nevertheless stress the importance of effective contract enforcement by the courts. 'Courts may have an important influence over the level of entrepreneurship in a given region or country.'⁷

7. 'Weak court systems are a particularly conspicuous problem for developing and transition economies.'⁸ The authors of a study of modern trends in international trade find that, as economies expand their trade in more complex goods and services, the quality of domestic institutions becomes increasingly important for assuring contract enforcement.⁹ Similarly, the authors of an analysis of empirical data from post-communist economies in East Europe (Russia, Ukraine, Poland, Romania and Slovakia) conclude that effective courts foster economic development in such transitional economies by significantly improving trust in contracting, encouraging entrepreneurs to extend credit, and lowering transaction costs and entry barriers. 'Courts become increasingly needed as the economy develops.'¹⁰

8. Courts cannot function effectively if the rules they apply are not readily accessible to the legal and business community. This is the situation of contract law in the four jurisdictions we visited. In none of them is contract law to be found in a locally enacted code, as it is in most countries of the globe (including modern Asian economies such as China, Japan, India, and Pakistan). Instead the general law of contract (leaving aside some local legislation of marginal relevance) is still to be found in the judgments of reported cases, comprising some local decisions (few in number, and only slowly increasing) and, in the main, decisions from the UK and other common law jurisdictions (huge in number, and steadily increasing). The law stated in these judgments is expressed in a foreign language (English), and in the fluctuating and highly technical terminology of common law doctrinal discourse. We elaborate on the inherent shortcomings of case-based systems of contract law below: see paragraphs 45-47. The effectiveness of case law as a repository of rules is particularly endangered "when the populace is alienated from the law because it is ... written in a language they do not understand, or was transplanted from elsewhere and is considered obscure or alien."¹¹ The adoption of the Pacific Contract Code would replace this obscure and inaccessible law with a clear and concise statement of contract law in codified form, immediately accessible to courts, litigants and lawyers.

⁷ Smith and Ueda, 'Law & entrepreneurship: do courts matter?' 1 *Entrepreneurial Business Law Journal* (2006) 231, 242. Cf Johnson, McMillan and Woodruff, 'Courts and Relational Contracts' (2006) SSRN: <http://papers.ssrn.com/abstract=291802> at 32: 'Entrepreneurs who say the courts work behave differently from those who say they do not work.' See also Dam, 'The Judiciary and Economic Development' (2006) SSRN: <http://ssrn.com/abstract=892030>.

⁸ Damman and Hansmann, 'Globalizing Commercial Litigation' (2008) SSRN: <http://ssrn.com/abstract=1113217> at 3. See also Rodrik (ed), *In Search of Prosperity: Analytic Narratives on Economic Growth* (2003) 1 at 15-17; Klerman, 'Legal Infrastructure, Judicial Independence, and Economic Development' (2006) SSRN: <http://ssrn.com/abstract=877490> at 4; Trebilcock and Leng, 'The Role of Formal Contract Law and Enforcement in Economic Development' (2006) *Virginia Law Review* 1517 at 1572, 1578-79.

⁹ Berkowitz et al, 'Legal Institutions and International Trade Flows', (2004) 26 *Michigan Journal of International Law* 163.

¹⁰ Johnson, McMillan and Woodruff, *supra* note 7, at 32-33.

¹¹ Tamanaha, 'The Primacy of Society and the Failure of Law and Development' (2009) SSRN:<http://ssrn.com/abstract=1406999> at 11.

A. Private sector development and contract enforcement

9. We are aware that there is a longstanding and ongoing debate on the relationship between formal law and economic development.¹² It has long been thought to be a fundamental tenet of capitalist economics that economic growth requires a legal order offering stable rights of property and contract (the ‘rights thesis’).¹³ In the absence of such rights investment and specialization are discouraged, exchanges with strangers are severely inhibited, and exchange relationships are largely confined to parties with non-legal ties – familial, tribal or cultural.¹⁴ Nevertheless, private sector development has occurred in modern times without the benefit of stable property and contract rights, notably in China and East Asia. This has led to calls for caution against the unqualified endorsement of the rights thesis. However, even strong sceptics of formal law development do not support its abandonment: “That would be wrongheaded and self-destructive. Every society in the world today requires an effective legal system that can, at a minimum, manage and support the activities of modern government and modern economic systems.”¹⁵

10. In their 2006 review of theoretical and empirical research on this issue, Trebilcock and Leng conclude that at low levels of economic development, informal contract enforcement may be reasonably effective, but at higher levels informal contract enforcement becomes “an increasingly imperfect substitute due to the presence of large, long-lived, highly asset specific investments and increasingly complex trade in goods and services that often occur outside repeated exchange relationships.”¹⁶ They point to the “self-destructive” nature of relation-based governance, which inevitably reaches a turning point where rule-based governance becomes more cost-effective.¹⁷ The enactment in 1999 of the Contract Law of the People’s Republic of China, Part 1 of which contains a general contract code, no doubt flowed from the recognition that China had reached this point.

11. Trebilcock and Leng accept that China and “the East Asian miracle” demonstrate that growth can happen without a rule-based governance environment.¹⁸ However, they argue that in these countries political stability, a strong political commitment to economic development, and

¹² Trubek and Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (2006) charts the history of this field. Trubek and Santos recognise three phases or ‘moments’ in the development of law and development doctrine since the 1950s: see ‘Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice’, *ibid* at 2-3. See also Hatchard and Perry-Kesaris (eds), *Law and Development: Facing Complexity in the 21st Century* (2003).

¹³ The pre-eminent modern exponent of the rights thesis is North, *Institutions, Institutional Change and Economic Performance* (1990), drawing on Weber, *Economy and Society* (ed Roth and Wittich, 1978): see Trebilcock and Leng, *supra* note 8 at 1520. See also Trubek, ‘Toward a Social Theory of Law: An Essay on the Study of Law and Development’ (1972) *Yale Law Journal* 1; Shihata, ‘The World Bank and “governance” issues in its borrowing members’, in Tschofen and Parra (eds) *The World Bank in a Changing World* vol 1 (1991); Knack and Keefer, ‘Institutions and Economic Performance: Cross-country Tests Using Alternative Institutional Measures’ (1995) 7 *Economics & Politics* 207; De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (2000); Tamanaha, *supra* note 11, at 14-17.

¹⁴ See Clarke, ‘China: creating a legal system for a market’ (2007) SSRN: <http://ssrn.com/abstract=1097587>.

¹⁵ Tamanaha, *supra* note 11, at 37. Similarly, Carothers, despite a sober assessment of law and development work funded by national and international institutions, concludes that ‘the effects of this burgeoning rule-of-law aid are generally positive, though usually modest’: Carothers, *Promoting the Rule of Law Abroad* (2006) at 11-12. Likewise Trubek, a long-time sceptic, nevertheless urges continued engagement with the rule of law enterprise: see Trubek, ‘The ‘Rule of Law in Development Assistance: Past, Present, and Future, in *The New Law and Economic Development*’, in Trubek and Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (2006) at 93-94.

¹⁶ Trebilcock and Leng, *supra* note 8, at 1519.

¹⁷ *Ibid* at 1571.

¹⁸ *Ibid* at 1572.

specific cultural factors combined to provide a supportive environment for economic development even in the absence of rule-based institutions.¹⁹ On the other hand, they conclude, “in developing and transition economies, informal contract enforcement mechanisms are often imperfect substitutes for formal state enforcement. In extreme cases [they create] considerable costs for countries’ long-term institution-building, which is detrimental to their growth prospects.”²⁰ They also warn that “unduly discounting the importance of effective formal legal institutions carries serious consequences for other non-instrumental values, including detrimental effects on personal freedoms.”²¹

12. Since the publication of Trebilcock and Leng’s article the flow of contributions to the debate from differing standpoints has not abated.²² The controversy about the extent to which formal contract law contributes to economic growth is unlikely to be resolved at the level of universally valid generalizations. Sen has suggested that the link between formal contract law and development may be not so much one of causal interdependence but of constitutive connection.²³ In any case, most commentators acknowledge that the role of contract law in economic development is likely to be contingent on context-specific political, economic, and cultural factors.²⁴ ‘One size does not fit all.’²⁵ The specific economic context provided by the Pacific countries is that of transition or ‘catch-up’ economies. As noted in paragraph 7 above, a number of commentators single out such economies as particularly in need of formal law development. The introduction of formal contract law has been specifically linked to growth in the finance sector²⁶ as well as to improved access to technology,²⁷ two points of particular relevance to Pacific countries.

¹⁹ Ibid at 1556.

²⁰ Ibid at 1553.

²¹ Ibid at 1579-80.

²² See Clarke, Murrell and Whiting, ‘The Role of Law in China’s Economic Development’ (2006) SSRN: <http://ssrn.com/abstract=878672>; Dam, ‘China as a Test Case: Is the Rule of Law Essential for Economic Growth?’ (2006) SSRN: http://ssrn.com/abstract_id=880125; Dam, ‘Institutions, history and economic development’ (2006) SSRN: http://ssrn.com/abstract_id=875026; Smith and Ueda (2006) supra note 7; Clarke (2007), supra note 14; Chen, ‘Legal Thought and Legal Development in the People’s Republic of China 1949-2008’ (2008) SSRN: <http://ssrn.com/abstract=1369782>; Peerenboom, ‘Are China’s Legal Reforms Stalled?’ (2008) SSRN: <http://ssrn.com/abstract=1283203>; Garnett, ‘Mercantilism, American Style’ (2009) SSRN: <http://ssrn.com/abstract=1375019>; Van Rooij, ‘Bringing Justice to the Poor, Bottom-Up Legal Development Cooperation’ SSRN: <http://ssrn.com/abstract=1368185>; Peerenboom, ‘Economic Development and the Development of the Legal Profession in China’ (2009) SSRN: <http://ssrn.com/abstract=1342287>; Shaffer, ‘Business and Law’, in Coen, Grant and Wilson (eds) *The Oxford Handbook of Business and Government* (2009); Hammer, ‘Development as Tragedy: The Asian Development Bank and Indigenous Peoples in Cambodia’ (2009) SSRN: <http://ssrn.com/abstract=1371595>; Tamanah (2009), supra note 11.

²³ ‘[I]n this view, the overarching idea of development is a functional relation that amalgamates distinct developmental concerns respective in economic, political, social, legal and other spheres. This is more than causal interdependence: it involves a constitutive connection in the concept of development as a whole’: Sen, ‘What is the Role of Legal and Judicial Reform in The Development Process’, World Bank Legal Conference, Wash. D.C., June 5, 2000; quoted in Tamahana, supra note 11, at 22.

²⁴ Trebilcock and Leng, supra note 8, at 1519.

²⁵ Trubek and Santos, ‘Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice’, in Trubek and Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (2006) at 9. See also Tamanaha, supra note 11, at 3-4: ‘Because every legal context in every society involves a unique constellation of forces and factors, there can be no standard formula for law; a good law in one location may have ill effects or be dysfunctional elsewhere; unanticipated consequences are to be expected. Law and development practitioners and scholars recognize this fundamental truth.’

²⁶ Trebilcock and Leng, supra note 8, at 1536, 1572. Cf Kähkönen, Lee, Meagher and Semboja, ‘Contracting Practices in an African Economy’, available at <http://w.w.w.iris.umd.edu>.

²⁷ See Williamson, *The Economic Institutions of Capitalism* (1985) at 334-35; Trebilcock and Leng, supra note 8, at 1558.

13. The best evidence of the likely success of a legal reform is that it is thought to be desirable by stakeholders in the jurisdiction in question.²⁸ Nearly all the 74 business people, lawyers, accountants, judges, politicians and government officials we interviewed supported the adoption of a Pacific Contract Code. The link between economic growth and effective contract law was made explicitly by many of the people we consulted.²⁹ In a modern economy ‘trust needs to be secured by formal arrangement’.³⁰ Several people pointed out that the modern economy runs on contracts with strangers.³¹ ‘The time has come when the personal basis of trade is disappearing and we have to deal with new players. The old school will have to become contract-literate.’³² As one judge said, ‘businessmen have to quickly smarten up’.³³ Several Pacific legislatures have demonstrated a willingness to embrace formal law reform by adopting legislation sponsored by the ADB.

II. SUMMARY OF VISITS

14. We visited Honiara between 8 – 15 July, Port Vila 16 – 23 July, Nuku’alofa 30 August – 6 September and Port Moresby 16 – 22 November. We were accompanied by ADB Business Law expert Terry Reid in Honiara 8 – 9 July and in Port Vila 16 July. In addition to the support we received from Terry, we received excellent on the ground support in Tonga from resident ADB Consultant Christopher Russell and in Port Moresby from Simon Nutley, Partner, and his staff at Peter Allan Lowing Lawyers PNG. In Solomon Islands, Tonga and Vanuatu we also received much-appreciated support from the following government officials—

- Jeffrey Wickham, Permanent Secretary, Ministry of Commerce, Industry & Employment, Solomon Islands
- Vika Fusimalohi, Deputy Secretary (Industry), Min Labour, Commerce & Industry, Tonga
- George Andrews, Commissioner, Vanuatu Financial Services Commission.

15. A full list of the persons consulted is set out in Appendix A.

III. THE LEGAL ENVIRONMENT

A. Overview

16. Contract law as it exists currently in Papua New Guinea, Solomon Islands, Tonga and Vanuatu largely consists of rules and principles of English common law and equity, as expounded in the judgments of United Kingdom courts (English case law).³⁴ In Tonga, current English case law applies. In the other jurisdictions, the rules apply as they stood at independence (PNG 1975, Solomon Islands 1978, Vanuatu 1980). Nevertheless, UK decisions reported after independence, and case law authorities from other common law jurisdictions, in

²⁸ Cf Troope, ‘Legal and Judicial Reform Through Development Assistance: Some Lessons’ (2003) 48 McGill Law Journal 357 at 393.

²⁹ [24](Business VAN), [38](Finance VAN), [10](Gov’t TON), [34](Gov’t TON), [40](Finance TON), [5](Gov’t TON), [27](Law TON), [43](Law PNG), [35](Gov’t PNG), [52](Judiciary), [72](Gov’t PNG), [61](Finance PNG), [34](Gov’t TON).

³⁰ [63](Gov’t VAN).

³¹ [28](Business VAN), [7](Business VAN).

³² [63](Gov’t VAN).

³³ [45](Judiciary).

³⁴ In Vanuatu there is a vestige of French law that applies within the Francophone community: see paras 22-23.

particular Australia and New Zealand, are regularly relied on.³⁵ In addition there is a slow trickle of Pacific case law.³⁶ Some UK legislation (even if superseded at home) also applies. There is almost no local legislation dealing with matters of general contract law.³⁷

17. In this Part we give a brief account of the components of contract law in each of the jurisdictions we visited.³⁸ It is organised under six headings—

- (i) English case law
- (ii) Local case law
- (iii) English legislation
- (iv) Local legislation
- (v) Customary law
- (vi) Inaccessibility of case law.

B. English case law

18. The Constitutions of all four jurisdictions formally adopt English common law and equity as a part of their law, subject to inconsistency with local circumstances or customary law. The qualification has rarely been applied.

19. **PAPUA NEW GUINEA.** The Papua New Guinea Constitution (Schedule 2.2) provides that the principles and rules that formed, immediately before independence (1975), the principles and rules of common law and equity in England, are adopted, and shall be applied and enforced, as part of the underlying law, unless inconsistent with the Constitution or a PNG statute, or inapplicable or inappropriate to the circumstances of the country, or inconsistent with custom in any particular matter. The effect is that the rules of English common law and equity as they apply to contracts are incorporated as they stood ‘frozen’ in the judgments at independence (1975).

20. **SOLOMON ISLANDS.** The Solomon Islands Constitution (Schedule 3) provides that ‘the principles and rules of the common law and equity shall have effect as part of the law of the Solomon Islands’ unless inconsistent with the Constitution or an Act of Parliament, or inappropriate in the circumstances of Solomon Islands, or inconsistent with customary law in any particular matter. The Constitution provides a cut-off date (1978) after which foreign decisions are not binding (Schedule 3.4(1)). The effect is that the rules of English common law and equity as they apply to contracts are incorporated as they stood ‘frozen’ in the judgments at that date. The Constitution expressly states that these rules shall have effect notwithstanding any revision of them by subsequent UK legislation (Schedule 3.2(2)).

21. **TONGA.** Until 2003, the Civil Law Act 1988 provided that ‘the Court shall apply the common law of England and the rules of equity, together with statutes of general application in force in England’, but only so far as ‘the circumstances of the Kingdom and of its inhabitants permit’, and subject to ‘such qualifications as local circumstances render necessary’.³⁹ There is

³⁵ [8](Gov’t SI).

³⁶ Paras 22-24.

³⁷ But see Fairness of Transactions Act 1993 (PNG), examined at para 32.

³⁸ More detailed accounts are to be found in: Corrin Care, Newton and Paterson, *Introduction to South Pacific Law* (1999), Ch 8; Corrin Care, *Contract Law in the South Pacific* (2001). See also Roebuck, Srivastava and Nonggorr, *The Context of Contract in Papua New Guinea* (1984); Roebuck, Srivastava and Nonggorr, *Pacific Contract Law* (1987).

³⁹ Civil Law Act 1988, s. 3.

no cut-off date. In 2003 the Act was amended to delete the words 'statutes of general application'.⁴⁰ The effect is that the law of contract in Tonga incorporates the rules of English common law and equity as they stand at any given time.

22. VANUATU. The Vanuatu Constitution (s 95(2)) provides that British and French laws in force or applied in Vanuatu immediately before independence (1980) continue to apply to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu, taking due account of custom.

23. Although the Constitution preserves not only British but also French law, we were told that practically speaking the applicable law of contract was English law.⁴¹ Of the judges, only the Chief Justice has formal training in French law.⁴² At the time of our visit there were no licensed legal practitioners in Vanuatu trained in French law.⁴³ We were also told that where the parties had their contract recorded in a written document prepared by a lawyer, it would routinely contain a provision excluding the application of French law.⁴⁴ However, the applicability of French law is still sometimes an issue raised in litigation.⁴⁵

24. In effect, therefore, the law of contract in Vanuatu incorporates the rules of English common law and equity as they stood 'frozen' in the judgments of English courts in 1980.

25. SUMMARY. As in any common law system, any person who wishes to refer to the law of contracts in any of the four jurisdictions must depend on case law as a source of information about the rules of contract law. That person will be faced with shortcomings that are inherent to case law everywhere. In all four jurisdictions there is the added burden of having to apply decisions in economically and socially dissimilar jurisdictions, mainly England, Australia and New Zealand: paras 54-57.

C. Local case law

26. In 1987 the authors of a casebook, addressing students of Pacific contract law,⁴⁶ began with the statement: 'There are not yet enough cases from the South Pacific to illustrate all the points of law you need to know about.' Since 1987 the trickling pace of reported judgments⁴⁷ on points of general contract law has not increased. As a result, important developments of contract doctrine in England and other common law jurisdictions have not been considered by local courts. The accumulated volume of local authorities is minuscule by comparison with those jurisdictions.

27. A recent search of PacLII revealed the following statistics:⁴⁸

⁴⁰ Civil Law Amendment Act 2003. The Act makes other consequential amendments.

⁴¹ [65](Law VAN), [57](Law VAN), [3](Law VAN), [23](Law VAN), [32](Law VAN), [7](Business VAN).

⁴² [65](Law VAN), [57](Law VAN).

⁴³ When we visited, a French notaire advised the francophone business community. We were told that this community is not insignificant: [57](Law VAN), [7](Business VAN), [3](Law VAN).

⁴⁴ [32](Law VAN), [57](Law VAN), [23](Law VAN). The provision appears never to have been challenged.

⁴⁵ Eg *Mouton v Selb Pacific Ltd* (Judgment 1) [1996] VUCA 4. In *Pentecost Pacific Ltd v Hnalobane* [1984] VUCA 4 French law was applied on the basis of the nationality of the defendant.

⁴⁶ Roebuck, Srivastava and Nongorr, *Pacific Contract Law* (1987) 1.

⁴⁷ Including judgments available on PacLII.

⁴⁸ PacLII accessed 28 Feb, 1 March 2009.

PAPUA NEW GUINEA. 960 decisions of the Supreme Court of Papua New Guinea since independence (1975) were available on PaCLII.⁴⁹ 25 were cases involving substantial points of general contract law.⁵⁰

SOLOMON ISLANDS. Of 208 decisions of the Court of Appeal of Solomon Islands since independence (1983) only 7 involved the application of substantive points of contract law.⁵¹

TONGA. There are 136 Court of Appeal of Tonga reported since 1990,⁵² of which 11 involve substantive points of contract law.⁵³

VANUATU. 14 of 353 Court of Appeal of Vanuatu decisions since independence (1982) are contract cases.⁵⁴

28. The total output of contract cases available on PaCLII from these four nations is thus 57. The doctrinal content of these judgments is often sparse, and many decisions hinge on the facts. This limits their utility as precedents.

D. English legislation

29. All four jurisdictions have adopted some English statutes.

⁴⁹ A total of 1303 cases decided since 1963 was available.

⁵⁰ *New Britain Oil Palm Ltd v Sukuramu* [2008] PGSC 29, *National Capital District Commission v Yama Security Services Ltd* [2005] PGSC 45, *Shell Papua New Guinea Ltd v Speko Investment Ltd* [2004] PGSC 16, *Fly River Provincial Government v Pioneer Health Services Ltd* [2003] PGSC 4, *Papua New Guinea Banking Corporation (PNGBC) v Tole* [2002] PGSC 8, *Koang No 47 Ltd v Monodo Merchants Ltd* [2001] PGSC 9, *Panga Coffee Factory Pty Ltd v Coffee Industry Corporation Ltd* [1999] PGSC 47, *Panga Coffee Factory Pty Ltd v Kum Farming & Trading Pty Ltd* [1999] PGSC 28, *Gooneratne v Coastal Shipping Co. Pty Ltd* [1999] PGSC 6, *Niugini Steel Corporation Pty Ltd v Olympic Stationary Pty Ltd* [1998] PGSC 11, *Highlands Trucking Corp Pty Ltd v MMK Transport Pty Ltd* [1994] PGSC 8, *Curtain Brothers (Queensland) Pty Ltd and Kinhill Kramer Pty Ltd v The State* [1993] PGSC 6, [1993] PNGLR 285, *Central Provincial Government v Haino* [1993] PGSC 1, *Tsang v Credit Corporation (PNG) Ltd* [1993] PGSC 18; [1993] PNGLR 112, *Congregation of the Brothers of Sacred Heart Inc v Director of Child Welfare* [1992] PGSC 3; [1992] PNGLR 40, *Watkins v Kumagai Gumi Co Ltd and PNG Electricity Commission ELCOM* [1991] PGSC 4, *Theiss Watkins (PNG) Ltd and Kumagai Gumi Company Ltd v Papua New Guinea Electricity Commission* [1991] PGSC 17; [1991] PNGLR 316, *National Airline Commission v Lysenko* [1990] PGSC 17; [1990] PNGLR 226, *Puruno v Koi* [1987] PGSC 22, *Woodward v Woodward* [1987] PGSC 20, [1987] PNGLR 92, *Independent State of Papua New Guinea v Hodson* [1987] PGSC 9; [1987] PNGLR 241, *National Airline Commission, trading as Air Niugini v Lysenko* [1986] PGSC 5; [1986] PNGLR 323, *The State v Keboki Business Group Inc and Morobe Provinseal Gavman* [1985] PGSC 6; [1985] PNGLR, *Toba Pty Ltd v Poole* [1984] PGSC 19, [1984] PNGLR 94, *Breckwoldt & Co (NG) Pty Ltd v Gnoyke (No 2)* [1975] PGSC 8, [1975] PNGLR 195.

⁵¹ *Aerolift International (SI) Ltd v Mahoe Heli-Lift (SI) Ltd* [2003] SBCA 16, *Harry v Kalena* [2000] SBCA 1, [2001] 3 LRC 24, *Air Transport Ltd v Island Construction Management Ltd* [1999] SBCA 2, *Ronia v Solomon Islands National Provident Fund Board* [1997] SBCA 5, *Cape Esperance Company Ltd v Success Company Ltd* [1995] SBCA 10, *Reef Pacific Trading Ltd v Reef Pacific (Sydney) Pty Ltd* [1994] SBCA 13, *Solomon Islands Housing Authority v Onio* [1989] SBCA 1.

⁵² The earliest date to which the PaCLII data base extends.

⁵³ *Pacific Royale Hotel v Vakalahi* [2007] TOCA 1, *Lita Trading Enterprises Ltd v Moala* [2005] TOCA 6, *Wiebenga v 'Uta'atu* [2005] TOCA 5, *Piukala v Fonohema* [2002] TOCA 3, *International Watersport Management Ltd v Pearl Creations Company Ltd* [2002] TOCA 7, *Reisedienst Quick Tours Ltd v Fischer* [2001] TOCA 18, *To'a v National Pacific Insurance Ltd* [2001] TOCA 16, *Fonua v MBf Bank Ltd* [2000] TOCA 13, *Helu v Koloa* [2000] TOCA 20, *Teta Tours Ltd v Ramanlal & Sons Ltd* [1999] TOCA 22, *Bank of Tonga v Tulikihakau* [1999] TOCA 16.

⁵⁴ *Vanuatu Copra and Cocoa Exporters Ltd v Maison de Vanuatu* [2007] VUCA 24, *Colmar v Rose Vanuatu Limited* [2007] VUCA 18, *Vanuatu Maritime Authority v Timbacci* [2005] VUCA 19, *Neel v Blake* [2004] VUCA 6, *Melcoffee Sawmill Ltd v George* [2003] VUCA 24, *Nutley v Kam* [2003] VUCA 29, *Lo v Sagan* [2003] VUCA 16, *SPIE-EGC Ltd v FIFA* [2003] VUCA 11, *Vanuatu National Provident Fund Board v Aruhuri* [2001] VUCA 16, *Robertson v Luganville Municipal Council* [2001] VUCA 14, *Dorsen v Brysten* [2001] VUCA 5, *Attorney-General v Kalpokas* [1999] VUCA 4, *Mouton v Selb Pacific Ltd (Judgment 3)* [1998] VUCA 8, *Banque Indosuez Vanuatu Ltd v Ferrieux* [1990] VUCA 3.

30. PAPUA NEW GUINEA has an appreciable body of pre-independence legislation, preserved by the Constitution (Schedule 2.4.6), replicating English legislation of some relevance to contracts. This ranges from legislation that regulates particular kinds of contracts to provisions that have only an incidental or peripheral impact. Examples are: Goods Act 1951, Bills of Exchange Act 1951, Instruments Act 1953, Mercantile Act 1953, Partnership Act 1951, Pawnbrokers Act 1951, Hire Purchase Act 1966, Second-hand Dealers Act 1968, Employment Act 1978. Strictly speaking, this is local legislation but, with some exceptions (eg Employment Act 1978), it reproduces English legislation exactly.⁵⁵

31. SOLOMON ISLANDS. The Constitution of Solomon Islands 1978 (Schedule 3.1) states that 'the Acts of the Parliament of the United Kingdom of general application and in force on 1st January 1961 shall have effect as part of the law of Solomon Islands'. This means that many English statutes that were relevant to conditions in England in 1960 are still in force in Solomon Islands, notwithstanding that some have been repealed, amended or replaced by the UK Parliament since that date.⁵⁶ The meaning of 'general application' has proved controversial and resulted in disputes.⁵⁷

32. TONGA. We were told that the 2003 amendment of the Civil Law Act 1988 Act removing the reference to English legislation had created uncertainty about the application of UK legislation in Tonga.⁵⁸ The PaCLII website provides a list of English statutes that 'may apply' in Tonga.

33. VANUATU. The Vanuatu Constitution provides that, until otherwise provided by Parliament, the English and French laws in force at Independence continue to apply to the extent they are not revoked or 'incompatible with the independent status of Vanuatu', taking due account of custom. The courts have held that this incorporates English legislation, such as the Law of Property Act 1925 (UK).⁵⁹

34. SUMMARY. In each of these jurisdictions the position of English legislation is different and uncertain. This situation is aggravated by the difficulties inherent in attempting to apply legislation from the other side of the world to Pacific conditions.

E. Local legislation

35. All four jurisdictions have enacted some statutes that impact on contracts. With one exception, none of this legislation affects the general rules and principles of common law and equity that govern contracts. 'Any changes are piecemeal, affecting one kind of contract here, one kind of commercial transaction or other situation there.'⁶⁰

36. The exception is the Fairness of Transactions Act 1993 (PNG). The Act applies to any contract, promise, agreement, dealing or undertaking of an economic or commercial nature (s 3). It confers power on a court to review any transaction if it is satisfied that the transaction was not

⁵⁵ A general account of the legislation may be found in Roebuck, Srivastava and Nonggorr, *The Context of Contract in Papua New Guinea* (1984) Ch 4.

⁵⁶ See eg *Air Transport Ltd v Island Construction Management Ltd* [1999] SBCA 2, applying the Law Reform (Frustrated Contracts Act 1943), *Harry v Kalena* [2000] SBCA 1, [2001] 3 LRC 24, applying the Law of Property Act 1925 (UK). Other examples are given in Corrin Care, *Contract Law in the South Pacific* (2001) Ch 1.

⁵⁷ See Corrin Care, *Contract Law in the South Pacific* (2001) 6-7.

⁵⁸ [5](Gov't TON), [27](Law TON).

⁵⁹ See *Nutley v Kam* [2003] VUCA 29.

⁶⁰ Roebuck, Srivastava and Nonggorr, *The Context of Contract in Papua New Guinea* (1984) 49.

genuinely mutual or was manifestly unfair to a party (s 5). The court must first attempt to arrive at a mediated settlement but, if it cannot, the court must make an order that conforms to what is fair in the circumstances (s 7). The Act has been applied by the courts.⁶¹ Its adoption of a broad standard of 'fairness' as an overriding criterion of contractual obligation would be compatible with the proposed Pacific Contract Code.⁶²

37. Examples of other legislation not affecting the general law of contract but affecting particular kinds of contracts are:

PAPUA NEW GUINEA. Frauds and Limitations Act 1988; Banks and Financial Institutions Act 2000; Investment Promotion Act 1992; Fairness of Transactions Act 1993; Companies Act 1997; Securities Act 1997; Independent Consumer and Competition Commission Act 2002.

SOLOMON ISLANDS. Bills of Sale Act [Cap 174]; Carriage of Goods by Sea Act [Cap 158]; Consumer Protection Act [Cap 63]; Companies Act [Cap 175]; Employment Act [Cap 72]; Insurance Act [Cap 82]; Price Control Act [Cap 64]; Registration of Business Names Act [Cap 178]; Unfair Dismissal Act [Cap 77].⁶³

TONGA. Bills of Exchange Act [Cap 108]; Carriage of Goods by Sea [Cap 141]; Contract Act [Cap 26] (repealed by Contract Repeal Act 1990); Incorporated Societies Act [Cap 28]; Marine Insurance Act [Cap 144]; Price and Wage Control Act [Cap 113].

VANUATU. Co-operative Societies Act [Cap 152]; Companies Act [Cap 191]; Employment Act [Cap 160]; Insurance Act [Cap 82]; Maritime Act [Cap 131]; Price Control Act [Cap 86]; Partnership Act [Cap 92].

F. Customary law

38. The constitutions of Papua New Guinea, Solomon Islands and Vanuatu, but not of Tonga, expressly provide for the application of customary law in particular matters. Where it applies it can be overridden by Parliament. However, in applying common law or equity (as well as, in Vanuatu, English legislation), account must be taken of customary law.

39. PAPUA NEW GUINEA. The Constitution provides that custom shall be applied as part of the underlying law, unless inconsistent with legislation or repugnant to the general principle of humanity (Sch 2.1.1). Moreover, common law and equity rules do not apply to the extent that they are inconsistent with custom in any particular matter. (Sch 2.2.2) Judges are directed to formulate rules, where necessary, by analogies drawn from relevant statutes and custom (Sch 2.3.3; cf Sch 2.5.10).

⁶¹ *Kora Gene v. Motor Vehicles Insurance (PNG) Trust* [1995] PNGLR 344, *Negiso Investments Limited v. PNGBC Limited* (2003) N2439, *Dr. Florian Gubon Trading as Gubon Lawyers v. Pacific Mobile Communication Limited*. (2006) N3104, *Augerea v The Bank South Pacific Ltd* [2007] PGSC 12.

⁶² The Act provides (s 4(1)) that 'fairness relates to the principle of the just and equitable distribution to and among parties to a transaction of the rights, privileges, advantages, benefits and duties, obligations and disadvantages of the transaction in proportion and relative to a party's standing in or contribution to the transaction, and according to business principles and practices appertaining to the particular transaction in question'. S 4(2) adds that in determining the fairness or otherwise of a transaction, the circumstances of the parties existing before, at and after the entering into of the transaction shall be taken into account, but 'without departing drastically from the rule of law of right to contract.'

⁶³ The Bills of Sale Act [Cap 174] (Solomon Islands) will soon be repealed by the gazetting of the recently enacted Secured Transactions Act 2008.

40. The Customs Recognition Act 1963 provides that custom may be taken into account in a civil case in relation to a transaction that the parties intended, or justice requires, should be regulated custom and not by law. It has been said that the Act was passed to improve the recognition of customary law, but it has not had this result.⁶⁴ The Fairness of Transactions Act (described above) explicitly supersedes customary law (s 3).

41. SOLOMON ISLANDS. The Constitution provides that customary law is part of the law of Solomon Islands (Sch 3.1) and that it overrides the principles and rules of the common law and equity. However, custom cannot override the Constitution or legislation. (Sch 3.2).

42. VANUATU. The Constitution provides expressly that customary law continues to have effect as part of the law of Vanuatu. (s 95(3)). It also provides that the application of British and French law must take due account of custom (s 95(2)). Where there is no rule of law applicable to a case, a court must determine it whenever possible in conformity with custom (s 47(1)).⁶⁵

43. We encountered a variety of views on the relevance of customary law to contracts. The general consensus was that customary law has little impact on contracts.⁶⁶ There appear to be no reported cases in which customary law has been applied to resolve a contract dispute.⁶⁷ Its application to contracts between local and non-local parties is problematic.⁶⁸ Nevertheless, it has been argued that custom as a source of contract law should not be underestimated,⁶⁹ and that some traditional transactions 'are purely commercial in nature and just like common law contracts'.⁷⁰

44. How the Pacific Contract Code should address this issue will need further careful consideration and consultation.⁷¹

G. Inaccessibility of case law

45. The adoption of a case law model is the dominant feature of the Pacific contract law environment. General contract law in all four jurisdictions is not written down in legislation,⁷² but is to be found in judgments of courts in the UK, Australia, New Zealand and other common law jurisdictions. These judgments typically run to many pages.⁷³ A huge number of such judgments has accumulated, and is constantly being added to. Many UK cases decided over 100 years ago must still be consulted; in Australia and NZ the period is not much shorter. Hundreds of decisions are delivered each year that add to or re-interpret contract doctrine. This

⁶⁴ Roebuck, Srivastava and Nonggorr, *The Context of Contract in Papua New Guinea* (1984) 59-60.

⁶⁵ See *Pentecost Pacific Ltd v Hnaloane* [1984] VUCA 4; [1980-1994] Van LR 134.

⁶⁶ 'Customary law doesn't enter into trading commercially': [15](Law SI), [45](Judiciary). Customary law most often intersects with contract when land is concerned: [32](Law VAN). Cf [24](Business VAN), [57](Law VAN), [51](Law PNG), [40](Finance TON).

⁶⁷ Corrin Care, *Contract Law in the South Pacific* (2001) 16. Our search of PacLII revealed none after 2001.

⁶⁸ *Semens v Continental Air Lines* Unreported, 2 FSM Intrm. 131 (Pn 1985), cited by Corrin Care, *Contract Law in the South Pacific* (2001) 17. Cf Stephens, 'Customary Tenure in Papua New Guinea: Vehicle or Roadblock for Development?' (2008) SSRN: <http://ssrn.com/abstract=1221902> at 10, arguing that the extent to which customary tenure systems are a help rather than hindrance to development varies depending on context.

⁶⁹ Roebuck, Srivastava and Nonggorr, *The Context of Contract in Papua New Guinea* (1984) 55.

⁷⁰ Ibid 43. Cf [21](Gov't VAN).

⁷¹ We heard a range of opposing views on this issue, some wishing to exclude the operation of customary law: [9](Law TON), [54](Finance PNG), others seeking to retain its applicability: [21](Gov't VAN), [6](Law PNG), yet others in between: [13](Judiciary). A complication is that customary law can vary from place to place: [8](Gov't SI).

⁷² An earlier attempt to codify contract law in Vanuatu and Fiji was drawn to our attention by [65](Law VAN).

⁷³ In addition lawyers must consult the great body of commentary contained in voluminous texts and journal articles. See Ellinghaus and Wright, *An Australian Contract Code* (Law Reform Commission of Victoria DP 27) (1992) 3-4.

makes it essential to keep up to date – no small task, particularly in jurisdictions that are not well-resourced.

46. Case law relies on the application of often minutely detailed rules never expressed in any final authoritative form, and endlessly evolving in their precise expression. Although broad principles are also invoked, they are not often applied directly in determining rights and obligations. Their application is usually mediated by detailed rules. Thus a court is not entitled simply to apply standards of conscience or good faith to a particular transaction, but must apply specific doctrines that define their legal operation.⁷⁴ This reliance on specific rules in the formulation of contract law has resulted in a law of great volume and complexity. Even its ardent supporters admit that case law has these inherent defects.⁷⁵

47. The inaccessibility of case law, and the time and expense associated with applying it, were widely cited in the four jurisdictions as significant problems, even by lawyers. This inaccessibility contributes to a low level of ‘contract consciousness’ in the community, and among local business people in particular. Contract is not generally used as a tool for enabling enterprise and managing risk. As a result there is a relatively large informal economy, limited to oral dealings between people who have familial, tribal or personal relationships. Written contracts are rarely used, even in transactions where their use is obviously advisable or even essential. There is a low level of compliance. There is a high incidence of disputes leading to highly inefficient outcomes.

IV. SHORTCOMINGS OF CONTRACT LAW IN THE PACIFIC

A. Overview

48. Contract law in the Pacific has many shortcomings. Many people, including judges and lawyers, remarked on its inaccessibility, the cost of using it and problems with contract enforcement.⁷⁶ Locals rarely use it. It is poorly understood and mistrusted. The law is outdated and out of touch with Pacific conditions. It is poorly resourced and lacks sufficient numbers of skilled practitioners. It inhibits both local and foreign investment and produces many other inefficient outcomes.⁷⁷

B. Little used by locals

49. It is clear that local business is largely conducted on the basis of non-contractual relationships.⁷⁸ Where contracts are made, they are usually oral. Written contracts are not used where, in developed economies, they are routine.⁷⁹ There is no point in making a written

⁷⁴ Ellinghaus and Wright (w Karras), *Models of Contract Law* (2005) 10-13; Ellinghaus and Wright, ‘The common law of contracts: Are broad principles better than detailed rules?’ 11 *Texas Wesleyan Law Review* 399, 402 (2005).

⁷⁵ Atiyah, ‘From principles to pragmatism: changes in the function of the judicial process and the law’ 65 *Iowa Law Review* 1272 (1980). Cf Collins *Regulating Contracts* (1999) 266-286; Collins ‘Transaction costs and subsidiarity in European contract law’ in Gundmann and Stuyck (eds) *An Academic Green Paper on European Contract Law* (2002) 269.

⁷⁶ [15](Law SI), [21](Gov’t VAN), [73](Law TON), [51](Law PNG), [16](Business PNG), [24](Business VAN).

⁷⁷ A number of people raised issues of legal environment reform that do not relate specifically to contract law, for example delay and expense, inefficient operation of courts, difficulties of enforcement: eg [20](Business SI), [42](Finance SI).

⁷⁸ [24](Business VAN), [28](Business VAN), [27](Law TON), [43](Law PNG).

⁷⁹ [24](Business VAN), [41](Business VAN), [3](Law VAN), [34](Gov’t TON), [11](Business TON), [9](Law TON), [68](Business TON), [1](Business PNG), [55](Business PNG), [37](Finance PNG).

contract with locals.⁸⁰ We were given examples of oral contracts for the sale of vehicles, major engineering repairs, exclusive distributorships, partnerships, equipment rentals, construction contracts and commercial leases.⁸¹ Even receipts and invoices are little used.⁸² The practice of one car rental business was to leave contract documents in their vehicles and 'presume people read them.'⁸³

50. On the other hand, multi-national and other large businesses in their dealings with each other make and perform contracts much as is done in Australia and New Zealand.⁸⁴ 'English contract law is working well for BHP.'⁸⁵ It is also increasingly used by local statutory bodies engaged in commercial activity.⁸⁶ But even big business does not always use contracts in dealings with local suppliers of goods and services.⁸⁷ For local producers and service-providers, recourse to the law is almost unknown.⁸⁸

51. The result is that in all four jurisdictions there is a large informal economy, and correspondingly little participation by locals in the formal economy.⁸⁹ They are economies in which contract is not entrenched as a way of doing business. 'Although a lot of business is done, it is not with the aid of lawyers.'⁹⁰ One lawyer described the environment as a 'pre-contract society'.⁹¹

52. In such an environment, trade at the local level is based on personal trust and family and tribal relations.⁹² Many local entrepreneurs still work on the wontok system.⁹³ 'People don't understand that commercial relationships can be created outside social groupings.'⁹⁴ This was acknowledged as having a limiting effect on economic development.⁹⁵

C. Poorly understood

53. People lack 'contract consciousness'. Many people do not really understand the binding nature of a contract.⁹⁶ We were given many examples of behaviour illustrating this. We were told that employees routinely quit their jobs without notice or absent themselves without

⁸⁰ [53](Business SI), [71](Business SI).

⁸¹ [69](Gov't PNG), [39](Business TON), [73](Law TON), [56](Finance TON), [40](Finance TON), [56](Finance TON), [26](Gov't TON), [40](Finance TON), [9](Law TON), [30](Finance TON), [62](Business TON).

⁸² [68](Business TON), [39](Business TON), [56](Finance TON).

⁸³ [62](Business TON). Cf [36](Finance SI): 'People don't read written contracts but nevertheless sign front and back'.

⁸⁴ [23](Law VAN), [51](Law PNG), [59](Business PNG), [47](Finance PNG), [74](Business TON), [42](Finance SI), [40](Finance TON), [68](Business TON), [43](Law PNG).

⁸⁵ [15](Law SI).

⁸⁶ For example the Solomon Islands Electricity Authority: [20](Business SI).

⁸⁷ For example we were told about a bank that did not use contracts with service providers and had encountered difficulty as a result: [38](Finance VAN).

⁸⁸ Eg [43](Law PNG).

⁸⁹ [49](Business SI), [24](Business VAN), [21](Gov't VAN), [65](Law VAN).

⁹⁰ [32](Law VAN).

⁹¹ [43](Law PNG).

⁹² [24](Business VAN), [56](Finance TON), [70](Judiciary), [37](Finance PNG), [69](Gov't PNG).

⁹³ [54](Finance PNG), [14](Gov't SI), [7](Business VAN). However, we were told that wontok was less important in Tonga because of the influence of Christianity and congregational relationships formed through churches: [30](Finance TON).

⁹⁴ [1](Business PNG).

⁹⁵ [71](Business SI): 'This limits you to dealing with people you know and trust.' See also [12](Business SI), [9](Law TON).

⁹⁶ [12](Business SI), [18](Law SI), [71](Business SI), [66](Finance PNG), [14](Gov't SI), [4](Finance VAN), [7](Business VAN), [57](Law VAN), [70](Judiciary), [62](Business TON), [74](Business TON), [9](Law TON), [59](Business PNG), [16](Business PNG), [47](Finance PNG), [54](Finance PNG). This does not mean that they do not have a strong sense of obligation: [9](Law TON).

explanation.⁹⁷ A microfinance lender told us that, despite a great effort to get people to understand their loan contracts 'quite a few go off track.'⁹⁸ A banker, referring to the prospect of timely completion of the sale of a customer's business, said he had his 'fingers crossed'.⁹⁹

54. Disputing is commonplace.¹⁰⁰ Renegotiation is often expected.¹⁰¹ 'Contract is secondary to what you can get away with.'¹⁰² Even signed contracts are often disregarded.¹⁰³ It is not unusual for construction contracts 'to grind to a halt midstream'.¹⁰⁴

D. Mistrusted

55. We were told that because of its inaccessibility, 'the law strikes fear into local business people.'¹⁰⁵ 'This is particularly because it is in complicated English and that is not a first language to the people of the Pacific.'¹⁰⁶ 'People are scared to enter into contracts.'¹⁰⁷ They 'don't see the enabling aspect.'¹⁰⁸

56. This fear is understandable, as we were told that people's lack of legal sophistication is often exploited.¹⁰⁹ For example, employees have unwittingly contracted out of their statutory rights.¹¹⁰ Small businesses have entered into insurance contracts without understanding the exclusions.¹¹¹ Land owners have made logging contracts not knowing that they were agreeing to illegal setbacks and elevation limits.¹¹² Local importers have handed over money without understanding that under the terms of their contract they might not receive the goods from the foreign seller.¹¹³ Consumers have accepted a situation in which product warranties are simply not honoured by local retailers and distributors.¹¹⁴ 'Workers and consumers are generally unaware of legal rights they have under contracts.'¹¹⁵

57. The complexity of the law serves only the interests of lawyers. 'A smart lawyer can cause trouble.'¹¹⁶ A local politician told us 'lawyers make too much money out of complexity.'¹¹⁷ Many people believed that the law's complexity encourages vexatious claims.¹¹⁸ It was also said to make the law operate inflexibly.¹¹⁹

⁹⁷ Eg [49](Business SI), [74](Business TON).

⁹⁸ [55](Business PNG).

⁹⁹ [42](Finance SI).

¹⁰⁰ [12](Business SI), [38](Finance VAN), [14](Gov't SI), [59](Business PNG), [27](Law TON), [43](Law PNG), [33](Judiciary), [54](Finance PNG).

¹⁰¹ [49](Business SI), [24](Business VAN), [27](Law TON).

¹⁰² [20](Business SI), [18](Law SI), [42](Finance SI).

¹⁰³ [69](Gov't PNG), [49](Business SI), [38](Finance VAN), [30](Finance TON). Verbal contracts are even less likely to be adhered to: [68](Business TON).

¹⁰⁴ [44](Gov't TON).

¹⁰⁵ [12](Business SI). Cf [35](Gov't PNG).

¹⁰⁶ Eg [2](Judiciary), [43](Law PNG).

¹⁰⁷ [72](Gov't PNG).

¹⁰⁸ [39](Business TON).

¹⁰⁹ [35](Gov't PNG), [1](Business PNG).

¹¹⁰ [15](Law SI), [45](Judiciary), [24](Business VAN), [29](Gov't VAN), [22](Finance VAN), [21](Gov't VAN).

¹¹¹ Eg a family furniture maker in Tonga: [27](Law TON).

¹¹² [20](Business SI).

¹¹³ [56](Finance TON).

¹¹⁴ [14](Gov't SI), [41](Business VAN), [28](Business VAN), [53](Business SI).

¹¹⁵ [21](Gov't VAN).

¹¹⁶ [20](Business SI).

¹¹⁷ [21](Gov't VAN).

¹¹⁸ [56](Finance TON), [44](Gov't TON), [2](Judiciary), [9](Law TON), [27](Law TON), [66](Finance PNG), [59](Business PNG), [33](Judiciary) [43](Law PNG), [54](Finance PNG).

¹¹⁹ [54](Finance PNG).

E. Out of touch

58. Many people, especially judges and practitioners, complained that the law of contract was based on antiquated English precedents and out-of-date UK legislation which had little relevance to local conditions.¹²⁰ Once England was an important focus of trade activity; in modern times trade has become much more focussed on the Pacific Region and Asia.¹²¹

59. Several judicial officers expressed the need for clearer guidance.¹²² A number of judges and lawyers found it difficult to adapt English common law to local conditions.¹²³

60. Although there is a perceived need for regional precedents,¹²⁴ they are few in number. 'Common law cases are very outdated and there is very little Pacific authority.'¹²⁵ 'Precedents here are so few and narrow that there is not much to rely on.'¹²⁶ In fact it was often said that in reality there is no Pacific common law.¹²⁷ This was the most important reason lawyers gave for codifying the law. 'Codification is a way of catching up.'¹²⁸

61. Many judges agreed that there was not enough volume of commercial litigation to enable the courts to develop a Pacific contract jurisprudence at the pace required by the imperatives of economic development. 'Only a few cases come through.'¹²⁹ Even in the most active court, the Supreme Court of Papua New Guinea, there have only been six reported cases dealing with substantial points of contract law since 2000.¹³⁰

F. Lack of resources

62. The out of touch and inaccessible nature of Pacific contract law is compounded by poor access to the modern reference material required to operate a common law system effectively.¹³¹ Many lawyers made joking references to the antique editions of important legal texts held in local libraries.¹³² To find the law often involves a huge research effort and many practitioners do not have the time.¹³³

63. The absence of a local law compels lawyers to consult the law in other common law jurisdictions. The volume of reported cases in England, Australia, New Zealand and other potentially relevant jurisdictions, such as the USA and Canada, makes this a massive undertaking. The task is not made easier by the fact that the law in these jurisdictions differs on

¹²⁰ [72](Gov't PNG), [16](Business PNG), [72](Gov't PNG), [13](Judiciary), [27](Law TON), [43](Law PNG), [32](Law VAN), [59](Business PNG), [64](Business VAN). Cf [39](Business TON).

¹²¹ [24](Business VAN), [49](Business SI), [41](Business VAN), [34](Gov't TON), [11](Business TON), [9](Law TON), [28](Business VAN). China, Korea, Japan, Thailand, Singapore and Indonesia, in addition to Australia and New Zealand, were cited as major investors and traders in the region.

¹²² [13](Judiciary), [70](Judiciary), [52](Judiciary).

¹²³ [32](Law VAN), [70](Judiciary), [9](Law TON).

¹²⁴ [32](Law VAN), [21](Gov't VAN).

¹²⁵ [52](Judiciary). Cf [13](Judiciary), [24](Business VAN).

¹²⁶ [64](Business VAN).

¹²⁷ [32](Law VAN), [2](Judiciary), [52](Judiciary), [45](Judiciary), [60](Judiciary), [47](Finance PNG), [12](Business SI), [18](Law SI), [69](Gov't PNG), [42](Finance SI), [37](Finance PNG)..

¹²⁸ [27](Law TON). Cf [43](Law PNG), [24](Business VAN).

¹²⁹ [52](Judiciary). See also [2](Judiciary), [45](Judiciary), [60](Judiciary), [59](Business PNG), [8](Gov't SI), [32](Law VAN).

¹³⁰ Details of the output of the highest court in each jurisdiction are provided at paras 27-28.

¹³¹ In this context the importance of PacLII was widely acknowledged by lawyers and non-lawyers alike.

¹³² [27](Law TON), [43](Law PNG), [9](Law TON), [32](Law VAN). Cf [70](Judiciary).

¹³³ Eg [27](Law TON), [70](Judiciary), [9](Law TON), [33](Judiciary).

some significant points, with the result that Pacific judges have, on occasion, disagreed on the applicable authorities.¹³⁴

64. Another consequence of the absence of a Pacific contract law is the use of standard forms of contract often based on New Zealand and Australian precedents that are inappropriate to local conditions. We were told by many lawyers and non-lawyers that it would be of great help if there were local standard forms.¹³⁵

65. It is essential to the effective functioning of the common law of contract that there is a sufficient pool of adequately trained commercial lawyers who have the time, skill and resources to keep abreast of current authority. This vital element of legal infrastructure is missing in the countries we visited. It was widely acknowledged in all four that there is a shortage of skilled commercial contract lawyers.¹³⁶ For example, in Tonga we were told there is 'only one lawyer if you want to win'.¹³⁷ Even judges were described as having only 'a textbook level of competence'.¹³⁸ We were told many times that the lower courts could not be relied on to apply the law correctly.¹³⁹

66. The shortage of skilled lawyers means that most local businesses do not have access to qualified legal advice. For example in Tonga we were told 'most people here have to be their own bush lawyers'.¹⁴⁰ Many larger businesses have had to place heavy reliance on contract advice provided by foreign lawyers, most often from Australia or New Zealand.¹⁴¹

G. Inefficient outcomes

67. We have already given many examples of inefficient outcomes produced by the common law of contract in the jurisdictions we visited. In this section we will give some more. They demonstrate the pervasive tendency of case law to retard economic development.

1. Investments inhibited

68. A number of people told us of instances where the perception that locals do not perform contracts had cost local suppliers opportunities to participate in projects funded by foreign investors.¹⁴² For example, Asian developers had brought in their own labour and materials.¹⁴³

¹³⁴ A recent major lawsuit turned on open conflict between UK and Australian authorities on powers of sale: [32](Law VAN). See also [9](Law TON).

¹³⁵ [42](Finance SI), [4](Finance VAN), [30](Finance TON), [40](Finance TON), [69](Gov't PNG), [68](Business TON), [39](Business TON).

¹³⁶ [18](Law SI), [46](Law SI), [4](Finance VAN), [63](Gov't VAN), [21](Gov't VAN), [3](Law VAN), [57](Law VAN), [26](Gov't TON), [2](Judiciary), [27](Law TON), [68](Business TON), [39](Business TON), [43](Law PNG), [6](Law PNG), [47](Finance PNG), [1](Business PNG).

¹³⁷ [62](Business TON).

¹³⁸ Cf [43](Law PNG). See also [64](Business VAN), [16](Business PNG).

¹³⁹ [54](Finance PNG), [33](Judiciary), [66](Finance PNG), [59](Business PNG), [45](Judiciary), [16](Business PNG), [7](Business VAN).

¹⁴⁰ [62](Business TON).

¹⁴¹ Eg [39](Business TON). Barristers from Australia and New Zealand are regularly hired to appear in all 4 jurisdictions. Judges from Australia, New Zealand and England frequently sit on appeals in Solomon Islands, Tonga and Vanuatu.

¹⁴² [67](Gov't SI), [12](Business SI), [53](Business SI), [24](Business VAN), [7](Business VAN), [34](Gov't TON), [72](Gov't PNG).

¹⁴³ [71](Business SI).

69. The 'pre-contractual' nature of the Pacific economy inhibits the flow of investment into the local economy in other ways as well. The business sector tends to be limited to 'old players'. New ventures have to be cash based. Some lenders said they were withdrawing from unsecured lending.¹⁴⁴ Several lenders pointed to the hazards of supporting the business plans of borrowers who felt free to apply the loan to a completely different venture, for example using a loan made for squash seeds to buy coffee plants.¹⁴⁵ At the same time, many financiers stressed that the future of the Pacific economies lies in investment in small and medium local enterprises.¹⁴⁶

70. The culture of non-enforcement of contracts has, in the past, contributed to very high debt default rates. High default rates increase the cost of credit and reduce its availability. This is a particularly significant factor in the microfinance market.¹⁴⁷ Several lenders reported impressive success in reducing their default rates by pursuing a policy of enforcing loan contracts. One bank had reduced a default rate of over 25% to 5 -7 % by adopting a stricter enforcement policy.¹⁴⁸

71. The lack of contract consciousness has also led to a number of problems with employment contracts.¹⁴⁹ A recurrent complaint was that investments in training had declined because of losses resulting from previous trainees disappearing before taking up their employment.¹⁵⁰

2. Misallocation of resources

72. We were given several examples of cases where resources had been misallocated or not utilised as a result of shortcomings of the current law. For example, the lack of contract consciousness was held to be responsible for widespread use of imported labour and materials, even though local supplies of both were abundant.¹⁵¹

73. As another example, inappropriate use of foreign precedents had resulted in executive employees being given benefits in excess of those demanded by local market conditions.¹⁵²

74. The complexity and inaccessibility of the present system of contract law adds to transaction costs. The cost of legal advice is high, with many lawyers charging fees comparable to those charged in Australian capital cities.¹⁵³

3. Unnecessary disputes

75. We were told that there were many disputes between contracting parties. This is a particularly important issue in Pacific jurisdictions as such disputes commonly lead to the abandonment of commercial relationships.¹⁵⁴

¹⁴⁴ [4](Finance VAN), [30](Finance TON), [66](Finance PNG).

¹⁴⁵ [40](Finance TON). See also [47](Finance PNG), [54](Finance PNG), [36](Finance SI).

¹⁴⁶ Eg [42](Finance SI), [12](Business SI), [4](Finance VAN), [35](Gov't PNG), [50](Gov't VAN), [40](Finance TON).

¹⁴⁷ [55](Business PNG), [22](Finance VAN), [54](Finance PNG).

¹⁴⁸ [40](Finance TON). See also [42](Finance SI), [36](Finance SI), [30](Finance TON), [56](Finance TON).

¹⁴⁹ Eg [74](Business TON), [68](Business TON), [49](Business SI), [62](Business TON).

¹⁵⁰ [11](Business TON), [74](Business TON), [49](Business SI).

¹⁵¹ [12](Business SI).

¹⁵² [27](Law TON).

¹⁵³ [18](Law SI), cf [21](Gov't VAN), [23](Law VAN), [47](Finance PNG).

¹⁵⁴ 'People walk away from disputes.' [12](Business SI), [38](Finance VAN), others.

76. Poor understanding of the binding nature of contract leads to parties making implausible claims. For example, when cleaners contracted to clean up a showground after a national holiday turned up for work, they demanded three times the agreed pay before starting.¹⁵⁵

77. The failure to use written contracts can often mean that the parties fail to address even basic matters, making disputes inevitable. For example, a builder and a developer agreed on a joint development project, without specifying who was responsible for material and labour costs. The builder incurred costs of more than TOP 600,000. The project came to a standstill over who should bear these costs.¹⁵⁶

4. Risk management

78. There were many instances where the failure to use a contract resulted in obvious risks not being provided for.¹⁵⁷ Written construction contracts are unusual in local construction projects. As a consequence issues like project management, cost and time overruns, quality control and regulatory compliance are often simply not addressed.¹⁵⁸ We were told about a motel building contract which contained only general architectural specifications; 'the rest is made up as you go along'.¹⁵⁹

79. In one of Tonga's most important industries, the refusal of pumpkin (squash) growers to sell their crops at the start of the season had left most them exposed to collapsing prices at the end of the season.¹⁶⁰ One business professional described squash growers as 'gamblers'.¹⁶¹

80. The failure to use written contracts often means that substantial investments lack any formal basis. For example, an apprehensive foreign bank manager told us that his national headquarters had only a verbal lease from the local owner.¹⁶² Similarly, lenders have made substantial loans without making compliance with building codes a condition, thus risking the entire loss of their security.¹⁶³

81. A lawyer described lending between Tongans as a 'disaster' because of the failure to use written contracts.¹⁶⁴

5. Waste and destruction

82. The most spectacular examples of inefficient outcomes are cases in which disputing parties resort to destroying the subject matter of the contract. Many people told us of houses being burnt or deconstructed as a result of disputes with landlords or builders.¹⁶⁵ 'Local people take the law into their own hands'.¹⁶⁶

¹⁵⁵ [14](Gov't SI). There were many references to the prevalence of vexatious and frivolous litigation: [59](Business PNG), [27](Law TON), [43](Law PNG), [33](Judiciary), [54](Finance PNG).

¹⁵⁶ [27](Law TON).

¹⁵⁷ 'A lot is done here without the protection of simple agreements.' [39](Business TON).

¹⁵⁸ [56](Finance TON), [40](Finance TON), [24](Business VAN).

¹⁵⁹ [14](Gov't SI).

¹⁶⁰ [74](Business TON).

¹⁶¹ [68](Business TON).

¹⁶² [30](Finance TON).

¹⁶³ [27](Law TON).

¹⁶⁴ [27](Law TON).

¹⁶⁵ [49](Business SI), [19](Gov't SI), [62](Business TON), [43](Law PNG), [54](Finance PNG), [68](Business TON).

¹⁶⁶ [28](Business VAN) cf [1](Business PNG).

83. One story concerned an agreement between a builder and landowners to share the profits of a development on the land. When the building was completed, at a cost of SI\$1.5m, the owners changed their minds. The builder offered to buy the land for SI\$0.5m but this was refused, and no compromise could be reached. The response of the builder was to take the whole building back, slab by slab.¹⁶⁷

84. Even when a dispute does not lead to the destruction of the subject matter, it may nevertheless result in a valuable asset lying idle or being rendered worthless. For example, an entertainment venue was built in Tonga under an oral contract which failed to require compliance with the building code. Because of non-compliance the building could not be used and had been abandoned.¹⁶⁸

V. BENEFITS OF A PACIFIC CONTRACT CODE

A. Overview

85. The draft Pacific Contract Code we envisage would state the law in 50–75 simply expressed rules applying to all contracts, covering formation, content, validity, termination and enforcement, and formulated so as to be compatible with the existing law of Pacific countries as well as contract codes around the world. The formulation of these rules will reflect our understanding of the common law of contract as well as our close analysis of a number of major contract codes of diverse origins, including the Indian Contract Act 1872; Restatement of the Law 2nd, Contracts (American Law Institute 1981); Uniform Commercial Code (USA); Civil Code of the Russian Federation 1994; Principles of European Contract Law (European Commission 1998); Contract Law of the People's Republic of China 1999; UNIDROIT Principles of International Commercial Contracts 2004.

86. The Pacific Contract Code would need to be adopted by parliamentary enactment in each jurisdiction. It would expressly exclude its application to the extent of any inconsistency with other legislation of the adopting jurisdiction. Existing local legislation - eg the Fairness of Transactions Act 1993 (PNG) - would thus be retained unless repealed. The PCC would also be subject to amendment at any time by the parliament of any adopting jurisdiction. However, it would be desirable to put in place a regional agreement, or devise other means, designed to promote and preserve its uniform application in all adopting jurisdictions.

87. We have previously produced a model Australian Contract Code (the ACC), contained in a discussion paper published by the Victorian Law Reform Commission.¹⁶⁹ The ACC attempts to express Australian contract law in 27 articles. This low number of articles was achieved by incorporating the equitable doctrine of unconscionability as an overriding standard of performance and enforcement. It is important to note that the Pacific Contract Code, as we envisage it, will be significantly different from the ACC. It will be a codification of Pacific contract law rather than Australian case law. It will contain at least twice as many articles, reflecting our current view that the ACC was too austere in its abstention from almost all elaboration of basic principles. In conformity with all other contract codes, the PCC would require adherence with overriding standards of good faith, cooperation, and conscience, but unlike the ACC it would provide guidelines and examples for the application of these and other more specific articles.

¹⁶⁷ [42](Finance SI).

¹⁶⁸ [44](Gov't TON). Similarly, a large government office building in PNG was pointed out to us as never having been used because of structural shortcomings.

¹⁶⁹ Ellinghaus and Wright, *supra* note 73.

88. The Pacific Contract Code would have many benefits. Some of these are inherent in codification because it will replace case law with a binding written text.¹⁷⁰ This alone explains why most countries in the world have enacted contract codes. In common law countries, too, the acknowledged defects of case law have led to many calls for its codification.¹⁷¹ These calls have so far been resisted in the UK and Australia, although India, Pakistan and Bangladesh have operated successfully since the 19th century with contract codes based on English common law and equity rules. In the USA, a strong movement for formal codification of private law ultimately resulted in production of the American Law Institute's Restatements, including the Contracts Restatement, which function as unofficial codifications, and in the adoption by all states of a Uniform Commercial Code.¹⁷²

89. Empirical research conducted by the authors of this report indicates that codifying contract law in the form of simply formulated general rules makes the law more accessible and efficient, without making it less fair or predictable in its application.¹⁷³ Codifying the law also makes it possible to harmonise it with the law of other jurisdictions.¹⁷⁴

90. Because the Pacific Contract Code would be easy to understand, it could be used as an effective educational tool. By encouraging locals to use contracts, it would lead to their greater participation in the formal economy.¹⁷⁵

¹⁷⁰ The advantages of codification have led to the codification of contract law in most major economies of the world, including India, Japan, Russia, China and major South American countries, and all countries of the European Union except the UK. In the USA the *Restatement 2nd, Contracts*, and *Uniform Commercial Code* serve as de facto codifications of general contract law. Transnational model codes have also been published: *Principles of European Contract Law* (1998) and UNIDROIT *Principles of International Commercial Contracts* (2004).

¹⁷¹ Calls for codification date back at least to Bentham and Wilberforce, and include Austin, Pollock, Maitland, Williston, Pound, Llewellyn. See Amos, 'Should we codify the law?' *Political Quarterly* 366 (July 1933); Lloyd, *2 Current Legal Problems* (1949) 165; Diamond, 'Codification of the law of contract' 31 *Modern Law Review* 361 (1968); Starke, 'A Restatement of the Australian law of contract as first step towards an Australian Uniform Contract Code' 49 *Australian Law Journal* 234 (1975); Goode, 'Codification of commercial law' 14 *Monash Law Review* 135 (1988); Ellinghaus and Wright, *An Australian Contract Code* (Law Reform Commission of Victoria DP 27) (1992); Arden, 'Time for an English commercial code?' *Cambridge Law Journal* 56 (1997) 516; Ellinghaus and Wright (w Karras), *Models of Contract Law* (2005); Svantesson, 'Codifying Australia's contract law – time for a stocktake in the common law factory' *Bond Law Review* 20 (2008) 92.

¹⁷² Crystal 'Codification and the rise of the Restatement Movement' 54 *Washington Law Review* 239 (1979); Herman, 'The fate and the future of codification in America' 40 *American Journal of Legal History* 407 (1996); Maggs, 'Ipse dixit: The Restatement (Second) of Contracts and the modern development of contract law' 66 *George Washington Law Review* 508 (1998).

¹⁷³ Ellinghaus and Wright (w Karras), *Models of Contract Law* (2005) 83-86. See also Geis, 'An Experiment in the Optimal Precision of Contract Default Rules' 80 *Tulane Law Review* 1109 (2006). Cf Feldman and Harel, 'Social Norms and Ambiguity of Legal Norms: An experimental analysis of the rule v standard dilemma' SSRN: <http://ssrn.com/abstract=989216> (finding that rules and standards have a similar compliance effect except where there is a conflicting social norm). There is a longstanding and continuing theoretical debate about the relative or optimal utility of broad principles and detailed rules ('general v specific', 'simple v complex', 'standard v rule' and other terms are also used). Contributions supporting the utility of broad principles, to greater or lesser degrees, include: Kötz, 'Taking codes less seriously' 50 *Modern Law Review* 1 (1987); Harmathy 'Codification in a period of transition' 31 *University of California, Davis Law Review* 783 (1998); Sono, 'The rise of anational contract law in the age of globalization' 75 *Tulane Law Review* 1185, 1189 (2001); Braithwaite, 'Rules and Principles: A Theory of Legal Certainty' 27 *Australian Journal of Legal Philosophy* 47 (2002); Fon and Parisi, 'Codifications and the optimal specificity of legal rules' (2004) SSRN: http://ssrn.com/abstract_id=566201; Mahoney and Sanchirico, 'General and specific legal rules' (2004) SSRN: <http://ssrn.com/abstract=716921>; Shavell, 'Optimal discretion in the application of rules', (2005) SSRN: <http://ssrn.com/abstract=716921>; Christiansen and Kerber, 'Competition policy with optimally differentiated rules instead of "per se rules vs rule of reason" 2(2) *Journal of Competition Law and Economic* 215 (2006); Parisi, 'Harmonization of European private law: An economic analysis' (2007) SSRN: <http://ssrn.com/abstract=1014385>.

¹⁷⁴ Cf Parisi, 'Harmonization of European private law: An economic analysis' (2007) SSRN: <http://ssrn.com/abstract=1014385>.

¹⁷⁵ See also paragraph 94 below.

91. The Pacific Contract Code would also improve legal support for business. It would help local business people to avoid disputes and manage them more effectively without resorting to litigation. By supplying simple and accessible default rules it would help to overcome the difficulty of establishing the obligations of contracting parties where there is no written contract. It would also encourage the use of writing, by raising the levels of understanding and use of contracts – see paras 94-99. It would at the same time help courts make better decisions and lawyers to provide better advice. It would also reinforce current initiatives to introduce alternative dispute resolution (ADR) to the Pacific Islands.

92. The Pacific Contract Code would also help to produce a better investment environment in the region. It would enable investors to manage opportunities and risks more effectively. A uniform law throughout the region would provide greater certainty, assisting the further growth of intra-Pacific trade.¹⁷⁶ The Pacific Contract Code would also be compatible with the contract law of the region's major trading nations. It would reduce business costs. All of these assertions are supported by statements made by the people we interviewed on our visits.

93. As we said in the Introduction, we found virtually universal support for the Pacific Contract Code. It is impractical to quote all the statements in its favour, ranging from unqualified endorsement to support in principle.¹⁷⁷ However, it is significant that the Chief Justices of all four jurisdictions supported the proposed Code.

The code would assist the Judiciary. Since 1975 there have been developments in English and Australian law. We have difficulty in following these developments. Development is an onerous responsibility. It would really help if the basic principles, which are universal, were codified and then it was left to the courts to apply them. It would increase certainty. It's important and in our interest.

Sir Salamo Injia (CJ PNG)

The common law may be easy for judges but it is not accessible to ordinary people. A code would be more accessible and easier to understand. It would be user friendly. It is crucial to have good law.

Sir Albert Palmer (CJ Solomon Islands)

It's a great idea – it would create a new law for the Pacific Islands. A code would be very timely. I can see it having huge benefits. It should make things easier for business. It would be doing lawyers a big favour.

The Hon Anthony Ford (CJ Tonga)

It is a good project. There is a need. Contract law is difficult for business people to understand as they do not have access to the judgments of the courts. I see such a code as summarising the essence of contract law in a way that will be understood by everyone, not just lawyers.

The Hon Vincent Lunabeck (CJ Vanuatu)

¹⁷⁶ The PCC would have the specific benefit in Vanuatu of removing all uncertainty generated by the lingering influence of French law.

¹⁷⁷ There were only two unequivocal dissenters, [23](Law VAN), [64](Business VAN). [32](Law VAN) was sceptical but could see some benefits. [8](Gov't SI) expressed no view.

B. Better understanding of law and greater use of contracts

94. Widespread lack of understanding of contract law and failure to use contracts is an obvious impediment to development in the Pacific Islands.¹⁷⁸ The Pacific Contract Code would make the law more accessible and would help to overcome these problems. Its brevity and simple language would make it easy to understand the law. A clear, short statement of the law would be an effective educational tool. Improved understanding would in particular help more local people to participate in the formal economy.¹⁷⁹

1. Easier to understand

95. We found strong support for the Pacific Contract Code because it would make contract law easier to understand. The idea of a short, simple code was widely endorsed. We were told many times that ‘it would be good to have something simple and clear’.¹⁸⁰

96. Unlike the common law, the Pacific Contract Code could be translated into indigenous and other locally used languages. This is an important advantage in countries where English is usually a third language.¹⁸¹

2. An educational tool

97. There was a general consensus that the Pacific Contract Code would be an effective educational tool which could be used to help raise ‘contract consciousness’.¹⁸² A number of people said that it ‘would help change the culture’.¹⁸³

98. We were told that the business community could be expected to make itself familiar with the Pacific Contract Code.¹⁸⁴ It was also thought the Pacific Contract Code would ‘get down to the grass roots’.¹⁸⁵ It was even suggested that it could be taught to high school students.¹⁸⁶ It would help overcome the significant literacy barrier in the region. ‘Children and educated people can read it and tell the others’.¹⁸⁷

99. The capacity to learn and change is a strong feature of Pacific communities.¹⁸⁸ There have been outstanding successes in micro-finance and self-funded superannuation.¹⁸⁹ Banks

¹⁷⁸ ‘We need stronger contract law.’ [53](Business SI), [59](Business PNG).

¹⁷⁹ Heller aptly describes the informal economy as ‘the triumph of poor people’s ingenuity in the face of bad law’: Michael Heller, *Gridlock Economy: How Too Much Ownership Wrecks Markets, Stops Innovation, and Costs Lives* (2008) at 155. See also Van Rooij, ‘Bringing Justice to the Poor, Bottom-up Legal Development Cooperation’ SSRN: <http://ssrn.com/abstract=1368185>; Nicole Garnett, ‘Mercantilism, American Style’ SSRN: <http://ssrn.com/abstract=1375019>.

¹⁸⁰ [63](Gov’t Van). Cf [21](Gov’t VAN), [65](Law VAN), [26](Gov’t TON), [62](Business TON) [40](Finance TON), [27](Law TON), [69](Gov’t PNG), [1](Business PNG), [59](Business PNG), [13](Judiciary), [54](Finance PNG), [15](Law SI), [42](Finance SI), [45](Judiciary), [53](Business SI), [59](Business PNG), [4](Finance VAN), [7](Business VAN), [33](Judiciary), [34](Gov’t TON), [73](Law TON).

¹⁸¹ [2](Judiciary), [43](Law PNG).

¹⁸² [71](Business SI), [12](Business SI), [18](Law SI), [49](Business SI), [24](Business VAN), [4](Finance VAN), [43](Law PNG), [72](Gov’t PNG), [16](Business PNG).

¹⁸³ [39](Business TON), [1](Business PNG), others.

¹⁸⁴ [68](Business TON).

¹⁸⁵ [43](Law PNG), [69](Gov’t PNG).

¹⁸⁶ [61](Finance PNG), [55](Business PNG), [35](Gov’t PNG).

¹⁸⁷ [35](Gov’t PNG), [54](Finance PNG), others.

¹⁸⁸ [67](Gov’t SI). Many people commented on the growing awareness and understanding of legal rights and obligations: [15](Law SI), [24](Business VAN), [4](Finance VAN), [40](Finance TON), [9](Law TON), [43](Law PNG), [47](Finance PNG), [33](Judiciary), [36](Finance SI), [34](Gov’t TON), [40](Finance TON).

¹⁸⁹ [1](Business PNG), [1](Business PNG), [54](Finance PNG).

have found that people quickly come to understand the contractual obligations involved in a loan.¹⁹⁰ One bank has successfully implemented a policy of making building loans only to customers who have written construction contracts.¹⁹¹ The Pacific Contract Code would be an effective means of using these capacities to accelerate general understanding of contract obligations. 'If you can set up uniform contract law people will embrace it and take it on.'¹⁹²

3. Encourage participation in formal economy

100. Many people suggested that the Pacific Contract Code would promote greater use of contracts, particularly written contracts, and this was the key to increasing participation in the formal economy. The Pacific Contract Code would act as a guide to local people who want to become more involved in commerce.¹⁹³

C. Better legal support for business

101. Business needs two kinds of support from the legal system. It needs clear guidance so that it can avoid disputes and manage them if they arise without resort to litigation. And, when business people have to resort to lawyers and the courts, they need affordable and skilled advice and just and efficient courts.

1. Fewer and better managed disputes

102. As noted in Part IV, disputes are a significant feature of commercial relations in Pacific jurisdictions.¹⁹⁴ Many people thought that the Pacific Contract Code would help to avoid contract disputes¹⁹⁵ and assist contracting parties to resolve them, when they arise, without resorting to litigation.¹⁹⁶

2. Better lawyers and courts

103. In Part IV we also noted that many people complained about access to competent lawyers. Many lawyers suggested that having the Pacific Contract Code would improve their services to clients. 'It would be helpful to every lawyer.'¹⁹⁷ It would update the law and make it more globally compatible.¹⁹⁸ The Pacific Contract Code would make it easier for courts to explain decisions.¹⁹⁹ Judicial competence would be enhanced²⁰⁰ and this would speed up decision-making.²⁰¹

¹⁹⁰ A bank cut its default rate from 25% to 5-7% by implementing a policy of enforcing loan contracts: [40](Finance TON).

¹⁹¹ [30](Finance TON).

¹⁹² [35](Gov't PNG).

¹⁹³ [14](Gov't SI), [51](Law PNG), [69](Gov't PNG), [1](Business PNG), [61](Finance PNG), [35](Gov't PNG), [68](Business TON).

¹⁹⁴ Paras 75-77.

¹⁹⁵ 'Once they understand the rules, they go away': [59](Business PNG).

¹⁹⁶ 'A code could be attached to contracts. A simple statement of the law would be very good for negotiating and mediating disputes.' [71](Business SI). Cf [49](Business SI).

¹⁹⁷ 'When it is in black and white we carry it like a bible.' [9](Law TON). Cf [51](Law PNG), [2](Judiciary), [11](Business TON), [39](Business TON), others.

¹⁹⁸ [27](Law TON). Cf [43](Law PNG), [24](Business VAN).

¹⁹⁹ [33](Judiciary).

²⁰⁰ [16](Business PNG).

²⁰¹ [13](Judiciary).

3. Promotes ADR

104. Several significant initiatives to promote ADR are already in progress in the region.²⁰² The Pacific Contract Code would facilitate ADR in contract disputes because the relevant legal principles would be better known and understood.²⁰³ 'It would help to have a 5 page statement of the law on the table.'²⁰⁴ It would focus attention on the real merits of the parties.²⁰⁵

D. Better investment environment

105. Many of the benefits of the Pacific Contract Code already described would also improve the investment environment. The Pacific Contract Code would be a 'rung on the ladder' to making the region more attractive.²⁰⁶

1. Better managed opportunities and risks

106. The Pacific Contract Code would lead to an environment in which business can rely on contracts to be performed, or enforced when necessary, making them an effective tool for managing opportunities and risks. The Pacific Contract Code would provide greater certainty.²⁰⁷ It would promote the institution of contract as creating legally binding obligations and increase the use of contracts as a risk management tool.²⁰⁸ A collateral benefit of better risk management would be greater compliance with planning laws and building regulations.²⁰⁹

2. Reduced costs of doing business

107. Many people thought simplifying the law would reduce costs of business.²¹⁰ The Pacific Contract Code would help investors by giving business people better access to the law.²¹¹ The Pacific Contract Code would help to overcome the fact that people can't afford legal services.²¹²

108. The Pacific Contract Code would provide the basis for developing simple standard form contracts for specific industries.²¹³ A lending executive doing business throughout the region said that documentation has to be 'tweaked to fit each jurisdiction at no small expense, and a uniform code would be of great benefit' to him.²¹⁴

²⁰² [2](Judiciary), [34](Gov't TON), [50](Gov't VAN).

²⁰³ [65](Law VAN), [50](Gov't VAN), [9](Law TON), [10](Gov't TON), [2](Judiciary), [40](Finance TON), [54](Finance PNG), [34](Gov't TON), [60](Judiciary).

²⁰⁴ [27](Law TON).

²⁰⁵ [9](Law TON).

²⁰⁶ [27](Law TON), [66](Finance PNG), others.

²⁰⁷ [7](Business VAN), [1](Business PNG).

²⁰⁸ [24](Business VAN).

²⁰⁹ [9](Law TON).

²¹⁰ [63](Gov't Van), [44](Gov't TON), [10](Gov't TON), [2](Judiciary), [34](Gov't TON), [11](Business TON).

²¹¹ [1](Business PNG).

²¹² [45](Judiciary).

²¹³ [10](Gov't TON), [51](Law PNG).

²¹⁴ [66](Finance PNG).

3. Regionally uniform and globally compatible law

109. We found virtually universal support for the idea that the Pacific Contract Code should be a uniform regional law.²¹⁵ It would promote investment on a regional scale.²¹⁶ Many people said it would provide greater certainty and help to accelerate an already growing intra-Pacific trade.²¹⁷

110. The Pacific Contract Code would complement other regional initiatives, such as the Chief Justices' Legal Forum and the ADB personal property security and company law reforms.²¹⁸

111. The global and regional compatibility of the Pacific Contract Code would be good for foreign investment.²¹⁹ 'There is a growing realisation that we must integrate globally, with balance.'²²⁰

112. The Pacific Contract Code would add to the appeal of the region to investors from code-based countries, such as China and other major Asian and European economies.²²¹ Pacific contract law, rather than having to catch up, would be at the cutting edge and represent 'world's best practice'.²²²

VI. RECOMMENDATIONS

113. In light of our conclusion that adopting the Pacific Contract Code would assist private sector development in the Pacific islands, we recommend that the project should proceed as soon as possible to Phase 2. An indicative plan for Phase 2 is as follows:

- (i) Printing and dissemination of report 'Reforming Pacific contract law'. ASAP.
- (ii) Draft of PCC and Discussion Paper (DP) by consultants. Time of commissioning (TC) + 6 months.
- (iii) Workshop with ADB staff and invited experts. Revision of PCC and DP in light of comments. TC + 7 months.
- (iv) Dissemination of revised PCC and DP, with call for written submissions. TC + 8 months.
- (v) Presentation of PCC to Pacific Chief Justices Forum. In-country consultations with key stakeholders in PNG, Solomon Islands, Tonga, Vanuatu, Samoa and (if feasible) Fiji. TC + 12 months.
- (vi) Analysis of submissions and consultations. Revision and publication of final draft of PCC ready for legislative adoption. TC + 15 months.

²¹⁵ [15](Law SI), [5](Gov't TON), [1](Business PNG), [72](Gov't PNG), [16](Business PNG), [6](Law PNG), [13](Judiciary), [55](Business PNG), [48](Gov't TON), [12](Business SI), [68](Business TON). Reservations were expressed by [24](Business VAN), [28](Business VAN).

²¹⁶ [47](Finance PNG), [18](Law SI), [1](Business PNG), [69](Gov't PNG).

²¹⁷ [26](Gov't TON), [73](Law TON), [66](Finance PNG), [4](Finance VAN), [41](Business VAN), [42](Finance SI), [37](Finance PNG).

²¹⁸ [10](Gov't TON), [2](Judiciary), [3](Law VAN).

²¹⁹ [61](Finance PNG), [16](Business PNG), [61](Finance PNG).

²²⁰ [1](Business PNG), [66](Finance PNG). Cf Maggs, 'The process of codification in Russia: Lessons learned from the Uniform Commercial Code' (1999) 44 McGill Law Journal / Revue de Droit de McGill 281.

²²¹ [61](Finance PNG).

²²² [7](Business VAN).

114. We recognize that Phase 2 will need to be followed by an implementation process that is crucial to the successful conclusion of this project. It will involve not only the process of assisting Pacific countries to enact uniform legislation adopting the PCC (Phase 3),²²³ but also efforts to bring about cultural change by raising the level of contract awareness and increasing the use of contracts in a society that at present lacks widespread appreciation of the importance of contractual relations to economic welfare and social order (Phase 4). Educational and other strategies will need to be employed to ensure that the PCC is brought home to business and grass roots in the community. Because of its brevity and simplicity the PCC will lend itself readily to such strategies. However, we do not address the details of Phase 3 and Phase 4 implementation in this report. They can only be fixed in conjunction with the Bank. The Bank is already well versed in the effective implementation of new legislation in developing countries.²²⁴ However, this project cannot go forward without first producing and disseminating a draft Pacific Contract Code that will provide a definite focus and a basis for concrete planning. Our recommendations are therefore limited to the implementation of Phase 2 of the project.

²²³ And to put in place a regional agreement designed to preserve its uniformity: see para 86.

²²⁴ The challenges involved in such projects are the subject of a large literature. See e.g. UNESCAP, *Harmonized Development of Legal and Regulatory Systems for E-Commerce in Asia and the Pacific: Current Challenges and Capacity Building Needs* (2004); Deere, *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries* (2009); Mummert, 'Embedding Externally Induced Foreign Aid', in Martens, *The Institutional Economics of Foreign Aid* (2002) ch 4; Makinde, 'Problems of Policy Implementation in Developing Nations: The Nigerian Experience' (2005) 11 *Journal of Social Science* 63.

LIST OF PEOPLE CONSULTED

Solomon Islands (visited 8 – 15 July, 2008)

Primo Afeau	Barrister & Solicitor, former Attorney-General
Bryn Battersby	Advisor, Economic Research Unit, Ministry of Finance & Treasury
Warren Cahill	Advisor to the Clerk to the National Parliament
McKinnie Dentana	Director, Economic Research Unit, Ministry of Finance & Treasury
Willis Eschenbach	IT Accounts Senior Manager, South Pacific Oil
Shadrack Fanega	Permanent Secretary, Ministry of Finance & Treasury
Anna Guthleben	Chief Legal Officer, Law Reform Commission
Michael Hemmer	Managing Director, South Pacific Oil and Chairman, Chamber of Commerce & Industry
Matt Hodge-Hopa	Advisor, Economic Research Unit, Ministry of Finance & Treasury
The Hon Frank Kabui	Chairman, Law Reform Commission, former Attorney-General and High Court Judge
Antonio Lee	Managing Director, Solomon Sheet Steel
Craig Lonergan	General Manager, Honiara, Solomon Islands Pacific Banking, Westpac
Dennis McGuire	Partner, Sol-LAW, Barristers Solicitors and Notaries
Sir Albert Palmer	Chief Justice
Andrew Radclyffe	Barrister & Solicitor
Mrs Taeasi Sanga	Clerk to the National Parliament
Bruce Saunders OBE	Managing Director, BJS Group of Companies
Greg Sojnocki	Partner, Morris & Sojnocki Chartered Accountants
Jeffrey Wickham	Permanent Secretary, Ministry of Commerce, Industry & Employment
Pamela Wilde	Policy Officer, Ministry of Justice & Legal Affairs
Phillip A Wyatt	General Manager, Credit Corporation
Gideon Zoleveke	Partner, CBI Accountants

Vanuatu (visited 16 - 23 July, 2008)

George Andrews	Commissioner, Vanuatu Financial Services Commission
John Aruhuri	General Manager, Chamber of Commerce and Industry
Simeon Athy	Director General, Ministry of Finance and Economic Management
Thomas M Bayer	Executive Chairman, Pacific International Trust Company Ltd
Campbell Beeson	General Manager, Pacific Retailing Limited
Gary Blake	Partner, Ridgway Blake, Barristers & Solicitors
James Campbell,	Manager – Risk and Compliance, ANZ Bank (Vanuatu) Limited
Kevin Fung	General Manager, Fung Kwei retailers
John Groten	Head – Commercial & Small Business Banking, ANZ Bank (Vanuatu) Limited
David Hudson	Partner, Hudson & Sugden, Barristers, Solicitors & Notary
Bob Hughes	Managing Director, National Bank
The Hon Vincent Lunabeck	Chief Justice
Paul de Montgolfier	Paul De Montgolfier & associé Limited Assistance Juridique et Conseil
Edward Nalyal	Managing Partner, Edward Nalyal & Partners, Barristers and Solicitors
Juris Ozols	Juris Ozols & Associates, Attorneys
Ralph Regenvanu	Member of Parliament
Mark Stafford	Partner, BDO Barrett & Partners, Chartered Accountants & Business Advisors
Reginald Tabi Gerian	Principal Investment Officer, Vanuatu Investment Promotion Authority
Adam Ward	Country Head Vanuatu, Westpac

Tonga (visited 30 August - 6 September, 2008)

Hon Lisiate Akolo	Minister of Labour, Commerce & Industry
John Bath	Manager – Risk Management, Tonga Development Bank
Aisake Eke	Permanent Secretary, Ministry of Finance
Tricia Emberson	Assistant Secretary, Chamber of Commerce and Chief Executive Officer, 'Alatini Group of Companies
Hon. Justice A. D. Ford	Chief Justice
Hasiloni Fungavai	Deputy Managing Director – Finance, Tonga Development Bank
Vika Fusimalohi	Deputy Secretary (Industry), Min Labour, Commerce & Industry
Matai'ulua Fusitu'a	Legal Practitioner and Managing Director, Spartan Marketing Group
Arthur Hubbard	General Manager, ANZ Banking Group Limited
Aminiasi Kefu	Acting Solicitor General
Ashley Matheson	General Manager, Westpac Bank of Tonga
Lee Miller	Sec'ty Treasurer, Tonga – New Zealand Business Association
Saia Moehau	Entrepreneur
Lake Niu	Law Practitioner and President, Law Society
Samui Palu	Chief Magistrate
Bruce Shaw	Acting Country Manager, The Fletcher Royco Construction Company Limited
Rob Solomon	Prime Ministerial Advisor
Ralph Stephenson	Licensed Lawyer, Stephenson Associates
Richard Sullivan	Mgr Research Department, Reserve Bank

Christine 'Uta'atu 'Uta'atu & Associates, Certified Public Accountants / Management Consultants

Kaho mo Vailahi Executive Officer, Chamber of Commerce

Papua New Guinea (visited 16 - 22 November, 2008)

Robert Allport General Manager, Credit Corporation

Josephine Advent Legal Officer, Constitutional and Law Reform Commission

Klewaki Agu Legal Officer, Constitutional and Law Reform Commission

Angela Banama Anis Legal Officer, Constitutional and Law Reform Commission

Vincent Bull Managing Partner, Allens Arthur Robinson, International Lawyers

Ray Clark Chairman, Nationwide Microbank Limited, and Executive Director, Institute of Banking & Business Management

David A Conn MBE Chief Executive Officer, Port Moresby Chamber of Commerce & Industry

Philip D Franklin MBE Managing Director, Trukai Industries Limited

Ross Hammond Managing Director, Westpac Bank – PNG – Limited

Rodney Hoffmann MBE Executive Manager, Lending Division, National Development Bank Limited

Sir Salamo Injia Chief Justice

Mary Johns Company Secretary, Legal, Bank of South Pacific Limited

Erastus Bryner Kamburi Company Secretary & Principal Legal Counsel, National Superannuation Fund Limited

Diri Kobla Acting Managing Director, Small Business Development Corporation

John Maddison Senior Manager, Legal, Bank of South Pacific Limited

Kulu Leka Assistant Registrar, Waigani District Court

Bill Noki District Court Magistrate

Dr John Nongorr	Lawyer, Nongorr & Associates
Steve Patrick	Managing Partner, Gadens Lawyers
Peter D Piawu	Acting Programme Manager, Small Business Development Corporation
Regina Segu	District Court Magistrate
Ian A Tarutia	Joint Chief Executive Officer, National Superannuation Fund Limited
Nathan Timo	Acting Manager, Business Development Services, Small Business Development Corporation
Alex Tongayu	Deputy Registrar of Companies, Legal & Enforcement Unit, Business Registration & Regulation Division, Investment Promotion Authority
Garima Tongia	Manager – Micro Finance Technical Support, National Development Bank Limited
Gary R Tunstall	Managing Director, PNG Administration, ANZ Banking Group (PNG) Ltd
Jim Yap	Head of Commercial Banking, ANZ Banking Group (PNG) Ltd
Frank Yourn	Executive Director, Australia Papua New Guinea Business Council