

Presentation Handout for the Commercial Law Reform and
Development in the South Pacific
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Company Law Reform in the Pacific Islands

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The Foundations of Legal Reform

- ❑ Consider first the primary role of markets in economic growth.
- ❑ Law is NOT an instrument of state policy. Rather, it seeks to limit the role of the state in markets.
- ❑ Thus, law is seen as an instrument to foster private transactions.
- ❑ L&D doctrine emphasises private law to protect property and facilitate contractual exchange (property rights and enforceable contracts) supported by an independent judiciary.

Traditional Approaches to Law Reform

- ❑ Lack of ownership – sometimes laws are transplanted from developed countries without cognizance of local conditions and adaption to local needs and culture.
- ❑ Legal reform has been undertaken within donor project cycles, which are typically over no more than 3 years, while fundamental legal reform can take much longer.
- ❑ Legal reform has ignored a “big picture” approach, which fits particular laws into systemic needs.

See Wade Channell, 2005, *Lessons not Learned, Problems with Western Aid in Post Communist Countries*, in Thomas Corothers, ed, *Democracy and Rule of Law Project*, Carnegie Foundation

Traditional Rule of Law Projects

- ❑ Assume that the reforming country needs the laws of a country that is considered to have the Rule of Law.
- ❑ Reform is often implemented without any conception of how changes in the law will impact upon the reforming country.
- ❑ The result has often been failure.

Pacific Private Sector Development Initiative (PSDI)

- Reform initiative supported by Asian Development Bank (ADB) and AusAID to promote private sector development in Pacific Island countries (PICs)
- Focus Areas
 - Business law reform
 - Access to finance
 - Public enterprise reform
 - Public – private partnerships
- Features
 - Rapid response capacity
 - Maximisation of linkages between focus areas
- Process
 - Analysis – advocacy – reform – implementation

Key Business Law Reform Issues

- ❑ Investment requires long time horizons, enforceable contracts, and well protected property rights—all problem areas in PICs.
- ❑ The commercial legal framework is outdated and unsuitable for the type of business conducted in PICs.
- ❑ Land rights in the PICs are problematic.
- ❑ Collateral rights over movable property are weak and outdated.
- ❑ Contract frameworks are weak leading to poor enforcement.

Key Business Law Reform Issues

(continued)

- ❑ The use of commercial law is effectively restricted to a small group of investors.
- ❑ The law often discriminates against local businesses and community groups.
- ❑ ADR mechanisms rarely exist, and arbitration does not exist or is not enforceable.

Principles for Reform

- Laws must be tailored to countries' circumstances and needs.
- This means
 - Ensuring that laws from other countries are not simply used without significant modification;
 - Ensuring that laws do not contain unnecessary provisions;
 - Ensuring they take into account other prevailing weak capacities to administer and enforce the laws; and
 - Ensuring that use of these laws minimizes the need for recourse to the judicial system.

Reform Process

– Critical Success Factors

- ❑ Thorough analysis (economic & legal)
- ❑ Strong government ownership
- ❑ Comprehensive consultations
- ❑ Rapid response (flexibility by donors to support reform process at all times)
- ❑ Implementation

Importance of Consultations

- ❑ Government ownership
- ❑ Identification of stakeholders
- ❑ Reform champions
- ❑ Public-private steering committee
- ❑ Identification of community needs (gender, traditional structures, land, etc.)
- ❑ Capacity issues
- ❑ Implementation

The Discretion Problem

- ❑ Existing laws copied from the United Kingdom and designed for another time and place (“legislation by Xerox”)
- ❑ Often, such laws place considerable discretion in hands of functionaries
- ❑ Abuses of discretions and rent-seeking behaviour
- ❑ The solution: remove discretions wherever possible

The Technology Problem

- ❑ Law reform seeks to access the new technology
- ❑ Important in PICs because of “tyranny of distance”
- ❑ Outsourcing offshore may be a solution but sovereignty and capacity issues

Case Study: Solomon Islands

- Reform Agenda
- Reform Process
- Special Features – Company Law
- Implementation

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