

Cooling emotions with money: compensation policy reform in Papua New Guinea

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The magnitude of claims for compensation in Papua New Guinea impedes continued social and economic development. Delays affect development projects: *ad hoc* settlements cloud grassroots understanding of the principles in statutes. A way forward is to create a panel of compensation experts under the auspices of the Courts. The panel would strengthen the Courts' capacity to mediate, conciliate and arbitrate compensation disputes, providing an even-handed approach to the issue from which public understanding of, and access to, formal PNG law would flourish.

Like most peoples, Papua New Guineans vigorously protect and pursue their rights. This is vividly demonstrated in the case of compensation claims. However, there is a general ambivalence among communities in Papua New Guinea about their rights under statutes. This reflects the inaccessibility and irrelevance of the formal legal system to many citizens at the grassroots level. In the area of rights to compensation, confusion is compounded by the existence of different systems applying across different sectors, combined with the prospect for cash-strapped groups to win large compensation payouts—as regularly seen in cases sensationally reported in the national media throughout the 1980s and 1990s. This context has produced a plethora of claims for compensation, the magnitude of which threatens the continued social and economic development of the country. Development projects, including public works, are often held up while compensation claims are

resolved. Meanwhile, delays in the settlement of legitimate claims fuels social tension. The *ad hoc* settlement of claims sometimes rewards spurious and unjustified cases which further clouds grassroots understandings of the differences that may exist between indigenous and statutory definitions of liability for compensation (see Goldman 1993). *Ad hoc* settlement also undermines efforts to build up the legitimacy of the law in the eyes of grassroots constituents. In short, the uneven current approach to compensation contributes to law and order problems, encouraging groups to seek self-help measures which may involve implicit or explicit threats of violence.

This paper reports on a study¹ which was commissioned by a collection of private and public sector bodies in Papua New Guinea (led by the Institute of National Affairs²), many of which face demands for compensation in their daily business. The aim of the study was to devise a way of

streamlining current arrangements by designing a single national body with responsibility for settling compensation disputes according to a set of uniform guidelines. Business and government could refer claimants to the national body.

The study identified two options for reform. These were presented for consideration by industry, government and community at a public seminar staged in Port Moresby 2–3 March 2000. The seminar attracted wide interest with around 100 participants attending at the height of the first day and news reports in the *National* and *Post-Courier* newspapers.

One option presented was the creation of a national tribunal and the other was to use the existing court system. Critical to both options was the establishment of a board to administer compensation monies and trust funds to ensure that the right people are paid and to assist successful claimants manage their money, including for future generations. The board could charge a levy to help fund the system for administration of compensation monies and the tribunal or court could recoup costs by taking a small percentage from every successful claim.

Discussion 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. This third option augments and builds on existing strengths of the court system and is a practical way forward, given government funding shortages and limited skilled personnel. The basic task of this panel would be to provide expert mediation, conciliation and arbitration on compensation disputes so as to facilitate agreements without the courts being required to give a full hearing (which is logistically near impossible). Of equal importance would be its role as a provider of public education, including through general awareness campaigns, of the principles of compensation contained in formal PNG law to help reduce spurious and unjustified demands.

Key design issues

The statutes of Papua New Guinea, derived from the Australian legal system, define compensation as the payment necessary for the restitution of damage to one's self, one's body or one's property. The two fundamental points of tension surround questions of liability and quantum. Categories of liability for legitimate compensation claims in PNG are currently set by statutes, which frequently differ from local understandings. A strong view of many sponsors of the project was that claimants had unreal expectations in relation to quantum and that the system needed to be regulated by the setting of limits on amounts which could be claimed for certain categories, such as are currently set for Worker's Compensation in Papua New Guinea. Some advocated the need for a schedule of compensation values which went well beyond the three page list currently formulated by the Valuer-General. However, other sponsors saw the need for flexibility to accommodate the great variety in the size of claims—from a few kina to millions of kina—and the diversity of parties to claims—from 'grass roots' citizens with little education to multinational companies. Much emphasis was placed on such guidelines in the hope that they could facilitate the settlement of compensation claims without the need for a full hearing in a court or a tribunal.

Graham Ellis points out that many Courts have now developed a mediation facility to limit the number of matters needing a full hearing by a judge. He defines a successful compensation scheme as that where only 10 per cent of claims require a formal hearing, meaning that 90 per cent of claims are settled without the need for a hearing by a judge. Even if the settlement rate declines to 70 or 80 per cent, this will create a significantly greater burden on the dispute resolution facilities: backlogs will develop which cannot be eliminated without substantial additional funding.

Background

Compensation claims in Papua New Guinea, writes Colin Filer (1997:158), are 'not governed by some abstract economic principle, but constitute one possible and widely variable element in the negotiation of specific social and political relationships'.³ The relationships of direct significance for development include those with government bureaucracies and private corporations. The compensation systems under most strain are those concerning land. This is related to the fact that most land in Papua New Guinea is not alienated but is held by social groups with fluid social organisations. Land boundaries are not mapped and were historically subject to extensive negotiation and confrontation. Most compensation disputes stem from the complicated issue of how to make land available for private and public sector development under this system of land tenure. Many compensation claims are over the 3 per cent of land which was alienated by past colonial administrations. Recent projects in the mining and petroleum (Togolo 1995) and agricultural sectors (Jones 1999) suggest a model where local communities are extensively consulted and involved and even become development partners.

The escalation of compensation disputes is also a product of the increasing incapacity and growing discontent with government in Papua New Guinea. Local groups resort to self-help measures to pursue grievances when government departments or legal courts fail to respond within expected periods of time or at all. These measures range from directly lobbying organisations and individuals, often on the basis that they are seen as having access to money, such as a manager of a plantation or a minister of national parliament. Self-help tactics may include explicit or implicit threats of violence, especially in certain parts of the country such as the Highlands. The failure

of law enforcement means that such threats go unchecked. These tactics have sometimes been successful because of the considerable discretionary power afforded by statute for Ministers to spend public money on *ex gratia* settlements regardless of the merits of the claim. *Ex gratia* are equated with traditional exchanges in which protagonists were offered gifts so as to immediately diffuse heated situations and set the ground for later negotiation and resolution of the dispute. In Tokpisin these payments are referred to as *bel kol pe*, a payment to cool emotions. When Ministers of government make such payments, judicial review is the only avenue for appeal.

Tribunal or Courts?

The premise of the options developed in the study was that existing law and principles of compensation were substantially adequate and that the need was for procedure to make laws work better in practice. Two proposals were central. One was a proposal to limit the discretionary power of Ministers by making the expenditure of all public monies for compensation claims subject to the approval of the Tribunal or Court. This could be facilitated by procedures requiring all compensation agreements to be lodged with a central registrar. The second was to confer power of contempt on the compensation body to deal swiftly with claimants who tried to use unlawful threats to force settlements. This proposal may help to build respect for the law, provided police can enforce it.

In addition, the success of either option relied on existing Land Courts and legislation to resolve disputes between groups over land. Several participants in the seminar, particularly from the mining industry expressed great faith in the *Land Groups Incorporation Act* (Chapter 147) to ensure distribution of compensation monies to rightful owners. They argued that the

Policy dialogue

problem was a lack of political will to implement these pieces of legislation. A counter-argument, which was strongly presented by others in the mining industry, was that too much faith was placed in these pieces of legislation. *The Land Groups Incorporation Act* (Chapter 147) was considered to work well in some parts of the country but not others, such as in the Southern Highlands Province where social structures were highly fluid and groupings regularly splintered and reformed in a localised landscape of constantly shifting political alliances and enmities. This fluid process may be replicated in the formation of Incorporated Land Groups, creating the potential for funds to be channeled into bodies unrepresentative of the targeted community.

The success of either the Tribunal or Court option would rely on the capacity of existing institutions—Land Courts, Land Titles Commission and National Land Commission—to handle land disputes and compensation matters successfully. National Court and Lands Department officials in the seminar identified the urgent need for an adequate database of information on land claims and Torrens title on alienated land which consolidates all the records kept in courthouses throughout Papua New Guinea. This was a task which it was estimated could take 5 years to complete.

Tribunal

The proposal for creating a new Tribunal to deal with all compensation claims was based on the premise that it would be able to determine decisions more quickly and cheaply than the existing court system. There would be no court costs and lawyers would not need to be involved. The Tribunal could provide speedy access to conciliation/mediation and it could use procedures of lodgment to filter spurious or unjustified claims. An advantage of the Tribunal was

that it could set amounts to be paid for certain categories of claim as occurred in the Worker's Compensation Tribunal.

A major problem in relation to land compensation is repeat claims by the same and different groups for the same land. There is also a problem of non-residential holders of land rights, such as people living in the city, seeking compensation for land and third parties who feel they have unfairly missed out. This highlights the need for careful land survey work and social mapping and the need for the tribunal to be able to make binding orders to prevent compensation claims from being reopened.

The Tribunal would be staffed by a variety of expert professionals, including local experts in knowledge of custom. These experts could form a pool of personnel who would be drawn on to serve in the Tribunal on a part-time basis according to the demands of each particular case. The choice of president for the Tribunal was seen as important in determining the regard with which the body was held by the community. There was consensus in the Seminar that a retired judge would have sufficient standing in the community as well as an understanding of the law.

A further advantage of a Tribunal over a court is that experts can play a greater role 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.

The role of the Tribunal in public education would include walking through the procedure, costs and probable outcomes of the process with potential claimees. This process would help parties have 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.

Policy dialogue

Courts

The option of using the existing court system was developed by former PNG Supreme Court Judge, Graham Ellis. This option was seen as capitalising on and strengthening a functioning institution regarded as corruption free by grassroots citizens in Papua New Guinea. Many in the seminar expressed a concern that the Tribunal option could easily become another underfunded administrative body. Moreover, it was considered that many decisions of a Tribunal may end up in the Courts anyway. Hence, legislation which directed all compensation disputes to the courts in the first place was one way of streamlining the process. There were several other advantages of the court over a Tribunal.

- The National Legal Judicial Service which is responsible for administering the Courts in Papua New Guinea enjoys a 'one line budget' guaranteed in the Constitution which means it would not be subject to political vagaries with changes of government.
- The system of lesser courts, such as Village Courts, Land Courts and District Courts, were decentralised throughout the country and accessible to grassroots citizens. Moreover the National/Supreme Court sits in Provincial capitals throughout the year.
- The court system already had an established pool of skilled personnel which it would be difficult for a Tribunal to build up given limitations on human capital.
- A strong argument which emerged during the seminar was that it was a better policy to work to improve existing institutions rather than create new institutions.

A problem with the Court option is that the likely increase in cases would still necessitate an increase in funding and the National Court already has an extensive

backlog of cases. However, Graham Ellis argues that additional judicial resources could be devoted to hear compensation cases when backlogs develop just as occurs when dealing with election petitions after national elections.

A Compensation Panel

The conclusion of the report written after the seminar was that the best way forward given the constraints of the PNG situation was to establish a panel of mediators, conciliators and arbitrators for compensation disputes situated under the auspices of the National Court. Claimants could be referred to the panel by a judge and obliged to undertake mediation, conciliation or arbitration. The panel could perform many of the duties of a Tribunal with the intention that it would provide a geographically and financially accessible form of justice where decisions were arrived at speedily. There would be no awards of other party costs but normal cost rules would apply if both parties wish to take the matter to the National Court.

The proposal for a Compensation Settlements Administration Board met with broad approval in the seminar. The proposal was largely developed by Deborah and Terry Dwyer, building on the proposal developed by a public sector inter-departmental working committee set up by Sir Julius Chan in 1995 (Toft 1995). The idea is that it would ensure that compensation monies were not immediately dissipated and was fairly distributed to rightful beneficiaries and had broader community benefits to limit growth of jealousies. 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) could be paid to a Compensation Settlements Administration Board to be handled as a

Policy dialogue

trust fund. It is also suggested that compensation monies for a single claimant be paid into a trust fund to fund an annuity in cases where a panel member or judge considers it wise because of the education or background of the claimant. The requirement for class compensation to be held in trust may help discourage claims based on expectations of a large windfall. However, this suggestion would need a strong public education campaign to overcome the suspicion of 'fat-cat bureaucrats' who rip off the 'little men'. Moreover, the Administration Board would have to be managed in the private sector and free of government interference.

The National Court and Land Court could be funded through a fee taken out of each successful compensation award. The fee could constitute 5 per cent of each award. The costs of the Compensation Settlements Administration Board could be covered by an annual charge on all trust funds under administration (for example, of no more than 1 per cent of assets or 10 per cent of income).

A way forward

The problem of excessive and unwarranted compensation claims is ultimately linked to limited economic opportunities and uneven development. This suggests the need for a uniform national approach that empowers local institutions of justice, such as Land Courts and Village Courts, which are responsive to the particular situations of communities on the ground and are neither concentrated in Port Moresby nor clustered around mining enclaves. This is a great challenge given the current funding shortages and incapacities of the PNG state. The creation of a Compensation Panel under the auspices of the National Court—an existing institution which is perceived as corruption free—is a practical way forward. It would consolidate an existing function of the courts by creating a pool of experts whose

role would be to mediate, conciliate and arbitrate specifically in compensation disputes. Its aim would be to reduce the number of cases required to be heard in the National Court. Moreover, it could begin a long and difficult process of public education on the principles of compensation in legislation and help foster realistic expectations about the likely quantum of payments awarded. A national compensation policy could be an important tool in this public awareness campaign and also provide a plan to coordinate the roles and functions of existing institutions and legislation dealing with compensation.

The current *ad hoc* approach to the settlement of compensation claims may diffuse emotions in the short term but fosters jealousies and resentments. The proposal for a panel of mediators, conciliators and arbitrators allied with a system for managing compensation payments, including for future generations, can contribute to changing community attitudes. Its success will rely on its ability to achieve outcomes for a grassroots constituency which has learned that power politics is the only way to be heard on the national stage.

Notes

- ¹ The report was jointly authored by Deborah Dwyer, Terry Dwyer, Graham Ellis, Michael Ward and Daniel Fitzpatrick. The contributions of specific authors have been acknowledged in the text where appropriate. However, this paper does not necessarily represent the views of the other authors and mistakes in this paper are my responsibility alone.
- ² The other PNG organisations behind this study were the Rural Industries Council, the Chamber of Mines and Petroleum, Elcom and Telikom. AusAID provided generous additional funding.

Policy dialogue

- ³ The literature on compensation is extensive. An excellent recent review is provided by Toft (ed.) (1997). See also Strathern (1993, 1997).

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