

A COMPENSATION CLAIMS PROCEDURE FOR PAPUA NEW GUINEA

Report to
The Institute of National Affairs
Port Moresby

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Graham Ellis
Michael Ward
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Report 2000

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Foreword

Compensation is a growing problem in Papua New Guinea. Hardly a day goes by without someone somewhere in the country claiming compensation. This disrupts essential services, is often accompanied by threats to disrupt resource projects and all manner of other services as well as private sector activities.

There have been many attempts to grapple with the problem by academics, politicians and business people. None has gone very far. The government has passed legislation outlawing the disruption of resource projects including agricultural holdings. It has never invoked this law and the threat of land claims remains one of the more serious disincentives to investment in Papua New Guinea.

Any solution to the problem has to have two essential elements—fairness and acceptability to all parties. Many of the current claims are by second or later generations who see the compensation paid for land in the past as being too small according to today's values. This has been compounded by the fact that some resource projects have paid quite large sums of money to obtain project areas and utilities have also paid amounts that translate into large sums per hectare.

This is because these projects require relatively small parcels of land and land compensation is relatively minor in the overall cost of the project. In the case of a utility, compensation is relatively small compared with the opportunity cost of not gaining revenue from the service.

Several years ago the Rural Industries Council sought to have a study done into ways that this problem could be addressed and some logic brought into dealing with an issue that has such an emotional background. Talks were held with the Chamber of Mining

and Petroleum, Elcom and Telikom and the Institute of National Affairs (INA) was approached. It was then decided to ask the Australian government aid agency, AusAID, to fund the balance of the study. All of these bodies, as well as WR Carpenter Ltd agreed. We are extremely grateful to them and hope that the final result will justify their faith in the INA.

It took some time to identify a suitable consultant. Fortunately the National Centre for Development Studies (NCDS) at the Australian National University was both available and willing to take on the assignment. The study has been carried out in four phases, a research phase, two weeks fieldwork where the consultants visited as many centres in Papua New Guinea as they could, a public seminar where the ideas were tested out, and the writing of a final report.

The challenge is to make sure that the report does not follow many other works on the same subject and that it is used in charting a new approach to compensation problems. We will be doing our best to ensure that the report is implemented.

Mike Manning,
Director, INA, Papua New Guinea
October 2000

Acknowledgments

We acknowledge those who contributed to the research and writing of this report, a project which involved complex interdisciplinary questions of culture, law and economics.

Deborah Dwyer wrote the initial draft of the paper outlining the legal issues regarding a compensation tribunal for Papua New Guinea. Terence Dwyer refined and expanded this discussion, with a focus on the administration of compensation settlements. Graham Ellis contributed the chapter on existing PNG laws and the use of an expanded court system to deal with compensation claims.

Fieldwork was undertaken by two of the authors, Daniel Fitzpatrick and Michael Ward, between 29 November and 23 December 1999. The fieldwork centred on interviews with the following officers

- statutory authorities including Elcom and Telikom
- provincial government officials in Mt Hagen, Goroka, Lae and Rabaul
- National government officials including representatives from the ombudsman's office.
- non-governmental organisation and land owner group representatives in and around Port Moresby, Lae, Rabaul and Lihir island
- representatives of the mining, industry and agricultural sectors.
- academics, judges and lawyers in both Port Moresby and regional centres.

The authors are grateful for the openness and hospitality of all these interviewees. Needless to say, all interviews were conducted on a confidential basis. Interviewee names and details are thus not disclosed, but are held on file with the authors.

During fieldwork a questionnaire was sent to over 100 representatives of government, private companies, community groups and citizens who could not be interviewed in person. The authors are grateful those who responded.

Michael Ward, Terence Dwyer, Graham Ellis and Mike Manning conducted the compensation conference held in Port Moresby to present and discuss the research paper, bringing a number of issues into greater focus.

Deborah Dwyer and Terence Dwyer wrote the concluding chapter which encapsulated the conference proceedings and the preferred options for a legal framework with which to deal with the vexed issue of compensation claims.

The project members would like to thank Mike Manning of the Institute of National Affairs in Port Moresby for his constructive comments and support throughout the project. Thanks go to Ron Duncan and Maree Tait at the NCDS for their unstinting support and their respective contributions to this project. We wish to thank the NCDS for providing all physical facilities and staff support required to bring the project to completion.

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Terms of reference

Compensation seminar/consultancy

Background

For many years Papua New Guinea has had an uneasy history of compensation. Whether it be compensation for land, accidental death or injury, or for tribal fighting there are anomalies and precedents being set daily. There is no national compensation policy on which to base decisions and no guidelines to assess amounts of compensation to be paid.

This has resulted in a spiralling increase in the number and level of compensation payments. Similarly, spurious compensation demands continue to increase and are sometimes associated with threats or criminal acts. This situation is a powerful disincentive to investment and development.

The Chamber of Mines and Petroleum has for many years recommended to government that it only recognise legitimate and reasonable land compensation claims and, in consultation with industry, formulate a compensation policy acceptable to all parties to provide practical guidelines for fairly and consistently assessing compensation payments.

The Rural Industries Council (RIC) has long been concerned about the ramifications on the agriculture sector from compensation paid to small groups of landowners as a result of mining and petroleum developments and other claims such as Telikom repeater stations and Elcom power lines, government works such as roads. The RIC is concerned that increased expectations created by these payments threatens existing large-scale agricultural projects and estates and will also affect future land mobilisation for agriculture.

Both organisations, as well as the Institute of National Affairs Council, see the need to open up a debate on the subject to formulate a national compensation policy that will be embodied in Compensation Act. This would provide a set of guidelines which would form a framework for all future compensation claims. It would encompass all aspects of compensation from insurance claims through to land and death compensation.

Terms of reference

1. Examine all current PNG legislation which makes reference to compensation, methods of compensation, calculation of compensation, limitations to compensation and any other aspects of compensation in Papua New Guinea. In relation to land compensation this would include the Mining Act, Petroleum Act, Forestry Act, Water Resources Act, Land Act, Land Disputes Settlement Act and the National Land Registration Act. It also includes Workers Compensation, Third Party Insurance, Aircraft Accident Compensation and any other Act which infringes on the general principle of compensation.
2. Consult with all parties currently engaged in, or responsible for, dealings in compensation in Papua New Guinea including, relevant government agencies including Statutory Authorities (Telikom, Elcom, Water Board, Town Authorities, Local Level Governments), politicians, Courts, mining and petroleum industry, forestry industry, agricultural sector, insurance industry, churches and other NGOs, landowner representatives etc.
3. Prepare a paper detailing the major issues and proposing a national compensation policy acceptable to all parties including regulations that embody practical guidelines for fairly and consistently assessing compensation payments.
4. Prepare drafting instruction for a Compensation Act based on

the national compensation policy. This should provide a proposed uniform national compensation system that is the framework for all future compensation claims. The drafting instruction should achieve

- uniformity and simplicity
 - fairness to all parties
 - enforceability
 - a judicial process to assess compensation claims and appeals, and to periodically review the regulations to the Compensation Act.
 - exclusion of *ad hoc* compensation payments based on bargaining power rather than fair and just principles.
5. Advise on and facilitate a national two-day seminar in Port Moresby to bring together concerned parties to discuss the national compensation policy and the drafting instructions. Where appropriate, prepare a series of working papers clarifying the issues for discussion at the seminar.
 6. Prepare amended drafting instructions on the basis of discussion and consensus reached at the seminar.
 7. Provide all written material to the INA by the due date in Word for Windows or Office 97 in a form that is ready for publication.

Summary

This report proposes a uniform, national system for dealing with compensation claims in Papua New Guinea. The premise of the proposal is that the substantive law relating to compensation is adequate and that what is required is a procedure to make the laws work better in practice and to strengthen and coordinate the work of existing institutions. This report has sought wide input from government, industry and the community in Papua New Guinea in the development of three core proposals

1. creation of a national data base
2. creation of a Compensation Panel under the auspices of the courts
3. creation of a Compensation Settlements Administration Board.

National database

There is an urgent need to create a national database on land claims and Torrens title on alienated land to consolidate all the records kept in courthouses throughout Papua New Guinea. No approach to compensation can function without a basic informational infrastructure. The Lands Department is not creating such a database at present. National Court and Lands Department officials estimate that this project could take up to 5 years.

Compensation Panel under the auspices of the courts

The crux of the proposal is to create a Compensation Panel to be located under the auspices of the courts. The panel would consist of expert mediators, conciliators and arbitrators. Parties to a hearing of the Compensation Panel could be referred by a judge or

could seek a hearing on their own accord. The panel would deal with all compensation matters that are in dispute but it would not supersede existing institutions, such as the Workers Compensation Tribunal, where these institutions are substantially meeting the needs of claimants and organisations. The Compensation Panel would offer prompt, financially accessible and binding resolutions and help ease the back log of cases in the Courts. The Compensation Panel could be created through an amendment to the National Court Act.

A Compensation Settlements Administration Board and Trust Funds

Any compensation payment above a certain amount, or which covered a loss extending beyond one year, or which involved a class of claimants (including a tribal group, future beneficiaries or unknown beneficiaries or other potential claimants) would have to be paid to a Compensation Settlements Administration Board to be handled as a trust fund. A requirement for class compensation to be held in trust may have the useful side-effect of discouraging large claims based on an expectation of a large windfall.

Through trust funds the Compensation Settlements Administration Board would ensure that compensation awards were available for future generations and current claimants. Claimants could not dissipate compensation payouts and return for more. A Compensation Settlements Administration Board could hold the compensation payout and could distribute it to rightful beneficiaries as periodic tax-free payments. The board could set a fee which could be used to fund the compensation system, including the court. A properly administered trust fund could also provide money for sustainable local development and infrastructure. The management and administration of trust funds must be free of government involvement for fear of corruption and leakage of administered funds.

Terms of Reference

The Terms of Reference were to formulate a uniform national policy on compensation after examination of the relevant literature, consideration of all statutes relating to compensation and consultations with interested parties in government, industry and the community in Papua New Guinea. The concern was that 'whether it be compensation for land, accidental death or injury, or for tribal fighting there are anomalies and precedents being set daily'. The objective of the policy was to set out 'a logical framework for the awarding of compensation which is equally fair to claimant and the organisation responsible.'

The Terms of Reference instructed the study to consider a way of consolidating all statutory references to compensation into a single Compensation Act which would also give legal expression to the national policy. The original terms of reference requested the preparation of drafting instructions for a Compensation Act based on the national compensation policy. The guidelines for the drafting instruction were

- uniformity and simplicity
- fairness to all parties
- enforceability
- a judicial process to assess compensation claims and appeals, and to periodically review the regulations to the Compensation Act.

In consultation with the Institute of National Affairs, a decision was made not to try and prepare drafting instructions for a Compensation Act or related amendments to existing statutes, such as an amendment to the National Court Act which would allow the creation of a Compensation Panel. It was agreed that this task required careful collaboration with Papua New Guinean policymakers and the time and resource pressures on the study

prevented achievement of this objective. The project instead concentrated on developing a policy framework to provide a unity and common direction to guide the assessment and settlement of compensation claims and which could provide the basis for drafting instructions in the future.

Key aspects of proposal

Uniformity and simplicity

Bringing claims for compensation ‘under the one roof’—a panel of compensation experts—will bring a measure of uniformity and simplicity to the current *ad hoc* system where procedures for claims vary from industry to industry. Moreover, a Compensation Panel would have the flexibility needed to handle a wide range of claims arising across the cultural and geographic diversity of Papua New Guinea. The Compensation Panel would rely on, and strengthen coordination with, officials and institutions that currently deal with compensation, including the work of Mining Wardens, Land Courts, Land Titles Commission, National Land Commission, Village Courts, District Courts, National and Supreme Courts.

Fairness to all parties

The Compensation Panel will make justice more accessible to grassroots claimants and will deliver resolutions more promptly and definitively than the current *ad hoc* approach. A hearing of the Compensation Panel will be more financially viable for grassroots claimants than redress through the higher courts, where formal legal representation is required. A requirement for any compensation payment involving public money to be registered and approved by the Compensation Panel will provide regulation of the discretionary power of Ministers to make *ex gratia* payments. All uses of public money for the payment of compensation money will need to be registered and approved by the Compensation Panel.

Enforceability

First, decisions of the Compensation Panel would be binding once they have been accepted by both parties. Second, the Compensation Panel would have the power of contempt to deal with claimants who try to use unlawful threats to force settlements. The issue of enforcement is affected by general law and order problems in Papua New Guinea outside the scope of this report. However, it is believed that the proposals in this report can assist law enforcement by providing a procedure for more definitive and prompt adjudication of disputed legal rights and by improving public understanding of the reasons for decisions.

A judicial process for assessing compensation claims

The objective of the Compensation Panel would be to facilitate resolution of disputes more promptly and cheaply than higher courts and more definitively than lower courts. The creation of the Compensation Panel would not alter individuals legal rights to pursue matter through the courts. Claimants to the Compensation Panel would not need the services of a costly lawyer, and no award for the other party's costs could be made against a party willing to accept the decision of a mediator, conciliator or arbitrator. Experts will play a greater role in hearings of the Compensation Panel in helping to sift information or interpret it than they can in court, where the adversarial process determines that expert evidence be limited or truncated and judges are limited in their powers of enquiry.

Education

The key to the success of the Compensation Panel would be its function to educate people about the principles of compensation that exists in statutes, including what constitutes fair and reasonable valuations. There are many cases in the past where claimants have been conned by experts, such as opportunistic lawyers, and this experience may drive them to make excessive claims. An important part of the educative function of a

Compensation Panel would be to offer a 'walk through' of the procedures, costs and probable outcomes. General public awareness programs are important to build an understanding of how excessive compensation claims impede development and to generate acceptance of the purpose and function of a Compensation Panel. The board could be given the job of public education which might include distribution of informative material to claimants or their lawyers to explain what sort of claims might be lodged with the court and how the system works.

Self-funding

Given the suggestion that compensation trust funds be tax-free, there is also a case for users financing the system which establishes and protects their property rights.

- Where a compensation claim involves land or other natural resource rights, the costs of official geographic and ethnographic surveys could be charged in part, or in whole, against the compensation payment.
- A fee (no more than, say, 5 per cent of all claims awarded) could be earmarked for payment of costs of the National Court and Land Court.
- An annual charge based on the income or assets of all trust funds under administration (for example, no more than 1 per cent of assets or 10 per cent of income) could be used to pay for the costs of the Compensation Settlements Administration Board.
- The Board should also be given the job of funding public education on compensation matters.

Structure of report

The body of this report was written to facilitate discussion in a public seminar that was held in Port Moresby in March 2000. For this seminar the study identified two options for reform. One is the creation of a national tribunal and the other is to use the existing

court system. In writing the report, care was taken in trying not to pre-empt the expression of views or be unduly prescriptive but rather to set out the design issues which needed to be addressed. Discussion in the seminar highlighted the strengths and weaknesses of both options and suggested the design of a hybrid of the two—a panel of compensation experts to sit under the auspices of the courts.

Chapter One discusses the background to compensation in Papua New Guinea and identifies the key design issues that need to be considered in the practical implementation of a new legislative response to dealing with compensation disputes.

Chapter Two summarises the compensation procedures of relevant statutes and demonstrates that they differ from industry to industry and may grant considerable discretionary power to Ministers whose decisions can only be challenged by judicial review.

Chapter Three analyses the differing experiences of industry, government and the community in relation to various types of compensation across sectors.

Chapter Four considers such issues in relation to the creation of a Compensation Claims Tribunal.

Chapter Five examines the advantages of using the existing Court system.

Chapter Six presents a proposal for a Compensation Settlements Administration Board which is seen as a necessary part of any system for handling compensation disputes because of the need to ensure a fair distribution of incomes over generations and across regions.

Chapter Seven distils the major arguments which emerged from the Compensation Seminar and explains the rationale for the proposal of compromise between the two options as the best way forward—the creation of a panel of compensation experts under the auspices of the courts.

The recommendations follow.

Recommendations

There are three components to the uniform compensation claims system that this report recommends

1. establishing a National Database for Land Claims
2. establishing a Compensation Panel to sit under the auspices of the courts
3. establishing a Compensation Settlements Administration Board.

A National Database for Land Claims

A National Database for Land Claims needs to be created consolidating all the records kept in courthouses throughout Papua New Guinea. This is a project which could take 2 to 5 years.

A Compensation Panel

The recommendations for creating a Compensation Panel are grouped under the nine headings which were used in considering the Panel and Court options.

Constitution of a Compensation Panel

The Compensation Panel should consist of

- a president, who shall be a serving or retired judge
- full-time members, who do not necessarily need to be legally qualified
- part-time members, chosen for their relevant experience or expertise.

A full Panel hearing should consist of three members of whom no fewer than two are full-time.

Members of the Compensation Panel should be appointed for seven years by the Governor-General on the advice of the National Executive Council and with the consent of the Chief Justice.

A member of the Compensation Panel should be removed by the Governor-General if convicted of a criminal offence or subjected to a civil penalty for breach of fiduciary duty or dishonesty, or if the National Executive Council or the Chief Justice so requests the Governor-General following an adverse finding against the Panel member by the Ombudsman Commission. Alternatively, members may be removed under the same procedures as for removal of a justice of the National Court

Jurisdiction

At this stage a Compensation Panel should not deal with every compensation issue. In particular, it may be appropriate that actions for death or personal injury be dealt with by a court in the first instance, and there seems to be no pressing reason to alter workers' compensation arrangements. However, if experience shows that a Compensation Panel is working satisfactorily, its jurisdiction can easily be expanded to confer additional primary as well as accrued jurisdiction in cases involving workers' compensation, motor vehicle accidents, death or personal injury.

In the first instance a Compensation Panel should have jurisdiction to determine compensation claims arising under

- Civil Liability (Aircraft Operators Liability) Act (Chapter 292)
- Electricity Supply (Government Power Stations) Act (Chapter 306)
- Forestry Act 1991–1993
- Land Act 1996
- Land Acquisition Act
- Oil and Gas Act 1998.

The Compensation Panel should be able to determine the quantum of compensation where a matter is referred to it by the court for assessment.

The Compensation Panel should have an accrued jurisdiction to settle other matters arising out of, or connected with, a claim for

statutory compensation, such as claims in tort or for breach of contract.

The Compensation Panel should have a general jurisdiction to determine the quantum of compensation payable by public companies or authorities.

There should be provisions allowing voluntary settlements. However, voluntary settlements should be publicly recorded.

Functions and powers

The Compensation Panel should have wide powers to facilitate consensual agreements for land use as well as powers to order compensation be provided either in cash or in kind and either to current claimants or to future generations through trust funds.

In relation to land use, a Compensation Panel will need to

- register applications for determination of land use agreements
- mediate applications for determination of land use agreements
- assist in negotiation of land use agreements
- register settled land use agreements
- arbitrate statutory entitlement to compensation where land use agreements are not reached.

The powers of a Compensation Panel would need to include powers

- to make orders for payment of damages, including periodic structured settlements
- to direct specific performance of contracts
- to order parties to exchange customary gifts or place funds in trust
- to review contracts where it may be harsh or unconscionable not to do so to order that payments be made in cash or in kind

- to designate compensation trustees for any given settlement (for example a supervisory board of trustees comprised of claimants, payer and administration board officers) so that the parties may have an ongoing role in dealing with compensation payments out of a fund.

Mediation, conciliation and arbitration

Judges would be free to refer litigants to (in order of use) one or more mediators, conciliators or arbitrators on the Compensation Panel and would be obliged to do so if requested by a party.

Mediation would involve a 'go-between' asking each party what their settlement ranges were and endeavouring to broker agreement. Conciliation would mean 'face to face' discussion in a non-adversarial context with the conciliator trying to bring the parties to agreement. Arbitration is a quasi-judicial process where the arbitrator stands back, looks at each side's arguments and makes an award. The same person could not be expected to undertake all three roles in any case, unless the parties both consented.

No award for the other party's costs could be made against a party willing to accept the decision of a mediator, conciliator or arbitrator.

If both parties wish the matter to be dealt with by the National Court, normal cost rules would apply.

The purpose of the Compensation Panel should be to provide conciliation and mediation. The Compensation Panel should have a discretion to allow the parties to withdraw for private negotiations on a 'without prejudice' basis during negotiations or mediation but facts admitted during mediation within the Compensation Panel should otherwise form part of the record for court purposes, as well as those of the Compensation Panel itself. The Compensation Panel should be required to give an arbitral decision where an agreement between the parties is not possible. Such a decision should state

the findings of fact and the legal basis for the decision so that it may be reviewed by a court.

Compensation claimants should first apply to the court registrar. The Compensation Panel registry should be based within the court registry.

Locating the Compensation Panel registry within the court registry will allow overlapping, parallel or competing actions to be merged into a single hearing process at the earliest opportunity.

Further, resources would need to be given to the court to expand registry functions. In the longer run, the court registry should receive additional funding from the Compensation Panel's user pays administration of compensation claims and awards.

Processing of claims

A Compensation Panel should not have arbitrary power to override voluntary compensation settlements but should have the power to insist on certain formal checks before a settlement is accepted as lodged and payment can be made. There should be a distinction drawn between

- notified agreements which have no adjudicative status but are binding as contracts between the parties and
- registered agreements which are considered by the Compensation Panel and which not only bind the parties as court orders but preclude intervention by third parties to seek compensation except in conformity with the legislation.

In order to promote all-inclusive settlement of claims related to compensation for resource development, it should be possible to notify or register comprehensive land use agreements with the Compensation Panel.

There should be formal threshold procedural requirements for acceptance of a claim or agreed settlement for lodgment with the Compensation Panel registry. These should cover identification of the parties, the nature of the claim and the interest affected. There

should be a process of provisional acceptance for lodgment which allows time for formal defects to be cured or waived by consent without prejudice to any applicable time limits for making claims.

There should be scope for judicial review of rejection by the Compensation Panel of applications to lodge claims or settlements and the court should have a wide discretion as to the orders it may make on such a review but there should also be time limits for a party wishing to seek review for a rejected application before it lapses. A party whose application is rejected for want of compliance with formalities should also have a grace period within which to correct such informalities without the application lapsing and having to start afresh.

Where a party wishes to amend an application already accepted as lodged by the Compensation Panel, the party should be free to do so if the other party consents and the Compensation Panel considers no third party interest may be affected. Where such an amendment is contested but the Compensation Panel considers no third party interest is or could be involved the Compensation Panel may decide the matter. Where the Compensation Panel considers there may be adverse effects on the interests of third parties, it shall either reject the amendment or require notice to be given to the third party who may either object to the amendment or seek to be joined in the case.

Where non-claimants wish to join the compensation process, whether by lodging a claim or seeking to be brought into the class of compensable persons or to increase the quantum, they should be allowed to do so, provided that they are able to meet the threshold criteria of loss. This should be subject to notice requirements to the other parties who may dispute the application. A third party who was notified of the original application and who did not seek to assert any rights to compensation should be barred from intervention unless a reasonable cause for previous non-intervention can be shown.

All persons or bodies with a legitimate interest should be afforded standing in the normal way to intervene before the Compensation Panel. A body whose objects include the enforcement of public duties imposed by legislation, should have standing to intervene if it is able to show an arguable case that those public duties may be breached by a proposed settlement.

Where an original application is rejected for lodgment, intervening parties who have made out a case to intervene may be allowed by the Panel to continue the action in their names.

Where an application in relation to a claim or proposed settlement relates to a geographic area or loss to a class of persons, the Compensation Panel may direct that notice be given to parties who may be likewise affected by the action complained of. Where parties seek to intervene or join proceedings before the Compensation Panel, they may apply to the court to be joined and the court may allow them to join the proceedings if, and only if, their claim relates to the same subject matter as the original claim. If the interveners have a *prime facie* claim but one which does not relate to the same subject matter they may bring a separate proceeding before the Compensation Panel.

The Compensation Panel should not be bound by the rules of evidence.

Any decision of the Compensation Panel should be fully appealable to the National Court. The court should be free to proceed with the matter *de novo*, though the transcript of evidence may be taken as read with the consent of the parties to the extent so agreed.

Where review of a Compensation Panel decision is not sought within the appeal period, that decision shall not be able to be re-opened unless the party can show fraud, forgery or misrepresentation was involved in securing the decision. Failure by a Compensation Panel to comply strictly with its procedures should not invalidate an uncontested decision.

Where a person acts in contempt of the Compensation Panel process or persists in making unlawful demands which have been rejected by the Compensation Panel, the Compensation Panel should be able to refer the matter to the National Court. The National Court should examine the matter and call the person before it. The court should be able to formally warn the person, issue an injunction, fine the person or imprison the person for contempt.

A Compensation Panel should have the power to impose costs against a vexatious claimant.

A Compensation Panel should have power to impose 'on the spot' fines against persons abusing the Compensation Panel or intimidating other parties. Such fines would be imposed after the party had been given an opportunity to respond. Such fines would be contestable in a court but non-payment could result in a jail term.

There should be no monetary *de minimis* limit used to exclude compensation claims. The Compensation Panel should have power to refer simple cases to magistrates or Village Courts.

Assistance to claimants

The Compensation Panel should be required to give some degree of administrative assistance to parties where it is of the opinion that it would expedite the resolution or hearing of a dispute.

A public advocate's office to assist under-represented and indigent clients should not be created because of the potential to fuel an increase in unmeritorious compensation claims.

Consultants

The Compensation Panel should be free to allow, through the President, the use of consultants by the panel or the parties in such manner as the panel considers will contribute to the impartial resolution or conciliation of a dispute.

Relation of a Compensation Panel to other courts and panels

Given the diversity of Papua New Guinea, a Compensation Panel must be able to refer matters to local provincial panels where they are established. It may also be desirable that part-time members of the Compensation Panel be appointed from provincial Compensation Panels. The Compensation Panel should engage local district officers or other persons with local knowledge as consultant assessors or as liaison parties to explain the workings of the compensation system to people in an area.

Where a compensation matter before the Compensation Panel involves a question of land ownership the panel may either adjourn the matter and remit the question of ownership to be settled by the Land Titles Commissioner or the Land Court, or, if it thinks desirable, the panel may propose to make a determination on the land ownership question in the course of mediating or settling the compensation claim, with any decision reviewable by the National Court in the usual way. Where the Compensation Panel proposes to hear a land ownership question it shall notify the National Court, which may either resolve to hear the question itself or refer it to the Land Court or permit the panel to proceed with hearing and determining the question.

A national Compensation Panel's powers should be able to be delegated to a provincial Panel by the responsible Minister.

Members of provincial panels should be eligible for appointment to the national Compensation Panel as part-time members without having to surrender their provincial appointments.

Administration

The panel registry should be under the primary control of the court but the Auditor-General and Ombudsman Commission should have power to examine records for the exercise of their functions and to report to the National Court in relation to any observed deficiency on the administration of the registry.

Audit of the Compensation Panel and the Settlements Board should be treated as both a public and private sector audit matter. Contracting out of audit functions should be permitted provided the Auditor-General is satisfied. In addition trustees of particular trust funds may make arrangements for their own audit scrutiny. Further, the equitable rights of trust beneficiaries to inspect trust documents and approach the National Court where breach of trust is suspected should be entrenched in statute.

It is suggested that because of the positions of public trust a Compensation Panel and Compensation Settlements Administration Board would involve, full scrutiny should be mandated. Reports should be made to Parliament. The Ombudsman Commission should be able to investigate complaints as well as examine material in the panel's registry for breaches of law or proper administration elsewhere. Freedom of information and full exposure to judicial review should be required. In addition, beneficiaries would have a general right of access to trust documents and could invoke the court's aid to stop breaches of trust.

A Compensation Settlements Administration Board

A Compensation Settlements Administration Board should be established which would supervise payment of compensation to the correct beneficiaries, handle complaints about failures to implement orders or agreements, and supervise the administration of trust funds and provide co-trustees. The board should be a public authority with its members appointed in a similar manner to the Compensation Panel, accountable to Parliament and examinable by the Ombudsman Commission.

The Compensation Panel and the Compensation Settlements Administration Board should be made self-funding through prescribed percentages being allowed to be charged in relation to settlements and income from the administration of trust funds

- where the claim involved land or other natural resource rights, the costs of official geographic and ethnographic survey could be charged in part or in whole against the compensation payment
- a fee (no more than, say, 5 per cent of all claims awarded) could be earmarked for payment of costs of the National Court and Land Court
- an annual charge based on the income or assets of all trust funds under administration (for example, no more than 1 per cent of assets or 10 per cent of income) could be used to pay for the costs of the Compensation Settlements Administration Board.

Compensation settlements and trust funds held by the Compensation Settlements Administration Board should be free of all taxes.

Any compensation payment above a certain amount, or which covered a loss extending beyond one year or which involved a class of claimants (including a tribal group, future beneficiaries or unknown beneficiaries or other potential claimants) would have to be paid to a Compensation Settlements Administration Board to be handled as a trust fund. Where in the opinion of the panel member or judge a single claimant, by reason of education, experience or background might be better served by having his or her claim settled by periodic payments he may direct the compensation to be paid into a trust fund to fund an annuity for the claimant. A requirement for class compensation to be held in trust may have the useful side-effect of discouraging large claims based on an expectation of a large windfall.

The Compensation Settlements Administration Board must be free of government involvement for fear of corruption and leakage of administered funds.

The establishment of a single large common investment fund had previously been canvassed. Such a fund would require an independent international fund manager. The settlement administration board could act as trustee to oversee the fund manager of such a common fund into which the particular trusts under its administration could with the consent of co-trustees place some or all of their funds.

There would be strict investment guidelines, though it would be advantageous to allow a fund to invest overseas. Compensation would be paid into the fund and held as units. Units could not be redeemed from the fund for five or perhaps ten years. Interest would be available annually to beneficiaries.

In the event that one large fund is found to be unduly bureaucratic and thus prone to overly long distribution processes causing injustice to beneficiaries, the decentralised trust funds currently set up could be used. Smaller trust funds could be administered by banks on a contract basis. Foundations were sometimes set up to administer specific compensation funds especially where a developer wished to stay at arm's length from the claimants. In any case, beneficiaries would have the right to inspect documents held by a settlements administration board.

The Compensation Panel should have power to order that a specific amount be paid into and held in trust while overseeing the conciliation/mediation process.

The Compensation Settlements Administration Board could also be given the job of funding public education on compensation matters. It might also be given the task of distributing informative material to claimants or their lawyers to explain what sort of claims might be lodged with the National Court and how the system works.

Chapter One

Compensation issues

Terms of Reference

The Terms of Reference were to formulate a uniform national policy on compensation after examination of the relevant literature, consideration of all statutes relating to compensation, and consultations with interested parties in government, industry, and the community in Papua New Guinea.

The Terms of Reference instructed the study to consider a way of consolidating all statutory references to compensation into a single Compensation Act which would also give legal expression to the national policy. The original Terms of Reference requested the preparation of drafting instructions for a Compensation Act based on the national compensation policy. The guidelines for the drafting instruction were

- uniformity and simplicity
- fairness to all parties
- enforceability
- a judicial process to assess compensation claims and appeals, and to periodically review the regulations to the Compensation Act.

In consultation with the Institute of National Affairs, a decision was made not to attempt preparation of drafting instructions for a Compensation Act or related amendments to existing statutes, such as an amendment to the National Court Act, which would

allow the creation of a Compensation Panel. It was agreed that this task required careful collaboration with Papua New Guinean policymakers and demanded time and resources beyond those available to this study. The project concentrated instead on developing a policy framework which could provide unity and a common direction to guide the assessment and settlement of compensation claims and which could provide the basis for drafting instructions in the future.

Outline

Compensation claims have been a significant public policy issue in Papua New Guinea for many years and much has been written on the subject. This report does not attempt to traverse the history of the subject which has been ably done by previous writers such as Toft (1997).

The body of this report was written with the aim of facilitating discussion in a public seminar that was held in Port Moresby in March 2000. Before this seminar two options for reform were identified. One was the creation of a national tribunal and the other to use the existing court system. In writing the report, care was taken in trying not to pre-empt the expression of views or be unduly prescriptive but rather to set out the design issues which needed to be addressed. Discussion in the seminar highlighted the strengths and weaknesses of both options and suggested the design of a hybrid of the two—a Compensation Panel to sit under the auspices of the courts.

The report also identifies the advantage in having a Compensation Settlements Administration Board to assist successful claimants invest compensation where required, especially where funds are to be placed in trust for future generations. Discussion in the compensation seminar supported the arguments in favour of making trust funds a compulsory part of any compensation process where compensation has to be paid

over a long period, including for future generations. The report gives careful consideration to the need to protect such funds from theft or fraud.

Key design issues

Every compensation claim necessarily involves two fundamental issues—liability and quantum. Liability involves the question of whether a claimant is entitled to make the subject claim against the chosen defendant. Potential disputes as to liability can be limited by statute if various categories of claims are recognised as being the only valid basis of a claim, and/or if certain categories of claim are excluded as providing a basis for a compensation claim.

Quantum is the issue of how much a claimant is entitled to recover in respect of a valid claim. The level of disputes as to quantum may be limited by fixing an amount in respect of particular claims, although such amounts should be adjusted to allow for inflation. This can be achieved by specifying a number of units with periodic revision and publication in the Government Gazette of the value of one unit. Alternatively, a formula can be provided by statute.

If compensation claim procedures are to be streamlined, then it is desirable to have one system that applies to each area and each industry and covers all possible kinds of claims. The size of claims varies greatly—from a few kina to millions of kina. The parties to claims range from ‘grassroots’ citizens with little education to multinational companies. Any compensation claim procedure system must accommodate that diversity.

It must not be assumed that all claims for compensation need be, or should be, heard by either a court or a tribunal. Such a system would soon grind to a halt. In most successful compensation schemes as many as 90 per cent of claims are finalised without the need for a hearing, that is, only 10 per cent of claims require a hearing. Even if the settlement rate declines to 70

or 80 per cent this would create a significantly greater burden on the dispute resolution facilities—backlogs would develop and could not be eliminated without substantial additional funding.

A court or tribunal is a dispute resolution facility and is usually limited to use of the adversarial process whereby two or more parties call and cross-examine witnesses and make opening and closing submissions. In recent years, however, much greater reliance has been placed on alternative means of resolving disputes, notably mediation. Many courts now have a mediation facility to contain the number of matters needing a hearing by a judge.

Thus, a statute dealing with compensation claims procedure needs to address a number of issues.

- (1) What is the scope of the Act?
 - all areas
 - all areas not specifically excluded by statute
 - only specified areas are included
 - specified areas are excluded
- (2) What categories of claim are permitted? (The liability issue)
 - any kind of claim
 - only specified kinds of claim
 - claims other than those specifically excluded
- (3) What determines the compensation? (The quantum issue)
 - schedule of values, with inflation facility
 - formula
 - not specified, but decided from claim to claim
- (4) How will agreements be accommodated?
 - privately
 - merely notified
 - registered but not published
 - registered and published

- (5) How will disagreements be accommodated?
- via the existing courts
 - via a new tribunal
- (6) How will disagreements be decided?
- litigation/arbitration
 - mediation/conciliation
 - with what, if any, rights of appeal?

The 1995 proposal for a 'Compensation Strategy'

Despite the volumes written and spoken about compensation claims in Papua New Guinea there has been only one proposal for a 'Compensation Strategy' at a national level. This proposal was made in 1995 by a public sector inter-departmental working committee established by Prime Minister Sir Julius Chan with representatives from the Department of Prime Minister and Cabinet, the Chamber of Mines and Petroleum, and the Law Reform Commission. The trigger for the establishment of this committee was the four million kina Boram compensation claim in February of 1995 for land occupied by the Wewak airstrip, hospital, and power station (Toft 1995). The recommendations proposed have not since been taken up by government and developed to the detailed level required for policy endorsement. This is the aim of this study. An overwhelming theme of fieldwork consultations in December was that compensation claims have increased alarmingly in size and frequency in the past five years. There is clearly an urgent need for a policy response.

This study significantly builds on the recommendations made by the 1995 working committee on compensation. The Terms of Reference for this project are substantially wider than those under which the Compensation Strategy of the 1995 working committee was developed. This study was asked to examine the feasibility and benefits of encompassing all forms of compensation within a

national policy whereas as the working committee was confined to the consideration of matters relating to land. This study has, however, found land to be the primary cause of claims.

The 1995 Compensation Strategy was particularly innovative in the measures it proposed for ameliorating landholders' situations which often gave rise to excessive compensation demands. The strategy was influenced by developments at the time in the community relations approaches of mining and petroleum companies. Many of the proposals of the Compensation Strategy are now a standard feature of agreements forged between mining and petroleum companies and landholders.

The 1995 Compensation Strategy had two stated objectives. The first objective was to prevent repeated claims by ensuring compensation money and entitlements were distributed accurately and an income was ensured for future generations. The second aim was to reduce jealousy between neighbouring groups over compensation payments by filtering benefits to the wider community.

The 1995 Compensation Strategy proposed to achieve these twin objectives through

- the creation of a government body (which the working committee named a Land Development Commission) as the lead agency in the coordination and monitoring of all action relating to land compensation and development.
- the formulation of awareness campaigns in relation to each development project. The Land Development Commission would coordinate such campaigns and their purpose would be to inform landholders, local government officials, and employees of the development agency, systematically on all facets of the project and its impact.
- the possible development of a Compensation Act to standardise and control compensation payments

- the creation of Landholders Compensation National Trust to invest compensation monies on the global market for the best possible dividends to ensure an expanding income for future generations (Toft 1995:2,3,9).

Approach taken

While this project endorses the basic idea of many of the proposals of the 1995 Working Committee on compensation, particularly in relation to landowner issues, significant and detailed adaptations have been suggested. The national policy suggested in this study applies equally to landholders, Members of Parliament, public servants, and company representatives, as well as any other members of the public, and care has been taken to try and suggest measures acceptable to all these parties.

The premise of this report is that the central problem is one of making the law work in practice rather than altering substantive legal rights. There are no magic solutions to problems of lawless behaviour. Civic education and a political will to enforce the law are as important as what is written on paper.

In addition any proposals for compensation reform must be consistent with PNG constitutional principles, including the separation of powers between the legislative, executive, and judicial branches of government. The courts' ability to review the actions of administrative bodies, including any compensation tribunal, is basic since tribunals are administrative bodies and not courts in the strict sense. Without judicial review, every person is potentially exposed to the unchecked and arbitrarily exercised power of executive government and its civil servants. Judicial review protects all citizens in the enjoyment of their legal rights free from the corrupt or oppressive exercise of power. No businessman, for example, would be likely to welcome a compensation process which would allow a K5 million plantation to be resumed by a public authority for K1 million with no right of appeal to the courts on the

question of valuation. Nor are overseas investors going to be attracted to a country where independent courts cannot ensure just compensation.

A limitation of these proposals is that many of the day-to-day problems experienced in the area of claims for compensation are questions of a failure of law enforcement, rather than any inadequacy in the law itself. Policing or prosecution policy are not within the scope of this report. A functioning system of handling compensation claims could, however, make a substantial contribution to public education by highlighting when compensation is, and is not, genuinely payable, and by removing the frustrations generated by long delays in settling claims, which may also contribute to unlawful and violent forms of 'self-help' by claimants.

The approach taken in preparing this report is conservative, namely, that the basic legal principles underlying compensation in Papua New Guinea are substantially satisfactory, that no one wants a new dysfunctional bureaucracy which disrupts or impedes mutually satisfactory consent agreements, that any reform must tie in with and strengthen existing institutions, and that the real problem is one of dealing with compensation claims expeditiously and educating the public on compensation principles.

One of the problems of the current system is demonstrated by the increasingly common incidence of claims being made, left unresolved and then settled by the intervention of a Member of Parliament with an *ad hoc* payment out of public funds. In effect, Members of Parliament are sometimes being treated by their constituents as *ad hoc* compensation tribunals. It is, however, the function of Members of Parliament to act collectively as a legislative body and not to act individually as *ad hoc* courts or tribunals or as Treasury paying agents. Members of Parliament should be able to refer constituents with compensation grievances to appropriate courts or tribunals secure in the knowledge that the constituent's

complaints will be dealt with and that, if the constituent has no legal claim, the constituent will be given clear reasons as part of the educative function of properly functioning legal institutions, so that festering resentments will be minimised.

There is a strong public interest in seeing compensation disputes speedily and properly resolved through procedural reform. This has, for example, been recognised at the provincial level in East New Britain. Elsewhere, public money has been spent on *ex gratia* settlements where the merits of the compensation claims have been dubious or non-existent. Rather than spending public money encouraging people to bypass the legal system, a better way to spend public money is to help claimants obtain a fair and impartial resolution of their complaints. The process of government would be improved if police, officials, and Members of Parliament were able to refer persons with grievances concerning compensation to an office which could help them with a proper legal resolution. Accountability of public funds would be improved if public authorities were subject to scrutiny by a court or tribunal before settling claims. Respect for law would also be improved if those seeking the assistance of a tribunal or court to pursue their claims came to realise that going outside the court or tribunal process through unlawful threats could expose them to speedy sanctions for contempt of court.

This report provides a pragmatic approach to the procedural problems of compensation claims—making the law work in practice. Any compensation claims procedure must address several problems.

1. It must ensure that genuine and meritorious claims are met and within a reasonable time period.
2. It must ensure that compensation goes to the correct persons, including future generations who may have rights in subject property.

3. It must ensure that frivolous, vexatious, or duplicated claims are discouraged.
4. It must not allow spurious claims for compensation to be used as a means of extortion.
5. It must promote fairness in the sense of observable and reasonably objective standards so that opportunistic *ad hoc* settlements are not made on a 'deep pocket' basis.
6. It must not allow collusive settlements of disputes to operate as engines of fraud.
7. It must ensure that disputes over compensation are not allowed to hold the community to ransom by impeding public or development works which are for the general benefit
8. It must be administered with integrity and be publicly accountable.

These are canons of perfection and it may be doubted whether any country has ever fully achieved them. Claims for compensation always involve two points of view (and often more). It is in the resolution and reconciliation of differing points of view that a well-designed compensation claims procedure can contribute to social harmony and economic progress. Although rights to compensation are set out in existing PNG law, administrative failure to deal with claims, together with opportunistic settlements, have meant that compensation payments have often been made outside legal principles.

What is required is not a compensation scheme (whether fault or no-fault based), nor a stripping of common-law compensation rights (which, apart from philosophical objections, would presumably raise questions of conflict with the PNG Constitution—the organic governing document of the state), but a 'Compensation Claims Procedure' which would facilitate rapid settlement of *bona fide* claims while minimising the use of compensation claims as a form of economic extortion or embezzlement of public funds.

Chapter Two

Review of statutes

Any new statutory procedure for compensation claims will need either to blend with or overrule existing legislative provisions. Further, there are laws that will govern any new statutory body. This section endeavours to summarise the main features of relevant statutes that deal with compensation claims, considered in alphabetical order within the hierarchy set out within Part II of the Constitution, namely, the Constitution, Organic Laws and Acts of Parliament.

The Constitution

The fourth of the National Goals and Directive Principles underpins all legislation in relation to natural resources and the environment by highlighting a number of matters, including the wise use of natural resources ‘in the interests of our development and in trust for future generations’.

This sentiment is reinforced in paragraph (d) of the Basic Social Obligations which requires that the national wealth, resources, and environment are to be safeguarded ‘in the interests not only of the present generation but also of future generations’.

It follows that there may well be an unrepresented interest group in any compensation claim, namely ‘future generations’, and this should be borne in mind by whoever is determining any such claims.

Under section 20 and Schedule 2 of the Constitution, the National Court (the senior trial court) and the Supreme Court (the senior appellate court) bear the responsibility for interpreting and developing the underlying law, defined in Schedule 2.1 to include custom. Section 21 specifically provides that the purpose of Schedule 2 is to 'assist in the development of our indigenous jurisprudence, adapted to the changing circumstances of Papua New Guinea'. Judicial support for these provisions may be found in decisions such as PLAR No 1 of 1980 [1980] PNGLR 326 (at p334 per Wilson J and at p344 per Andrew J).

Hence it may be expected, whatever the claims procedure, that decisions on compensation claims will provide a body of case law just as the courts of equity developed in the English legal system, although clear principles would be needed in order to provide the necessary measure of certainty in relation to existing or potential compensation claims.

Section 22 gives the National Court the power to give effect to constitutional rights if there is a lack of 'machinery or procedural laws'. One area in which this power has been exercised is the publication by the National Court of a simple form whereby applicants may lodge human rights claims.

By reason of section 26, the head of any statutory body and any board members would be required to comply with the provisions of the Leadership Code and would be subject to the constitutional responsibilities of office set out in section 27. The Ombudsman Commission, established by section 217, would have the power to investigate any breaches of such obligations or of the obligations contained in the Organic Law on the Duties and Responsibilities of Leadership, and the person concerned could become the subject of a Leadership Tribunal and/or criminal proceedings.

Protection from unjust deprivation of property is provided by section 53, although it is a qualified right and may be restricted by statute. For present purposes it is sufficient to note that there may, from time to time, be challenges based on this provision.

It is worth noting that section 53 rights may be enforced in the National Court or the Supreme Court or any court which Parliament may establish for that purpose either by any person with the necessary interest or on the initiative of the court. It is not difficult to think of situations where the latter alternative could be appropriate and of significant effect.

It must be borne in mind, however, that the rights of non-citizens are not as extensive as the rights of citizens in certain situations. Such differences may impact on the willingness of non-citizens to invest in Papua New Guinea in situations where development is desirable.

Judicial and administrative proceedings in Papua New Guinea are required to abide by the principles of natural justice, including an entitlement to know what is being claimed, to be heard, and to receive reasons for the decision made in the proceedings. As the principles of natural justice are developed from case to case, section 59(2) helpfully sets out the minimum requirement as 'the duty to act fairly' and 'to be seen to act fairly'.

Section 172 permits the establishment of courts other than the National Court and the Supreme Court. Appointments (and removals) would be the responsibility of the Judicial and Legal Services Commission. Section 186 permits the appointment of assessors.

As to the exercise of judicial power, section 158(2) requires that '[i]n interpreting the law the Courts shall give paramount consideration to the dispensation of justice'.

The office of Auditor-General, established by section 213, is required by sub-section 214(1) to inspect and report to Parliament annually in relation to public monies. This obligation is extended by sub-section 214(2) to ‘all arms, departments, agencies and instrumentalities of the National Government’ and ‘all bodies set up by an Act of the Parliament...for governmental or official purposes’.

Organic Law on the Ombudsman Commission

This statute sets out the functions and powers of the Ombudsman Commission and makes provision for matters such as procedures in relation to complaints.

Organic Law on Provincial Governments and Local-level Governments

Section 118 establishes a Provincial and Local-level Government Mediation and Arbitration Tribunal with the intent that it would be responsible for resolving all inter-government disputes involving provincial or local-level governments by mediation or arbitration. Furthermore, parties to any such dispute are prevented from commencing court proceedings unless those avenues have been unsuccessful. While this provision does not relate to claims for compensation, it does show a preference for the resolution of disputes by mediation, if possible, instead of through the courts.

Civil Liability (Aircraft Operators Liability) Act (Chapter 292)

This Act serves to make part of PNG law the provisions of various international conventions to which Papua New Guinea is a signatory, namely

- the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air

- the Hague Protocol to Amend the Warsaw Convention
- the Guadalajara Convention, Supplementary to the Warsaw Convention, for Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier
- the Rome Convention on Damage caused by Foreign Aircraft to Third Parties on the Surface.

While those conventions permit the commencement of legal proceedings, in a number of respects they operate to confine the amount of damages which can be recovered in such actions. There has, from time to time, been criticism that ceiling amounts are too low and that they should be raised. That course of action involves two difficulties. First, unless the conventions are amended then Papua New Guinea, as a signatory, is obliged to abide by them. Second, if those restrictions were raised or removed then there would be a consequential increase in air fares due to the resulting increase in insurance premiums payable by airlines.

Compensation (Prohibition of Foreign Legal Proceedings) Act 1995

This controversial legislation was enacted when proceedings were commenced in Australia against BHP Limited arising out of the Ok Tedi mine. Section 4 of the Act prohibits the commencement or continuance of 'compensation proceedings' in a foreign court, section 5 renders such conduct a criminal offence, and section 6 provides that any judgment obtained as a result of such proceedings shall not be enforceable in Papua New Guinea. 'Compensation proceedings' as defined in the Act cover all legal proceedings except those commenced in a Papua New Guinea court or legal proceedings commenced elsewhere with the consent of each of the parties to those proceedings.

Criminal Law (Compensation) Act 1991

Since 1991 the courts have been able to order that an offender pay compensation as part of his/her punishment for committing a criminal offence. Amounts of up to K5,000 may be awarded but only after obtaining a probation report and considering the circumstances of the offence and the offender and any relevant matters of custom. The Act does not provide any right of appeal, but an appeal on sentence would provide an opportunity for any award of compensation to be challenged.

Electricity Supply (Government Power Stations) Act (Chapter 306)

Section 19 of this statute provides that, where any compensation is payable as a result of the exercise of the powers conferred by the Act, the Minister shall determine the amount of compensation, but also provides the right of appeal to the National Court.

Forestry Act 1991–1993

This statute created the Papua New Guinea Forest Authority, the National Forest Board, Provincial Forest Management Committees, the National Forest Service and the State Marketing Agency. The intention behind the creation of the Act is the development of National and Provincial Forest Plans as the basis for the development of forest resources.

Those resources are developed via a Forest Management Agreement whereby the Forest Authority acquires timber rights. In respect of customary land such an agreement is made between the customary owners and the PNG Forest Authority. Forestry activities can only be carried out by a forest industry participant pursuant to a permit, authority, or license.

Applications under the Act are made to, and considered by, the National Forest Board, which makes recommendations to the Minister. If the Minister does not approve the application, he refers it to the National Executive Council (NEC), that is, the Cabinet.

Licences required by the Act are also granted by the National Forest Board, as are applications for registration as a forest industry participant and consultant. Under section 113, unsuccessful applicants may appeal to the Minister for Forests.

As there does not appear to be any other claim procedure or dispute resolution provision in the Act, a person or firm is left to pursue any complaint through the court system, normally by way of an application to the National Court for judicial review of the relevant administrative action. In order for such an application to succeed it would be necessary to show that the person who made the decision had failed to consider relevant matters properly, considered irrelevant matters, acted in bad faith, acted fraudulently, made an error of law, or acted contrary to the principles of natural justice.

A particular difficulty has arisen in the forestry industry in Papua New Guinea because of agreements between forestry companies and local landholders where the former take advantage of the latter. This is difficult to counter when the relationship between the forestry companies and the government, in particular the Minister, is close.

Land Act 1996

The definition of 'court of competent jurisdiction' in section 6 of this Act provides for matters relating to customary land to be heard by the Land Titles Commission. For matters not relating to customary land, the District Court in which the land is situated has jurisdiction for smaller claims, otherwise proceedings should be brought in the National Court.

By virtue of section 9, any dispute as to ownership of customary land is to be determined by either the Land Titles Commission or the Local Land Court.

Section 19 enables claims for compensation to be heard by the Land Titles Commission in the case of customary land and by the National Court otherwise. The effect of sections 21 and 22, however, is that such an action would only arise when the Minister

rejects a claim for compensation. Section 26 enables the amount of compensation to be agreed while section 27 permits submission of the claim for compensation to arbitration where the Minister and the claimant so agree.

Section 55 of the Act creates the Land Board whose primary function is to consider applications for leases. Section 62 provides that any appeal over a decision of the Land Board is by way of notice of appeal to the Minister, determined by the Governor-General (normally upon advice from the Minister).

Jurisdiction in all disputes between owners of adjoining land rests with the nearest District Court, whose decision is final (see section 163).

Land Disputes Settlement Act (Chapter 45)

This law seeks to use the principles underlying traditional dispute settlement processes to resolve disputes in relation to customary land. The Act does cover disputes relating to interests in customary land and the position of the boundaries of any customary land but does not extend to whether land is customary land.

Section 4 gives the Governor-General, acting on advice, the power to require resolution of a dispute by means other than those provided in this Act where the dispute is long-standing or has resulted in breaches of the peace, if there is no prospect of agreement, or where the national interest so requires.

Part II of the Act provides for Provincial Land Disputes Committees comprising five persons with the senior Provincial Land Magistrate as the Chairman. Part IV provides for Local Land Courts also comprising up to five members with a Local Land Magistrate as Chairman plus either two or four Land Mediators or local residents. Via section 68 of the Act the Land Titles Commission loses its jurisdiction when a Local Land Court is established 'in and for a province'. Part V provides for Provincial

Land Courts comprising one Provincial Land Magistrate for first instance matters and three for appeals from the Local Land Court.

Part III of the Act provides for resolution by mediation (as distinct from the adversarial approach of court proceedings) via the appointment of 'Village Magistrates or other persons' as Land Mediators. Where an agreement is reached as a result of mediation, that agreement is to be lodged with the nearest Local Land Court. The parties may apply to have such an agreement approved by the Local Land Court.

The Local Land Court may make interim orders prior to resolution of a land dispute. Section 41 requires the Local Land Court to 'state clearly the terms of its order', 'explain the reasons for its decision' and do so 'in the presence of the parties to the dispute'.

Of the procedural provisions contained in the Act, two are worth noting. First, section 68 enables both a Local Land Court and a Provincial Land Court to determine and apply relevant customs. Second, section 72 precludes legal representation unless all parties agree and the court is satisfied that legal representation is necessary.

Land Groups Incorporation Act (Chapter 147)

As the name suggests, this Act allows groups to hold land in the same manner as a company, in which case the group's name will include the words 'Land Group Inc'. Plainly, this process may give rise to disputes both within the group and as to who is within the group. A register of such land groups is kept and they must each have a constitution and a dispute settlement authority. The jurisdiction of the courts in disputes is limited to where the parties agree, the constitution of the group so provides, or the dispute settlement authority consents, in which case the Village Court or Local Court hears the case. Such a court is not bound by the rules of evidence and may even reach a decision without hearing argument from the parties. There is no right of appeal or review.

Land Registration Act (Chapter 191)

The National Court has jurisdiction in relation to any dispute arising under this Act.

Land (Tenure Conversion) Act 1963

This pre-independence Act was amended in 1987. It sought to provide titles to individuals in respect of customary land via a conversion order made by the Land Titles Commission with registration pursuant by the Registrar of Titles under the Land Registration Act.

The introductory paragraphs of the statute make it plain that the object of the legislation was to promote agricultural development and economic well-being by making people the title owners of land which they farmed. There are no claim procedure provisions in the Act, thus suggesting that any dispute arising from this Act would be resolved via the existing court system.

Land Titles Commission Ordinance 1962–1971

This is also a pre-independence statute, designed to provide for the expeditious determination of land rights disputes by the creation of a Land Titles Commission. To that end the Commission ‘is not bound to observe strict legal procedure or apply technical rules of evidence’ (sub-section 29(1)).

The Chief Commissioner and Deputy Chief Commissioner are required to be fully qualified lawyers. Section 10C enables the appointment of assessors. Large or complex matters may be determined by three members instead of one (section 14A).

Section 15 provides the Land Titles Commission with jurisdiction to hear and determine all issues relating to ownership and use of customary land and disputes as to whether or not land is customary land, while section 15A allows the Local Court to make orders authorising or restraining the use of customary land.

The Supreme Court may order that a matter involving a dispute as to whether land is customary land be transferred to it from the Land Titles Commission (section 31B), and the Land Titles Commission may refer a stated case to the Supreme Court (subsection 32(1)).

Division 2 of Part III of the Act deals with disputes as to the extent of customary land by providing for Demarcation Committees to resolve such issues. Section 25A specifically permits the Commission to mediate disputes.

Division 2 of Part V provides for the Land Titles Commission to review its decisions while Division 3 of that Part affords an appeal from such a review to the Supreme Court. Part VA enables settled disputes to become decisions of the Land Titles Commission (or, if an appeal, of the Supreme Court).

Paragraph 42(1)(a) limits the Land Titles Commission, in relation to ownership, to considering only persons living at the relevant date, although the interests of infants may be taken into account (section 43).

Local Courts Act (Chapter 41)

Magistrates of the Local Court have jurisdiction in civil matters up to K1,000. A magistrate may attempt to achieve a mediated solution to a dispute but, if that mediation fails, cannot then hear the case unless the parties consent. There is a right of appeal to the National Court.

Magisterial Services Act (Chapter 43)

This statute sets out the five grades of magistrates other than the Chief Magistrate and Deputy Chief Magistrate, namely, Local Court Magistrate (Grade 1), Senior Local Court Magistrate (Grade 2), District Court Magistrate (Grade 3), Senior District Court Magistrate (Grade 4) and Principal Magistrate (Grade 5).

Mining Act 1992

Section 3 of this statute requires the Minister to convene a development forum before the grant of any special mining lease, to which not only the applicant but also the landholders and representatives of both the national and provincial governments must be invited.

The effect of section 4 is that disputes relating to either interest in, or the boundaries of, customary land shall not affect either an application for, or a grant of, a tenement and that such disputes shall be determined pursuant to the Land Disputes Settlement Act.

Under the Mining Act, tenements are granted by the Minister under advice from the Mining Advisory Board. Applications for the grant or extension of a tenement are lodged with the registrar, who has the option via section 102 to accept or reject the application. Accepted applications are referred to the Mining Advisory Board.

The Act provides for hearings by Mining Wardens appointed under the Act. As there are no provisions setting out required qualifications or experience for such wardens, there is a danger that such wardens will be too close to either the government or the mining companies. There is no equivalent of judicial independence—the warden is merely required to follow the statutory procedure ‘such other procedures as will afford a fair hearing to the applicant’.

Section 17(b) empowers the Minister to enter into agreements settling any disputes ‘arising out of or relating to the agreement and administration of [the] Act’. It is worth noting that section 151 legislates how conflicting boundary descriptions are to be decided.

Part VII of the Mining Act deals with compensation to landholders. Section 154 sets out the principles of compensation by specifying the areas of entitlement and providing for references to values published by the Valuer-General. It also precludes certain kinds of claims for compensation and makes it a criminal offence to

pay, or agree to pay, compensation in respect of any such claim. Section 155 precludes entry onto land which is the subject of a mining tenement until compensation has been agreed and paid. Compensation agreements must be submitted to the Chief Warden who may approve it or recommend amendments. Upon compliance with the statutory procedures the agreement is signed and submitted for registration.

Motor Vehicles (Third Party Insurance) (Basic Compensation Act) (Chapter 296)

This statute provides compensation when death is caused by a motor vehicle accident. The maximum amount that can be awarded is K5,000 to a wife or dependent child or up to K2,500 in any other case. Decisions can be made by either an appointed assessor or a magistrate after an inquiry which is not bound by the rules of evidence. Orders made have the same effect as if made by the District Court. The statute does not provide for any right of appeal. This is not surprising, however, given that any award of compensation under this Act does not affect the right to bring court proceedings claiming damages.

National Court Assessors Act (TNG) (Chapter 42)

This statute, which applies only in New Guinea and not in Papua, provides for assessors to be appointed either on the application of the parties or as the court considers appropriate. Assessors do not adjudicate but determine questions of fact or custom. They may thus provide the court with assistance in the resolution of disputes.

National Land Registration Act (Chapter 357)

The Act created the National Land Commission, which is not bound by the rules of evidence, but which must observe the principles of natural justice. Appeal may be made to the National Court where the commission makes a preliminary decision as to the admissibility of a claim. The right of appeal to the National Court

from the determination of a claim is, however, limited to cases of failure to observe the principles of natural justice. When the commission considers a settlement award is warranted, prescribed amounts are set out in Schedule 2. This Act prevails over the provisions of the Land Disputes Settlement Act in the event of overlapping disputes.

Oil and Gas Act 1998

This statute represents the most recent attempt of the parliament to deal with matters including compensation claims. Section 10 gives the National Court jurisdiction in all matters arising under the Act, thereby precluding all lower courts from hearing such matters.

The usual structure of a Minister, Director, and Advisory Board is established by the Act. Section 46 provides for project consultation prior to the first grant of any licence in respect of a petroleum project, and section 50 provides for any agreement to be recorded in a development agreement.

Division 12 deals with rights in respect of land and property. Section 113 deals with the rights of landholders by providing that such disputes shall be settled according to the Land Disputes Settlement Act (Chapter 45). Section 121 adopts the same approach for matters relating to customary land.

Section 118 is titled 'Compensation'. Sub-section 118(2) sets out the matters that may be the subject of compensation. Sub-sections 118(4) and 118(5) provide for agreements as to the amount of compensation to be signed and lodged with the Director. Sub-section 118(6) requires that compensation payable under section 116 be determined in accordance with the values published by the Valuer-General. Sub-section 118(7) precludes compensation being determined by reference to the petroleum or minerals known or thought to be in or under the land.

Where there is no agreement, disputes are to be determined by the wardens appointed under the Mining Act—outlined in sub-section 118(8). Right of appeal to the National Court from the decision of a warden is provided by sub-section 118(17). Pending the resolution of a dispute pursuant to the Land Disputes Settlement Act (Chapter 45), the warden may order that payments of compensation be made into a trust account established by the Director for that purpose (sub-section 118(19)).

Part IV of the Act grants the state an equity entitlement and permits the sharing of the benefits of those entitlements with appropriate landholders either in accordance with a development agreement or, failing any such agreement, as determined by the Minister. Likewise, benefits may be shared with local-level and provincial governments.

Part 4 of the Schedule to the Act states that disputes between the Minister and a licensee over any of the matters set out in Clause 11 may be referred to arbitration.

Valuation Act (Chapter 327)

Apart from provisions dealing with the registration of valuers, the Valuation Act deals with valuation of property in Part IV by providing for the valuation and periodic revaluation of property. A person may lodge an objection with the Valuer-General and, if dissatisfied with the outcome, may appeal to the District Court. If the amount involved is high enough, there is a right of appeal to the National Court.

Where a valuation cannot be made according to the accepted principles of valuation, section 79 permits the valuation to be obtained at another date and then updated to allow for inflation.

This statutory scheme depends not only on the accuracy of the valuation but the period between valuations. If the interval since the last valuation is substantial or in a climate of inflation the statutory valuation will not provide a good indication of current market value.

Village Courts Act 1989

A Village Court is constituted by an odd number of Village Court Magistrates (generally not less than three, although in some circumstances a Village Court Magistrate may sit alone). In criminal matters, a Village Court may impose a fine of up to K200 or order performance of community service work for a period of up to six months.

Division 4 of the Act gives the Village Court civil jurisdiction over disputes relating to the ownership or use of customary land pending a decision of the Local Land Court. It may make orders for compensation, damages or debt of up to K1,000 and has jurisdiction over compensation relating to bride price, custody of children, or death. The Village Court may make preventive orders where it considers a dispute may cause a breach of the peace.

Division 6 provides for initial attempts to resolve disputes by mediation, with any resulting agreements being recorded and enforceable. Village Courts apply any relevant custom and do not apply rules of evidence. There is a right to appeal to a Local Court or District Court Magistrate within twelve months. A Village Court may recognise and make orders in respect of groups of people. Thus the role of the Village Court in Papua New Guinea is to resolve disputes within a village quickly, without formality, and by mediation if possible.

Water Resources (Chapter 205)

This Act creates a Water Resources Board as part of a statutory scheme intended to provide for the protection and management of the nation's water resources. Section 16 renders the holder of a water investigation permit or a water use permit liable to compensate the owners and occupiers of land for entry on, or use of, the land by that permit holder. Sub-section 16(2) sets out the bases for compensation, but there does not appear to be any provision which forbids claims on other bases as contained in section 154 of the Mining Act.

Sub-sections 16(4) and 16(5) permit parties to reach a signed, written agreement as to compensation but requires that it be lodged with the Director of Water Resources. In the absence of such an agreement, the amount of compensation is determined by the Minister.

There is a right of appeal from the Minister's decision to the National Court. Failure to pay compensation may lead to cancellation of the permit.

Workers' Compensation Act (Chapter 179)

Compensation to workers and their dependants for injuries suffered in the course of employment is provided by the Workers' Compensation Act. The Act establishes the Office of Workers' Compensation comprising the Chief Commissioner, Commissioners and a Registrar. Employers pay premiums to insurers, who pay a prescribed percentage of their premium income into a fund from which benefits are paid.

Commissioners sit as members of the Workers' Compensation Tribunal that decides disputed claims. This tribunal has exclusive jurisdiction over such claims, although it may delegate matters to a Village Court. It is not bound by the rules of evidence. The Act sets out a facility for the expeditious settlement of claims. There is a right of appeal to the National Court. Benefits are set out either by amount, maximum amount, or formula. The Act does not affect the other legal rights an injured worker may have, such as an action, on the basis of negligence, against the person or firm responsible for the accident in which the worker was injured.

It has been suggested that this scheme would work better if it were a private sector scheme. As a government scheme it is underfunded and serious backlogs have emerged—some public servants literally have hundreds of files on their desk. By contrast, the Motor Vehicles Insurance Trust appears to function well.

Conclusions

From this brief consideration of various Papua New Guinea statutes it is clear that the procedures for compensation claims vary from industry to industry. Considerable power is granted to Ministers, extending in some cases to dispute resolution. Often, the only means of challenge is to seek judicial review of the relevant administrative decision.

Beyond the determinations of Cabinet Ministers, there are a variety of bodies that can become involved in compensation claims or related issues. They include the Village Court, Local Court, District Court, and National Court, as well as Mining Wardens, the Local Land Court, and Land Titles Commission. Which body is appropriate in any particular case depends on whether or not the land is customary land, and on the nature of the dispute.

Also, it is important to realise that some situations may involve a number of different kinds of claims. Indeed, some situations may involve both civil claims and criminal conduct. Major projects, such as Bougainville and Ok Tedi mines, are often insulated from the reach of statutes that would otherwise apply. While that is a course which parliament is entitled to take if it so desires, the fact remains that such statutes may operate against uniform compensation procedures applying throughout the nation.

Chapter Three

Cases from the field

Much of the information provided by interviewees during fieldwork will be familiar to readers of this report. That compensation claims have increased dramatically since the 1980s, in both number and amount, is nothing new to the citizens, residents, or investors of Papua New Guinea. That many of these clients have been opportunistic, extortionate and backed by violence, need hardly be repeated. That a root cause of compensation disputes has been police and government failure, and a breakdown in law and order, is widely accepted.

This fieldwork chapter provides case illustrations of problems with the existing arrangements. An analytical framework is developed from these cases in order to discuss types of compensation disputes in Papua New Guinea, problems with the current 'compensation' system, and avenues for improving the current system. The discussion is organised under the headings of disputes concerning alienated land, customary land, and personal injury. The cases are presented in boxes separate from the analysis.

Box 1 A Compensation Claims Tribunal

Most compensation claims are ambit and backed by threats, violence, and damage. Government departments and bodies are the worst offenders in settling huge claims, and, until there is a sea change in this philosophy and until the law is involved to deal with opportunists, nothing will change.

The suggestion that any approach to compensation issues needs a national scope is a policy relic of the colonial state and not applicable in the contemporary PNG context of state incapacity. Institutions and law need to develop at the regional level in Papua New Guinea, one step beyond the minutiae of life in the village, and ways need to be found for facilitating this development. One avenue is to support Village Courts, because they are largely successful at providing a system of justice at the grassroots level, although they can be significantly improved. A major problem is that they may be beholden to local prejudices—they may, for example, be biased against women. A national compensation policy will fail, because it will require landowners to place faith in a system of governance in which they have long since lost confidence.

Compensation claims need to be directed into the existing court system, because this system basically works well. An additional advantage is that funding for the National Court is guaranteed in the constitution and will not be affected by changes of government.

The creation of a Compensation Claims Tribunal could open up the floodgates for claims, resulting in cases being kept waiting for years before they are heard. Indeed, the creation of a tribunal may increase frustrations, because its creation may raise expectations of claims being processed more quickly than they are at present. This is what has happened to the recently created Human Rights Claims Tribunal.

Among the roles of any such tribunal should be included a function to monitor the actions of resource developers and ensure that compensation agreements are honoured and the rights of landholders protected. Landholders will continue to lose out in current compensation agreements with mining companies, because the long-term environmental problems are not exactly known, despite environmental impact studies. The current focus on mechanisms to ensure better distribution of compensation money, such as through the Land Groups Incorporation Act, is misconstrued in the emphasis on formalising the membership, structures, and land rights of local groups. The extreme fluidity and ambiguity of social groups in Papua New Guinea militates against such a formalisation. Indeed local groups should be referred to as 'landholders' rather than 'landowners', because land in Papua New Guinea is held in trust for future generations and is not owned in any 'western legal sense'.

A major problem is that the Valuer-General's schedule of compensation payments is not widely known. People have unrealistic expectations of how much they will be paid by the government and they are invariably disappointed with the figure they are offered.

Disputes concerning alienated land

According to many interviewees, most compensation disputes concern land acquired by pre-independence PNG administrations. Even though this type of 'alienated land' represents less than 3 per cent of the land in Papua New Guinea (the rest being customary land), it is usually land that has increased substantially in value since the acquisition. This has helped create grievances among original landholders, or, more commonly, their better educated and more money-oriented descendants.

In many cases, under German, British, and Australian administrations, land was not acquired for money, since that held little value to the landholders at the time. Instead, small items—of relatively little value to colonial administrations—were the units of exchange. Moreover, where money was transferred, the amounts were again relatively small.

Often the landholders were also not aware that they were transferring ownership of their lands for all time. This misunderstanding was not simply a question of literacy or education. Because land is life for subsistence landholders—the source of economic livelihood and security, communal identity, and spiritual affiliation—the notion of transferring ownership for all time had little or no meaning in traditional landholder perspectives.

That said, productive development of much alienated land has created a ‘honey pot’ effect as original or adjoining landholders have witnessed substantial increases in its value. Often, therefore, ‘compensation’ claims have arisen over alienated land in an effort to share in, or extort benefits from, the fruits of development. Needless to say, these claims generally ignore the central role of capital input in the increase in land value.

In basic legal terms, alienated land cannot be re-claimed by former holders unless the current owner has committed fraud or otherwise promised to return it. Understandably enough, therefore, interviewees reacted strongly to any suggestion that alienated land could be claimed—whether for return or compensation—by original landholders or their descendants. Certainty of land tenure, particularly that acquired in good faith by private investors, is fundamental to the economic activity that allows compensation payments to be made in the first place.

Yet, ‘compensation’ disputes over alienated land remain a major problem. The province of East New Britain seems to be one of the few places in Papua New Guinea that has successfully handled the issue. They have implemented a ‘no-compensation’ policy (see Box 2).

Box 2 East New Britain has historically fewer compensation disputes

The manager of a plantation in the Highlands estimates that he has received between 350 and 400 claims for compensation in the last five years. He believes there has been an alarming rise in the number of claims in this period and feels that there is an increasing trend towards reinforcing claims with criminal acts. Many of the claims attacked the plantation's right to specific plots of land, most of which were acquired by the business from the colonial government in the 1950s and 1960s on 99-year leases and are apparently secure in formal legal terms. This plantation manager believes that most of the claims lodged with him are bogus, but he often pays anyway because of the incapacity of the police to protect the business from sabotage. Disgruntled claimants regularly take matters into their own hands; their criminal actions melding into a general environment of lawlessness—vehicles are highjacked, road blocks erected, payrolls stolen, produce and equipment stolen and vandalised and staff intimidated. The plantation manager felt that his business received no support from government institutions and that some, such as village courts, were biased in favour of local groups. He employed a private security force of 150 personnel but could still not protect his property or staff.

This manager of the Highlands plantation argued that he had tried several measures to build better relations with surrounding landowning groups, such as donating money to community benefits. He felt that these actions had been futile and that surrounding communities failed to understand the contribution that the plantation made to the local economy. He felt that his business was targeted in the region, because it was easier to extort money from him than the Department of Lands or the National Land Titles Claims Tribunal, the government authorities to which he told local

groups to direct their complaints. These bodies, however, were based in Port Moresby, reacted to cases slowly, and had limited capacity to pay. The plantation manager complained of a ‘hand-out mentality’ among landowning groups.

The East New Britain Provincial Government has been more successful than other provinces in acquiring land for development purposes relatively quickly. The province has historically had fewer compensation disputes than many other parts of the country. For example, compensation claims for personal injury and death are not an issue in the province, in contrast with the Highlands. A recent increase in what the provincial government sees as unnecessary compensation claims has prompted the formalisation in writing of a long practiced policy of not paying compensation for infrastructure development projects. The stated aim of the policy is to facilitate ‘...the concept of compensation with the view to control, regulate and manage the practice of compensation in accordance with traditions and customary norms, while at the same time prevent the unnecessary abuse of the institution’.

The East New Britain policy establishes Compensation Tribunals at rural local-level governments, where particular customary norms will be better understood. The role of the tribunal is to act as a mediator between parties disputing a compensation claim. Where the parties cannot come to an agreement, the tribunal has the power to determine liability to pay compensation as well as the amount and form of compensation and the manner in which it is to be paid. Once a resolution has been reached, the chairman of the Tribunal makes an order incorporating the terms of the agreement. The agreement is signed by all parties and witnessed by the chairman.

In situations where a local-level government or the provincial government is a party in compensation, related dispute matters are referred to an Independent Tribunal. The Independent Tribunal consists of five prominent figures from the community but cannot include currently serving politicians or public servants. The five

members include a chairman and a representative for each of the four regions in the province. The Independent Tribunal is a permanent body whose members serve for three years.

The Compensation Tribunals at local-level governments consist of a District Land Court Magistrate, two representatives of non-government organisation within the local-level government area, and two members of a Ward Development Committee. A quorum of the tribunal consists of four persons, but the tribunal cannot sit unless the chairman and all parties to the dispute are present.

The chairman of the Compensation Tribunal is informed whenever a development project is proposed which involves clearing of economic trees or plants, or the removal of soil from land under customary title. The chairman arranges a forum with the parties affected to inform them of the project. The Tribunal sits if a dispute then arises about compensation. Once an agreement has been reached that landowners need to be paid just compensation, Government Valuation Officers are sent to make a valuation of property, which is then used by the Tribunal to determine the payment of compensation in cash or in kind. The local-level government is responsible for payment.

Finally, the East New Britain no-compensation policy clearly states that matters relating to compensation for death or injury are the jurisdiction of a normal court of law. Moreover, claims for compensation for loss of jobs are the responsibility of the Department of Labour and Industry.

Compensation for state land is not a new issue, and has been subject to regular inquiry. In 1978, the Papua New Guinea Government established a procedure for resolving these disputes. That procedure requires the dispute to be registered under the National Land Registration Act for determination by a National Lands Commission. This Commission is distinct from the Land Titles Claims Tribunal, which considers disputes over customary land.

The National Land Claims Tribunal will consider evidence of formal ownership by the claimant group, and the validity of the original colonial acquisition. The National Land Claims Tribunal then has discretion to grant compensation up to a maximum limit. There is no discretion to return land to the claimant group. Moreover, private owners of alienated land are under no legal obligation to pay money.

This system for resolving compensation disputes over alienated land has clearly failed. Box 3 provides a case example from Mount Hagen.

Box 3 Mt Hagen case study

On 17 September 1999, the Mogei Agilka Kundump sub-clan occupied the Holy Trinity Teachers College in Mount Hagen town forcing a temporary closure to college activities. The group asserted they would continue their occupation and forcefully repossess the land if the government did not take immediate action to address their claim for compensation. The Mogei Agilka Kundump had been frustrated by repeated delays in their attempts to pursue the claim over the previous ten years. They believed they had been grossly underpaid by the colonial government at the time of the original acquisition of the land on which the college now stands. The Catholic Church acquired a 99-year lease from the Australian Administration in 1952. The Mogei Agilka now demanded compensation of K1.5 million.

The occupation succeeded in making provincial government officials respond to their claim. The provincial government had been dealing irregularly with the issue as it had been raised by the landowners over the previous ten years and had attempted to go through the appropriate channels for the case to be heard in the National Lands Claims Tribunal. The provincial government took far more proactive action this time, however, in order to placate the

Mogei Agilka. They arranged and paid for the National Lands Commissioner to fly from Port Moresby up to Mount Hagen to hear the case. The hearing was held on 8 June 1999, and the Commissioner's decision was handed down on 22 September. The Commissioner decided in favour of the claimants and ordered the state to pay the Mogei Agilka compensation of K700,000.

Two points about the decision perplexed and frustrated the Provincial Lands Officer in Mount Hagen. First, the decision had been made without the state's side of the story being presented in the hearing. The state lawyer had failed to attend. The Commissioner rationalised that the claimants had been waiting long enough and deserved a decision regardless. Second, and of much greater concern to the Lands Officer, was the amount of the award and the fact that no explanation had been given as to how this sum was calculated. The Lands Officer was worried about the precedent this set and how the funds would be raised and also about the Mogei Agilka reaction if, as seemed likely, payment was delayed. Payment had not been made as of 15 December 1999, and the Provincial Lands Officer was not sure which level of government or government department was responsible.

What was the landowners' view leading up to this decision? The Mogei Agilka Kundump had sent several letters to the Western Highlands Provincial Government and other bodies relevant to land matters between 1987–99. The letters show that the amount demanded periodically increased over this time from K250,000. The landowners argue that their forebears were taken advantage of when they accepted compensation of £209, 19 shillings and 10 pence for the land in 1952. They argue that their forebears would not have been able to foresee the current cash value of the land or the recent increase in population of the Mogei Agilka Kundump, which they noted was growing at 4.5 per cent a year. They argued that they had been disadvantaged on several fronts. First, they had

lost land that was more productive than that on which they now live. Second, they believed that their welfare had been sacrificed for the benefit of the rest of Papua New Guinea, pointing out that teachers trained at the college educated children in all parts of the country. Third, they noted that the Department of Lands had given in to landowner demands for compensation in other parts of the country, including what they regarded as a similar case, where landowners in the Sepik were awarded compensation for a Teacher's College. The Mogei Agilka stressed that they felt disadvantaged in relation to other Mogei Agilka clans who had regained land within the town boundaries.

Their conclusion was that claiming compensation from the government for land acquired during the colonial period had become 'a tradition in Papua New Guinea'. This was because people in the position of the Mogei Agilka could not participate in the government policy which stipulated working on the land as a road to development. The government had misled the Mogei Agilka.

What was the position of the Catholic Church? As the third party in this dispute, the Catholic Church had expressed their willingness to renegotiate the initial agreement if it was found that the original acquisition had involved 'some injustice and/or the use of pressure or force'. The church, however, pointed out that the colonial government had originally been invited by local leaders to acquire the land in order to create a buffer zone between two warring Mogei groups and that local leaders had welcomed the arrival of the church.

The case in Box 3 demonstrates several themes which are common in relation to compensation for alienated land.

- Frustrations with the delays and inadequacies in the current process lead to direct political action. This, of course, often causes considerable inconvenience and cost to the community.

- Direct political action by sufficiently powerful groups triggers *ad hoc* payments far in excess of those allowed under the National Land Registration Act. Such payments are based on power not principle. They thus help breed corruption and copycat actions.
- The validity of clients' claims that original colonial acquisitions were involuntary or unlawful is often difficult to assess. Historical records are usually poor; evidence of prior ownership unwritten, and genealogical descent from original landholders clouded by clan intermarriages, intra-group disputes and sheer opportunism. These problems are revealed in the National Land Claims Tribunal determination in the Box 1 case itself. In this determination, the Claims Tribunal stated that it was ignoring the lack of sufficient legal evidence of original ownership by the claimant group. Because of the delays, non-appearance by the state's lawyer, and the its belief that a historical injustice had occurred, the Tribunal supported the claimants' case.
- The nature of customary land ownership itself poses problems. One interviewee, a long-standing resident of Papua New Guinea, described developing vacant valley land for plantations in the 1950s. This land was not used by local clan groups, who lived above the valley floor, because it was swampy and malarial. Yet, consistent with the axiom that all land in Papua New Guinea is or was owned by some customary group, the local clan groups believed that they owned the valley floor. The problem therefore is that the nature of customary ownership, particularly when the land in question was not used, makes it difficult to determine boundaries. This type of land is also often subject to overlapping claims and tribal fighting. This is the reason, it appears, that the Catholic Church actually received the Mt

Hagen land in Box 3. In short, the National Land Claims Tribunal must deal with intrinsically vague issues of boundaries and overlapping claims, in addition to the other problems of ownership and unlawful acquisition.

- The current system is hampered by its legalism. Claimant groups often cannot meet statutory requirements to produce legal evidence of their original ownership. Claims are obstructed by poor maintenance of historical records of colonial acquisitions. The maximum limit for claims often bears little relation to the value of the claim itself. The result, in combination with the problem of delay, is that claimant groups generally prefer direct political action. This is not to say that legal requirements are unimportant, but rather to say that historical grievances and claims are rarely resolved by legalism. The lesson is important. In a country like Papua New Guinea, where government is relatively weak and clan groups are strong but often chaotic, top-down institutions based on formal law must be complemented by bottom-up institutions based on mediation, discussion, and compromise. It follows that, while this report will provide suggestions for formal top-down institutions, it acknowledges that a basic function of any such institution will be development of bottom-up processes to resolve local level grievances. Such processes will not necessarily be based on legalism but on mediation and compromise.
- The National Land Claims Tribunal is grossly under-funded. There are very few commissioners and they command few resources. Not surprisingly, delays of up to five years are common. In 1995, Oliver (1995:16) found that '[s]ince the end of the third quarter 1994, because of a lack of funds, the Claims Tribunal has not been able to conduct any hearings, has had no telephone or fax facilities and has not

been able to purchase any stationery or repair malfunctioning office equipment'. It appears the situation has improved little since then.

Funding

The fieldwork cases relating to alienated land suggested that the foremost problem of the National Land Commission is chronic under-funding. One question which naturally arises is whether any proposed tribunal will need to have self-funding aspects. For this reason alone, the transfer of functions could represent an improvement over the current National Land Commission process.

Should the compensation dispute also entail dispute over original ownership, the existing system for resolving such disputes should be retained.

Development of principles and mediatory institutions

Failure to satisfy current National Land Registration Act requirements for proof of original ownership and boundaries and non-consensual or unlawful acquisition, should not be allowed to prevent determination of compensation disputes over alienated land.

Sufficient mediators must be trained to provide local level assistance for compensation disputes relating to alienated land. The emphasis should not be on monetary compensation and legal entitlements, but on local community benefits arising out of alienated land developments. In this regard, the community benefits packages developed by Telikom (Box 4) and the mining industry are useful precedents.

A compensation tribunal could help in training of mediators and development of template community benefits packages. Training of mediators could be undertaken in conjunction with a program such as that run by Dr John Rivers at the University of Lae. This program has received considerable support from the mining industry, and has developed substantial expertise and credibility.

Box 4 Telikom community benefits packages

The Lands and Survey Division in Telikom oversees the maintenance and development of some 300 repeater stations across Papua New Guinea. Around ten of these stations are damaged per year. About half of this damage is done by landowners with grievances over compensation for land. The manager considered the damage to the other five repeater stations to be simply criminal acts—a matter for the police.

These days, Telikom prefers to acquire land on 25-year lease-lease back agreements and has been in a process of transferring past contracts over to these agreements. Lease-lease back is the preference of landowners, especially compared with compulsory acquisition. Telikom does not have a land compensation policy of its own but is subject, as a government authority, to the regulations laid down in the Lands Act (1996). The organisation has, however, developed a ‘community services package’ which it offers to landowners on an annual basis to foster good relations. These packages consist of K2,400–K3,000 security and maintenance including

- free Telikom service
- K1000 medical supplies selected by landowners for local aid post
- K1000 school materials.

Community services packages are reviewed every five years. They are often paid before compensation has been determined. The major delay to the payment of a community services package is the resolution of ownership disputes between land groups. Some 70 per cent of community service packages are delayed by land disputes and the process of resolution through Land Courts is often laboriously slow. To allow development of repeater stations while such disputes are being resolved, Telikom signs a ‘Memorandum of Understanding’ with all claimants to the land, guaranteeing the release of packages upon determination of the rightful landowners.

Development of template community benefit arrangements

It must be emphasised that community benefits packages are not a new idea in Papua New Guinea. Most industries have developed community liaison and benefits packages, often with little success. Failures with Highlands coffee plantations for example show that granting equity participation to local clan groups is no guarantee against project theft and extortion, and that the communal structure of Papua New Guinea clans creates problems, because it allows different 'big men' to come and go, leaving agreements negotiated with communities often uncertain and subject to change.

The mediation role of a compensation tribunal will therefore not be easy. Its focus must be on developing long-term mediation expertise credible to all parties and a research and 'clearing house' capacity for template community benefits arrangements that may be used in different regions and industries. Such template arrangements, of course, will only be the basis for negotiation.

A lesson of the fieldwork is that template community benefit arrangements must vary between regions and industries. Significant differences prevent an approach that is too uniform and prescriptive. Project security is easier for some ventures than others. Equity participation by local groups, while generally a desirable means to engender community benefits and participation, is not appropriate for some ventures. Perhaps most significantly, many industries can also not afford the substantial packages developed by the mining industry.

Developing community benefit principles will also occur in conjunction with the proposed land use agreements.

Compensation disputes over customary land

Customary land represents at least 97 per cent of Papua New Guinea. It may only be acquired by the state. The justification is, first, to protect customary groups from landlessness and

exploitation and, second, to allow private developments 'clean' title from the state, free of any defect or dispute in the original customary title. As a result, the process of land acquisition by the state is fundamental to both public and private development.

Many interviewees, particularly those in provincial governments and statutory authorities, pointed out that a large number of 'compensation' disputes arise during this acquisition process, usually to the detriment of the proposed development. The following discussion accordingly considers the process of state acquisition of customary land for both public and private development.

The current process

First, the site must have been identified and surveyed either by the Works Department, for public purposes, or, in the case of private development, the developer. Once a site has been selected for public or private development, the National Lands Department and Department of Provincial Affairs will issue an instruction number to the relevant provincial government. A Land Investigation Report will then be completed by the Customary Lands Section. The Land Investigation Report will inquire into ownership of the land. At this time, compensation will also be discussed with the Lands Investigation Officer. A difficulty here is that there are no guidelines about this stage of the compensation negotiating process. Excessive promises are commonly made regarding the benefits of the development.

The Lands Investigation Report is sent to the provincial Lands Department, which then forwards it to the Village Affairs Secretariat, Provincial Affairs Secretariat, and the Attorney-General's Department for checking. Assuming that all is in order, the Provincial Affairs Secretariat will issue a certificate of inalienability. Where there is a dispute over ownership or boundaries, the matter will be referred either to the Land Titles Commission or a Land Court.

While this process is in train, the National Lands Office instructs the Valuer-General to conduct a valuation. The Valuer-General commissions a local valuer for this purpose. The Valuer-General will not act unless a survey of the land has been provided with the Lands Investigation Report and certificate of inalienability.

The valuation will then be included with the certificate of inalienability that is sent to the provincial government. It is only then that agreement is sought with landowners. The valuation, prepared on the basis of the Valuer-General's schedules, will be the basis for negotiation, and generally it is only the two categories of land and economic trees that are the subject of compensation payments.

The valuation thus occurs only once the Lands Investigation Report has been provided to the national government. This unduly slow and complicated procedure allows expectations, opportunistic land improvements, and customary land ownership disputes to become unwieldy long before valuation and negotiation. One provincial Lands Officer recommended that the valuation take place at the time of preparing the Lands Investigation Report.

Issues raised by the land acquisition process

One issue is whether the valuation should take place when the Lands Investigation Report is being prepared. The Lands Act and relevant regulations could be amended for this purpose. The fact that funds may ultimately not be forthcoming should not prevent this early valuation recommendation.

Another issue is whether the process of land acquisition should be decentralised to the provincial governments. Such an approach is possible under the current Act and has reportedly been successful in East New Britain (Box 2). Its benefits are that it avoids the current lengthy delays in Port Moresby, particularly the Department of Lands.

It was pointed out to us that such a decentralising approach may be opposed because of the inadequacies of some provincial governments and their reluctance to take political responsibility. If

Box 5 Recentralisation of the process of land acquisition

Since 1997 the Provincial Administrator of East New Britain has had power to administer the relevant section of the Land Act (1996) in the province as conferred by national Minister for Lands through the Ministers' (Delegation) Act and the accompanying Regulation (Chapter 35). These powers have greatly accelerated the process of acquiring land for development purposes, because they eliminate the need for gaining approval from the Lands Department in Port Moresby. For instance, the provincial government now has the authority to issue the 'instruction number' for a Land Investigation Report, which the Provincial Department of Lands undertakes once receiving a proposal for a development project. The powers delegated are

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|------------|---|
| Section 9 | the power to apply to the Land Titles Claims Tribunal or Local Land Court for a determination of ownership of customary land or interests therein |
| Section 10 | the power to acquire customary land on such terms as are agreed between him and customary land-owners |
| Section 11 | the power to lease customary land for the grant of special agricultural and business lease |
| Section 56 | the power to appoint personnel, before whom a member of the Land Board may make oath or affirmation |
| Section 57 | the power to refer matters to the Land Board |
| Section 58 | the power to receive recommendations from the Land Board |
| Section 71 | the power to receive recommendations from the Land Board |

Section 76	the power to accept terms and conditions of proposed leases and execution of state leases
Section 102	the power to grant lease over land for special agricultural and business purposes
Section 121	the power to consent to surrender of lease or part thereof
Section 125	the power to grant a licence
Section 126	the power to grant licence over resumed land
Section 128	the power to approve permitted dealings
Section 130	the power to approve subdivision
Section 131	the power to consolidate leases
Section 136	the power to inspect land in a state lease
Section 137	the power to authorise a person to examine land
Section 138	the power to authorise a person to occupy land temporarily
Section 144	the power of Minister relating to trespass
Section 152	the power of Minister to obtain court orders to send people back.

mandatory decentralisation of land acquisition is not possible, the national government should discuss with provincial governments the possibility of allowing decentralisation for smaller, or unopposed, acquisitions.

A final issue raised is the extent to which the government might implement the recommendations of the 1995 Oliver report and, in particular, devote greater resources to the system for resolving customary land ownership disputes.

Acquisition for private purposes

Private developers must not only deal with land acquisition delays, which encourage excessive expectations, they must also bear the burden of negotiating compensation packages with customary landholders. A common complaint was the ineffectiveness of government agencies in assisting with this process.

A compensation tribunal could assist the negotiating process through developing, first, a mediation capacity and, second, template compensation agreements for different regions and industries. These issues were covered above in the discussion regarding alienated land.

Compensation categories

Some interviewees suggested that a compensation tribunal should prepare a list of compensable heads of claim. Certain types of claim could be made (for example, social disruption) but others would automatically be disallowed. Set categories of claim would thus assist the negotiating process.

The mining industry has taken significant steps recently in standardising and refining fixed categories of claim. These categories go far beyond the simple economic trees categories of the Valuer-General. A similar expanded approach is now to be found in the new Oil and Gas Act. The possibility of updating other legislation to render compensation categories and procedures more uniform needs to be canvassed.

The advantage of the Oil and Gas Act, and the mining industry approach, is that it is more likely to produce greater community acceptance of the development than the limited, and apparently under-valued, categories of the Valuer-General. It also produces a set of standard categories that saves negotiating time and misunderstanding.

We encountered strong resistance, however, to the proposition that the categories found now in the mining industry, and the Oil and Gas Act, be extended to all other industries and developments. Most industries and statutory authorities lack the financial capacity of the mining sector. Many had successful compensation agreements without the expanded categories present in the mining industry.

One possibility is a middle-way approach. A compensation tribunal could develop template agreements and categories for different regions and industries. These templates would be the product of lengthy landholder, industry and government consultation. They would only be the basis for negotiation, but would save time and prevent misunderstanding. They would work in conjunction with the land use agreements discussed below. They would also not prevent the legislative and institutional standardisation of compensation procedures.

Compensation for personal injury or death

Although land represents the greatest cause of compensation disputes, violent and extortionate personal injury claims are a growing problem in Papua New Guinea. This is particularly so for private enterprises that are perceived to have ‘deep pockets’, but is also a common aspect of the relationship between local groups, particularly in the Highlands (Box 6).

- Personal injury claims are often a vehicle for outright extortion. Private enterprises are increasingly subject to claims for injury that bear no relation to their activities.
- Problems with law and order, particularly lack of police enforcement, often force *ad hoc* settlement of personal injury claims regardless of their merits. Needless to say, this simply serves to encourage further extortionate claims.
- The clan-based nature of PNG society often exacerbates personal injury disputes, particularly post-injury violence, as relatives directly involve themselves in any conflict. This phenomenon is exacerbated by the breakdown in law and order, particularly in the Highlands.
- The court system, and other formal personal injury institutions, suffer from the problem of many institutions in Papua New Guinea—they are too remote and slow to prevent local level conflict and violence.

Box 6 Traditional compensation payments

A senior police officer in the Western Highlands complained that people see the payment of compensation in traditional form as a way to avoid being sent to prison. Prison is a deterrent which may be used as a bargaining chip by the parties of victims to extract a traditional compensation payment, which these days includes pigs, cash, and consumer items. A provision within the Criminal Law (Compensation) Act 1991 gives a judge the flexibility to reduce a gaol sentence if the offender has made a traditional compensation payment. The rule of law still prevails, however, and offenders are still sent to jail.

A high profile case occurred in 1995 between the Premier of the Western Highlands Province, Lukas Roika, and his deputy, William Pik. Pik's people had been blamed for the death of a young man which occurred during a drunken brawl. The young man was from Roika' Mogeï Engembe clan. An elaborate ceremony was staged during which the Kaulka Kundbo and the Kurupbo clan of Dei Council, led by William Pik, offered their counterparts K26,960, 138 pigs, 5 cassowaries, 2 cows, and a horse. The spokesman for the Mogeï Engembe was Yak Wandak, a senior peace mediator in the Western Highlands Province. His response was reported in *The National*: 'This compensation payment is forcing me to say that we (Mogeï/Engembe) must now forgive the murderer (still at large) and let him go free' (p.4. 4/8/1995). The exchange was a major event in the province and was attended by the Premier, John Roika, the provincial police commissioner, John Wakon, and many other local community leaders.

Walking around Mount Hagen town with William Pik five years after this event, his big man status appeared as strong as ever judging from the myriad greetings of passers-by.

The current system

A number of Law Reform Claims Tribunal reports have considered the system for personal injury claims, particularly in relation to motor vehicle accidents (see Box 7 for an example of a extortionate demand relating to a traffic accident that did not involve personal injury). This report cannot replicate the expertise, consultations, and time that underpinned these Law Reform Claims Tribunal reports. Proposals for a no-fault system, based on a set schedule of amounts payable for different categories of injury or death, have been discussed at length and, to date, rejected.

Some interviewees pointed out that a no-fault system will not resolve the problems with personal injury claims that were identified above. Clan groups are hardly likely to be more ready to accept a fixed statutory amount that is likely to be less than full compensation through a court process. Extortionate claims are no more likely to be prevented by a no-fault statutory system than fault-based court determinations. Group-based conflict will not be deterred by statutory payments which are directed at individuals, and which fail to give weight to different status levels in a clan group. Indeed, conflict may well be exacerbated over time if, as has been common in Papua New Guinea, fixed amounts are not updated, and consequently are undermined by inflation.

Moreover, there are many areas of the personal injury system that are regarded as operating well. A number of interviewees pointed to the Motor Vehicle Insurance Trust as one relatively effective institution. Different opinions were expressed as to the workings of the Workers Compensation Tribunal. Finally, the court system is generally regarded as one of the few functioning national institutions, despite being plagued by the problems of delay and expense under which most court systems suffer.

The point is that these personal injury institutions have developed over time after considerable research and consultations. There is no evidence that moving to a no-fault system will help prevent the extortionate and violent claims described to us by a number of interviewees. Equally, there may be little point in simply transferring the jurisdiction of the Workers Compensation Tribunal and the Motor Vehicle Insurance Trust to a compensation tribunal.

That said, if personal injury claimants and their relatives receive quick concrete evidence that compensation will be paid, they are more likely to refrain from violence. Speed therefore seems to be the key. The current system allows for interim payments in motor vehicle accident cases. This was praised by some interviewees, although it appears that there are problems with its implementation.

The issue thus arises as to whether a compensation tribunal should be given jurisdiction to make small interim payments for personal injury or death arising out of workers compensation, motor vehicle accidents, or injuries caused by state or public authorities. A tribunal could also develop template principles for such interim (no liability) payments to be made by private parties subject to personal injury claim.

Box 7 Personal injury claims

A local group in the Mount Hagen region held a trucking company to ransom over a claim for compensation. The claim arose out of collision on the Okuk Highway between one of the company's trucks and a Public Motor Vehicle (PMV) belonging to someone from the Hagen group. The manager of the trucking company insists that the PMV was coming down the wrong side of the Okuk Highway when it collided head-on with the company truck. No one was hurt but the PMV was written off. The Hagen group then claimed that it was the company's responsibility to pay the replacement value of the PMV on

the grounds that the accident only occurred because the truck happened to be on the road at that particular point in time. The company manager refused.

The next time a company truck travelled up the Okuk Highway members of the disgruntled Hagen group hijacked it. The tray was dropped off at the police station in Mount Hagen town but the truck itself was driven back to the village where it was held. The group issued a warning to the company manager that all company trucks travelling up the Okuk Highway would befall the same fate until the company replaced the PMV. The manager refused to meet their demands outright but set about organising a forum for settling the dispute. The manager set up a meeting in Mount Hagen town between himself, representatives of the local group, the provincial police commander, and the governor of the province.

On his arrival in town for the meeting, the company manager was surprised to see the attendance of the entire local group of the PMV owner—some hundreds of local people had been mobilised in support. In that context, neither the police commander nor the governor was prepared to countenance the position of the company manager. The manager agreed to replace the PMV. The manager, however, released some of his frustrations by the manner in which he met the demands of the group—he found an old PMV in Lae which he repainted and presented to the group. The PMV was accepted and the company's trucks were once again able to ply the Okuk Highway safely.

Chapter Four

A Compensation Claims Tribunal

A tribunal or a court?

The final determination of legal rights and duties is, under the Constitution, always the province of the courts. This, however, does not mean the courts should be bothered with a mass of first-order disputes. If all compensation disputes had to be dealt with *ab initio* by the courts, it is likely that many would not be quickly resolved and the courts might be overwhelmed. Nor are all disputes so intractable as to warrant a full court hearing.

It must also be remembered that the courts have to deal with more than compensation disputes and cannot necessarily be expected to expend scarce court time processing a mass of factual detail, when their primary role is to lay down legal norms for the guidance of administrators and others.

A specialist tribunal would have the advantage that not all its members would have to be legally qualified and it would be able to make direct use of the expertise of non-legal members, such as valuers, accountants, and anthropologists. While it would be desirable that the president of any compensation tribunal would be, or have the status of, a judge, and that a tribunal have legally qualified members, the capacity to use the expertise of other professions would be a considerable advantage in analysing complex factual situations.

A tribunal would be able to constitute itself according to the gravity of the dispute. A simple dispute may be able to be dealt with by a single member through a mediation conference; a large and complex dispute may require a hearing by a full tribunal panel with both sides and the tribunal being assisted by legal representatives and experts' reports.

It should be stressed that a tribunal makes decisions as an administrative, though quasi-judicial, body and its decisions must be appealable to the courts. Nor should claimants be compelled to proceed through a tribunal. Their right to seek redress in the courts should not be altered, but the courts should be given the discretion to remit cases to a specialist compensation tribunal for findings of fact or to make an assessment of damages or loss. The Act setting up the tribunal would be an alternative to taking proceedings to the courts.

It should be pointed out that the choice of using a tribunal or a court as the vehicle for dealing with compensation claims is very much an on-balance decision. Tribunals can perhaps be less formal and directly employ non-legal members, but they do not have the inherent powers of a court, such as the ability to imprison for contempt. The case for using a court is developed elsewhere and, indeed, one could have a tribunal under a court if desired.

It is suggested that compensation disputes be heard in the first instance by a specialist compensation tribunal. This would be an alternative to seeking redress in the courts, but the courts would be free to use the tribunal as a finder of facts or to assess the quantum of loss.

There are a number of key issues to be considered in creating a tribunal.

- Constitution
- jurisdiction
- functions and powers

- mediation and conciliation
- processing of claims
- assistance to claimants
- consultants
- relation of a compensation tribunal to other courts and tribunals
- administration of a compensation tribunal.

Arguably one of the most vexed issues for procedural reform is how claims are processed. There is a view that all compensation claims should be lodged with a tribunal for the record and for official endorsement. The rationale is that this procedure would reduce extortionate demands. A negative effect, however, would be the creation of an enormous amount of paperwork which could unnecessarily hinder consent agreements. To overcome this problem, a two-tier system of lodgment is proposed whereby agreements can be lodged just for the record, or they can receive the tribunal's endorsement as registered agreements.

Constitution of a Compensation Claims Tribunal

An advantage of a tribunal is that it may make use of the skills of specialists other than legal professionals and part-time members in establishing facts and providing a forum for mediating disputes or facilitating consensual contractual solutions.

Nonetheless, any decision of a tribunal must be based on legal principles and subject to review by the courts. It is therefore suggested that a tribunal consist of a President, who should preferably be a National Court judge, and three (to seven) full-time members, of whom no less than one-third should be legally qualified. The other full-time members could be appointed from professions such as valuers, accountants, anthropologists, and economists. It is desirable that there be a legally qualified member

available for complex or major cases since these are more likely to result in appeals to the courts. Without a legally qualified member, a tribunal is more likely to fall into error, requiring further time and expense in properly rehearing the matter.

In addition to full-time members, a tribunal could have part-time members chosen from a wide variety of backgrounds, such as retired public servants (for example, district officers), mining wardens, academics or private legal practitioners.

Part-time members could assist in handling simpler cases or providing a third member where a full tribunal hearing by three members was required and more than one full tribunal hearing needed to be progressed.

It may be desirable to include Land Court Judges among the members, whether or not on a full-time basis. It may also be desirable for the Valuer-General or a member of his/her department to be included as a member since the compensation process would both need and inform the Valuer-General's tables, because guidelines for the economic values of trees and other assets will be needed. Land disputes and valuation questions may be intertwined in compensation disputes. If it is felt that the appointment of a serving Public Service officer to the tribunal was prejudicial to its independence, another possibility would be the appointment of a retired or former Valuer-General or departmental officer.

It is suggested that the tribunal consist of

- a president, who shall be a serving or retired judge
- full-time members, of whom one-third should be legally qualified
- part-time members, chosen for their relevant experience or expertise.

A full tribunal hearing should consist of three members of whom no fewer than two are full-time and at least one is legally qualified.

Appointing and removing tribunal members

Because the members of the Compensation Tribunal will have heavy public responsibilities and exercise quasi-judicial functions, there must be complete public confidence in their competence, integrity and impartiality.

It is therefore suggested that the members of the tribunal shall be appointed for fixed terms of, say, seven years by the Governor-General on the advice of the National Executive Council and with the consent of the Chief Justice. The consent of the Chief Justice is desirable because the decisions of the tribunal are intimately connected with, and ancillary to, the judicial system, and the courts will use the tribunal by referring matters to it and the tribunal's registry will be administered by the court.

Because the tribunal members will hold quasi-judicial status, they will need to enjoy similar protection to the judiciary against arbitrary removal from office. At the same time, since the tribunal is an administrative body, there needs to be a method of ensuring accountability and removal in cases of misconduct or corruption. It would seem reasonable that a tribunal member be removed from office upon conviction for a criminal offence or if he or she is rendered liable to a civil penalty for a serious matter such as breach of fiduciary duty or dishonesty, for example in carrying out duties as a company director. In addition, it would seem reasonable that a member be removed upon the request of either the National Executive Council or the Chief Justice to the Governor-General following an adverse finding by the Ombudsman Commission. The requirement that it be an adverse finding by the Ombudsman Commission would provide protection against arbitrary removal. The ability of the Chief Justice to request removal means that the courts will not be embarrassed by having a member of an ancillary quasi-judicial body in whose integrity they have lost confidence.

It is suggested that members of the tribunal should be appointed for seven years by the Governor-General on the advice of the National Executive Council and with the consent of the Chief Justice.

A member of the tribunal shall be removed by the Governor-General if convicted of a criminal offence or subjected to a civil penalty for breach of fiduciary duty or dishonesty, or if the National Executive Council or the Chief Justice so requests the Governor-General following an adverse finding against the tribunal member by the Ombudsman Commission. Alternatively, members may be removed under the same procedures as for removal of a justice of the National Court.

Jurisdiction

The basic role of the tribunal is to settle compensation disputes. Compensation disputes may arise in relation to the acquisition of customary land by mining or forestry companies for mineral extraction or logging purposes, or they may arise in relation to the acquisition of customary land by governments or public authorities for the provision of public services such as schools, airports, and roads. Compensation disputes may also arise in relation to personal injuries.

One view is that all compensation disputes should go through a tribunal and be barred from the courts. There are problems with this approach. First, the constitutional powers of the courts cannot be removed (even if that were conceded to be desirable). Second, the constitutional rights of legitimate claimants to just compensation cannot (and should not) be removed, and, third, in order to make final, non-appealable, decisions the tribunal would have to be the Supreme Court itself. All tribunals are administrative bodies and, as such, they are always subject to the power of the courts to correct unlawful administrative decisions. We also note that there seems to

be no general dissatisfaction with the level of compensation awarded by the courts. Rather, complaints are directed against *ad hoc* extra-legal compensation settlements made by public authorities or imposed by threats upon business enterprises which find it commercially expedient to settle in the absence of a fully effective legal framework.

The question then really reduces to whether claimants should be forced to go through a compensation tribunal in all matters prior to approaching the courts.

Although there may be some attraction in the idea that a specialist compensation tribunal should handle exclusively all compensation claims, this does not seem practical or desirable. Claimants may quite reasonably and properly wish to approach the courts directly in serious cases and there seems no reason to remove from the courts their inherent ability to settle compensation claims at common law. For example, the parties in a K150 million dispute between a trading company and a public authority may quite sensibly prefer to have their dispute heard in a court at the outset so that all facts are tested under the rules of evidence and costs are minimised by cutting out a hearing by a lower body which would inevitably be appealed.

Allowing people to go directly to the courts does not mean that a compensation tribunal could not handle a matter referred to it by the court if the court felt that such a referral would expedite a final assessment of the quantum of damages. There should be one restriction, though—secret court settlements should be forbidden. A claimant would be at liberty to bypass the tribunal and file a claim directly with the Supreme Court, but no settlement of that claim could be made without being filed on a public register as a consent order of the court (this would prevent collusive dealings).

On a practical level, leaving open the rights of litigants to go directly to the National Court is not likely to weaken the usefulness of a compensation tribunal. Tribunals generally do not award costs

against losing parties, often do not require legal representation, and need not be bound by the rules of evidence. Most claimants would prefer to have their claims tested without the risk of being liable for costs and would only seek review by a court if the tribunal's decision was manifestly wrong. In practice, one would expect a tribunal decision to be the final decision since most parties do not wish to incur the expense of legal representation or run the risk of costs.

Ideally, a compensation tribunal's primary role is to facilitate negotiation and conciliation between parties during the creation of a mutually agreed compensation agreement. If, however, parties cannot come to agreement, a tribunal must have legal authority to make a decision regarding disputed matters. A single dispute can involve many heads of claim. There may be a claim under the Forestry Act for statutory compensation, a common law claim for trespass or nuisance, and a claim for breach of an oral contract regarding land use. For example, a tribal group may claim in trespass and breach of contract because a logging company has breached an agreement to use only one part of its land for a logging camp and may claim under statute that the company has not paid the proper statutory compensation for the amount taken out of the entire area of land actually logged. If a tribunal only has the power to deal with claims for compensation under statutes, it will not be able to settle the whole dispute. A court would have to deal with the claims for trespass and breach of contract in this case. Judicial systems in many countries avoid delay and duplication of cases by conferring what is termed an 'accrued jurisdiction' on the tribunal or lower court dealing with one head of claim so that it can deal with all the other heads of claim in one hearing to resolve the matter efficiently.

One benefit of giving a tribunal an accrued jurisdiction is that it can promote a wider settlement in conciliation between the parties which covers all matters in a binding way. For example, there are

cases where companies have tried to make binding agreements with tribal groups under existing legislation yet such agreements may be technically invalid because of failure to conform precisely with statutory requirements as to form. A tribunal decision embodying such agreements through a mediation process would stand on a stronger legal footing than a mere private contract, because it takes effect as a consent court order if it is not appealed.

A compensation tribunal is not a court and would not have the unlimited jurisdiction of the National Court (this is one consideration favouring the use of a court for compensation procedures rather than a tribunal). It is necessary to decide what jurisdiction a tribunal should have. Jurisdiction may be as wide or as narrow as the policymakers decide. For example, policymakers may wish a tribunal to decide disputes over statutory compensation for lands acquisition, but may not wish it to hear commercial disputes between trading companies. On the other hand, if a commercial dispute involves compensation payable by a public authority (for example, for an alleged breach of contract), policymakers may wish to subject payouts to the scrutiny of a tribunal as an institutional check against public sector fraud.

Given that an administrative tribunal does not have the unlimited jurisdiction of a superior court, it will be necessary to delineate in the legislation establishing such a tribunal the kinds of compensation claims that may be brought before it for decision and the extent of any accruing jurisdiction. Existing PNG legislation provides for the determination and payment of compensation for various kinds of land and resource acquisition. Such provisions could be rewritten to confer jurisdiction on a compensation tribunal. For example, rather than mining wardens determining the compensation to be paid to customary landholders, this could be a function of a compensation tribunal (which could enlist the

assistance of mining wardens as assessors). Other experts, such as economists and actuaries, may also be of assistance to a tribunal in working out long-run projections for valuations and valuing non-market goods and services. Where legislation requires compensation to be paid by public bodies for land acquisitions, that too could be a function carried out by a compensation tribunal.

Because of the need to promote equity and uniformity in the handling of compensation claims by the public sector, the tribunal could also have a general jurisdiction to determine claims against governments or other public authorities such as Elcom and Telikom. This could also be the case in regard to claims against public companies.

Thus, one approach may be to make it unlawful for any person (including a public body or corporation) to pay or settle any demand for compensation which is not made in accordance with the procedure laid down in the Act or pursuant to court proceedings under the ordinary law. The Act could then prescribe more or less stringent tests depending on whom the claim is made against or how much is sought as a quantum relative to the property damaged or other occasion of loss.

This part of the legislation will need careful drafting—a manager of a public company held up on a road with a spurious demand for compensation could hardly be expected to enter into a debate with the assailant about the legal niceties of whether the law is being broken by the handing over of a wallet. The general idea behind a prohibition on extra-tribunal settlements, however, would be to ensure that in less immediate cases, a document trail is created that either deters spurious claims or remains as evidence of a breach of law.

It is not suggested at this stage that a compensation tribunal should deal with every compensation issue. In particular, it may be seen as inappropriate for actions regarding death or personal injury

not to be dealt with by a court in the first instance, and there seems to be no pressing reason to alter workers' compensation arrangements. If, however, experience shows that a compensation tribunal is working satisfactorily, its jurisdiction can easily be expanded to confer additional primary as well as accrued jurisdiction in cases involving workers' compensation, motor vehicle accidents, death or personal injury.

Careful consideration also needs to be given to whether a tribunal should or needs to have jurisdiction over disputes between private individuals involving compensation claims where that claim is not based on a statute. For example, if one businessmen scratches another's car pulling out of a carpark and he offers to settle the matter on the spot with his personal cheque for K300 to save their no-claim bonuses, should that be made illegal? On the other hand, an extortionate claim is no less extortionate because it is based on a common law right rather than a statutory right.

Nor is it suggested that all consent settlements be banned and all compensation claims within its jurisdiction must go through a full hearing by a tribunal. The courts are busy enough and the object of any legal system should be to encourage resolution rather than prolongation of disputes. There must also be provision for voluntary settlements to be notified or registered, as discussed later.

It is suggested in the first instance that a compensation claims tribunal shall have jurisdiction to determine compensation claims arising under the

- Civil Liability (Aircraft Operators Liability) Act (Chapter 292)
- Electricity Supply (Government Power Stations) Act (Chapter 306)
- Forestry Act 1991–1993
- Land Act 1996
- Land Acquisition Act
- Oil and Gas Act 1998.

The tribunal should also be able to determine the quantum of compensation where a matter is referred to it by the court for assessment.

The tribunal should also have an accrued jurisdiction to settle other matters arising out of, or connected with, a claim for statutory compensation, such as claims in tort or for breach of contract.

The tribunal should also have a general jurisdiction to determine the quantum of compensation payable by public companies or authorities.

There should be provisions allowing voluntary settlements, but these settlements should be publicly recorded.

Functions and powers

Because it is better to prevent disputes in the first place, and informed consensual arrangements are always preferable to an arbitrator's decision, it is desirable for a compensation tribunal to have wide active functions and powers to assist in the promotion of agreements and conciliation and mediation of disputes, in addition to the normal power to make decisions on a dispute.

Compensation, after all, can refer to situations where some money is paid voluntarily (for example, interest is often described by judges as the 'compensation' for money lent, and a business deal may include reference to an amount by way of compensation for profits lost on a cancelled or renegotiated contract), as well as situations where some money is paid, or act carried out, to rectify an intrusion on another's rights.

In this report, the meaning of compensation is a payment by way of restitution for a wrong or loss, including amounts payable under statute as compensation for disturbance and so forth. In dealing with a compensation dispute, a tribunal should, however, be able to facilitate a mutually satisfactory commercial agreement which includes matters other than strict legal compensation.

If a tribunal is to promote voluntary agreements and conciliation as well as resolving disputes, it should be obliged to carry out several functions. An important function will doubtless be settling compensation in land use disputes, for example, where mining, forestry or agricultural activity impinges on customary land. In relation to land use, a compensation tribunal will need to

- register applications for determination of land use agreements
- mediate applications for determination of land use agreements
- assist in negotiation of land use agreements
- register settled land use agreements
- arbitrate statutory entitlement to compensation where land use agreements are not reached.

In addition, because agreements may not be ‘once for all’ affairs in many cases, a tribunal would need to have an ongoing supervisory role in many cases. It would need to be in a position to ensure administrative oversight and supervision of compensation agreements and prudent management of compensation funds. This function could be carried out by a Compensation Settlements Administration Board under the direction of the Compensation Tribunal.

Assuming that the administrative procedures are in place, a tribunal itself would need various powers to help in mediating voluntary agreements or resolving disputes. Its powers would probably need to encompass such things as the power

- to make orders for payment of damages, including periodic structured settlements
- to direct specific performance of contracts
- to order parties to exchange customary gifts or place funds in trust
- to review contracts where it may be harsh or unconscionable not to do so (a power similar to that of courts under the NSW Contracts Review Act)
- to order that payments be made in cash or in kind

- to designate compensation trustees for any given settlement (for example, a supervisory board of trustees comprised of claimants, payer, and administration board officers), so that the parties may have an ongoing role in dealing with compensation payments out of a fund.

The tribunal would need various administrative powers—to engage consultants, for example. It could be expected that the tribunal would occasionally need assistance from experts on questions relating to anthropology, valuation, geo-spatial survey and mapping, environmental impacts, among other things. Valuation in particular is critical. If a tribunal were able to engage consultants to prepare early ‘preliminary’ valuations before a full hearing, unrealistic expectations could be avoided and parties encouraged to settle.

The tribunal would also need administrative support systems and staff to deal with matters such as reporting to parliament and producing decisions and files for court appeals. It would need to play a role in public education on compensation and land use issues. It would need basic support services such as information management and technology, internal and external audit, library and legal research facilities. It may be that these could be met by administrative cooperation with the court and its registry and library. Consideration would need to be given to which functions should be performed by tribunal staff employees and which could be tendered out. If library, legal research, or registry facilities are to be shared with the court, then consideration will need to be given to the tribunal providing funding support to the court. Such issues are explored further later in this report.

The suggestion is that the Compensation Tribunal have wide powers to facilitate consensual agreements for land use as well as powers to order compensation be provided either in cash or in kind and either to current claimants or to future generations through trust funds.

Mediation and conciliation

Should a compensation tribunal have mainly a conciliation or mediation function, or should it arbitrate as well? Should there be scope for more formal adversarial processes, or should these be heard on appeal to a court only when conciliation or mediation has failed?

Given the nature of public understanding of the formal legal system in Papua New Guinea, it would seem that a tribunal could make a major contribution by acting as an 'honest broker' in actual or-anticipated disputes. It would be highly desirable that a tribunal seek to promote agreement between the parties and provide a safe ground for 'without prejudice' discussions and negotiations. It is noteworthy that the East New Britain compensation policy makes mediation compulsory before a matter can proceed to an independent tribunal.

To borrow from a different context, in Australia, once an application made by a land claim group is accepted for registration, the door to the mediation process for the creation of a land use agreement is opened. The mediation/conciliation process can thus unfold within the procedural framework of the tribunal unless mediation is found to be unnecessary or inappropriate (for example, because the parties are already in agreement or there is no likelihood the parties will agree to any or all matters open to mediation, or there is insufficient detail in the application to support mediation). All or part of an application may go to mediation. Mediation is conducted by members of the tribunal or by consultants appointed by the president and agreed to by the parties. The consultants must have appropriate skills and must disclose potential conflict of interest to the president. The court (in Australia) can order mediation to cease, but only once three months have elapsed after the beginning of the mediation process. The court must take into account any tribunal reports provided. The

court then determines the outstanding issues, and may order further mediation.

Mediation raises several procedural questions. Should mediation be held in private? Can there be public disclosure? Who decides if there is public disclosure—is it the tribunal, and must the parties agree to an open mediation process? To what extent should mediation proceed on a ‘without prejudice’ basis?

During mediation, how should tribunal members and consultants be involved with developing an agreement? Should assistance to parties be mandatory or provided on request? May the tribunal request assistance from the parties where, for instance, a mining company already has a sophisticated process for handling compensation agreements? Can the *bona fides* of any party-provided experts be tested or established by the tribunal?

There will be cases where the tribunal is forced to make an arbitral decision and in such cases the normal adversarial approach seems appropriate, subject to a greater degree of informality in relation to rules of evidence or legal representation than might be observed in a court. Nonetheless, if called upon to make a decision, the tribunal should do so and state the reasons for its decision in a way that enables the parties to understand why the decision has been made, and which enables a court to exercise judicial review. Reasoned decisions and transparency are a vital part of the educative role of a compensation tribunal.

In addition, part of the value of an expert tribunal will lie in pre-sifting factual material such that a reviewing court could concentrate on the legal issues rather than the factual matrix. A tribunal’s findings of fact may often be uncontested, thus freeing the reviewing court to make a quick decision based only on the legal issues. Appeals to the courts should, however, remain open and parties who wish to proceed directly to a court should not be prevented from doing so.

In practice, the courts and the tribunal should complement one another, rather than competing for business. The tribunal's primary function ought to be that of conciliation and mediation in order to achieve agreements that all parties fully and mutually accept (for example, over land use and compensation). Ideally, there would be no need to resort to the court.

This report suggests that the tribunal's emphasis should be on conciliation and mediation. The tribunal should have the discretion to allow the parties to withdraw for private negotiations on a 'without prejudice' basis during negotiations or mediation, but facts admitted during mediation within the tribunal should otherwise form part of the record for tribunal and court purposes. The tribunal should give an arbitral decision where an agreement between the parties is not possible. Such a decision should state the findings of fact and the legal basis for the decision so that it may be reviewed by a court.

Application process

Although a compensation tribunal is an administrative body, it is also designed to forward unresolved disputes to the courts in a form with which the court can deal. Further, a tribunal hearing, even if less formal than the courts, is not intended to be less serious in its approach to establishing people's entitlements.

Both the courts and the tribunal have parts to play in the compensation system. It thus makes sense for them to use a common registry to track applications and document files. In Australia, initial applications regarding native title disputes are now made to the Federal Court. The Federal Court then notifies the Registrar of the Native Title Tribunal. The Registrar then notifies relevant persons that the application has been made and invites them to become parties. The Federal Court refers matters to the tribunal for mediation and the tribunal reports to the court on the progress of mediation.

There is merit in an approach which requires that notifications of anticipated disputes, requests for mediation, or conciliation or arbitration of disputes, should be lodged through the court registrar so that the parties realise that their matters are being taken seriously and so that the court can exercise, through its registrar, a preliminary check of applications to ensure that they are within jurisdiction. If the registry processes of the tribunal are handled by the court registry system, the administrative processing of appeals is likely to be smoother, because the documents will always be under the control of the court's officers. Since the jurisdiction of the courts can never be removed under the PNG Constitution, it seems efficient to avoid duplication of files, as cases will from time to time go on to appeal.

Given that tribunal decisions would take legal effect as consent court orders, it is also appropriate that relevant documents be under the control of the court should the court be called upon to enforce a tribunal decision by way of contempt proceedings.

It is suggested that compensation claimants first apply to the court registrar and that the tribunal registry be based within the court registry.

Overlapping applications

It is possible that one dispute may involve separate parties. For example, a forestry or mining application may involve competing claims to resource ownership by more than one clan group. By placing the tribunal registry within the court registry, it may be possible to streamline dispute resolution and speed up the process by bringing together overlapping claims to achieve one determination of an issue per geographical area. In Papua New Guinea, it might also be a more efficient option to involve both court and tribunal in these administrative functions to help end parallel or competing compensation claims occurring simultaneously in both fora. Claimants could also be joined, as in Australia, so that a single unified process, bringing together the various claimants, may proceed.

The tribunal registry should be located within the court registry so that overlapping, parallel or competing actions may be merged into a single hearing process at the earliest opportunity.

Implications for court administration

Obviously, it would be undesirable to give the court registry new functions as a compensation tribunal registry without increasing the resources available to it. It is suggested later in this report that a self-funding 'user pays' system of funding a compensation tribunal should be the objective. Using the National Court as the initial point of entry for applicants may place strain on the court registry. If the tribunal is self-funding, it may be that the National Court would be aided in carrying out the new administrative functions by a fund-splitting arrangement.

Further, resources would need to be given to the court to expand registry functions. In the longer run, the court registry should receive additional funding from the tribunal's user pays administration of compensation claims and awards.

Processing of claims

Claims for compensation may arise in more than one way. The common paradigm for compensation claims is generally the tort claim. Person A has damaged person B's person, land, or personal property and Person B brings an action in a tribunal or court, seeking compensation in the strict sense. But things may not happen in exactly that way. Indeed, in resource development, a mining company or forestry company is generally in negotiation with customary landholders before much damage is done or much compensation is payable. The compensation question is thus inextricably linked with the question of landholder consent to another party's statutorily permitted land use.

This means that a compensation tribunal may find that its involvement is sought not merely by aggrieved citizens but by those who are anxious lest they cause grievance. Person B may not yet

have been injured, but Person A, who is about to exercise a statutory right to enter Person B's land, may want to ensure, before entering the land, that a process has been agreed with Person B for compensating that person for any resulting loss or disturbance.

Thus, unlike a classical tort case, the person who knows he or she will be liable to pay compensation may wish to notify a tribunal of a 'dispute' before it has arisen. It is highly desirable that a compensation tribunal have jurisdiction to handle such matters so that serious disputes are forestalled and negotiated agreements are in place before compensation becomes payable and all parties have a settled framework for dealing with the ongoing complaints which may arise. This desideratum is reflected in the principle that notice has to be given before mining development commences. It may also be noted that there have been suggestions that all mining compensation agreements be centrally registered.

In principle, it would seem desirable that, where a resource developer proposes to enter someone else's land, he or she give notice to the tribunal registry so that the court is aware of the potential dispute. At the same time, the party proposing to enter the land should be required to explain to the other parties, such as customary landholders, that, if they cannot reach a satisfactory agreement or any dispute subsequently arises, there is an independent tribunal which can hear both sides and suggest a way of settling the matter. In some cases, the tribunal may wish to send a staff member or appoint a district officer to convey the same message.

The purpose of such notification is not to encourage claimants but to let parties know that there is an umpire who can help them resolve deadlocks. If, for example, a mining company does all its own negotiations with people who have never before dealt with such large-scale negotiations, it would be understandable that there may be some suspicion amongst the people, no matter how reasonable and fair-minded the company may have been. If the

other party knows that any agreement has to be notified to, or registered with (the difference is discussed later in this report), an independent tribunal under the courts, then there will be a sense in which both parties may have more confidence in their agreement.

Thus, assisting in the formulation of compensation land use agreements, processing these agreements, and sorting out the parties to such agreements, may be a large part of a compensation tribunal's work.

There seem to be two processes involved in achieving agreement regarding compensation. First, there is the threshold question about the *bona fides* of a claim. The claimant must have the appropriate level of interest in and connection to the place over which compensation is claimed, for example, ownership of land, rights to use land which are disturbed, and so forth. Second, there must be an appropriate level of loss, displacement, or change in circumstances to warrant compensation. Thus, questions will arise as to whether a claim group is clearly defined (who are the proper claimants?), what the internal/external boundaries of the claim are (over what area?), what the factual basis supporting rights to claim compensation is (what is to be compensated for?), and whether or not overlapping applications have claims in common.

In some circumstances—for example, where a bogus head man makes an application supposedly on behalf of a group of people—the claimant would have to prove connections with the group they purport to represent, either by supplying evidence of their express consent to his or her application, or by allowing only group applications. Circumstances may arise where a claim group has to submit evidence to show that they have traditional connections to the land and are not interlopers on land held by others.

It is thus necessary to examine in great detail the issues raised by the processing of agreements or claims.

The tribunal will have to consider claims for compensation, as well as proposed settlements of claims where those claims have been made against public companies or public authorities. Claims not involving statutory compensation liabilities between private persons or between persons and private companies, trusts, or partnerships, may be settled without reference to a compensation tribunal, unless the tribunal's jurisdiction is extended to vetting such settlements. For example, should two public trading companies involved in a dispute about compensation for a cancelled contract have to lodge, notify, or register any settlement with a compensation tribunal? Since their compensation dispute would not involve any claim for statute-based compensation, there seems no reason to interfere with normal commercial negotiations by bringing it into the tribunal's jurisdiction.

Examining and vetting compensation claims and settlements

On one view, there is no role for a compensation tribunal to examine the *prima facie* merits of any claim or interfere with voluntary settlements. However compelling this may be in theory, there are practical problems with compensation in Papua New Guinea. In some cases, compensation may be demanded without any pretence of establishing any such right. This is already criminal but still occurs, and further practical disincentives may need to be created. In other cases, compensation may be paid, possibly collusively, at an inflated level as a means of milking taxpayer funds for private gain, as when a road resumption program pays well above market rates for any land resumed or damaged. In other cases, the position may be reversed, and people entitled to compensation may be defrauded through not being paid properly for their resources (for example, a forestry operation may underpay customary owners or even pay money to fraudulent associates posing as village leaders).

While these activities may be illegal, deterrence involves more than words in a statute book. Apart from police investigation and prosecution, if a legal system is to work it must generate evidence and audit trails.

There seem to be four roles a tribunal could play in compensation claims procedures.

- Applications for lodgment of claims or settlements could be checked *pro forma* only for whether they disclose a threshold issue before being accepted for lodgment by a tribunal.
- Consent settlements could be notified to the tribunal so that a report trail of any collusive or fraudulent claims is collected as public information in the Court registry system for the benefit of investigations by police or the Ombudsman Commission.
- Consent settlements could be registered with the tribunal and take effect as a binding court order between the parties, which limits further claims by other parties.
- Unresolved compensation claims could be mediated or decided by the tribunal according to law.

A threshold test on lodgment for tribunal applicants seeking to negotiate an agreement would arguably reduce spurious, extortionate, or manifestly unfair claims or agreements. Yet it is desirable that parties are free to consent voluntarily to an agreement. Where a developer chooses to make an agreement with another party or parties, regardless of any of the tribunal's criteria for finding the proper claimant or procedures to weed out vexatious or extortionate claims of this sort, should a tribunal, in a free society, be able to veto an independent consent agreement and refuse to allow it to have any legal effect? On the other hand, there is a broader public interest in not allowing excessive or extra-legal 'compensation' payments born of extortion and commercial expediency.

In any case, it may be beyond any government's resources to provide for a tribunal with a comprehensive vetting function, in which all consensual agreements arrived at independently must be vetted by the tribunal in the same way the former Australian Securities Commission had to vet all corporate prospectuses. The process was cumbersome and expensive.

On the other hand, it is not in the best interests of parties if the system of negotiation and registration of agreements meant to safeguard those parties can simply be bypassed and no procedural safeguards are in place. If agreements based on extortion can be registered and given full legal effect, what incentive is there to create more satisfactory agreements through a lengthier and more transparent tribunal process? If a developer can deal with anyone and on any terms, what is to stop opportunistic or disgruntled people from using any tactic necessary to obtain compensation? Should a tribunal have the power not to accept lodgment of manifestly unsatisfactory agreements? Should the parties to an agreement be able to appeal to the court and force lodgment and registration of their agreement in any case?

One solution to this vexed question of freedom of contractual choice versus the public interest in preventing exploitation or extortion would be to have differences between lodgment, notification, and registration of an agreement.

Lodgment. Without successful lodgment, no compensation claim could be paid at all. Lodgment would essentially be a formal requirement designed to identify the claim, the parties, the settlement, and the basis for computing the settlement. Such formal requirements are essential to identify the dispute and the parties. If all these formal requirements were *prima facie* in order, the application would be accepted for lodgment and compensation could then be paid voluntarily. Lodgment would be a process of ensuring evidence was kept for the record.

Notified agreements. Once successfully lodged, an application relating to a consent agreement would then either be a notified agreement or a registered agreement. After a claim had been successfully lodged, the parties could reach agreement with or without tribunal mediation and could conclude the matter without any further tribunal involvement if they wished. The idea is that a defendant would be at liberty to settle the claim provided that the amount paid is within the limits set in the Act (\$X per acre, per pig, and so forth), and, in any case, a record of the settlement would be provided to the registrar and recorded in the public registry (public recording of claims and settlements would discourage double dipping). Where an agreement is simply notified to the tribunal either at the time of application or after, and there is no further tribunal involvement, the agreement would be a notified agreement and take effect according to its terms. Notification would not mean that the tribunal had passed any judgment on whether the claim was meritorious or not, and the tribunal would have discretion to refer questionable notified agreements to the police or Ombudsman Commission for investigation. Most importantly, a notified agreement as a private agreement would not preclude further claims. If a restriction were placed on the permissible quantum payable beyond the limits set out in the Act or regulations, then the matter would be adjudicated upon by the tribunal which would apply the ordinary law (such a stringent restriction is not proposed here).

Registered agreements. A registered compensation agreement would be one where the tribunal had formed a view on its merits. Registered compensation agreements would also have the potential to bind third parties. Registration of an agreement should confer sufficient benefits to make potential parties want to use the tribunal structure and the registration process. For example, a registered agreement could only be reopened or renegotiated

under the supervision of the tribunal within a procedural framework which limits the scope for extortion. Legislation which mirrors certain aspects of contracts review legislation might be welcomed both by developers, who may prefer the legislative framework to arbitrary blackmail by opportunistic persons (the *bona fides* of whom would be tested in the tribunal), and claimants, who would know that unconscionable terms would be reviewed. Also, any moves to reopen a registered agreement would, in most instances, be restricted to those who are parties to the agreement.

Without registration of an agreement, a developer could be assailed by any compensation seeker at any time without having recourse to procedural safeguards such as the *prima facie* concluded status of a registered agreement or review and oversight by tribunal members and consultants.

If parties make a notified, non-registered agreement and one or more later decides that the agreement was disadvantageous, extortionate, or fraudulent, the party might be allowed to go to the tribunal, but the process of review of the agreement will begin from the very beginning, with the tribunal reopening all previous agreements, canvassing its whole history and looking at it *ab initio*. The tribunal would have power to rewrite the agreement, taking into account circumstances such as bargaining power and whether benefits under the agreement are excessive (for example, taking into account Valuer-General's tables for values of trees). Contracts review legislation may be an appropriate model for the role of a tribunal in these circumstances.

Where the parties have all submitted themselves to the tribunal's jurisdiction to rewrite an agreement, such a revision would be binding. Where the parties do not consent to the tribunal's revision of a reopened notified non-registered agreement, however, recourse would be to the court for judicial review of the agreement. In such a case, the aggrieved party may well wish they had gone to

the tribunal in the first place (parties may always approach the court for review at first instance or appeal a decision of the tribunal, but this may not always be the best approach in terms of time and money).

A two-tier approach. It may be desirable to have a two-tier system for registration of agreements. Compensation/land use agreements may be placed in one of two categories. First, there are those which are supervised by and approved by the tribunal. These would be the registered agreements.

A second category would be those agreements consented to independently and registered without having been supervised by or approved by the tribunal. These would be the notified agreements. Notified agreements would not enjoy the protection of the tribunal's procedural safeguards, such as the prohibition of anyone other than registered parties seeking further compensation under the agreement. Notified agreements would have to meet a set of minimal procedural criteria—in essence, a small audit-like measure requiring the agreement to have set out the method of calculation of compensation and an explanation of the variations, if any, from the Valuer-General's compensation guidelines. If these criteria are not met, the notified agreement would be a 'qualified notified agreement', which might be referred to the appropriate authorities for investigation. In essence, any deficiencies are thus publicly alerted.

An agreement involving payment by a public authority, if it is qualified in this way, may also be referred to the Ombudsman Commission for investigation into fraudulent misappropriation of funds, for example, where compensation payouts are excessive compared to the Valuer-General's guidelines.

Benefit of registration over mere notification. The use of a statutory scheme for negotiation and registration of compensation and land use agreements allows people with different interests a

good framework for reaching practical and mutually acceptable agreements about the management and use of resources, as well as ongoing compensation.

It may be observed that such land use agreements on a public register, which are binding to third parties, are closely linked to the question of land ownership and registration. A registered land use agreement might almost seem like a certificate of title. Before a land use agreement could be approved by a tribunal, the tribunal must be sure that the claimant party has rights to the land. There have been several proposals for land registration programs, and, if any legislation for registering customary land were put in place, compensation procedure legislation would have to be linked into it.

There can be different types of agreements, superior to mere contracts, with rights of renegotiation, procedural rights and protections, a framework for day-to-day oversight and management, and administration of funds via trust funds. By placing the narrow legal compensation issues within the broader framework of a mediated agreement, a tribunal could facilitate mutually beneficial outcomes. In practice, in some major developments, compensation issues are already being subsumed in broader working agreements between tribal groups and business enterprises and are working satisfactorily. If the Compensation Tribunal were given a broad jurisdiction, it would be able to facilitate similar all-encompassing agreements in other industries and other parts of the country.

Greater certainty can thus be offered to developers (for example, in the mining, forestry, and agricultural sectors) without loss of flexibility. Agreements can permit future grants of interests to registered parties, provide for future generations with an effective statutory monitoring structure, and generally facilitate more secure long-term relationships between the parties, as well as providing greater certainty about who to deal with (not just 'all comers').

Agreements under a tribunal will have the effect of a binding contract, but with the attraction of more efficient monitoring that will not require the parties to run to court all the time.

A registered agreement will also bind all others with interests in land or waters, among other things, in the area covered by the agreement, even though they are not parties to the agreement. This is something a contract cannot do. This would be a major feature of registration, which could potentially eradicate opportunistic claims. It would be unlawful for any public company or public authority to pay any compensation claim not sanctioned by a court or made within the tribunal's procedures. The ability afforded to registered parties to reopen and reassess the agreement within the security of a statutory framework is also an important feature.

To sum up, a compensation tribunal should not have arbitrary power to override voluntary compensation settlements, but should have the power to insist on certain formal checks before a settlement is accepted as lodged and payment made. A distinction should be drawn between notified agreements, which have no adjudicative status but which are binding as contracts between the parties, and registered agreements, which are considered by the tribunal and which not only bind the parties as court orders but also preclude intervention by third parties to seek compensation except in conformity with the legislation.

Land use agreements

The history of more recent agreements between mining companies and customary landholders and their communities suggests that land use agreements may have a wide scope. Land use agreements could (and arguably should) include provisions regarding land rehabilitation—for example, trust funds may be created to provide for eventual replanting after forestry or mining activities. Land use agreements might also be subject to guidelines which would require them to refer to the Valuer-General's schedule

and explain any variations. This would assist in keeping the schedule up-to-date and relevant as well as checking unjustified claims.

In addition to compensation payable under legislation or for immediate use of land for activities such as mining or forestry, there seems no reason why a land use agreement should not cover ancillary matters such as provision of housing, utilities, and social or physical infrastructure such as community centres, schools, or hospitals. It would not be conducive to forestalling or resolving disputes over resource development compensation if an agreement could not be registered or notified to the tribunal because it fell outside the tribunal's jurisdiction by dealing with matters over and above the immediate compensation issue.

The idea behind a land use agreement is that it would be a voluntary legally binding agreement covering a range of land use issues including compensation for any land destruction. In Australia, land use agreements are used in conjunction with resolution of native title applications. Land use agreements could include provisions for future acts and could deal with the exercise of different rights and interests in relation to an area (for example, there may be more than one kinship group with customary rights over an area to be used as a mining lease). The Australian system appears to have features relevant to, and potentially useful in, the Papua New Guinea context, although the issue of native title is not particularly relevant since land is owned by tribal groups. Where there is a dispute as to the true ownership group in relation to land or who the proper recipients of compensation in an area are, however, some legal tests of the threshold entitlement (ownership or connection to land by usage, material disadvantage, and so forth) may be as relevant in Papua New Guinea as in Australia. As noted elsewhere, this highlights the point that questions of compensation are often intimately connected with questions of land

ownership determination—currently dealt with by the Land Court and Land Titles Commission. A process of referral and/or cross vesting jurisdiction is necessary to ensure a full and proper resolution of compensation cases involving land.

The legal effect of registration of a land use agreement is crucial to the operation of a fully binding compensation system. In Australia, under the Native Title Act, the legal effect provided by the legislation depends on registration of the land use agreement. Details of the agreement are entered on the register. Public registration of land use agreements is of benefit to both claimants (who will have guidance in forming expectations of what levels and types of compensation are ‘in the ballpark’) and potential resource users (who will not have to start from scratch in thinking about how to design an offer of compensation).

In order to promote all-inclusive settlement of claims related to compensation for resource development, it should be possible to notify or register comprehensive land use agreements with the tribunal.

Lodgment test

In Australia, the current Native Title Act includes a ‘registration test’ which must be met before a native title claimant is recognised as having a right to negotiate over land development. This is not appropriate in Papua New Guinea, where customary land ownership has always been recognised and the Compensation Tribunal would not have to deal with the question of title to land, although title disputes may arise which would have to be referred to the Land Court. Some threshold requirements may, however, have to be met before an agreement or claim is accepted as properly lodged with the tribunal registry, simply to ensure the *bona fides* of the claims and the claimants. For example, a claim should not be accepted for lodgment if there is a no apparent cause of action on

the facts as alleged (for example, if the claim is for past potential rather than actual loss). Part of the educative function of a compensation tribunal would be to explain to claimants just what it is they may claim compensation for, and requiring and assisting claimants to lodge claims in a valid form would be an important part of that process. In practice, having a compensation tribunal to which claimants could be referred by Ministers, Members of Parliament, public officials, authorities, and companies, should be a major factor in educating the community about when compensation claims may be legitimately made and how unacceptable coercive behaviour will be dealt with.

Is there a place for vetting initial land compensation claims prior to accepting land use agreements? One view is that there should be no threshold test process upon lodgment. Without threshold requirements, all applications would be accepted and entertained by the tribunal, which would hear and determine all questions, including threshold or jurisdictional questions (for example, questions regarding who the proper claimants are or whether there is a valid claim) during the negotiation and conciliation process. The substantive negotiation and conciliation process would be curtailed if the facts of the case evidenced a spurious or otherwise flawed claim.

On the other hand, while it is not desirable to create procedures for their own sake, and a tribunal should be perhaps less formal than the courts, it does seem that some formal requirements should be met before the tribunal registry accepts lodgment of a claim or proposed settlement of a claim. A tribunal should not have its time wasted, and delays to genuine claimants by persons who abuse the tribunal's processes as a form of economic extortion must not be allowed. At a minimum, before a claim, agreement, or settlement is accepted as lodged, there must be supporting

documentation. The tribunal has to have something to work with. For example, identification of the parties may need to be done by either signature, occupation and address, or photograph and thumbprint. Sworn statements may need to be lodged in support, either in writing or orally recorded, or a translator's affidavit may be required. A statement of the claim must be set out disclosing the facts on which liability to compensation is alleged to arise and how it has been or should be computed. It may, for example, be necessary for a claim group to certify an application—for example, as an incorporated landowning body—so that the landowning kin group can swear as a body corporate that the claim is a true claim in an affidavit. Thus, at a minimum, to be accepted for lodgment, a claim for compensation would have to be in writing, specify the occasion of loss, identify the person or property injured and, once accepted at the registry, be open to public inspection.

The benefit of some basic formal requirements for lodgment of a claim or proposed settlement are that the tribunal's time is not wasted on frivolous claims while audit and accountability trails are established (for example, if a public authority seeks to lodge a collusive settlement with a corrupt employee's kinship group). Formal testing of applications on lodgment may be of great assistance as a means of ascertaining who has a valid *prima facie* claim to compensation, especially if there are doubts about the *bona fides* of the claim, whether this amounts to fraud, extortion, or merely misguided and misconceived actions.

Once a claim is accepted as lodged in valid form, the tribunal then deals with the merits through conciliation, mediation, or arbitration as required.

Minimum threshold procedural standards should be met before a claim or agreement is accepted for lodgment by the tribunal registry.

Threshold procedural standards

Ideally, a claim which met threshold criteria for lodgment the would contain sufficient *prima facie* evidence of the identity of the claimants, the nature of the interests involved, and loss or disruption involved. For example, where parties are not able to write, one would presumably want other evidence of consent to an agreement or claim, such as a thumbprint and photograph annexed to the document. On the other hand, this might be an excessively harsh requirement, given that claim groups may have difficulty in fulfilling the formal application requirements sufficiently. There may be problems obtaining documents, obtaining additional advice in remote places, and couching the claim appropriately to meet threshold criteria, among other things.

Thus, there could be a provisional lodgment process which preserves the applicant's right to negotiate a compensation agreement and allows the tribunal to give procedural guidance to claimants and allow lodged agreements or claims to be amended and re-tested as the need arises. For example, if a defending party does not object to an apparent failure by a claimant to comply with proper procedure, then the tribunal may have power to waive non-compliance, and the non-complaining party would be prevented from complaining later of any formal deficiencies.

Problems may arise because of the difficulty in understanding the difference between mere assertion and providing material supporting an assertion. Rejection of assertions made by claimants can create an emotive environment in which claimants feel that they are not believed and that their position is being denigrated. A threshold lodgment test, however, may be of value in creating a framework for claimants to learn how to provide supporting evidence for their claim, rather than make mere assertions regarding their rights. It may serve as an educative tool, if proper

assistance, support, and information about the claim process, and how and where to obtain appropriate evidence is provided to claimants.

The question of how far a tribunal goes in giving assistance to a claimant is a delicate one. If, for example, a tribunal offers more than procedural assistance, and gives advice to claimants, the other party may feel entitled to object. Legal advice should remain the province of the parties' advisers, and the tribunal's supervision of the lodgment process should be designed to ensure that formal procedural matters are either in order or dealt with so that later tribunal or court proceedings are not vitiated for want of the correct form being followed. In practice, in simple cases, one would expect neither party to be legally represented and the matter may often be dealt with through mediation or at a 'without prejudice' preliminary conference.

A threshold process for provisional lodgment of applications may also serve as a filter to remove vexatious, unmeritorious claims, thus allowing the tribunal's resources to be used efficiently.

Further questions that will need to be settled are whether an application may include direct oral representations as evidence of facts (for example, tape recordings and translations) as well as written information. Other procedural matters may include verification of oral or written material by affidavit or statutory declaration and procedures for taking evidence in isolated areas. There may be questions as to whether the tribunal registry may have take into account other information (for example published demographic or linguistic maps) not included in an application when deciding whether to accept a claim or agreement for lodgment.

It is suggested that there should be formal threshold procedural requirements for acceptance of a claim or agreed settlement for lodgment with the tribunal registry. These should cover identification of the parties, the nature of the claim, and the interest affected.

There should be a process of provisional acceptance for lodgment which allows time for formal defects to be cured or waived by consent without prejudice to any applicable time limits for making claims.

Rejected applications

As the tribunal would be an administrative body, it would have to be subject to the control of the courts. If an application is rejected for want of compliance with formalities or any other reason, the courts should be free to correct that decision. The court would already have powers to do so through the use of prerogative writs, and it would seem sensible to admit judicial review in the first place. Rather than leaving the court limited to either rejecting or admitting the application, the legislation could provide for the court to make other orders, such as referring the matter to mediation and deferring hearing of an appeal, or admitting the application subject to conditions.

There should also be time limits so that a rejected application would lapse if judicial review is not sought within a given time period. Further, if an application to lodge a claim or settlement is rejected because it fails to meet the formal criteria, it should be possible to cure defects within a specified period rather than forcing the party or parties to prepare a new application afresh. This could, for example, become important in determining priorities between the equities of different claimants.

There should be scope for judicial review of rejection by the tribunal of applications to lodge claims or settlements, and the court should have a wide discretion as to the orders it may make on such a review, but there should also be time limits for a party wishing to seek review for a rejected application before it lapses. A party whose application is rejected for want of compliance with formalities should also have a grace period within which to correct such informalities without the application lapsing and having to start afresh.

Application amendments and variations

At first glance it may seem unreasonable not to allow a party to vary or amend their application before the tribunal, either unilaterally or with the consent of the tribunal, but such a freedom could work injustice on the other party or even under-represented parties who may not have had notice of any new ambit claim which may intrude upon their sphere of interest. One view would be to require a court order before an application could be amended given that the process is ultimately under the control of the courts. Thus, in Australia, amended native title applications must receive the benefit of a court order and go through the initial registration test. The threshold questions of title would appear to be less difficult in Papua New Guinea, but the legal resources available to parties may also be less. In addition, court time is also scarce. In many cases, the amendments may not be significant and there may be no real objection from the tribunal or the other party and no third party interests may be involved.

Where there are third party interests, it would be inappropriate for a tribunal to allow the amendment without notice being given to the third party, who may object.

It is suggested that, where a party wishes to amend an application already accepted as lodged by the tribunal, the party should be free to do so if the other party consents and the tribunal believes that no third party interest may be affected. Where such an amendment is contested but the tribunal considers no third party interest is or could be involved, the tribunal may decide the matter. Where the tribunal considers there may be adverse effects on the interests of third parties, the tribunal shall either reject the amendment or require notice to be given to the third party, who may either object to the amendment or seek to be joined in the case.

Claims from third parties

For any compensation claim, there may be more than one affected group. Persons not recognised as having claimant status in the first instance may wish to bring claims arising out of the same activity. For example, how might those who are not land owners, or are not within a mining lease area, but have other interests in the area (for example, are affected by it downstream) join a claim brought by others? If a person or group does not make or join a claim, does an agreement made by others and is then registered preclude or extinguish any other claims by affected third parties? Should there be a time limit for joining or objecting? If a group which ought to have been notified about a compensation claim was overlooked, can the agreement process be reopened and a renegotiation occur to include them? Are there any special circumstances (such as a failure to notify) which would warrant opening an agreement to non-registered persons? If an interest is found to exist and if others are allowed to come in and renegotiate, how may others come in later to claim, for example, through an application to the court? Should this occur within certain time limits? What specific criteria need to be met if this is to be the case? Should the same threshold test apply? Must the original parties/claimants/tribunal members approve before others are allowed to join? An excessively liberal approach to entertaining new claims may invite endless renegotiations, undermine the settled status of contracts and agreements, and encourage third parties to invent claims as a form of rent seeking. On the other hand, to deny third parties a right to come into the process where they are genuinely affected by the actions of others (perhaps with a time lag) would be to leave fertile ground for later conflict. A middle way seems desirable.

It is suggested that where non-claimants wish to join the compensation process, whether by lodging a claim or seeking to be brought into the class of compensable persons, or to increase the

quantum, they should be allowed to do so, provided that they are able to meet the threshold criteria of loss. This should be subject to notice being given to the other parties, who may dispute the application. A third party who was notified of the original application and did not seek to assert any rights to compensation should be barred from intervention unless he can show a reasonable cause for his previous non-intervention.

Minimum requirements for third party intervention

No legal system allows free rein to intervene in judicial or quasi-judicial proceedings. Remote or emotional interests are not a sufficient reason to intervene in proceedings. The rules on standing should, however, not be altered to exclude organisations which might be considered to represent legitimate public interests. For example, if a Papua New Guinea non-profit organisation is established for the protection of the environment, and there are statutory environmental requirements which have to be satisfied by a proposed land use, then it would not seem unreasonable to allow standing to such an organisation to intervene where a proposed land use agreement is arguably in breach of statutory duty. On the other hand, a foreign body would be unlikely to be able to claim standing.

This is not a radical extension of the law, more in the nature of a clarification, as such a group might well be able to pursue its objectives through the use of prerogative writs in other proceedings. For example, any affected citizen is always free to seek a writ of mandamus or prohibition from the court against a tribunal purporting to authorise an unlawful land use. The general purpose of public notification is to ensure that all issues associated with a compensation matter are fully resolved. It would be an unfortunate waste of resources if narrow rules on standing led to a situation where a compensation agreement was approved by the

tribunal but set aside by a court on grounds which could not be aired before the tribunal because the objector was refused standing by a tribunal and had to proceed in the court instead.

All persons or bodies with a legitimate interest should be afforded standing to intervene before the tribunal in the normal way. A body whose objects include the enforcement of public duties imposed by legislation should have standing to intervene if it can show an arguable case that those public duties may be breached by a proposed settlement.

Rejected applications for third party intervention

If there is a process of making applications to the tribunal registry to lodge claims or negotiated settlements of claims and third parties are allowed to intervene, the question arises as to what happens if the original application is rejected for failure to comply with formal requirements (for example, failure to identify parties).

If a party's application fails the formal criteria to be accepted for lodgment, that party loses procedural rights to negotiate. A third party intervener, however, may have made out a *prima facie* case in their application to join the original action. Thus, one may have a situation where the party that first sought compensation fails to make out an application, but the intervener shows a case. Should the rejection of the original application mean that the intervener has nothing to proceed with? For example, under the current Australian native title legislation, only those native title rights and interests which the Registrar considers established *prima facie* will be included on the register. Good faith negotiations about future acts are restricted to those rights and interests which are registered. In Papua New Guinea, there may be some disputes over land ownership, or uncertainty as to customary group ownership rights as between kin groups in some cases. It is possible therefore that Group A may initiate a claim or seek to

lodge a proposed settlement, but that intervening Group B establishes that only they, and not Group A, have rights in the matter.

Thus, where an original application is rejected for lodgment, intervening parties who have made out a case may be allowed by the tribunal to continue the action in their own right.

Requirements for notification of a claim

In many cases, a proposed compensation settlement or claim would be of less interest to others than those directly or indirectly involved (for example, small claims paid by public authorities). In other cases, however, there may be a considerable range of interests over a wide geographical area—in a proposed compensation/land use agreement, for example. Notification procedures are already required under land legislation. If a land group makes an application, the question naturally arises of whether the tribunal registrar should ensure or require that other groups in surrounding areas are notified that the application is being made. How wide an area should be covered by any such notification, given that affected or potentially affected areas could be very large indeed (for example, a forestry agreement involving compensation may not foresee the extent of soil run-off causing sedimentation and the effects this has on fishing downstream)? The purpose of any notification would be to give others the opportunity to be involved in the process of mediation, make their own application, or object to the claim as stated. They may be in dispute over the relevant land, or they may allege that they too will suffer damage or loss from a proposed activity. The notification process should bring the claim to the attention of as many potentially interested parties as possible (see below). Procedure will be important. Will persons responding to a notification join the original action (and possibly prevent an agreed settlement between consenting parties), or will they undertake separate actions? In

Australia, the court may join anyone to native title proceedings if it is satisfied that their interests are affected; but, to be joined, interested parties must have applied to the court in the first place.

Perhaps no hard and fast rule can be laid down. In some cases the interveners will be making claims directly relevant to the primary claim (for example, that the land is theirs and does not belong to the original claimants). In other cases, the interveners may have a case for compensation which passes the requisite legal tests but is not necessarily connected with the first claim and, hence, should be dealt with separately to avoid prejudicing against the original claimants (for example, a claim that a mine or logging will cause erosion or silting down river may be a legitimate claim for tort compensation for nuisance or breach of statutory duty, but it is not a claim in respect of the same subject matter as a claim by the immediate owners of the land being mined or logged, which would be based on statutory compensation rights). In some cases, it may be desirable to join all parties to avoid rehearing all the facts. In other cases, the essential facts may differ and dealing with two essentially different disputes in the one hearing would only complicate things.

Notification should not be an invitation for interfering or opportunistic meddling—a person or group wishing to intervene or join the compensation proceedings would have to show cause. There would have to be a process of sifting through objections or further claims triggered by notification lest an objection process frustrate and delay the tribunal in settling the primary dispute or the settlement lodged with it.

Ideally, once the tribunal processes are completed and an agreement is reached and registered, the matters should be closed to renegotiation or other tribunal process to all except those who were parties to the agreement (including those the court joined to the action).

It is suggested that, where an application in relation to a claim or proposed settlement relates to a geographic area or loss to a class of persons, the tribunal may direct that notice to be given to parties who may be likewise affected by the action. Where parties seek to intervene or join proceedings before the tribunal, they may apply to the court to be joined, and the court may allow them to join the proceedings if, and only if, their claim relates to the same subject matter as the original claim. If the interveners have a *prime facie* claim but one which does not relate to the same subject matter, they may bring a separate proceeding before the tribunal.

Rules of evidence

The rules of evidence are often maligned but they have a purpose—to ensure that untested, merely asserted, claims are put to the test before peoples' legal rights are affected. It would, however, be most unrealistic to expect documentary or direct evidence of many matters—these are unlikely to be available in many compensation cases. A tribunal should not be bound by the rules of evidence but should be enjoined to take into account the best evidence available.

Thus, it is suggested that a compensation tribunal should not be bound by the rules of evidence.

Appeals relating to tribunal findings on matters of fact

One view may hold that a decision of the tribunal regarding facts should not be reviewable, because the tribunal will have the necessary expertise and will have heard the evidence first-hand, and, as such, the courts should only review for errors of law. The distinction between facts and law may, however, be quite vexed and there may be a feeling of injustice if the tribunal gets the facts wrong and no one can start afresh. There is thus a case for allowing the court to consider the matter from the beginning in a

fresh hearing. This is especially so if the tribunal is not bound by the rules of evidence and a party wishes to test some of the evidence previously admitted by the tribunal.

It should also be pointed out that if appeals to the National Court are limited to appeals only on questions of law, the court will have no option but to refer matters back to the tribunal, so that the tribunal can determine them according to law. Indeed, this could happen more than once in the same case—a kind of legal ping-pong. Hence, if there is an appeal involving a question of law it is better to let the court deal with both the facts and the law. This does not prevent the court from expediting matters by taking the transcript of evidence as agreed by the parties.

One compromise between allowing full rights of appeal and limiting appeals only to questions of law could be to allow review by the courts only where a question of law is involved. That is, a claimant could not seek court review unless it is possible to show that the tribunal had made an error of law. Once a potential legal error is identified, however, the court could proceed to rehear the whole case. Such a compromise is not suggested here, because it could easily lead to time being wasted in sterile jurisdictional arguments as parties seek to argue fact/law distinctions in order to obtain (or prevent) review by the court.

It is suggested that any tribunal decision should be fully appealable to the National Court. The court should be free to proceed with the matter from the beginning, though the transcript of evidence may be taken as read with the consent of the parties.

Reopening a tribunal decision that has not been appealed

The whole point of an adjudicative process is to settle matters after all parties have been given a chance to come forward. Once parties have had a decision from a tribunal they should be entitled to a period of, say, 60 or 90 days to consider seeking review by a

court. If they do not do so, the tribunal decision should take effect as a consent court order. Normally, unappealed court orders cannot be reopened, but there are exceptions; for example where fraud, forgery or misrepresentation was involved in obtaining the order.

Further, if a lower court or tribunal makes an error when hearing a matter, and that error is not appealed, the parties are still bound by the decision despite the fact that it is erroneous and inconsistent with the law as laid down by the higher courts.

It is suggested that where review of a tribunal decision is not sought within the appeal period, that decision shall not be able to be reopened unless the party can show fraud, forgery, or misrepresentation was involved in securing the decision. Failure by a tribunal to comply strictly with its procedures should not invalidate an uncontested decision.

Contempt of the tribunal and persistent unlawful compensation demands

It is an unfortunate fact of human experience that there are persons who show an arrogant and insulting disregard for the legal rights of others. There may be cases where persons whose claims are rejected as being without substance by a tribunal or by a tribunal Registrar persist in making demands without any merit and may even resort to intimidation. This may happen before or after a claim is made, during the tribunal process, or after a decision has been given. Making extortionate compensation demands is already covered by criminal law and Parliament has shown its disapproval by passing legislation specifically dealing with this subject. As far as we know, however, no prosecutions have yet been brought.

Unless sanctions are enforced against illegal behaviour, it tends to persist. While policing and prosecution policy are outside the

scope of this report, a tribunal should have some power to penalise unlawful conduct.

It is desirable that any tribunal process be taken seriously and that the judicial system which it serves not be brought into contempt. No one should be able to invoke the aid of the law and at the same time go outside it. While the tribunal is an administrative body and thus should not have, in its own right, the power to imprison any person for contempt, the tribunal should be able to refer any action which would constitute contempt of court, or which appears to be in breach of law, to the court itself to be dealt with summarily as contempt. The court should have power to fine that person or order imprisonment. Such a power, used appropriately, might reinforce the message Parliament has sought to give and be a useful alternative to criminal prosecution, given the difficulties involved in investigating and mounting a criminal prosecution.

It is suggested that, as well as bringing a person to the court for contempt, a tribunal should have the power to impose costs against vexatious claimants.

It may also be desirable to give a tribunal power to impose 'on the spot' fines against persons who seek to abuse the tribunal or intimidate other parties (after the accused party has been given an opportunity to respond). Such fines would be contestable in a court, but non-payment could result in a jail term.

It is suggested that where a person acts in contempt of the tribunal process or persists in making unlawful demands which have been rejected by the tribunal, the tribunal should be able to refer the matter to the court. The court should examine the matter and call the person before it. The court should be able to formally warn the person, issue an injunction, fine the person, or imprison the person for contempt.

Limiting the scope of claims to eliminate small or *de minimis* situations

Administrative and legal resources are not costless and there may be some merit in limiting small claims. On the other hand, non-monetary claims—for example, in relation to spiritually significant sites—may cause significant disputation. Rather than limit access to the tribunal *per se*, frivolous claims should be discouraged by a system of user-pays financing, which would include filing costs for claimants, that the tribunal would have discretion to waive. A compensation tribunal should have the power to refer simple cases to magistrates or Village Courts for determination in accordance with standard guidelines (for example, where a case involves no point of law or where liability is admitted and the only question is taking the local evidence to compute the amount of loss).

It is suggested that no monetary *de minimis* limit should be used to exclude compensation claims. The tribunal should have power to refer simple cases to magistrates or Village Courts.

Assistance to claimants

While there is a natural reluctance to encourage litigation and it is not normal for a court to render assistance to litigants, a tribunal is a hybrid administrative and quasi-judicial body. The purpose of a tribunal is to keep disputes out of the court system, preferably by encouraging parties to reach amicable agreement. In many cases, parties may be seen as having unequal bargaining power, and may start from a position of some distrust on one side at least for that reason. It would not seem inconsistent with or prejudicial to the tribunal's adjudicative role if it were required to render some administrative assistance or guidance to parties. Assistance could take the form of tribunal officers filling in forms for parties who are unable to write, directing potential claimants to qualified legal practitioners or consultants practising as advocates or expert

witnesses before the tribunal, providing conference facilities for negotiation and conciliation, or providing interpreters where necessary. Provided that the other party is informed of the actions of the tribunal in such cases and that any hearing of an unresolved dispute does not involve the participation of a tribunal member who may have authorised assistance or sought to act as a conciliator or mediator in the case, some degree of assistance does not seem incompatible with the tribunal's duty of impartiality.

The tribunal should be required to give some degree of administrative assistance to parties if it believes that this would expedite the resolution or hearing of a dispute.

A publicly funded advocate's office

There is a limit beyond which an adjudicative body cannot and should not go in assisting parties to litigation. While a tribunal can properly guide a litigant through the formal processes necessary to initiate proceedings, it cannot be expected to run his or her case. To do so would be to prejudice its necessary impartiality. In one view, litigation costs are part and parcel of the matters which a potential private litigant must weigh up, and it is no part of the state's business to spend public money assisting private litigation, especially where that litigation may confer pecuniary benefits on a private person. However, in Papua New Guinea at least, the process of compensation has assumed a degree of public importance. There is a public, not just private, interest in seeing compensation disputes speedily and properly resolved. Public money has already been spent on *ex gratia* settlements where the merits of the compensation claims have been dubious. Rather than spending public money encouraging people to bypass the legal system, it would appear better to spend public money assisting them to obtain a fair and impartial resolution of their complaints within it. It would assist the process of government if police,

officials, and Members of Parliament were able to refer persons with grievances concerning compensation to an office which could help them reach a proper legal resolution. It should be pointed out that a public advocate's office may assist defendants as well as claimants, such as when two clan groups are in conflict. Finally, it seems not unreasonable that, where a case is successful, a fee is recouped by the public advocate's office.

Thus, there should be a public advocate's office to assist under-represented and indigent clients. This office should be independent of the tribunal and separately funded from the public purse. The office should, however, be able to recoup some of its expenses by charging fees to clients who have had successful claims.

Consultants

Consultants can play a very useful role, especially in the conciliation and mediation of disputes. For example, there is considerable expertise and experience in parts of the mining and petroleum sectors in Papua New Guinea in relation to creating comprehensive compensation agreements. Should the tribunal be able to call on such persons, if their employers are willing to grant leave? What roles should consultants play? Should they be merely expert witnesses or used perhaps as assessors by the tribunal or even be allowed to act as advocates? Who should approve of their use, the tribunal president and/or the parties to a negotiation/conciliation process?

In Australia, the Native Title Tribunal can engage consultants (a function of the President) regarding mediation. Whether the consultants are used depends upon the number of cases and how many tribunal members are available, among other factors. It seems no *a priori* rule can be laid down and the matter should be left to the judgment of the tribunal (bearing in mind the normal rules against the appearance of bias, and so forth) and the president, who should have the power to allow the use of consultants by the parties or the tribunal.

It is suggested that the tribunal be free to allow, through the President, the use of consultants by the tribunal or the parties in such manner as the tribunal considers will contribute to the impartial resolution or conciliation of a dispute.

Relation of a compensation tribunal to other courts and tribunals

Many of the compensation claims brought before a compensation tribunal will involve compensation for land use or destruction. The question of land ownership may become a difficult prior question before compensation can be paid or provided. For example, in Australia, the acceptance for registration of a land claim application determines who can proceed to mediation (only those whose applications are registered) and preserves the applicant's rights to negotiate for compensation over mining and other development of the land while the question of the proper nature and extent of land rights is dealt with. A tribunal may be able to assess the damage and say what should be paid or done, but who is to receive the benefit may be another question. Ideally, the question of land ownership should be settled before a compensation claim is lodged. In practice, the questions may occur concurrently or even in reverse order. Money may have been paid into a compensation trust fund for landholders and a new group may emerge claiming to have kinship ties to the land.

There are relevant concerns regarding the staffing and resource levels of the governmental organs in Papua New Guinea responsible for land titles and disputes. Under the Papua New Guinea Land Disputes Settlement Act, land mediators were appointed to mediate local land disputes (s.25–26). Appointees were often prominent locals and other persons appointed by the magistrate. If mediation failed, the dispute went to the Local Land Court. The Local Land Magistrate (usually the local magistrate) and two other mediators heard the case. The emphasis was on

mediation, but the court could make its own determination. The Local Land Court did not have to rule in favour of one party and could reach compromise between parties. It did not need to make orders as to who owned land; it could make orders about any kind of rights over land under custom (s. 40). If the process failed, the case went to the District Land magistrate. Appeals were only allowed in limited circumstances. This only describes an idealised version of the process, because these courts were not well funded and little financial commitment was made to support them. The administration and process in fact, has been less than satisfactory. Magistrates were overstretched, because the Local Land Courts were additional to their normal court load.

It may also be noted that wardens still make assessments for compensation purposes and have functions in terms of enforcement of mining legislation.

It is suggested that given the diversity of Papua New Guinea, it would be highly desirable that a compensation tribunal be able to refer matters to local provincial tribunals where they are established. It may also be desirable that part-time members of the tribunal be appointed from provincial compensation tribunals if established. In addition, a compensation tribunal may wish to engage local district officers or other persons with local knowledge as consultant assessors or as liaison parties to explain the workings of the compensation system to people in a particular area.

Land compensation cases where there are disputes as to land ownership

If a party has had a claim accepted for lodgment by the tribunal, should that party retain rights to negotiate even if their landholder status is under challenge? Is that fair to the true owners who may prefer to settle for less and encourage a development or may wish to seek more compensation for disturbance? Should land use

agreements be created between parties while the other issues are outstanding or being heard simultaneously (meaning that an agreement made between a developer and a party found to be the 'wrong' party could be a unnecessary waste of time and resources)? Where there is a dispute over the nature and extent of a group's claim (perhaps disputed by the developer or another kin group), could a tribunal sensibly promote negotiation of a land use agreement while a court is simultaneously hearing a claim about ownership? What forum should hear the dispute about land ownership? Should the tribunal hear this as part of the process of establishing compensation rights, or should the matter be referred to the Land Court? Should any tribunal processes of negotiation toward a land use agreement be put on hold unless and until the other issues are cleared up, preserving the right to negotiate but not facilitating it until firmly established later?

Bearing in mind the frustration claimants may feel if a compensation process gets bogged down in further disputes and the temptation such delays may give to undesirable forms of 'self help', it seems appropriate to consider means of resolving such logjams. Some procedure for referral or cross vesting seems inevitable.

The most natural approach is for a tribunal to simply rely on the Land Courts to settle ownership questions before hearing any claim or accepting notification or registration of any land use agreement, but that may be unrealistic.

Another approach would be to vest the tribunal with jurisdiction to settle all matters associated with a claim or settlement, provided that any determination on ownership could be appealed (either to the Land Court or the National Court). If it were mandatory for one or more Land Court judges to be members of the Compensation Tribunal, this might assist in ensuring the tribunal had the expertise to make a decision (the question of disputed land ownership and the need to coordinate compensation and title issues is one

argument in favour of having a Compensation Court rather than a tribunal. For example, one could have a Land and Compensation Division of the National Court, which would deal with the matters concurrently).

It is suggested that, where a compensation matter before the tribunal involves a question of land ownership, the tribunal may either adjourn the matter and remit the question of ownership to be settled by the Land Titles Commissioner or the Land Court, or, if it seems desirable, the tribunal may propose to make a determination on the land ownership question in the course of mediating or settling the compensation claim, with any decision reviewable by the National Court in the usual way. Where the tribunal proposes to hear a land ownership question, it shall notify the court, which may resolve to hear the question itself, refer it to the Land Court, or permit the tribunal to proceed with hearing and determining the question.

Delegating a tribunal's jurisdiction to equivalent provincial tribunals

East New Britain has already implemented a compensation policy designed to bring claims before its own provincial compensation tribunal. It would be undesirable for a national tribunal to interfere with a provincial tribunal which was operating satisfactorily. In order to allow for the operation of such a provincial tribunal, it should be possible to delegate jurisdiction to it. Alternatively, the members of the provincial tribunal could be appointed to the national tribunal, thus making their expertise available to other provinces. It is possible to have both options operating simultaneously so that the provincial tribunal in East New Britain functions as before while its members are able to share their expertise with other members of the national tribunal. In essence, the provincial members would have dual appointments.

It is suggested that the responsible Minister should be capable of delegating a national compensation tribunal's powers to a provincial tribunal.

Members of provincial tribunals should be eligible for appointment to the national tribunal as part-time members without having to surrender their provincial appointments.

Administration

Any body which decides on claims which involve large amounts of money should be subject to careful scrutiny.

The tribunal registrar

The role of the tribunal registry is very important since the registrar would establish and maintain the register of land use agreements and keep records of notified agreements and claims, which may be required for civil and criminal proceedings. The East New Britain customary land management system is of interest in this regard. A registry is kept in every village and a central registry is kept in Rabaul. It is an old maxim that *lex non promulgata non obligat* (one is not bound by a law which is not published). Making copies of notified agreements available at local provincial offices and other bodies would assist in the tribunal's educative function. If, as suggested, the tribunal registry is located within the court registry, the tribunal registrar would be under the primary supervision of the court. In addition, the tribunal registry should be open to examination by the Auditor-General and the Ombudsman Commission.

It is suggested that the tribunal registry should be under the primary control of the court, but the Auditor-General and Ombudsman Commission should have the power to examine records and report to the court any observed deficiency in the administration of the registry.

Audits

The tribunal and the Compensation Settlements Administration Board (discussed in Chapter 6) would handle large sums of money. Because major trust funds would be involved (often held for future generations), a higher level of scrutiny and audit than for public companies is warranted. There should be both internal and external audit. The Auditor-General should have a primary audit role which he could delegate to a licensed company auditor. The board and the tribunal, however, should be free to contract out audit or trust administration to private auditors or trustee companies. The board should be bound to facilitate an external audit by a licensed company auditor of any trust fund if the Auditor-General has not completed his audit of that fund within six months after the close of the financial year. In addition, the trustees of any particular trust fund should be free to supervise or arrange additional audits for their particular trust funds. Further, the equitable rights of trust beneficiaries to inspect trust documents and approach the court where breach of trust is suspected should be entrenched in statute.

It is suggested that the audit of the tribunal and the compensation board should be treated as both a public and private sector audit matter. Contracting out of audit functions should be permitted provided the Auditor-General is satisfied. In addition, trustees of particular trust funds should be able make arrangements for their own audit scrutiny. Further, the equitable rights of trust beneficiaries to inspect trust documents and approach the court if breach of trust is suspected should be entrenched in statute.

Scrutiny of the Compensation Tribunal and the Compensation Settlements Administration Board

Because both bodies would be occupying places of high public trust, the Compensation Tribunal and the settlements administration board should be subject to full public scrutiny and accountability. The tribunal would be under the judicial supervision of the court, whose registry would carry out its administrative functions. The settlements administration board would be under the general supervision of the tribunal, which would retain a watching jurisdiction over compensation settlements. Any beneficiary of a compensation settlement would have standing to approach the tribunal, and each trust fund should have tripartite trustees (for example, from the board, the claimants, and the payer) to ensure arm's length management. The annual reports and financial accounts of both bodies, and of all compensation trust funds under administration, should be tabled in parliament.

It may also be desirable to have a Parliamentary committee with which the tribunal and board might liaise and discuss matters raised by reports or audits.

The Ombudsman Commission should also have a watchdog role. The Ombudsman Commission can direct the Public Prosecutor or a tribunal to prosecute a person in public office for breaches of the leadership code, which includes conflict of interest and misappropriation of public funds (Organic Law on the Duties and Responsibilities of Leadership, ss. 5–16). The Commission can receive complaints about a state service or member of a state service, or any governmental body or officer or employee of a governmental body (s.13, Organic Law on Ombudsman

Commission and s.219 of the Papua New Guinea Constitution). The Commission also has a monitoring role. The Ombudsman Commission could be a useful watchdog regarding the functions of the tribunal. Legislation should be passed to ensure that its functions cover the tribunal.

It is suggested that, because of the positions of public trust a tribunal and Compensation Settlements Administration Board would involve, full scrutiny should be mandated. Reports should be made to Parliament. The Ombudsman Commission should be able to investigate complaints, as well as examine material in the tribunal's registry for breaches of law or proper administration elsewhere. Freedom of information and full exposure to judicial review should be required. In addition, beneficiaries should have a general right of access to trust documents and should be able to invoke the court's aid to stop breaches of trust.

Chapter Five

Advantages of using the existing court system

At present there are a number of statutory schemes giving jurisdiction to a variety of different bodies in respect of claims for compensation in Papua New Guinea. Some claims are determined via the existing court system. If streamlining of the system is desired, then one obvious approach is to require that all claims proceed through the court system of Papua New Guinea.

Enacting legislation directing all compensation claims through the existing courts system would avoid many of the potential problems of establishing a new tribunal from the ground up. The case for using the existing court system can be summarised under the following headings.

Funding

A new court or tribunal will require funding at a time when there is considerable financial pressure on the government. This is not to say that the existing courts would not be able to absorb additional cases without further funding. Using existing facilities, however, would be a cheaper alternative in that there would not be duplication of many facilities such as administrative support, including but not limited to registry functions.

Further, the body responsible for the administration of the courts in Papua New Guinea, the National Judicial Legal Service (NJLS), has for some time enjoyed a 'one line budget' which provides

flexibility as to how, when, and where funds are spent. This is in contrast with a body which has a detailed budget or a body which is intended to be self-funding. Any proposal for a self-funding body still needs to consider what will happen if the body fails to fund itself. Plainly, some form of contingency allowance must be made by the government in order to cover the possibility of a revenue shortfall.

Simply stated, funding of the courts is guaranteed in the constitution, whereas the funding of any body outside the court system will be at the mercy of politicians, a fact which must be a particular cause of concern during times when there is severe budgetary pressure on the government, either domestically or via international organisations such as the World Bank or the International Monetary Fund. Indeed, the current financial predicament of Papua New Guinea is such that a body outside the court system might not 'get off the ground', with the consequence that any benefits to be obtained from rationalising the procedures governing compensation claims would not be achieved.

Competence

Compensation claims frequently involve legal issues—questions of entitlement, jurisdiction and standing of the claimants are but three examples. While issues of quantification, which arise in assessment of the amount of compensation, may involve accounting or even actuarial matters, these are usually handled by evidence from experts in those fields. The qualifications and experience most commonly required in the assessment of compensation claims are those of the lawyer.

It is highly desirable that Papua New Guinea have an indigenous judiciary and, to that end, the best candidates should be appointed to the benches of the National Court and the Supreme Court. Those seeking a judicial career or those whose

skills need to be developed can and do rise through the various grades of the Magistrates Court. Judges have been, and no doubt will continue to be, selected, in appropriate cases, from the senior magistrates.

To have lawyers appointed to a separate tribunal will have one of two consequences—either the appointment of those who might otherwise be serving as magistrates or judges, or the appointment of lesser quality candidates. Neither alternative is attractive.

Reputation

Papua New Guinea has a judiciary that has, over 25 years of independence, accumulated a good reputation among the people of Papua New Guinea. That reputation has not only been obtained through criminal, civil, and constitutional cases, but also through election disputes and human rights claims, as well as industrial disputes. If the existing court system is used for all compensation claims, then what might be termed the goodwill of the courts would be automatically obtained from the outset.

Consider, by way of example, how the courts of Papua New Guinea have made an impact on the payback system, gradually steering the nation to the rule of law where disputes are decided calmly and rationally by judges and magistrates rather than by aggressive retaliation by victims.

In contrast, a new body would have no such reputation, and claimants are likely to view unfavourable outcomes with suspicion. Such concerns would not be allayed by poor decision making and ill-expressed reasoning for such decisions.

Corruption

Allied to the question of competence, is the issue of corruption. This has become apparent in Papua New Guinea, not only as a result of court proceedings, but also via various Leadership Tribunals and Commissions of Inquiry.

Papua New Guinea's judiciary has a reputation for honesty, having been free from the kind of matters that have damaged the image of the nation's politicians.

This is an important factor in areas, such as the forestry industry, which have experienced many allegations and findings of corruption over the years.

Work flow

Claims for compensation can hardly be expected to flow evenly over time. There would no doubt be periods when many claims were commenced and periods when few claims were lodged. For a new and separate body this means either a backlog or wasted resources.

Since compensation claims would be only one area of the work of the court system, however, variations in the number of claims could be more easily accommodated.

Convenience

Using of the existing court system carries the advantage that established procedures can be utilised. This should render the process of streamlining compensation claim procedures quicker, simpler, and cheaper.

Speed of finalisation

Matters which are commenced in the National Court carry a right of appeal to the Supreme Court—the ultimate appellate court in Papua New Guinea.

Matters which are heard by magistrates in the District Court may be taken on appeal to the National Court.

In the event that a matter is not likely to be decided within a sufficient time, either party or both parties may apply to have the hearing expedited in order to minimise delay.

Case management procedures ensure that the time between the commencement of a matter and its hearing is kept to a minimum and that the preparatory steps necessary in each case are completed without delay.

The courts have a number of options in the event of undue delay, including striking out either the claim or the defence, summary judgment, and appropriate orders for the payment of costs.

This pre-trial regime is well known to practitioners, as is the facility for obtaining injunctions, that is, orders of the court which either restrain conduct or require specified steps to be taken.

If matters are heard by a tribunal then rehearings or appeals will still impact on the existing court system. There are always those who wish to exhaust all avenues of appeal. In such cases, commencement of claims in the existing court system may be expected to produce a final result sooner.

Uniformity

As a consideration of the various statutes reveals, the current procedure for claims varies from industry to industry. Consider, by way of hypothetical illustration, two adjoining villages—one which has a claim arising out of the forestry industry, the other from a mine.

Alternatively, consider two different compensation claims arising from the same village. It is difficult to explain, let alone justify, the fact that such claims should be heard by two different bodies.

Bringing all claims ‘under the one roof’—namely the existing court system—would introduce a measure of uniformity and remove such anomalies.

Flexibility

The nature of compensation claims will vary with time. If a specialist body established by special legislation is handling those claims, then it may be necessary to amend the enabling statute.

Furthermore, in a country as diverse as Papua New Guinea, the best approach to compensation claims in one area may not be effective in another area. For example, a policy which is successful in East New Britain may simply not work in another region such as the Highlands.

The appropriate method of resolution may differ from claim to claim—in some cases the normal adversarial courtroom process may be preferred, in other instances mediation may be a preferable alternative. There will almost certainly be cases where indigenous procedures will be more effective.

Some cases will be best heard by judges. Other cases may be best heard by suitably experienced experts—a surveyor, a valuer, an accountant, an actuary, or a respected local expert, to give but a few examples. This can be achieved by having provision in the court's rules for references to such persons, a scheme which has been used successfully by the Supreme Court of New South Wales to resolve matters commenced in its Commercial List.

An established body of good repute, with the option to tailor the procedure according to the nature of the claim, can thus achieve the resolution of a variety of claims in a manner which is both time and cost effective.

Eliminating duplications

There will from time to time be two or more claims arising from the same subject matter. If each of those claims must be brought within the existing court system, then it is possible to consolidate such claims or hear them together in order to avoid wasteful duplication.

Jurisdictional challenges

Whenever there is more than one procedure for handling compensation claims there, is scope for disputes as to which body has jurisdiction. For example, the Land Disputes Settlement Act (Chapter 45) applies to disputes over interests in customary land and also to disputes about the position or boundaries of any customary land but does not apply to disputes over whether or not land is customary land.

Consider customary land adjoining non-customary land. Any dispute regarding the boundary of the customary land will

necessarily involve a dispute as to whether or not some land is customary land.

All claims should be accommodated in the same manner by the same body. If all disputes were handled by the existing court system, it would not be necessary to argue such jurisdictional challenges, because applications from a specialist claims tribunal to the courts would not arise.

There are a number of issues that must be considered in relation to any proposal for how compensation claims should be handled. How those issues would be addressed if all claims for compensation were accommodated within the existing court system is considered below.

Constitution

If the existing court system is used, then it is not necessary to devote consideration to how the body will be constituted.

Appointment of adjudicators would also be covered by existing provisions. Appointments are based on qualifications and experience and there is a mechanism for removal in the event of misconduct.

Jurisdiction

If the existing courts are being used, then the only issue of jurisdiction would be the deciding court in which proceedings should be commenced. That can be governed by the existing provisions which establish the extent of the jurisdiction of the lower courts and statutory provisions, such as those found in section 10 of the Oil and Gas Act, which requires all claims under that Act to be brought in the National Court.

Functions and powers

There are three functions which a body dealing with compensation claims, whether a court or a tribunal, needs to address—the registration of agreements and the resolution of disagreements, hopefully by mediation but otherwise by litigation.

Mediation and conciliation

Alternative dispute resolution procedures

Litigation requires time and money. Alternative dispute resolution has been a growing field in recent years for that reason. In many jurisdictions throughout the world, efforts are being made to resolve disputes by mediation, and only a small percentage of claims need to be handled by the traditional courtroom process. Even those matters for which attempts to find a solution by mediation fail are subject to procedures designed to minimise the time and cost of the hearing. Those procedures include the preparation and exchange of witness statements instead of oral evidence, the use of a court-appointed expert to resolve what would otherwise be a conflict between the opinions of the experts engaged by the parties, and the referral of disputes to referees or arbitrators who possess sufficient experience in the subject matter of the claim, as well as a knowledge of the relevant dispute resolution procedures.

It is desirable that alternative dispute resolution procedures, particularly mediation, be used to limit as much as possible the number of claims that require a hearing.

Ideally, the parties should not have to apply for alternative dispute resolution. Obviously, the parties to any dispute can reach an agreement between themselves. If such an agreement is not reached, alternative dispute resolution should be imposed, without the need for application, so as to limit the number of claims going before the courts.

Overlapping applications

If the existing court system is used, overlapping claims can be accommodated by appropriate directions in each case.

Questions of which body has jurisdiction should not arise if all matters are handled by the courts—the only potential dispute would be over which court should hear a particular matter, and that

issue could be resolved at an early stage of the proceedings. The resolution of such issues in any case would provide a precedent that should subsequently eliminate, or at least minimise, the number of similar disputes.

Implications for court administration

Streamlining the procedures for compensation claims so that all claims are handled by the existing court system would create additional work for the courts. This alternative, however, would only involve the expansion of an existing system rather than the creation of new administrative systems.

Processing of claims

If the statutory regime provides that certain claims may not be made, then there should be vetting in order that such claims be rejected at the outset. Otherwise, matters will fall into categories—those that have already produced agreements and those that have not been resolved and thus remain as claims.

The registration of agreements should involve some vetting in order to consider whether a third party is affected. If so, either that third party should be notified, or the agreement should be advertised in order that the interests of affected third parties might be considered.

Having eliminated prohibited claims and agreements from the dispute resolution system, the remaining matters should proceed to mediation. Only those matters that did not reach a mediated solution would require directions to the parties as to how they should be prepared for hearing.

Land use agreements

Standard form agreements, or at least a list of the topics to be covered by land use agreements, might be prepared. This would not only serve to facilitate resolution of disputes but also help identify the issues in the event that agreement cannot be reached.

Vetting of settlements

If the relevant legislation neither limits the kind of claim that can be made nor sets out either the fixed amount or maximum amount for various claims, then it is difficult to see how there can be any vetting of settlements.

If there are restrictions on the kinds and amounts of claim, then settlements should be vetted to ensure compliance with those aspects.

If rejected settlements only arise from non-compliance with the law, then no further action is required.

The process of amending applications would be governed by the rules of the court in which the claim was lodged.

Claims from third parties

The courts regularly deal with the situation where one of the existing parties wishes to add further parties to proceedings—the plaintiff merely amends to add further defendants; the defendant cross-claims in order to add third parties.

If a third party considers it has a legitimate interest in a pending claim, then, in the absence of the consent of the parties, it would be necessary for the court to decide whether that third party should be added to the proceedings. Hence, there is a need to provide an administrative facility to deal with applications by third parties to become involved in existing proceedings.

Requirements for standing

A party must have a 'sufficient interest' in order to have standing in legal proceedings in Papua New Guinea and this issue has been considered by the National and Supreme Courts on a number of occasions. There is no reason why the position should be any different in the case of compensation claims. If one of the existing parties objects to the involvement of a third party, the issue would need to be determined early in the proceedings, perhaps even before an unresolved claim is subjected to mediation.

Plainly, if a third party is not permitted to become a party to an existing claim, it will be a matter for that third party to consider whether it wishes to commence a claim of its own.

Claim notification requirements

This will depend on the nature of the claim. The issue of notification would best be handled when the settlement agreement or claim is lodged with the court registry. In some cases it would be appropriate to require that specific persons or firms be notified. In other cases there would need to be a requirement to advertise so that any affected person or firm has an opportunity either to be heard before any settlement is finalised or to participate in any claim proceedings.

Rules of evidence

There will be cases of such a nature that the rules of evidence should apply in order to confine the evidence and focus on the issues to be determined. Such cases, however, should not be common and the default position should be that the rules of evidence do not apply.

Cases where it is desirable that the rules of evidence apply could be accommodated by providing that the rules of evidence shall not apply unless the court so orders, either as a result of an application by a party or via the exercise of the court's discretion as to how the proceedings can best be conducted.

Right of appeal on matters of fact

Permitting appeals on matters of fact has the consequence of providing an opportunity for matters to be reheard in their entirety, and that is undesirable. On the other hand, it is unjust if a matter which has not been correctly decided on the facts cannot be remedied.

Matters which are commenced in the National Court may be expected to involve substantial amounts or significant issues and, as such, an unrestricted right of appeal is warranted.

Plainly, it is desirable that the scope for appeals is limited for small matters. The difficulty with restricting appeals to questions of law is that such a limitation only leads to disputes as to whether an issue is a question of fact or a question of law. Flexibility can be provided by providing a right of appeal from lower courts, but leaving discretion to the court hearing the appeal—for example, by permitting it to inquire into the decision of the court from which the appeal is brought.

If the existing courts are being used, the prevailing appeal provisions can apply so that compensation claims can be handled in the same way as other civil matters.

— If the existing courts are used, the procedure for dealing with cases of contempt is already covered.

Small claims

It is difficult to define a small claim in that there are claims which some would consider small yet to the claimant they are large, especially in the case of subsistence farmers. Small claims could be handled by the lower courts in accordance with their jurisdictional limits. It is desirable, however, that small claims not be given an opportunity to clog the dispute resolution system. To that end, statutory specification of permitted claims, prohibited claims, and claim amounts or formulas should reduce the scope for small claims to become an administrative burden. Ideally small claims would be resolved by mediation at the Village Court level. Placing a threshold value on claims would only serve to ensure that all claims are inflated to achieve that minimum amount.

Assistance to claimants

Ideally, claimants should have legal assistance. The reality, however, is that it is a luxury that cannot be afforded. The better course is to have a system that does not require legal assistance for claimants. For 'test cases', or cases which raise an important issue, it would be desirable for legal assistance to be available.

In Papua New Guinea the Public Solicitor's office appears for accused persons in criminal matters. The resources of the Public Solicitor are not sufficient for legal assistance to be provided in human rights claims and would not, in the absence of significant additional funding, be able to assist those claiming compensation. As it is unlikely that such funding could be obtained, it is preferable to have a system in which the substantial majority of claims are settled without the need for legal proceedings and those matters that do come before the courts are resolved in a manner which does not require legal assistance.

It must be borne in mind that in many civil claims, such as claims by those injured in motor vehicle accidents, lawyers often act for plaintiffs knowing that they will not be paid unless the action is successful and the court awards costs in favour of the plaintiff. There is no reason why that system should not apply in cases where the nature of the claim warrants legal assistance.

Consultants

Consultants or experts could be used in one of two ways. A court-appointed expert might be used to provide an opinion on an issue, instead of having experts engaged by each of the parties who provide competing views. In other words, a consultant (such as an accountant or actuary) could be used in appropriate cases to avoid courtroom disputes over expert evidence.

The second way in which a consultant might be used is as a referee or arbitrator in cases involving his or her field of expertise. In this way, matters involving accounting issues could be heard and considered by an accountant who would then prepare a report for the court. The court would then have discretion over whether to adopt that report. This system has been successfully used by the Supreme Court of New South Wales for the resolution of large commercial and building disputes.

Relation to other courts and tribunals

If the existing court system is used, the relationship between the various courts would be covered by existing legislation.

If claims for compensation in Papua New Guinea are to be streamlined, the same body should be able to hear liability issues (whether compensation is payable), quantum issues (how much compensation is payable), and ownership issues (to whom such compensation is payable). Of course, ownership issues may arise without any associated claim for compensation. As ownership disputes are likely to arise when there is a prospect of compensation, however, there is a real likelihood that ownership and compensation disputes will need to be resolved at the same time.

The use of the existing courts for all claims would remove the undesirable situation of the same land being the subject of two disputes in different courts or tribunals at the same time.

Any system must cater for both customary land and non-customary land.

Administration

If existing courts are used, administrative costs would be funded via budget allocations. Should compensation claims create additional work for the courts, then additional funding would be required. Filing fees and other such charges should recoup at least some of the costs that arise from compensation claims. The advantage of this arrangement, unlike a scheme that seeks to be self-funding through deduction of a percentage of the outcome, is that the court does not have any financial interest in the outcome of the claim.

In some parts of the world, lawyers are permitted to charge a fee that depends on the outcome of the case. To permit a tribunal to do so would create a clear conflict of interest and could adversely affect the reputation of, and public confidence in, the tribunal.

The costs of the parties can be addressed via appropriate orders for costs on a case-by-case basis.

The registrar

The role of the registrar, apart from fulfilling administrative duties, would include consideration of whether there are third parties who may be affected by a claim or settlement agreement, rejecting any prohibited claims, and making directions to ensure that claims are referred to mediation as rapidly as possible.

With the benefit of experience under a consolidated system, the court may seek to delegate certain aspects of claims and/or settlements to their registrars.

If the existing courts are used, the matter of scrutiny of the body does require attention.

Supervision of compensation payments

When an individual is awarded or receives compensation, it is difficult to justify supervision. When a group is awarded or receives compensation, however, supervision might be desirable. Likewise, supervision is desirable when an award or payment of compensation is made taking into consideration the interests of future generations.

If compensation claims are being handled by the courts, power should be given to the court to make any orders it considers appropriate in relation to the compensation. This might include appointment of a trustee or trustees which could, where the amount is substantial, include both local representatives (such as village chiefs or elders) and specialist trustee companies which are commonly allied to banks or major accounting firms.

In such cases, orders might also be made regarding the periodic provision of financial statements and any auditing considered necessary in the circumstances.

If compensation claims are taxed, the amount of claims will be higher, because claimants will seek a net (after tax) outcome. Where a claim is of a capital nature (such as a claim for loss of land) and would not otherwise be taxed, it can hardly be suggested that compensation in such a case should be taxed. If the award of compensation is to cover a loss of income or some other receipt which, if received, would have been taxable, then it is arguable that it should be taxed. However, a claim for compensation by a subsistence farmer arising out of damage to his means of subsistence which is not taxed, should not be subject to taxation.

Chapter Six

A Compensation Settlements Administration Board

Compensation settlements and land use agreements will often involve ongoing relations between the parties. Often they will involve compensation being placed in trust for the purpose of site rehabilitation, for use by future generations, or for the future needs of the current generation. Many claimants will not be financially sophisticated and would not want the burden of managing a capital amount to produce a stream of payments over many years. In many cases, structured settlements which involve part immediate payment, part payment in kind, and part set aside in trust, will be the appropriate response to compensation needs. For example, a trust fund for future site rehabilitation reduces the risk that compensation will be payable by an insolvent trading company at the end of the day.

Those who pay compensation have an equivalent interest in ensuring that compensation funds are not dissipated or wasted through imprudent management. If compensation is wasted or dissipated, disappointed claimants may well be tempted to seek compensation again, despite the earlier compensation.

It is also important to avoid the Nauru problem. It would be best to avoid a situation where claimants are left with land which is not rehabilitated and a trust fund which is dissipated by imprudent management.

The role of the Compensation Settlements Administration Board

A Compensation Settlements Administration Board would have the role of supervising the correct distribution of payments to the correct beneficiaries. Payments to the wrong beneficiaries have caused problems in private compensation settlements in Papua New Guinea, and payers have sometimes been forced to pay again. An administration board would have access to tribunal files with the necessary identification of the correct parties and could hold an amount in reserve against claims by future unidentified beneficiaries. Its role would be akin to supervising specific performance of a court order. It would also have the job of providing an administrative structure for the supervision of trust funds set up under arbitrated or consent settlements.

Money, unlike honey, tends to attract the interest of human beings who do not share the frugal work habits of bees or ants. Wherever there is money, there is the temptation of fraud or misappropriation. As the creators of the American Constitution realised, the best protection against abuse of power or position is to ensure division of power and set persons to watch each other. Where a trust fund is created, a tripartite set of trustees should be established—one or more representing the claimants, one or more representing the payer and one or more representing the Compensation Settlements Administration Board, which will provide secretarial and administrative oversight. Where a party is unwilling to nominate a trustee (for example a departed or liquidated logging company), a trustee could be nominated by the board with the consent of the beneficiary representatives who undertook the original litigation. The trustees of each fund would be free to decide investment policy, to order audits, to see documents, and to outsource investment management to a list of approved financial institutions. The Compensation Settlements Administration

Board should only approve a financial institution as a fund manager if that financial institution provides appropriate fidelity insurance or as the guarantee of a parent which is a licensed bank or insurance company.

Because of the public importance of having a properly functioning compensation procedure, the use of the Compensation Settlements Administration Board should be mandatory. This does not mean that claimants will be left to beg for their money from a bureaucracy. The board will stand in a fiduciary position and the claimants will have the rights of beneficiaries of a trust, for example, the right to inspect trust documents. They will be clients, not mendicants. They will always have the right to go back to the tribunal if they feel the board is not administering a trust in accordance with the settlement, or if they wish the settlement trust terms to be varied.

It is suggested that there should be a Compensation Settlements Administration Board which would supervise payment of compensation to the correct beneficiaries, handle complaints about failures to implement orders or agreements, and supervise the administration of trust funds and provide co-trustees. The board should be a public authority with its members appointed in a similar manner to the Compensation Tribunal, accountable to Parliament and examinable by the Ombudsman Commission.

Funding of the Compensation Settlements Board and tribunal/court

Few things in this world are provided by human beings free of cost or charge. While natural resources may be provided free by the Creator, any compensation paid or set aside in relation to their use will require the labour and management of people who will expect to be paid. Traditionally, the administration of justice has been seen as part of the duties of the sovereign and there has been a strong and justifiable view that the sovereign should not force people to pay for justice.

Notwithstanding the traditional view, there is an argument that a tribunal and board are rendering a service to both claimants and payers, not just by resolving disputes, but by facilitating the creation of wealth through the economic use of resources. Where a benefit is being conferred, it may be argued that it is appropriate for some form of user charge to be employed. Particularly at a time when the Papua New Guinea Treasury is not overflowing with funds, the question needs to be raised whether some form of user charge can be employed.

It does not seem inappropriate for the tribunal and board to be funded by both a percentage taken out of settlements and a commission taken from the investment earnings of trust funds. Private lawyers and trust companies are often remunerated in this manner and these expenses are not entirely dissimilar.

As both the board and tribunal would be self-funding, it also seems appropriate that they should be able to employ people either on secondment from the public service or on private sector terms and conditions. It is important that the operations of the tribunal and the board do not suffer because of inability to attract persons of the requisite expertise.

Although the initial funding for a compensation tribunal and Compensation Settlements Administration Board must come from government, it is suggested that the tribunal and board should be made self-funding through allowing prescribed percentages to be challenged in relation to settlements and income from the administration of trust funds.

Tax treatment of settlements and the income of trust funds

The tribunal and board, as public authorities, should enjoy the normal immunity of state authorities from taxation. In one view, this immunity should not extend to settlements or the income of trust funds because these ultimately accrue to the benefit of private

individuals. That, however, might be described as a rather narrow view even from a tax perspective. There is a broader public policy perspective involved. A functional compensation system assists in mobilising natural resources for productive development, thereby generating revenue for the treasury. If a well functioning compensation procedure had been in place and disputes over at the Panguna mine had been properly resolved, it would have more than paid for itself in terms of treasury revenue (see Chapter 5).

Even from a narrow tax perspective there are arguments for exemption. To a large extent, compensation payments will be for capital losses and should not be taxable in any case. Further, to the extent that compensation payments represent income, either the recipients would be below any taxable threshold or the payments would be compensation for in kind subsistence which would not be taxable income in any event. If, as suggested, the tribunal makes trust funds mandatory in some cases and these were held under the board, it might also be argued that people should not be taxed on money which they are not allowed to deal with freely. Tax exemption could be seen as a *quid pro quo* for the compulsory use of the board to hold trust funds. Payments applied to meet social or community needs, such as schools or first aid centres, would not be income to anyone and, in any case, it would be absurd to tax funds which would otherwise be used to provide the same services for which tax revenues are raised. Finally, a blanket tax exemption and status as a public authority should enable the board to gain exemption from foreign taxes on grounds of sovereign immunity in cases where compensation trust funds are invested overseas.

From the point of view of economic development, Singapore's Central Provident Fund has played a key role in marshalling funds for capital investment in Singapore and overseas for the benefit of its people. Handled wisely, the trust funds of a Compensation

Settlements Administration Board could in due course perform a similar role for Papua New Guinea in ensuring that funds from resource use were reinvested to build up Papua New Guinea's capital stock, its public infrastructure, the productivity of its workers, and their living standards. The economic importance of encouraging collective savings is a major reason why life insurance and pension funds are treated concessionally or not taxed in most countries. Such considerations furnish a further argument in favour of complete tax exemption for compensation settlements and trust funds (they also underscore the importance of careful protection of such funds from theft or misinvestment through political abuse—which is why the beneficiaries should have their equitable rights entrenched in statute so that the courts are always available to stop breaches of trust).

It is suggested that compensation settlements and trust funds held by the board should be exempt from all taxes.

Chapter Seven

Public discussion

The reform of attitudes to, and the administration of, compensation in Papua New Guinea is a multifaceted problem. In this final chapter, we bring together an overview of the themes which emerged from the conference discussion of the options presented and suggest a way forward.

Among the issues which emerged from the conference, several stand out.

1. The problem of unjustified or exaggerated claims being made (notably against agricultural enterprises or public works), where those claims were backed by the implicit or explicit threat of violence. This is essentially a police matter, but it is noted here that it could, and perhaps should, be dealt with through contempt proceedings, including imprisonment where appropriate. Before proceeding with more rigorous law enforcement, however, the more basic problem of lack of community understanding of compensation needs to be addressed.
2. It is clear that much dissatisfaction arises from a lack of understanding of the basic principles under which compensation is payable. This lack of community understanding is not helped by 'entrepreneurial' lawyers who induce villagers to pay large sums of money in the pursuit of

frivolous or unjustifiable claims. If ordinary people see legally trained persons raising such claims it is understandable that the community would come to see compensation as a potential honeypot rather than a procedure for strict restitution. The East New Britain 'no compensation' policy and its associated tribunal might be seen as an example of public education. That policy makes it clear that what is paid is not 'compensation' in the opportunistic sense but restitution for things such as compulsory acquisition of land. If the word 'compensation' has been so misunderstood in popular understanding as to mean any windfall payment one can demand, a public education campaign might be better to avoid using it and substitute a term such as 'restitution' instead.

3. There is a distinct lack of basic data. Land and genealogical data were not necessarily maintained accurately or up-to-date. Any tribunal or court process for dealing with compensation claims must rest on accurate facts.
4. The current state of the Land and National Courts in relation to dealing with claims and handling records. The Land Court does not have resources sufficient to do its job, while the National Court needs resources to organise and integrate its records so that related or overlapping claims in local registries can be brought together and disposed of.
5. The importance of funding. Any reform would require a commitment of funds to law enforcement, land surveys and judicial administration. A Compensation Settlements Administration Board outside of the normal public service system met with general support and could provide a key element in helping to fund the administrative facilities needed to deal with compensation claims.

The compensation conference discussed extensively the options presented in the earlier chapters. Rather than alter those chapters, we have chosen to give here an overview of the discussions and suggest a way forward which might best implement the common consensus that reform in handling compensation claims is required.

Options

A new division of the National Court

On the first day of the conference, a number of discussants and contributors expressed the view that existing structures should be used to facilitate resolution of compensation claims and that a new division of the National Court would be the preferred option, rather than a new compensation tribunal. A new tribunal might become yet another slow-moving bureaucratic quagmire which merely added expense and delay, providing another hoop to jump through for claimants who would ultimately lodge appeals with the National Court in any case.

The National Court is seen as a respected and independent institution, free from political interference. It has its own broad budgetary 'one line' appropriation which it is able to spend as it pleases. A tribunal, it was thought, might have difficulty finding and maintaining appropriate levels of government funding and might prove too expensive to establish in the first place.

However, participants cited several obstacles militating against this proposal.

First, participants were generally in favour of a mediation/conciliation approach to compensation claims with as little involvement on the part of lawyers as possible. At present, courts did not reflect a non-adversarial approach. Several participants suggested that parties to a dispute ought not be in a situation

where they must have legal representation in order to succeed, but court processes necessitate legal representation. In an ideal situation, lawyers would be welcome to provide advice to the forum in certain areas where it was warranted, but not appear as 'hired guns' for the parties, particularly local landholders who could ill afford them.

A solution to the problems faced by parties involved in court proceedings envisaged a new division of the National Court incorporating the processes of mediation and/or conciliation. Emphasis could be placed on facilitating negotiated consensual settlements, rather than relying on the typical adversarial model. Mention of the processes of the Australian Family Court was made approvingly by one of the conference attendees who had experience in Australia working with and studying the Family Court.

A new division would stretch the resources of the National Court considerably and would necessarily involve increased work loads for court staff. It was pointed out that the number of judges has decreased from fourteen to twelve during the 1990s.

It would be possible to provide additional court funding by allocating a percentage of a compensation settlement or income from the settlement (just as trustee companies charge a commission on capital and income for the administration of trust funds), rather than rely on an increase in funding from the government.

It was also put to the conference that one criterion for the type of compensation structure should be its ability to go to the people. Several speakers voiced concern about the remoteness of justice. A court or tribunal located exclusively in Port Moresby would not be the appropriate vehicle to provide accessible and efficient justice. Many villagers would not have speedy access to compensation processes if these were centralised in Port Moresby. This was seen as a possible disadvantage for both the court and tribunal approach, although the court system as it presently exists avoids

this problem for the most part, since local courts exist throughout the country. Revitalisation of local Land Courts was suggested as one possible means of bringing justice to localities, but this option would not assist compensation claims for issues other than land and is possibly an unduly narrow approach. It was also put to the conference that the Land Court appears to have deteriorated in the absence of government support.

Questions of customary law were of particular importance. It was commented that customary law is sometimes difficult to ascertain, especially in the light of situations where younger, stronger males in a locality simply assert what they wish customary law to be in order to claim land to which they have no traditional right.

Use of existing legislation

Several speakers felt that the national government should revitalise and reinvigorate two Acts, the Land Disputes Settlement Act 1975 and the Land Groups (Incorporation) Act 1974, on the basis that these were initiatives that had come out of PNG culture, utilised indigenous methods of conciliation and mediation, were locally based, and used customary law. Political will was needed, however, to revive them. Comments were made that customary law was at times difficult to ascertain, since it was neither rigid nor formulaic. Although certain broad unifying principles could be derived from the multiplicity of customary usages in Papua New Guinea, it might be difficult in any particular case to ascertain which specific customary rules should be properly applied in order to achieve a just result.

Also, it was felt that these land dispute mechanisms would not work in larger, more complex cross-border, cross-jurisdictional development projects where two tiers of government—both national and provincial—as well as various groups of landowners and business people were involved. Such disputes were well beyond the local grass roots level and may involve political

considerations that were not easily resolved by customary law alone. At a local grass roots level, for less complicated disputes, where the mediation/conciliation process was not corrupted or influenced so as to breach principles of fairness and political non-interference, then the two Acts could work well, if supported by government.

Another problem with the existing legislation was that the two Acts did not filter out spurious claims, nor did they deal with renegotiation of previous claims, which thus failed to be resolved with any certainty or finality.

A Compensation Claims Tribunal

On the second day, support for a new tribunal was voiced, particularly since it would reduce costs to parties. Legal representation would not be required and court costs would not be awarded against a party. A tribunal could provide speedy access to a conciliation/mediation process, achieving 'win-win' outcomes. Provision of a lodgment test procedure to weed out spurious claims which would otherwise clog up the tribunal was seen as an advantage. Also, it was felt that a tribunal would be advantageous, because compensation payments could be subject to a monetary ceiling. Workers Compensation was cited as an example of a process where there was certainty of outcomes since claimants knew there was a ceiling on awards which could be made.

It was felt that the court system suffered from other disadvantages. At the local, district and National Court level, courts are bogged down with many compensation cases and it might take years for disputes to go through the courts. Compensation awards are made to persons who are not the rightful landowners and at times, it was mentioned, spurious claims are successful via *ex parte* court orders in favour of a claimant, triggering further litigation between the successful claimant and a second group which is then forced to prove their rightful ownership of land as against the first successful claimant.

Concern was expressed about the practice of opportunistic lawyers and others going out to remote localities to find clients for compensation claims that have little or no legal merit. Entrepreneurial lawyers seek potential clients by building up expectations regarding compensation claims and payouts, convincing communities to pay large fees of K10,000–20,000 which they can ill afford, for the prospect of large compensation awards. A compensation tribunal could, through lodgment requirements, sift such spurious claims before proceeding.

Contributors felt that a tribunal would need to have the power to make binding orders, thus stopping subsequent claims over the same issue. Land survey work would need to be undertaken to identify all those with sufficient nexus to the locality to sustain a proper claim. The problem of non-residential holders of land rights who sought compensation was mentioned, as well as third parties who felt they missed out on compensation and later made claims. The complex social structures of communities in Papua New Guinea necessitated prior identification of all those with sufficient connection to land to merit a claim. Finality and certainty were both important principles, as was fairness. The practice of reopening compensation claims because payouts had been dissipated or were later felt to be unsatisfactory was seen as a large problem. The widespread reliance on compensation as a form of income was also mentioned as a major problem. Threshold lodgment criteria and the educative function of a tribunal in counselling parties could help engender more realistic expectations in the wider community.

It was commented that a method of enforcement for non-performance of an agreement was also needed. Generally, an aggrieved party would return to a tribunal for further orders. Transparency was also seen as important, insofar as non-disclosure clauses in agreements ought to be illegal as they might merely cloak scams rather than afford bona fide commercial-in-confidence protection.

Participants commented that a compensation tribunal would ideally be comprised of a wide cross section of local expertise, including valuers, geologists, anthropologists, accountants and lawyers. Various speakers at the conference felt that it would be very important to involve local people who had historical/ genealogical knowledge as well as knowledge of custom. A broad pool of expertise should be made available to resource a tribunal since the issues arising in compensation disputes can vary widely from case to case, depending on the subject matter of the claim. A variety of expertise should be available in order to arrive at well informed and satisfactory compensation agreements. Tribunal members would not necessarily be full-time members, but could be part of an extensive list of persons who would be available on a case-by-case basis. This would involve a smaller financial burden on the tribunal, rather than the significant salary outlays required for a large group of full-time members.

It was suggested that lawyers and judges alone, with experts merely brought in to give brief statements as testimony without an ongoing presence to comment and inform a court or tribunal was unsatisfactory. Expert evidence, as presented in court, was necessarily limited or truncated by the adversarial process and expert witnesses could not provide an adequate and ongoing educative role. In court, they could not assist in the role of sifting information or interpreting it in the light of expert or special knowledge.

Any legislation defining the composition of the tribunal should specify the qualifications and requirements for membership (for example, a registered valuer), rather than merely stating that appointment shall be at the pleasure of the Minister. Such open-ended language has been abused, it was said, causing problems with accountability, transparency, and integrity in government administration.

Tribunal members must declare any conflict of interest. Some experts will have had, in all likelihood, prior involvement with parties to compensation disputes. An accountant or anthropologist may have worked for a mining company, for example. Interests and conflicts must be declared to the tribunal, and parties should have the opportunity to object to an expert consultant involved in the tribunal proceedings.

A number of conference contributors thought the president of a tribunal would ideally be a retired judge, since such a person would have substantial community respect and be considered highly trustworthy. Because parties might later appeal to a court, a retired judge would have the expertise to deal with evidence and finding of facts at a tribunal level so that facts would not necessarily need to be re-established in the court proceedings, shortening court time and costs.

A tribunal that could go out to localities, utilising local elders and other respected persons with knowledge of custom, could be most helpful in sifting out spurious claims.

Lands officers were seen as doing a good job in often extremely difficult circumstances. Where grass roots negotiations failed, the documentation created by Lands Department officers as well as mining officers and others could be used to form the basis of what would be a fair and reasonable claim in a tribunal. The functions of these personnel would need to be integrated with tribunal administration and procedure.

A tribunal could be helpful to parties if guidance was offered by way of offering a 'walk through' of the procedures, costs and probable outcomes. Such guidance should be compulsory. It would help give parties a more realistic view of the quantum of the claim, as well as other options for resolution of a dispute. A tribunal or court registrar could assist claimants by advising them where to go to obtain relevant information. Such assistance would not involve

legal representation, but could comprise assistance in filling out appropriate documents, understanding tribunal procedure, learning what are fair and reasonable valuations and so forth. Such assistance, in fairness, could also be made available to small developers as well as landholders.

At times, claimants were intimidated by the plethora of experts involved in litigation and were afraid of being swamped by expert evidence in court. It was suggested that perhaps part of the psychology behind seeking excessive claims involved more than mere greed or opportunism on the part of claimants, but a genuine fear that they would be 'conned' by experts. It was thus important to educate people as to what is fair and reasonable in all circumstances, whether in a tribunal or a court.

There is no legal aid system in Papua New Guinea, and fears were expressed that such a system would fuel an increase in unmeritorious compensation claims.

A way forward

A third approach—an expert panel under the auspices of the court

Neither a new division of the National Court nor a compensation tribunal can function properly without a basic informational infrastructure. The court registry has difficulty in linking cases and information. Related cases may be filed in different court registries. Cases may be partly heard and an interim order given but then languish for want of prosecution without being struck off. Land title documents as well as information regarding traditional ownership rights appear to be spread throughout numerous localities without being readily available at a central location. Records are not necessarily adequately maintained. A court may be given inconsistent Torrens titles on alienated land. Vital information that would provide basic evidence of claims has been either lost, misplaced, or has failed to be collected or updated in recent years. Disputes about land

ownership, which must be resolved prior to the settlement of any compensation issue, cannot be finalised. It was felt that the creation of a national database for land claims could take two to five years to establish and would involve consolidating all the records kept in courthouses throughout Papua New Guinea. At present, the Lands Department is not creating such a database.

No matter how well constituted a tribunal's membership, how low its costs, or how efficient its dispute resolution mechanisms, contributors felt that the problems of identification of land ownership, unresolved boundary disputes, and the multiplicity and decentralisation of claims, pose great difficulties for both the court and tribunal option. If parties are unable to reach agreement themselves, they might go to a tribunal, but would not reach timely resolution of their dispute if necessary information is missing, unavailable, or inaccurate.

Before a new division of the court is created or a tribunal established, in the light of the financial and infrastructure difficulties facing Papua New Guinea, a third, hybrid, approach begins to emerge as a more immediate and realistic approach, namely the establishment of a Compensation Panel which would operate under the auspices of the National Court.

There is not necessarily a conflict between a tribunal or court option. If it is too difficult to fund a tribunal, the court's legislation could be amended so that the National Court could remit a compensation dispute to a panel of mediators, conciliators, or arbitrators, where the dispute could be settled and no court costs awarded. A Compensation Panel could have many of the attributes of an independent tribunal in terms of the composition of its members, a conciliation/mediation role, and perhaps a self-funding mechanism.

It is therefore suggested that the best way forward, given the constraints facing Papua New Guinea, would be to amend the National Court's legislation so that a panel of mediators, conciliators and arbitrators was created under the National Court.

1. Judges would be free to refer litigants to (in order of use) one or more mediators, conciliators, or arbitrators on the panel and would be obliged to do so if requested by a party.
2. Mediation would involve a 'go-between' asking each party what their settlement ranges were and endeavouring to broker agreement. Conciliation would mean 'face to face' discussion in a non-adversarial context with the conciliator trying to bring the parties to agreement. Arbitration is a quasi-judicial process where the arbitrator stands back, looks at each side's arguments and makes an award. The same person could not be expected to undertake all three roles in any particular case, unless both parties consented.
3. No award for the other party's costs could be made against a party willing to accept the decision of a mediator, conciliator, or arbitrator.
4. If both parties wish the matter to be dealt with by the National Court, normal cost rules would apply.
5. Any compensation payment above a certain amount, or which covered a loss extending beyond one year, or which involved a class of claimants (including a tribal group, future beneficiaries, or unknown beneficiaries or other potential claimants) would have to be paid to a Compensation Settlements Administration Board to be handled as a trust fund. Where, in the opinion of the panel member or judge a single claimant, by reason of education, experience, or background might be better served by having his or her claim settled by periodic payments, the judge or panel member may direct the compensation to be paid into a trust fund and disbursed as an annuity for the claimant. A requirement for class compensation to be held in trust may have the useful side-effect of discouraging large claims based on an expectation of a large windfall.

6. Where the claim involved land or other natural resource rights, the costs of official geographic and ethnographic survey could be charged in part or in whole against the compensation payment.
7. A fee (no more than, say, 5 per cent of all claims awarded) could be earmarked for payment of costs of the National Court and Land Court.
8. An annual charge based on the income or assets of all trust funds under administration (for example, no more than 1 per cent of assets or 10 per cent of income) could be used to pay for the costs of the Compensation Settlements Administration Board.

A Compensation Settlements Administration Board and trust funds

While there was concern over both the court or tribunal options in deciding compensation claims, there was little disagreement about the idea of a Compensation Settlements Administration Board to protect claimants from dissipation of compensation payments.

Trust funds for compensation payouts were seen positively since compensation awards were made for future generations as well as current landowners. It was stated that, without proper administration, compensation funds could easily be dissipated by some individuals or groups at the expense of others who ought to have benefited from the compensation payment. A Compensation Settlements Administration Board would hold the compensation payout and could distribute it to rightful beneficiaries as periodic tax-free payments. Periodic payments would make it more difficult for one party to receive a windfall upon distribution.

Several speakers voiced concern that any apparatus to manage and administer trust funds must be free of government involvement for fear of corruption and leakage of administered funds. The government could be an imprudent investor, while unscrupulous

individuals might simply appropriate funds to themselves. Public sector bodies were not seen as working. For example, legislation creating a Public Trustee was not brought into force. Government trust accounts generated no interest.

The trust funds were seen as potentially lacking good advice and experiencing too much government interference and too meagre funds. The duties of trustees were seen as very complex and would be difficult to explain to people at the village level. Long-term fund holdings would involve problems of keeping proper records of beneficiaries. Concern was expressed regarding distribution of the funds. If payments were made to groups according to custom, it may have unjust results insofar as custom is not unchanging and people may not know their rights regarding equal distribution of benefits. If adequate recording mechanisms are not in place, people may come back for further unauthorised trust distributions. An unentitled individual may seek a distribution by using a false name and benefit improperly.

On the whole, however, trust funds were seen as a means of ensuring that lump sum compensation was not spent immediately. It was felt that a properly administered trust fund could also provide money for sustainable local development and infrastructure. Claimants would not dissipate compensation payouts and return for more.

It would also be possible to hold compensation funds for a period of time prior to distribution. A waiting period as well as distribution made as periodic payments could discourage the dissipation of compensation in the hands of a few claimants or prevent the wrong people from obtaining funds.

The establishment of a single large common investment fund had previously been canvassed. Such a fund would require an independent international fund manager. The settlement administration board could act as trustee to oversee the fund

manager of this common fund, into which the particular trusts under its administration could, with the consent of co-trustees, place some or all of their funds. The idea of pooling small trust funds into a common trust fund to obtain economies in investment is well understood overseas. It does not derogate from the right of the co-trustees to make their own investment decisions, but can result in increased investment options, a spreading of investment risk, and reduced administrative costs.

There would be strict investment guidelines, though it would be advantageous to allow a fund to invest overseas. Compensation would be paid into the fund and held as units. Units could not be redeemed from the fund for five or perhaps ten years. Interest would be available annually to beneficiaries. The question arose as to whether one large fund would be unduly bureaucratic and thus prone to overly long distribution processes, causing injustice to beneficiaries.

On the other hand, decentralised trust funds are currently established. Smaller trust funds could be administered by banks on a contract basis. Foundations were sometimes set up to administer specific compensation funds, especially where a developer wished to stay at arm's length from the claimants. In any case, beneficiaries would have the right to inspect documents held by a settlements administration board.

If a common compensation trust fund were established under a settlements administration board, an extremely useful feature would be a mechanism whereby compensation monies claimed could be paid into a trust prior to settlement of a claim. If the parties could not settle their dispute within a specified period of time, perhaps two or three years, the compensation payment held in trust would be forfeited to the government, which would use it for public purposes. Such a mechanism might create a real incentive for agreement to be reached. A new court division, tribunal, or panel could have such a mechanism incorporated into its functions,

with power to order that a specific amount be paid into and held in trust while overseeing the conciliation/mediation process.

A Compensation Settlements Administration Board would administer the trust funds under the eye of its co-trustees and beneficiaries. As noted above, a percentage of the funds under administration could be used to fund the compensation system—that is, the courts, the panel and the board—thus diminishing or obviating the need for government funding. Given the suggestion that there is a case for compensation trust funds being tax-free, there is also a case for users financing the system which establishes and protects their property rights. The Board could also be given the job of funding public education on compensation matters. It might also be given the task of distributing informative material to claimants or their lawyers to explain what sort of claims might be lodged with the court and how the system works.

Conclusion

‘Hasten slowly’ is often a wise maxim in dealing with legislative or social reform. It is clear that compensation disputes are a major impediment to Papua New Guinea’s economic and social development. The process of settling such disputes needs to be swifter and needs to ensure that compensation is used appropriately and not dissipated. It is equally clear that any reforms must build on existing institutions and revitalise them. It is hoped the kinds of reforms canvassed in this paper and at the conference (such as a court panel and a Settlements Board) will assist Papua New Guinea to build the legal infrastructure it needs to unlock its full potential for the benefit of all its citizens.

Appendix

Is compensation a threshold to development?

Hunter R. Hagon—Chairman, Coffee Plantations and Processors Association Inc.

Luke von Boehm—Group Field Manager, Wahgi Mek Plantations Ltd

Wera Mori—Exploration Manager, Eastern Pacific Mines Ltd

Prelude

I take this opportunity to express my gratitude to the organising committee for inviting me to participate in this very important forum. Mr Manning and the Institute of National Affairs must be commended for their foresight on this very sensitive but important issue of compensation, which has been a subject of many controversies. The consultancy team from the National Centre for Development Studies at the Australian National University is also acknowledged for their role in moulding these controversial matters into a common denominator where solutions could be advocated.

Mr Chairman, unfortunately I am unable to attend the conference in person, as I have to attend other pre-committed engagements, a National Court hearing in Mount Hagen, which to some degree is pertinent to compensation matters. I wish to extend my sincere

apologies to the participants and organisers for my absence at this forum. The following is a presentation of my experience with landowners on compensation matters in the plantation sector of the central Highlands area of Papua New Guinea.

Introduction

It is common knowledge that land in Papua New Guinea is predominantly customary owned and is claimed by a clan, sub-clan, family group, or individual. Western society views the land tenure system in Papua New Guinea as complicated, unstructured, and an impediment to development. The value of land to the traditional landowners is best summarised by Ian Downs (1970) in his novel *The Stolen Land*.

Land is the beginning and the end of a New Guinean. It is upon the land that he chiefly depends for his security and also as a sanctuary for his atavistic beliefs. If he is a convinced Christian, than be believes that God has given the land to him. Under no circumstances will a New Guinean ever consider that he has irrevocably sold or parted from his land. All he is allowed is a right to share its usage. Land sold becomes land stolen. Land taken by conquest must be recovered, if necessary by violence. For so long as the spirits of his ancestors continue to dwell in tribal lands, the New Guinean has a duty and an emotional compulsion to return to his tribal home before he dies.

One has to understand these contrasting views on landownership when considering how to pave the way for any development. In Papua New Guinea, compensation related

landownership problems are widespread. Papua New Guineans are now more aware than ever before of the consequences of exploitation of their natural resources.

Since Papua New Guinea gained political independence, both renewable and non-renewable resources, such as timber, fish, petroleum and minerals, have been exploited to facilitate social and economic development. Such developments have brought changes to PNG society, but the benefits have been mixed. Exploitation and development of resources have inevitably generated problems that often relate to compensation.

This chapter asks whether compensation is a threshold to development by examining aspects of compensation dealings and expectations as experienced in the rural industry, especially with coffee and tea plantations.

Historical background

Coffee is the largest rural industry in Papua New Guinea, representing the livelihood of approximately two million of the four million inhabitants of the country. It is a renewable resource and generates approximately K500 million annually. The Eastern Highlands, Simbu, and Western Highlands Provinces produce approximately 87 per cent of the country's total production.

Since the introduction from Wau of the first arabica coffee at Aiyura in the (current day) Eastern Highlands Province in the early 1950s, Highlanders have turned to this 'green gold' at a phenomenal rate, making coffee the leading export earner in the agricultural sector, sometimes surpassing the combined total earnings of both copra and cocoa. The expansion of the crop with the support of the then Australian Administration saw the acquisition of traditional land to facilitate the development of coffee

plantations, mainly in the Eastern and Western Highlands Provinces and some parts of Southern Highlands and Morobe Provinces.

Customary land was acquired after a District Lands Officer (DLO) had conducted a land investigation report which detailed the total area of the land to be acquired, rightful traditional landowners, and obtained the consent of landowners as to the form and recipients of compensation.

The Colonial Administration would then acquire the land, make the necessary compensation payment, and lease it out to prospective planters. It was the prerogative of the Administration to decide the purpose of the lease and the crop type to be planted. The alienated land would have been leased for either tea or coffee plantations. The government recouped its money through taxes and other levies imposed on the plantations.

Authority to acquire customary land rested with the government. This arrangement was important because it meant individuals or private organisations did not enter into purchasing arrangements with traditional landowners outside of government control. This process maintained consistency and uniformity and obviated controversies and potential tribal conflicts.

Prior to independence, these arrangements facilitated a very vibrant and healthy agriculture-based plantation industry, which was complemented by produce from hundreds of thousands of small-scale growers.

Now, however, it is a tragedy—many of those successfully-run rural plantations have been run down due to mismanagement and gross abuse of resources. Another common factor has been excessive compensation demands by later generations with the use of threats against the management of plantations. As a consequence, the managers have left and the plantations have once again become bush, resulting in many hundreds and even thousands of rural

dwellers losing cash earning opportunities. The net effect of such tragedies has been less export earnings for the country, which is not helping to improve the country's dwindling foreign reserves.

Land type acquired and forms of compensation payment

From before the arrival of white men until the first 30–40 years of contact with the western world, Highlands tribes dwelled on raised hills and ridges purely for defensive purposes. The lowlands were utilised for food gardens and for ceremonial battlegrounds between rival enemy clans.

Land was purchased by the Colonial Administration from traditional landowners for various purposes. The original landowners were adequately compensated with the currency that was most appropriate and meaningful at that time. Purchase of land was made using shells, steel axes, bush knives, salt, laplaps, and money as agreed to by both parties.

In most cases, purchases of land over ceremonial or *singsing* grounds and good gardening land fetched the premium prices, while areas assumed to be inhabited by evil spirits fetched the least.

Along the lowest point in the Wahgi Valley adjacent to the meandering flow of the Wahgi River, extensive patches of swamps were covered by thick growth of *pipit*, a form of reed nowadays woven by Highlanders to make walls for their houses. The perception was that evil spirits and devils dwelled in those swampy areas, and tribesmen did not venture into them for fear of reprisals from those spirits. Those areas became arable only in the late 1960s and early 1970s after extensive drainage systems were built to drain the waterlogged floodplains.

Land ownership claims over those drained floodplains intensified only after they gained economic significance from extensive development as tea and coffee plantations by expatriate planters

and companies such as W.R. Carpenters and Wahgi Mek. As a consequence, the significance of land shifted away from traditionally held values to those of the modern economic sector. Land that was traditionally considered of least value during the pre-colonial era became very important overnight.

The problems faced by Wahgi Mek have been created by only a few opportunists. These people are capitalising on the existing system to take over a company that is owned by over 100,000 people living in the Wahgi Valley of the Western Highlands Province. This matter will not be elaborated here as it is the subject of a court case in the National Courts of Papua New Guinea.

Compensation and controversies

As is common in all the Highlands provinces, land, pigs and women (not necessarily in this order) are the major causes of tribal disputes and these disputes often lead to wanton destruction of both life and property. Conflicts over land ownership emerge for various reasons but in recent times they have mostly been directly related to compensation.

The notion of compensation has been used by many individuals and groups to take over very successful expatriate-run plantations. Such groups are often led by a few individuals whose motives are not in the best interests of the silent majority. They are driven by their desire to exploit any opportunity to establish a political base in order to usurp political dominance during national elections. The groups' objective is to utilise the resources of the plantations to consolidate their power base, in total defiance of the welfare and aspirations of the community they purport to represent.

Others envy the success of competent plantation managers and feel that they are capable of taking over the plantation, which may be on their traditional land.

The leaders of such groups are militant and aggressive in pursuit of their interests. They often resort to political leverage, especially when financial transactions are involved. The politicians provide them with assistance in order to gain favours from their constituents and remain in power at the next elections.

Many of the previously successful expatriate-run plantations in the Eastern and Western Highlands Provinces have been totally run down and destroyed. Those individuals and groups who took over the plantations lacked management skills. Resources such as vehicles, factories, and buildings were totally abused and will be expensive to restore.

Initial controversies often emanate from landowners who are disgruntled about the compensation payment made for their land during colonial days. They feel that the payments received by their grandparents at that time cannot be equated with the cash compensation payments that are paid today.

The importance of cash compensation became apparent in the late 1980s and early 1990s during the development of mining and petroleum projects such as Porgera and Kutubu. Since those resources are non-renewable and the scale of environmental damage is quite phenomenal, and since the projects yield massive rates of return, it is important that these companies are seen to be adequately compensating landowners. In the process, incorrect and unjustified comparisons are drawn between mining developments and commodity tree crop plantations on the issue of compensation payments.

Situations on plantations become very problematic when there is apparent lack of government support. There must be consistency on the part of the government to ensure that there is very little disruption to plantation management. The government must

establish and maintain its authority over the people on any transactions pertaining to land acquisition. If there is to be any review of past land acquisition, then both parties must agree to ensure that there is a climate of settlement and reconciliation conducive to foreign investment. Papua New Guinea cannot afford to create doubt and uncertainty in the minds of foreign investors, especially when the present law and order situation, and general economic climate, discourages many potential foreign investors.

The general problems in the Wahgi Valley, including those of Wahgi Mek Plantations, would not have escalated had the law enforcement agencies of the government got their act together and brought the situation under control. Lack of transparency in the execution of police duties prevents the law from being impartially enforced in dealing with such matters.

Due to the lack of police action, disgruntled and renegade landowners perceived their actions to be correct in the eyes of the law. What is needed in this country is a demonstration of authority on the part of government, because, at present, it is perceived as non-existent in many rural areas such as Banz, Minj, Henganofi, Chuave.

The use and abuse of compensation in Papua New Guinea

Compensation payments originated during the pre-colonial era to settle clan or intertribal disputes. It is an entrenched customary facet of almost all conflict resolution and its practice was strengthened in colonial times when the Australian Administration used it to settle many disputes.

Since the exploration and development of oil and mining projects began, compensation payments have intensified, with the subsequent payment of royalties and allocation of free carried shareholdings to landowners. Following this, the demands and

expectations of landowners, as well as local and provincial governments, have become excessive. A number of problems are directly attributed to the use of compensation payments.

1. Compensation demands have been summarily and excessively enforced with people-power by armed tribesmen.
2. Overlapping land ownership claims and/or clan rivalry frequently complicate such issues, leading to life-endangering conflict and even death, which generates a second round of compensation demands.
3. Project development is usually held up, delayed, or abandoned, even when some land claims are bogus.
4. Foreign and even local project development capital is drying up as the real or perceived personal life and investment capital risk increases.
5. Excessive escalated one-sided forced settlements are now being adopted in almost all conflicts and are sometimes artificially 'manufactured' disagreements.
6. There are similarities in the practices landowners have adopted to those used in strikes by unionised workers in essential service industries in Australia.

Some of the processes of arbitration and conciliation adopted there should be revisited here—that is, compulsory return to work and enforcement of negotiation rules.

National framework on compensation claim procedure

It is imperative that a uniform national policy on compensation claims and procedures must be designed. The framework of this policy must be flexible enough to reflect the various industries. Clear demarcation must be established on the limits of various respective industries to accommodate the specifics of each different case.

The rural industries, which represent the livelihood of at least 85 per cent of the country's population, must be supported in the formulation and design of any policies. The increase in import costs due to the weakening kina, and their impact on production costs, must be taken into account.

Policies should encourage the sustainable growth of rural industries, thereby helping alleviate the many social problems that confront Papua New Guinea today.

In order for any new policy to be effective, a number of remedies must be in place.

1. – The government must be the sole authority permitted to acquire traditional land and lease it for any development purposes, including the development of commodity tree crop plantations such as coffee.
2. The government must display its authority and honour any past transactions on the acquisition of traditional land for development purposes. It must not allow plantations to become vulnerable to take over attempts by militant and aggressive landowners.
3. If there are to be any reviews of past agreements and compensation payments, it must be the responsibility of the government to accept or reject claims as plantations are already positively contributing to the economic development of Papua New Guinea.
4. All compensation measures must be consolidated into a single Compensation Claims Procedure Act. This new Act must demarcate the requirements of each respective industry so that the new rates proposed are appropriate to the needs of each respective industry.
5. It is important that the compensation payment rates applicable to the development of Mining and Petroleum Projects are different to those for the development of rural based industries such as tea, coffee, coconut and cocoa plantations.

6. An effective and efficient arbitration system—outside of the overloaded and prolonged court systems—must be adopted to avoid frustration and prevent conflicts from escalating.
7. With overloaded courts and correctional services, coupled with the present and worsening lawlessness and the absence of law enforcement agencies, the entrenched compensation system has provided a very necessary safety valve for frustrations and requires formalisation and rationalisation rather than suppression.
8. There is reportedly not a single developed economy which does not have a state land tax system, With the relatively low population of Papua New Guinea, such a system must be adopted to ensure land owners register their land ownership and pay a renewal annual fee. Land for which rent is not paid becomes state land and can be commercially developed. Such a system would be relatively easy and cheap to set up and administer with the use of modern technology such as landsat mapping.
9. Any compensation legislation must embrace the formalisation of a 'Compensation Claims Procedure' which would impose heavy penalties on claimants who did not follow the rules laid down, particularly if they backed their claims with physical threats.

Such a compensation claims procedure could operate in a similar manner to employee/employer disputes considered by the Australian Arbitration Commission and, if legally valid, given a *bona fide* status and classified as registered disputes subject to the rules and procedures of the Arbitration Act.

These measures are essential because the opening of any new developments in Papua New Guinea would seem to hinge on the payment of compensation. Therefore, compensation payments in Papua New Guinea are indeed a threshold to development for all industries.

References

- Aleck, J., 1992. 'The village court system of Papua New Guinea', *Research in Melanesia*, 16:101–28.
- and Rannells, J. (eds), 1995. *Custom at the Crossroads*, Faculty of Law, University of Papua New Guinea, Port Moresby.
- Ballard, C., 1997. 'It's the land stupid! the moral economy of resource ownership in Papua New Guinea', in P. Larmour (ed.), *The Governance of Common Property in the Pacific Region*, National Centre for Development Studies, The Australian National University, Canberra:73–88.
- Banks, C., 1997. 'Shame, compensation and the ancestors: responses to injury in Hanuabada and Bena', in S. Toft (ed.), *Compensation for Resource Development in Papua New Guinea*, Monograph 6, Law Reform Commission of Papua New Guinea, and Pacific Policy Paper 24, National Centre for Development Studies, The Australian National University, Canberra:23–65.
- Banks, G., 1996. 'Compensation for mining: benefit or time bomb? The Porgera gold mine', in R. Howitt, J. Connell and P. Hirsch (eds), *Resources, Nations and Indigenous People: Case studies from Australasia, Melanesia and Southeast Asia*, Oxford University Press, Melbourne:223–35.
- and Ballard, C. (eds), 1997. *The Ok Tedi Settlement: issues, outcomes and implications*, Pacific Policy Paper 27, National Centre for Development Studies, The Australian National University, Canberra.

- Barnett, T.E., 1972. 'Crime, kin and compensation: the law as accessory to payback', *Melanesian Law Journal*, 1(3):29–36.
- , 1992. 'Legal and administrative problems of forestry in Papua New Guinea', in S. Henningham and R. May (eds), *Resources, Development and Politics in the Pacific Islands*, Crawford House Press, Bathurst:90–118.
- Bedford, R. and Mamak, A., 1977. *Compensation for Development: the Bougainville case*, Bougainville Special Publication 2, Department of Geography, University of Canterbury, Christchurch.
- Bonnell, S., 1997. 'The impact of compensation and relocation on marriages in Porgera', in S. Toft (ed.), *Compensation for Resource Development in Papua New Guinea*, Monograph 6, Law Reform Commission of Papua New Guinea, and Pacific Policy Paper 24, National Centre for Development Studies, The Australian National University, Canberra:137–42.
- Brunton, B., 1992. 'Review article: Michael A. Ntummy, 1992. "Administrative Law of Papua New Guinea"', *Melanesian Law Journal*, 20:163–70.
- and Colquhoun-Kerr, D., 1985. *The Annotated Constitution of Papua New Guinea*, University of Papua New Guinea Press, Port Moresby.
- Burton, J., 1997. 'The principles of compensation in the mining industry', in S. Toft (ed.), *Compensation for Resource Development in Papua New Guinea*, Monograph 6, Law Reform Commission of Papua New Guinea, and Pacific Policy Paper 24, National Centre for Development Studies, The Australian National University, Canberra:116–36.
- Carrier, J. and Carrier, A., 1989. *Wage, Trade and Exchange in Melanesia: a Manus society in the modern state*, University of California Press, Berkeley.

REFERENCES

- Connell, J., 1991. 'Compensation and conflict: the Bougainville Copper Mine, Papua New Guinea', in J. Connell and R. Howitt (eds), *Mining and Indigenous People in Australasia*, Sydney University Press, Sydney:55–76.
- Dinnen, S., 1996. Challenges of order in a weak state: crime, violence and control in Papua New Guinea, PhD dissertation, Department of Law, Research School of Social Sciences, The Australian National University, Canberra.
- , 1998. 'Criminal justice reform in Papua New Guinea', in P. Larmour (ed.), *Governance and Reform in the South Pacific*, Pacific Policy Paper 23, National Centre for Development Studies, The Australian National University, Canberra:253–72.
- Duncan, R. and Duncan, R., 1997. Improving security of access to customary-owned land in Melanesia: mining in Papua New Guinea', in P. Larmour (ed.), *The Governance of Common Property in the Pacific Region*, National Centre for Development Studies, The Australian National University, Canberra:73–88.
- Epstein, A.L. (ed.), 1974. *Contention and Dispute: aspects of law and social control in Melanesia*, Australian National University Press, Canberra.
- Filer, C., 1985. 'What is this thing called "brideprice"?', *Mankind*, 15(2):163–83.
- , 1990a. 'The Bougainville rebellion, the mining industry and the process of social disintegration in Papua New Guinea', in R.J. May and M. Spriggs (eds), *The Bougainville Crisis*, Crawford House Press, Bathurst:73–112.
- , 1991. 'Two shots in the dark: the first year of the task force on environmental planning in priority forest areas', *Research in Melanesia*, 15(1):1–48.

- , 1997. 'Compensation, rent and power in Papua New Guinea', in S. Toft (ed.), *Compensation for Resource Development in Papua New Guinea*, Monograph 6, Law Reform Commission of Papua New Guinea, and Pacific Policy Paper 24, National Centre for Development Studies, Canberra:156–89.
- Fitzpatrick, P., 1980. *Law and State in Papua New Guinea*, Academic Press, London.
- Fingleton, J., 1991. 'The East Sepik land legislation', in P. Larmour (ed.), *Customary Land Tenure: registration and decentralisation in Papua New Guinea*, Monograph 29, Institute of Applied Social and Economic Research, Port Moresby:147–61.
- , n.d.. Laws and procedures for land group incorporation, Report prepared for Chevron Kutubu Oil Project.
- Gerritsen, R. and Macintyre, M., 1991. 'Dilemmas of distribution: the Misima gold mine, Papua New Guinea', in J. Connell and R. Howitt (eds), *Mining and Indigenous People in Australasia*, Sydney University Press, Sydney:35–54.
- Ghai, Y.P. and Regan, A.J., 1992. *The Law, Politics and Administration of Decentralisation in Papua New Guinea*, Monograph 30, National Research Institute, Port Moresby.
- Goldman, L., 1983. *Talk Never Dies*, Tavistock, London.
- , 1993. *The Culture of Coincidence: accident and absolute liability in Huli*, Oxford University Press, Oxford.
- Goddard, M., 1992. 'Of handcuffs and foodbaskets: theory and practice in PNG's village courts', *Research in Melanesia*, 16:79–94.
- , 1996. 'The snake bone case: law, custom and justice in PNG village court', *Oceania*, 61(1):50–63.

REFERENCES

- , 1998. 'Off the record: village court praxis and the politics of settlement life in Port Moresby, Papua New Guinea', *Canberra Anthropology*:41–62.
- Gordon, R.J. and Meggitt, M.J., 1985. *Law and Order in the New Guinea Highlands: encounters with Enga*, University Press of New England, Hanover and London.
- Griffin, J., 1990. 'Bougainville is a special case', in R.J. May and M. Spriggs (eds), *The Bougainville Crisis*, Crawford House Press, Bathurst:1–15.
- Hasu, M. and Morauta, L., 1981. 'Compensation payments among the Toaripi of the Gulf Province', in R. Scaglione (ed.), *Homocide Compensation in Papua New Guinea: problems and prospects*, Monograph 1, Law Reform Commission, Port Moresby:30–6.
- Hill, E.R., 1996. 'Expanding the role of mediation in Papua New Guinea', *Melanesian Law Journal*, 24:1–20.
- Holzknicht, H., 1995a. 'Papua New Guinea land tenure, land use and biodiversity conservation', in N. Sekhran and S. Miller (eds), *Papua New Guinea Country Study on Biological Diversity*, Department of Environment and Conservation, Conservation Resource Centre, Port Moresby, and Africa Centre for Resources and Environment, Nairobi:59–66.
- , 1995b. *Working Papers Produced as Part of the FMPP Landowner Involvement Component 1993 to 1995*, Papua New Guinea Forest Authority, Groome Poyry Ltd. and World Bank, Port Moresby.
- (ed.), 1995. *Manual on Land Group Incorporation*, Working Paper 4, Resource Owner Involvement Component, Forest Management and Planning Project, Port Moresby.

- , 1996. *Policy Reform, Customary Tenure and Stakeholder Clashes in Papua New Guinea's Rainforests*, Rural Development Forestry Network Paper 19c, Overseas Development Institute, London.
- , 1997. 'Two sides of the coin: the case of forestry', in S. Toft (ed.), *Compensation for Resource Development in Papua New Guinea*, Monograph 6, Law Reform Commission of Papua New Guinea, and Pacific Policy Paper 24, National Centre for Development Studies, The Australian National University, Canberra:84–104.
- James, R.W., 1996. *Challenges of Equity in Developing the Underlying Law*, Faculty of Law, University of Papua New Guinea, National Capital District.
- Jackson, R., 1982. *Ok Tedi: the pot of gold*, University of Papua New Guinea, Port Moresby.
- , 1991. 'Not without influence: villages, mining companies and government in Papua New Guinea', J. Connell and R. Howitt (eds), *Mining and Indigenous People in Australasia*, Sydney University Press, Sydney:18–34.
- Kalinoe, L., 1993. 'Determining ownership of customary land in Papua New Guinea: re Hides Gas Project land case', *Melanesian Law Journal*, 21:1–12.
- , and Twivey, T., 1996. 'Compensation payment outside court by perpetrators of crime: re the state v William Muma', *Melanesian Law Journal*, 24:117–22.
- Kirsch, S., 1997. 'Indigenous response to environmental impact along the Ok Tedi', in S. Toft (ed.), *Compensation for Resource Development in Papua New Guinea*, Monograph 6, Law Reform Commission of Papua New Guinea, and Pacific Policy Paper 24, National Centre for Development Studies, The Australian National University, Canberra:143–55.

REFERENCES

- Larmour, P., 1989. 'Sharing the benefits: customary landowners and natural resource projects in Melanesia', *Pacific Viewpoint*, 30:56–74.
- (ed.), 1991. *Customary Land Tenure: registration and decentralisation in Papua New Guinea*, Monograph 29, Papua New Guinea Institute of Applied Social and Economic Research, Port Moresby.
- , 1998. *Governance and Reform in the South Pacific*, Pacific Policy Paper 23, National Centre for Development Studies, The Australian National University, Canberra.
- Lynch, O.J. and Marat, A., 1993. 'A review and analysis of national laws and policies concerning customary owners' rights and the conservation and sustainable development of forests and other biological resources', in J.B. Alcorn and B.M. Beehler (eds), *Papua New Guinea Conservation Needs Assessment*, Volume 1, Biodiversity Support Program, Washington DC:7–29.
- Maun, A., 1994. 'Ok Tedi Mining: human and environmental tradedy', in H.M. Schoell (ed.), *Development and Environment in Papua New Guinea: an overview*, Point Series 18, The Melanesian Institute, Goroka.
- Manda, G., 1995. 'The choice of a customary land registration system in PNG', *Melanesian Law Journal*, 23:155–82.
- McGavin, P.A., 1994. *Economic Security in Melanesia: key issues for managing contract stability and mineral resources development in Papua New Guinea, Solomon Islands and Vanuatu*, Discussion Paper 61, Institute of National Affairs, Port Moresby.
- Morse, B.W., 1993. 'Customary law: frozen in time, frozen out or alive and kicking?', *Melanesian Law Journal*, 21:13–27.
- Muroa, G., 1995. 'Constitutional constraints on power of eminent domain', *Melanesian Law Journal*, 23:95–118.

- , 1996. 'Judicial recognition of land acquisition in traditional societies: Wena Kaigo v Siwi Kurondo', *Melanesian Law Journal*, 24:21–36.
- Nonggorr, J., 1991. 'Provincial government participation in mining and petroleum development', *Melanesian Law Journal*, 19:125–42.
- , 1993. 'Development of Customary Law: replacing the Customs Recognition Act', *Melanesian Law Journal*, 21:49–62.
- Ntomy, M., 1995. 'Standing before the National Court of PNG: judicial review of a governmental action and the requirement of an interest to sue', *Melanesian Law Journal*, 23:65–94.
- Oliver, N., 1995. *Land Mobilisation Programme: review of land dispute settlement organisations*, Department of Lands and Physical Planning, Government of Papua New Guinea, Port Moresby.
- Ottley, B.L. and Millott, J.F., 1974. 'Compensation for economic loss: the search for standards in Papua New Guinea', *Melanesian Law Journal*, 2(2):178–205.
- Paliwala, A., 1982. 'Law and order in the village: Papua New Guinea's village courts', in C. Summer (ed.), *Crime, Justice and Underdevelopment*, Heinemann, London:192–227.
- Placer (PNG) Pty. Ltd., 1988. *Compensation Agreement for the Special Mining Lease*, Porgera Project, Enga Province, Papua New Guinea.
- , 1993. *Compensation Agreement for a Lease for Mining Purposes*, Porgera Project, Enga Province, Papua New Guinea.
- Polumé, S., 1988. 'Mineral resources and the ethics of development', in P.J. Hughes and C. Thirlwall (eds), *The Ethics of Development: choices in development planning*, University of Papua New Guinea Press, Port Moresby:204–21.

REFERENCES

- Power, A.P., 1991. 'Policy making in East Sepik Province', in P. Larmour (ed.), *Customary Land Tenure: registration and decentralisation in Papua New Guinea*, Monograph 29, Port Moresby Institute of Applied Social and Economic Research, Port Moresby:101–20.
- , 1995. *Village Guide to Land Group Incorporation*, Ivin Enterprises (for PNG Forest Management and Planning Project), Wewak.
- , 1997. 'Landowner compensation: policy and practice', in S. Toft (ed.), *Compensation for Resource Development in Papua New Guinea*, Monograph 6, Law Reform Commission of Papua New Guinea, and Pacific Policy Paper 24, National Centre for Development Studies, The Australian National University, Canberra:84–93.
- Rivers, J. 1999. *Formulating basic policy for community relations programs*, State Society and Governance in Melanesia Discussion Paper 99/1, The Australian National University, Canberra.
- Scaglione, R. (ed.), 1981. *Homocide Compensation in Papua New Guinea: problems and prospects*, Monograph 1, Law Reform Commission of Papua New Guinea, Port Moresby.
- (ed.), 1983. *Customary Law in Papua New Guinea: problems and prospects*, Monograph 2, Law Reform Commission of Papua New Guinea, Port Moresby.
- , 1990. 'Legal adaptation in PNG village courts', *Ethnology*, 29(1):17–33.
- and Gordon, R., 1981. 'Introduction', in R. Scaglione (ed.), *Homocide Compensation in Papua New Guinea; problems and prospects*, Monograph 1, Law Reform Commission of Papua New Guinea, Port Moresby:1–4.
- Strathern, A., 1981. 'Compensation: should there be a new law?', in R. Scaglione (ed.), *Homocide in Papua New Guinea: problems and prospects*, Monograph 1, Law Reform Commission of Papua New Guinea, Port Moresby:5–24.

- , 1993a. 'Compensation: what does it mean?', *TaimLain*, 1(1):57–63.
- , 1993b. 'Violence and political change in Papua New Guinea', *Pacific Studies*, 16(4):41–60.
- , 1997. 'Introduction—compensation: or moving swiftly over broken ground', in S. Toft (ed.), *Compensation for Resource Development in Papua New Guinea*, Monograph 6, Law Reform Commission of Papua New Guinea, and Pacific Policy Paper 24, National Centre for Development Studies, The Australian National University, Canberra:1–9.
- Strathern, M., 1974. 'Managing information: the problems of a dispute settler (Mount Hagen)', in A.L. Epstein (ed.), *Contention and Dispute: aspect of law and social control in Melanesia*, Australian National University Press, Canberra:271–316.
- Toft, S., 1995. Compensation strategy, Paper presented at Conference on Business Development, Community Relations and Law and Order, Port Moresby, 30 November–1 December.
- , 1997. 'Patrons or clients? Aspects of multinational capital-landowner relations in Papua New Guinea', in S. Toft (ed.), *Compensation for Resource Development in Papua New Guinea*, Monograph 6, Law Reform Commission of Papua New Guinea, and Pacific Policy Paper 24, National Centre for Development Studies, The Australian National University, Canberra:10–22.
- (ed.), 1997. *Compensation for Resource Development in Papua New Guinea*, Monograph 6, Law Reform Commission of Papua New Guinea, and Pacific Policy Paper 24, National Centre for Development Studies, The Australian National University, Canberra.
- Trompf, G.W., 1994. *Payback: the logic of retribution in Melanesian religions*, Cambridge University Press, Cambridge.

REFERENCES

- Togolo, M., 1989. *Land, Mining and Redistribution: Panguna and Ok Tedi in Papua New Guinea*, Pacific Island Development Program, Honolulu.
- , 1995. Landowners and mining in Papua New Guinea, Paper presented at Mining and Petroleum Conference, Sydney, 20–21 March.
- Ward, R.G., 1997. 'Changing forms of communal tenure', in P. Larmour (ed.), *The Governance of Common Property in the Pacific Region*, National Centre for Development Studies, The Australian National University, Canberra:73–88.
- Westermarck, G., 1986. 'Court is an arrow: legal pluralism in Papua New Guinea', *Ethnology*, 25:131–49.
- Wolfers, E.P., 1992. 'Politics, development and resources: reflections on constructs, conflict and consultants', in S. Henningham and R.J. May (eds), *Resources, Development and Politics in the Pacific Islands*, Crawford House Press, Bathurst:238–57.
- Woodman, G.R., 1993. 'Problems and techniques of adoption of customary laws as underlying law', *Melanesian Law Journal*, 21:28–48.
- Zimmer-Tamakoshi, L., 1997. 'Everyone (or no one) a winner: gender compensation ethics and practices', in S. Toft (ed.), *Compensation for Resource Development in Papua New Guinea*, Monograph 6, Law Reform Commission of Papua New Guinea, and Pacific Policy Paper 24, National Centre for Development Studies, The Australian National University, Canberra:66–83.
- Zorn, J., 1990. 'Customary law in the Papua New Guinea village courts', *The Contemporary Pacific*, 2(2):279–311.

Compensation is a growing problem in Papua New Guinea. Although there have been many attempts to grapple with the problem by academics, politicians and business people, none have gone very far. The threat of land claims remains one of the more serious disincentives to investment in Papua New Guinea.

This report proposes a uniform, national system for dealing with compensation claims in Papua New Guinea. The law relating to compensation is adequate. What is required is a way of making the laws work better in practice. Existing institutions need to be strengthened and their activities coordinated. Drawing on wide input from government, industry and the community in Papua New Guinea, a number of concrete proposals are established, including the creation of a Compensation Panel under the auspices of the courts and the creation of a Compensation Settlements Administration Board.

The report concentrates on providing solutions which are fair and acceptable to all parties while recognising the unique needs and constraints of Papua New Guinea. Crucially, the solutions proposed are realistic and achievable. Resolution of the problems of compensation in Papua New Guinea demands sensible, sensitive and responsible new policies. This report is the foundation of this new approach.

A Compensation Claims Procedure for Papua New Guinea
Report to the Institute of National Affairs, Port Moresby
Deborah Dwyer, Terence Dwyer, Graham Ellis, Michael Ward
and Daniel Fitzpatrick
Institute of National Affairs – Asia Pacific Press

