IASER DISCUSSION PAPER

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Y.P. Chai
Professor of Law,
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First published March, 1989

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IASER Discussion Paper No. 57

Published by IASER - the Papua New Guinea Institute of Applied Social and Economic Research

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ISBN 9980 75 015 4
National Library Service of Papua New Guinea

ABCDE 892109
Printed at the IASER Printery
ACKNOWLEDGEMENTS

This discussion paper is a part of the authors' research on the law and politics of decentralisation in Papua New Guinea. IASER Discussion Paper No.56 examined the constitutional arrangements for decentralisation. A fuller account of the research will be published as a Monograph in 1989.

Yash Ghai would like to thank the following institutions which have assisted him in his research on decentralisation:

. Overseas Development Administration (UK)
. The Nuffield Foundation
. The British Academy
. The Legal Research Institute of the University of Warwick
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1. INTRODUCTION

This paper discusses the principles, institutions and procedures for the conduct and negotiation of intergovernmental relations within the decentralised system of government established in Papua New Guinea under the Constitution and the Organic Law on Provincial Government (OLPG). The conduct and negotiation of intergovernmental relations are fundamental to an understanding of decentralisation because it is there that the major tensions and conflicts of the system express themselves. An examination of how these are handled and resolved provides useful insights into the dynamics of the system and its capacity to sustain decentralisation.

Intergovernmental relations are of much greater importance in Papua New Guinea than in many other instances of power-sharing because the OLPG — its provisions so different from the political and administrative system existing before 1977 — provided directions and targets for the future, although it is not, in all respects, a blueprint. One can learn something of how the process, set in motion by the OLPG, has moved in these directions and removed the obstacles in its way, through an examination of intergovernmental relations. Because some of the fundamental assumptions of the Constitutional Planning Committee (CPC: 1974) and, to a lesser extent, the Bougainville negotiators related to the conduct of intergovernmental relations, it is also possible to learn something of the validity of the assumptions, thereby gaining some insight into the wider political system and culture of Papua New Guinea.

When reference is made to "intergovernmental relations", we have in mind a number of tasks that need to be performed if the system of decentralisation envisaged in the constitutional laws is to be implemented and sustained. Discussions of this topic have tended to concentrate on dispute settlement, a bias perhaps established by the CPC which gave much attention to it. However, unless "dispute" is broadly defined, it refers to a pathological situation when intergovernmental relations have broken down. It appears that many other matters need to be considered in an examination of intergovernmental relations and we establish these by reference to the scheme of the OLPG. An important task is the

1 By the "Bougainville negotiators", we mean the persons on both sides who in 1976 negotiated the settlement of the dispute between Bougainville and the national government over the removal, in July 1975, from the draft national Constitution, of provisions on provincial government. The terms of the settlement were embodied in the Bougainville Agreement (August 1976). Throughout this paper we refer to the negotiations giving rise to that Agreement as the "Bougainville negotiations".
implementation of the balance of power between the centre and the provinces.

In some respects, the OLPG is precise — as with its provisions concerning primarily provincial legislative subjects or the minimum unconditional grants. In others, it provides broad standards or guidance — as with the division within the concurrent legislative subjects or the additional unconditional grants. It is in the latter regard that institutions and mechanisms are needed to define the balance and to ensure the necessary transfers to the provinces. Other tasks are to sustain whatever balance has been struck at a particular point, to ensure intergovernmental cooperation and, when necessary, coordination in the exercise of respective functions. A further task is a periodic review of the balance and, after the scheme of the OLPG has been substantially implemented, to determine remedial action or directions for the future, by adjustments in the balance.

For most of these tasks, one needs institutions and procedures for the exchange of information and views and for decision making, either jointly or severally. Various categories of institutions are possible — political, administrative, judicial, expert, quasi-autonomous and so on. This is also the case with procedures — consultative, adversarial, mediatory, advisory and so on. For most of the tasks, some modes of dispute settlement are necessary, in case the normal relations and expectations break down. This is particularly so in regard to the sustaining of the balance, whatever the attempts to build in dispute-avoidance provisions and mechanisms.

The OLPG faced peculiar difficulties in fashioning the system for intergovernmental relations. The system of government agreed to under the Bougainville Agreement did not fall neatly into a clearly recognisable constitutional category, such as unitary or federal, which might suggest precedents. It strove, within an essentially unitary framework, to incorporate elements of federalism. It relied heavily on ideas, assumptions and schemes proposed by Tordoff-Watts (1974) and the CPC, which took the unitary nature of the government as the starting point. For that and other reasons, it placed a primacy on political consultation and negotiations. The Bougainville negotiations took place in circumstances when both these assumptions were questionable. These led to some refinement of earlier proposals, the incorporation of some substantive matters such as primarily provincial legislative subjects, exclusively provincial taxes and minimum unconditional grants and a degree of entrenchment no longer compatible with a simple unitary model. Thus, although the balance between the centre and the provinces was now somewhat different from that envisaged earlier, the CPC scheme of intergovernmental relations was substantially adopted in the OLPG.

The CPC's recommendations on intergovernmental relations followed from its conception of decentralisation as a system of cooperation and consultation between different levels of
government. It proposed institutions which would promote discussion and consultation among governments, both to prevent disputes and to encourage cooperation. It assumed that the national and the provincial governments would have a mutual interest to cooperate and promote decentralisation, and that when disputes did arise, the best method to deal with them would be through a political settlement. Hence the importance it attached to the Premiers' Council.

However, the CPC's belief in the efficiency of political, consultative and mediatory processes (the "Melanesian Way") combined with the premise of a unitary state meant that the council and other similar bodies were not vested with the final powers to dispose of a dispute. It did envisage arbitral functions for the Premiers' Council, which would dispose of a dispute, but its proposals for this were vague. As a corollary of its predilection for political settlement, the CPC was generally opposed to involvement of the courts, which it feared would adopt a legalistic approach and introduce rigidity in intergovernmental relations. Courts were to be institutions of last resort and then only on points of law which were expected to be few since it wanted to declare the most important provisions to be non-justiciable (CPC: 10/23, para.196).

The OLPG built on the philosophy of the CPC and raised procedure to a new level of importance, because it then served not only to encourage cooperation but also to protect provinces against encroachment by the centre. Given the complex and ambitious aims of the OLPG it may be argued that the machinery it provides is inadequate and that this contradiction is its major weakness. It may not be a sufficient defence to say that these ambitious aims could only have been pursued at the expense of weak machinery.
Discussions of intergovernmental relations frequently proceed on the assumption that there are two clearly defined parties -- the national government and the provincial governments. The assumption is misleading because each level of government is an interplay of myriad interests and institutions. To begin with, the national government consists of the Parliament, the National Executive Council (NEC) and the bureaucracy. But none of these is necessarily homogenous because the interests of the backbenchers may differ from those of Ministers, and inter-ministerial disputes are common. Also, while some sections of the bureaucracy such as the National Planning Office (NPO) and the Departments of Finance and Provincial Affairs have gained from decentralisation, others such as Health and Primary Industry have lost. A similar analysis can be made at the provincial level, where the interests of one province are not identical with that of another. As we examine later in this paper, they are often in conflict. Different interests at the national level mesh or interact with different interests at the provincial level in a variety of different ways. Intergovernmental relations consequently are complex and difficult to comprehend in their entirety.

For example, the CPC and the constitutional laws cast the Parliament, notwithstanding that it is part of the national government, in an umpiring role. The OLPG prescribes a key role for the Parliament in the suspension of a provincial government, the disallowance of a provincial law or the repeal or alteration of a provincial tax. In part, the participation of the Parliament was intended to ensure fair procedures and to delay immediate action by the NEC in order to encourage second thoughts or a compromise. However, it was also due to the consideration that the Parliament would stand between the national executive and provincial governments -- that it was to be the ultimate custodian of the constitutional scheme of decentralisation.

The members of the CPC were essentially parliamentarians (its ministerial members took no active part) who had used the legislature with some success to challenge particular aspects of government policy. Several Members of Parliament had championed provincial governments for their areas, and the national legislature was frequently viewed as a platform for the expression of local views and the forum for interprovincial negotiations. In those colonial days shortly before independence, with Ministers insecure in the control and direction of their own departments, the legislature did enjoy a special eminence - emphasised, in ter alia, by its roles as the maker of governments and the Constitution. However, as discussed, the CPC probably misjudged the dynamics of political change ahead.

The CPC also probably misjudged another matter closely connected with the role of the Parliament -- the relationship
between a provincial government and the national Members of Parliament (MPs) from that province. It recommended that the MPs should not have a right to sit in the provincial assembly and the assembly should not be compelled to coopt them (CPC: 10/6/52). However, in order to encourage communication and cooperation between the two sets of leaders, the assembly should be given the power to coopt the MPs to sit and participate in assembly debates, without a vote (ibid.:10/6/53). It also recommended against a person's simultaneous membership of the National Parliament and the assembly (ibid.:10/6/58).

At first sight, the CPC's concern to keep the MPs out of the provincial assembly and government may seem inconsistent with its view of the Parliament as the custodian of provincial interests, since MPs would tend to speak out for their provincial government if they had close working links with it. Unlike federal systems, the provinces had no formal representation at the centre, so an MP's role as spokesperson for a province could be significant. The CPC decided against formal links because it considered that if a person was an acceptable representative at one level of government, he or she was not necessarily acceptable at another (ibid.:10/5/47). It may also have seen its proposals as ensuring a wider distribution of political power and authority and preventing the undue dominance and manipulation of fledgling provincial institutions by established national politicians.

It is worth analysing the assumptions underlying the constitutional relationship between the MPs and provincial governments, because it has a bearing on the perceived role of the Parliament as well as helping to illuminate the wider scene within which the operation of provincial government is best located. The CPC had rather formal notions of different levels of government and a clearly differentiated role and function of each. For example, it stated that the energies of the members of the National Parliament, who were paid to act as full-time representatives of their people at the national level, "ought not to be diverted into provincial politics" (ibid.:10/6/52). Its concept of MPs was perhaps influenced by notions of what they are seen to be in Western political systems -- persons who are concerned with broad questions of policy and legislation, critics of the government, somewhat distanced from the administration. In such systems, issues in the relations between levels of government are mediated (in part at least) through political parties rather than individual MPs, and their own relationships with the party are as significant as their connections with their constituencies.

The role and the situation of Members of Parliament in Papua New Guinea are different. Parliamentary business occupies only a small portion of their time, especially since few of the provisions that the CPC recommended for an active role of the backbencher in national policy and administration, have taken root. The links that MPs have with the administration have been valued, both by the
(alien) administration to help implement its policies and by politicians as opportunities to channel resources to their areas and supporters. They have seen themselves as vital links between their areas and the national administration. The primary concern in the country has been with the delivery and administration of services rather than broad policy questions. This has defined the role of MPs, emphasising their involvement with administration and projects at the grassroots. They have had a special relationship with the local authorities. They have been the spokespersons for their areas -- delegates -- rather than the representatives of political parties. MPs have not been concerned with the intricacies of legislation, nor are they well qualified for that or general principles of national policy.

It was these particular existing roles of MPs that the provincial governments began to claim and perform. The MPs felt threatened and annoyed, even some of those who had in the past supported provincial government and may have expected that it would operate under their tutelage. The consequence was widespread criticism from the MPs of the conduct and arrogance of provincial governments and attempts to reduce the status and powers of the provinces.

The dissatisfaction of the MPs has interacted with the attitudes and functioning of the national executive. All post-independence governments have been coalitions of parties and groups. Not only have the governments been unstable, so have the parties and groups. Significant gains, in terms of political influence and office, accrue to those politicians who are able to command the loyalty of a few MPs - hence a large part of parliamentary politics is geared to woo MPs and sustain their support. The tenure of MPs has been insecure and in order to strengthen their hold over their constituencies, they have sought means of patronage there. The interests of some senior politicians looking to build a bloc of parliamentary support and the MPs wishing to displace provincial governments as main dispensers of projects and services have sometimes led to disruptive schemes. Examples include the sectoral funding in certain ministries, the national development fund or the suspension of provincial governments.

The coalitional nature of national government has also meant that it is unable to pursue coherent or consistent policies regarding decentralisation. This has sometimes enabled the provinces to exploit the divisions within the national executive to their advantage, as for example, in June 1983 when several Ministers and backbench MPs publicly attacked a national government decision to remove the major constitutional entrenchment of the provincial government system by making the OLPG into an ordinary Act of Parliament, and in late 1984 when again some Ministers (Regan 1985: 157-158) failed to support the Prime Minister's call for a referendum on provincial government. Nevertheless the failure to achieve the collective policy making and responsibility of the NEC
has introduced instability and uncertainty in national policies regarding provincial government (as in other areas of policy).

Various consequences of these developments which provide the background to intergovernmental relations are worth noting. First, there is no formal link between provincial governments and MPs, which serves to clear misunderstandings and form the basis for cooperation. Were this to materialise, the MPs would become a major link between the national and provincial governments and, because they would be involved in provincial policy making, a lobby for the province at the national capital. Only in very few provinces -- North Solomons, East New Britain and Eastern Highlands -- has this happened and in those provinces only to a limited degree. On the other hand, there are also examples of MPs using the national institutions to undermine their provincial governments -- the most blatant cases being the suspensions of Enga, Manus and Western Highlands. The MPs have introduced a further element of tension and uncertainty into a system already fraught with these problems.

Second, the Parliament has not acted as a referee over decentralisation. There was always a certain tension between the two roles of the Parliament (more clearly implicit in the OLPG than the CPC recommendations), as referee and player, but the tension had not been evident due to political developments. Far from protecting provinces against the national executive, it is the national executive which has occasionally stood between provincial governments and the wrath of the MPs. A good illustration of this is the national executive's moderating of the proposals originally presented in 1978 by Akoka Doi, a backbencher, to introduce national MPs as full voting members of the provincial assembly and executive. The ease with which in 1983 the Parliament removed certain safeguards in the provisions for the suspension of provincial governments and the ready support they have since given to all but one of the seven suspensions has amply demonstrated its potential for partiality. Consequently, provincial governments pursue their interests outside the Parliament, in the Premiers' Council and other arrangements and particularly by greater collaboration and coordination among themselves. For example, when Prime Minister Somare announced his intention to turn the OLPG into ordinary law or to hold a national referendum to decide the future of provincial government, the premiers organised their own lobbies and campaigns outside the Parliament. The result is greater pressure on other institutions provided to deal with intergovernmental relations or the establishment of new modalities.

Third, the difficulties of establishing collective responsibility in the NEC has prevented the development of a consistent approach to provincial government and a considered response to the resolutions of the Premiers' Council. A related factor is the relationship of the national executive to the Parliament. The lack of collective responsibility of the NEC causes and contributes to the weak control of the government over the
Parliament. The scheme of intergovernmental relations assumes that once a common position has been negotiated between the centre and provinces, for example in the Premiers' Council, the national government would be able to implement its part of the agreement. If the Westminster-type parliamentary system that the Papua New Guinea Constitution established, worked according to normal expectation (collective ministerial responsibility and executive parliamentary majority), that would be a reasonable assumption. But the nature of the party system in Papua New Guinea has resulted in weak executive control over parliamentary business and decisions. It is significant that the major 1978 proposed amendment to the OLPG was originally proposed by a backbencher and the capacity of the government to influence its progress in the legislature was limited. The national government's ability to negotiate and implement agreements on intergovernmental relations with any certainty or consistency is consequently a major constraint on healthy relationships.

The problem is aggravated by the multiple relationships between different organs of the national government and the provinces. This is inevitable under Papua New Guinea's kind of decentralisation, without a coordinating mechanism other than the NEC. National agencies tend to restrict their involvement with provincial governments to matters with immediate connection to their functional roles. The Department of Provincial Affairs (from 1977 to 1982, the Department of Decentralisation) has at times tried to play a coordinating role, but has never had the capacity to do so. Since 1982, its role has been restricted largely to organising the annual Premiers' Council conference, the training of kiaps, administration of suspended provincial governments and administration of development agreements in less developed areas in a few provinces. The Public Services Commission, under strongly pro-decentralisation Commissioner, Rabbie Namaliu, coordinated the implementation phase, from 1977 to 1979, but played a minor role after that in relation to personnel matters. The Department of Finance has had difficulty in administering the financial relationships established under the OLPG, and until 1985 largely concentrated on keeping financial control in provinces without full financial responsibility (Regan 1988).

In 1984, in response to criticisms by the World Bank of government implementation capacity and the lack of integration of national departments and provincial governments, a small coordinating unit called the Program Management Unit was established in the Department of Finance. Its brief was to improve implementation and coordination of government programs. It is working to improve liaison between "line" departments and provincial governments and to help both departments and provincial governments critically evaluate their priorities. Despite considerable opposition from some entrenched interests in the Department of Finance and Planning, its efforts are resulting in improved coordination between some national departments -- notably Lands and
Primary Industry — and provincial governments. The Department of Justice assisted provincial governments in the establishment phase, but largely withdrew from 1979 after the establishment of a legal unit in the Department of Decentralisation (a unit which has become largely inoperative since 1984 due to lack of experienced staff). The so-called "line" departments which have had functions and staff transferred to the provincial governments (Health, Education, Primary Industry, Forests, Lands, and Works and Supply) have varying degrees of contact with provincial governments, the closest being the Department of Education, where administration had been highly decentralised even before the OLPG. Prior to the advent of the Program Management Unit, the Department of Primary Industry was the worst — almost completely ignoring the primary industry functions carried out by provincial governments.

Until recently, the autonomy of the Public Services Commission in the management of public servants was a further source of uncertainty and confusion. Given the 'unitary' nature of Papua New Guinea's state system and partly as a consequence of the restriction on other institutions for intergovernmental relations to advisory functions, the lack of cohesion in the NEC contributes greatly to uncertainty and indecisiveness in these relations. Sometimes this redounds to the benefit of the provinces, since the antagonism of a section of the NEC against a province or provincial government generally is as likely to be deflected or dissipated in the desultory and complex decision making of the NEC — as is the enthusiasm of other sections. In either event, the NEC's style bears significantly upon other institutions for intergovernmental relations, the principal one being the Premiers' Council.

Since the passing of the Public Services (Management) Act in 1986, the management of public servants has been devolved substantially to departmental heads and to appointees under s.50 of the OLPG.
3. THE PREMIERS' COUNCIL (PC)

Composition, Functions and Procedure

The Premiers' Council is the most important political body actively dealing with intergovernmental relations. It is the only forum where the heads of government meet. The CPC had a notion that the premier of a province should participate in meetings of the NEC at which important matters directly affecting his or her province were discussed (CPC:10/21/183). Some premiers have since said that the Premiers' Council should replace the NEC (personal communication) or that all premiers should attend one NEC meeting each year (proposal made by P. Anis, Premier of New Ireland, to the 1987 Premiers' Council conference in Lae, October 1987). However, nothing has come of these proposals.

The Premiers' Council consists of the Prime Minister, the national Ministers of Finance and Provincial Affairs and the premier of each of the provinces (Constitution, s.187H(2)). Its major function is as a forum for the exchange of views on matters of mutual concern, especially fiscal and administrative arrangements between governments, the legislative powers of the provinces and the subsidiary, but no less important, role of the non-judicial settlement of disputes (Constitution, s.187H(4) and (5); OLPG, s.84). At its first meeting\(^3\) (1978 Premiers' Council conference, Kavieng) the council tried to flesh out these functions and identified the following additional matters:

- clarify the boundaries and limits of powers of the provincial and national governments;
- act as a sounding board for policy proposals affecting rural people;
- act as an initiator of new policies and changes to existing policies;
- act as an equal and competent adviser to the NEC; and
- be a conscience keeper for national government (Premiers' Council 1978: second session).

There is no evidence that the national Ministers objected to this somewhat expansionist view of the Premiers' Council or its functions, but in practice, the NEC has treated it with somewhat less regard than might be implied by these terms of reference.

\(^3\) Prior to the Kavieng meeting, there had been two major meetings involving a number of premiers, one in Port Moresby in September 1977 and one in Simbu in November 1977. As they involved only premiers and not the national government Ministers as required by the Constitution (s.187H), those meetings cannot be classified as Premiers' Council conferences.
The law says remarkably little about the powers and procedures of the council. The council has evolved its own procedures. It has so far met once a year, except in 1984, 1986 and 1988 when it has held additional meetings. The meeting in 1988 was called to discuss the report of the "specialist committee" on intergovernmental fiscal relations, that in 1986 to receive a briefing on national budget proposals from the new WNGT government, and that in 1988 to discuss proposed amendments to the OLPG.

The Premiers' Council conference agenda is now prepared through a somewhat elaborate procedure. The process starts at regional provincial secretaries' meetings which identify submissions (made by any provincial government or national government department) of sufficient importance to be referred to the relevant regional premiers' conference. These meetings often consider any comments that may have been made on the submissions by provincial and national departments. Regional premiers' meetings, at which national department representatives are expected to be present, then select items for the Premiers' Council (henceforth PC) conference. However, the final decision on what appears on the agenda is made by the Prime Minister.

The guidelines for the selection of items adopted by the 1982 PC conference and used ever since provide that "matters which affect, or are likely to affect, the greatest number of provinces, or to have significance as national issues, shall be given priority". Matters relevant only to one province or region should be dealt with by the Regional Premiers' Council (Premiers' Council secretariat 1982: Resolution, PC:1/5/82). In general, these guidelines have been observed, but occasionally parochial matters (when a province is trying to rally support from other provinces) have slipped through. Since the second PC conference in Wewak in 1979 there has been a problem with the large number of items selected. This has limited the time for discussion, despite the guidelines which are intended to restrict the number of agenda items to allow adequate time for full discussion. In practice, about 30 items are included, so that, as the PC meets for only three or four days, little more than an hour is usually available to discuss each item. The crowded agenda is a matter of some concern and the PC has advised that matters merely for noting should not be discussed. It is being left for the provincial secretaries to brief their political bosses on such matters.

A meeting of provincial and departmental secretaries is normally held shortly before the PC conference to prepare for it. The aim is to ensure that the secretaries are in a position to fully brief the politicians, and also to help focus the discussion at the PC conference by preparing draft resolutions. The PC submissions routinely conclude with proposed courses of action, which, if approved, normally form the basis of the draft resolutions. The PC conferences are not open to the public or the media, but relevant national Ministers and officials attend as necessary. The PC is
serviced by a small secretariat, which was originally located in the Office of the Prime Minister but since about 1982 has operated out of the Department of Provincial Affairs.

The PC operates largely by passing resolutions. The resolutions relate predominantly to the submissions to the PC and are often substantially changed from the drafts prepared by the secretaries. The PC appoints a committee to draft resolutions based on the discussion on submissions. These are presented to the final sessions of the council and are then accepted, generally without a formal vote. The General Constitutional Commission recommended that the status of the resolutions should be clarified, in particular, whether they are binding (1983:177). Given that the PC is essentially a forum for the exchange of views, it is difficult to see how its resolutions can be other than recommendations to whichever body they are addressed. In most instances they are addressed to the NEC.

At its very first meeting, the Prime Minister indicated that the resolutions would be regarded as 'recommendations' to the NEC — presumably in the same way as the resolutions of the Parliament (Premiers' Council 1978: second session). The PC secretariat transmits the resolution to the relevant national department and, after receiving its views, prepares a submission to the NEC. There is no evidence that any premier has objected to the 1978 view of the Prime Minister and the procedure since followed. Unless otherwise specified, the resolutions of the Parliament are not binding on the government, but the Parliament does have the option of legislating if it feels sufficiently strongly about a matter. The PC does not have this possibility although the premiers from the islands region provinces decided at a regional meeting in June 1987 to request Members of Parliament from the region to introduce legislation into the Parliament in an effort to implement a 1984 Resolution about the jurisdiction of Village Courts (Islands Region Premiers' Council 1987a:27; and Islands Region Premiers' Council 1987b:22). This move reflects a growing frustration on the part of many provincial governments with the failure of the national government to implement even non-controversial resolutions, an issue that is discussed in more detail later.

Being an intergovernmental body, the PC can be used for more than an exchange of views. It can be used for negotiations and reaching agreements. There appears to have been few major instances of the latter — in particular, July 1984 when the provinces and the national government reached agreement on the recommendations of the specialist committee on fiscal relations and in October 1987 when the Minister for Provincial Affairs agreed to oppose proposed amendments to the OLPC concerning full voting membership of provincial assemblies for national MPs.

The PC has passed a total of 324 resolutions. It has passed 264 resolutions — 242 at its annual conferences up to its 1986
meeting (Premiers' Council secretariat 1987:2), a further 22 at its October 1987 meeting and 13 at the June 1988 meeting. It has also passed 47 resolutions at its special meetings, 26 in 1984 and 21 in 1988. A few of these are repeats, some merely purport to take note of developments or information papers, some concern minor administrative matters and some are really parts of a proposed joint scheme, like the resolutions at the special July 1984 meeting on the 63 recommendations of the specialist fiscal committee report. Nevertheless, the bulk of the resolutions concern key policy matters -- at the least, of decentralisation. They involve for the greater part the transfer of powers and functions to the provinces, the provision of more funds to them or reform of legislative or administrative arrangements affecting the provinces.

Resolutions dealing with transfers of powers and functions are often passed on the same topic year after year -- for example, the numerous resolutions about fisheries, lands and forestry powers. The resolutions usually seek delegations of powers or changes to national legislation which would allow provincial laws to deal with aspects of those matters that are of provincial interest. Fisheries powers have been the subject of resolutions at the 1978, 1979, 1980, 1981, 1983, 1985 and 1987 PC conferences. Resolutions on land functions have been passed at the 1978, 1979, 1982, 1985 and 1986 PC conferences and on forestry functions at the 1979, 1982, 1983 and 1987 conferences. Only in the case of land functions has there been any progress because in 1986, at least in part as a result of PC pressure, extensive land functions were delegated to two provinces (East Sepik and East New Britain) on a trial basis, and in 1987, the East Sepik Provincial Government passed its own land laws, thereby assuming responsibility for most aspects of land administration in the province (Larmour ed., forthcoming). However, the delegations were more directly the result of lobbying by the two provinces than of the PC resolutions.

Resolutions seeking more funding for the provinces have been passed at every PC conference. The resolutions have become more frequent since about 1981, when the weaknesses in the financial arrangements under the OLPG became more evident. Two major reviews of those arrangements have resulted from PC resolutions (in 1980, Resolution No. 6c/3/80 and in 1983 No. 1/6/83). But to date very few changes have resulted, even when the national government has agreed to the changes proposed, as was the case with most resolutions made by a special PC conference held in July 1984 to consider the report of the financial review arising from the 1983 PC resolution (Department of Provincial Affairs 1984).

Legislative and administrative arrangements have been the subject of numerous resolutions. Examples include the 1984 resolution concerning the jurisdiction of Village Courts, a 1984 resolution concerning licensing laws and a 1985 resolution about national laws vesting powers in now defunct offices of district commissioners and district officers. Few have been implemented, even though most have not been controversial.
Although a detailed and accurate breakdown of the implementation status of PC resolutions is not available, it seems unlikely that much more than 50 percent have been implemented. The greater number of those that have been implemented relate to relatively minor matters or those sponsored by the national government. Many of the rest have been rejected by the national departments or the NEC. Many which have been accepted have never been implemented— for example, the abovementioned 1984 resolution on jurisdiction of Village Courts, a resolution which requires a very simple amendment to the Village Courts Act (Ch 44) to give Village Courts power to deal with offences against community government rules (Premiers' Council secretariat 1984:184; resolution PC:18/7/74).

The Prime Minister's view of the status of the resolutions of the PC has undoubtedly weakened its position. While the Prime Minister may sometimes urge the NEC to accept and implement particular resolutions, there is no notion that the government should be morally committed to resolutions of a body of which three of its senior Ministers are members and the Prime Minister is chairperson. The practice that has developed is that the national government members do not actively oppose or vote against resolutions of which they do not themselves approve or consider that the NEC would not approve, although they would normally give an indication of this. Consequently, what pass for the resolutions of the PC are in fact often merely resolutions of the provinces.

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4 The Premiers' Council secretariat produced material for the 1987 PC conference intended to provide information on implementation, but it was very confused (it gave several different figures for the total number of resolutions passed at all PC conferences) and impossible to verify. For example, percentages were given of resolutions which were "obsolete", "implemented", or "not implemented", without identifying which were the resolutions in question (Premiers' Council secretariat 1987:26-30 and attachments). Out of a total of 242, the figure given for "implemented" resolutions was 104 (43%). But it was suggested that of the remaining 138, as many as 30 (12%) were "obsolete", 49 (21%) did not require implementation (because they related to information, papers or other matters not requiring action) leaving 57 (24%) in the category of "not implemented". But even if the accuracy of the initial figures and categories is accepted, if the various categories not requiring implementation are deducted ("obsolete", and "information papers"), 161 resolutions remain -- 104 (65%) of which have been implemented and 57 (35%) have not. However, in the absence of detailed reporting on the implementation of each resolution and on the criteria used to decide on whether or not a resolution has been implemented or is obsolete, the categories and statistics are highly suspect.
It was envisaged that one role of the PC would be to express the views of the provinces to the centre, but it was also assumed — implicit in its role to settle disputes rather than, as it is turning out, dispute creating — that the PC would also on occasions provide a forum for agreeing on positions. The national government may argue that three of its members have no mandate to bind the NEC. On the other hand, the procedures of the PC attempt to ensure that all relevant parties have the provisional agendas and submissions for its meetings some months before each meeting (and in any case some issues have become hardy annuals). This process should give the NEC enough time to formulate its position regarding the basis of discussion and negotiations. While only the three national Ministers are members of the PC, other Ministers (and their officials) are allowed, indeed encouraged, to attend and participate, and it is normal for several to do so. The prior meeting of the secretaries could be used to narrow differences and identify those requiring political decision. Even if no agreement could be reached through this procedure, the comments of the NEC on the resolutions of the PC should be communicated to the following meeting of the PC with a view to reaching common ground. One cannot expect that the PC will reach agreement on all matters. However, little attempt is made to use it in that way. On most occasions, it is not even a venue for the exchange of views. The flow of views tends to be one way — from the provinces to the centre. The lack of the use of the PC as a joint decision-making body is a major failure of the institutional machinery for decentralisation.

It is true that the constitutional laws do not explicitly provide for a joint decision-making body. Yet the scheme of decentralisation established under the OLPG, particularly the potentially vast area of concurrent legislative powers, requires (more than the CPC proposals ever envisaged) some modality for making joint decisions. The division of executive and legislative powers between the centre and the provinces is complex (Chai and Regan 1988). That complexity is increased because of provision for that division of powers to be flexible in order to meet changing circumstances. Implicit in the law is the necessity to agree on the extent and terms of changing transfers of powers and functions.

Once the national government accepted the 1977 McKinsey and Co. proposals for uniform transfers of functions to all provinces (McKinsey and Co. 1977), the PC was the obvious forum for the necessary consultation and agreement as required by the OLPG (ss.31, 43, 44 and 114(3)). The method chosen by the national government for the initial transfers of power through its unilateralist, administrative delegation (Regan 1985:130-136; Axline 1986:58-63; Regan 1988:11-12 and 23-25), allowed no room for consultation, much less agreement. One could conceivably justify this on the grounds that it was necessary to get decentralisation under way. However, there is little excuse for not using the PC after that for decisions on transfers. As already indicated, the provinces have repeatedly sought to use the PC for consultations and negotiations on the
allocation of powers within the area of concurrent powers. The national government has, at the least, a constitutional obligation to negotiate in relation to these matters (s.114(3)). By and large, the national government has rejected these approaches or resolutions and failed to provide an explanation for its attitudes. Relatedly, the Prime Minister sought to provide a number of justifications for the rejection at the 1986 PC conference, but these were in the most general of terms and cannot really be regarded as satisfactory. One was that the majority of resolutions called for the decentralisation of powers which were beyond the capacity of the provinces to manage at the levels provided by the national government. Also not all the provinces were equally equipped to handle the functions requested and some resolutions aimed 'too high' for the national government to implement financially. The most revealing was the justification that:

"the resolutions had created conflicting views and opinions between national and provincial governments and issues became unresolved for a long time for unknown reasons" (Wingti 1986:3).

This neatly sidesteps more plausible explanations such as the absence of discipline and collective responsibility in the NEC, the lack of respect the NEC accords to the PC and the weaknesses in the administration of the national government.5

Even if the PC has played only a small role in specific policy decisions, it has in some other respects discharged a useful role. It has educated the national government about the needs, demands and aspirations of the provinces. The direct access that it provides the provinces, to the Prime Minister -- whose portfolio otherwise has few connections with provincial affairs -- is of great potential value. It has already been used once, to great advantage, at the 1983 meeting, after the Parliament had endorsed the recommendation of the General Constitutional Commission to turn all Organic Laws to ordinary Acts. The premiers refused to proceed with the agenda unless the Prime Minister clarified his position on the matter. After many heated discussions over more than two days, the Prime Minister adopted a more conciliatory attitude. The matter has not been proceeded with and intergovernmental relations are less tense. The PC meetings are well covered in the media, which ensures high visibility to dominant issues in decentralisation.

The PC has been important in informing provinces of interesting developments in other provinces and of identifying areas of cooperation. Some examples are in the levying and collection of

5 At the 1987 PC conference the Prime Minister's briefing was a little more frank: "the problem remains that national government, through agencies, has not got the capacity to implement such decisions" (Premiers' Council secretariat 1987:28).
provincial taxes on beer and tobacco and bottlenecks in administration such as in land transactions. Despite some tensions that exist among groups of provinces (which is discussed later), the PC has been remarkably successful in generating provincial solidarity. A high degree of consensus has emerged on major issues and has enabled the provinces to deal collectively with the national government from a stronger position than would be the case in bilateral dealings. A good example is the lead that the provinces took in initiating a thorough review of the financial provisions of the OLPG.

Most of the provinces have been unhappy with certain aspects of these provisions as well as the total package. Officials in the Department of Finance were aware of the problems and proposed to the 1980 PC that there should be an intergovernmental review of the financial provisions. The PC agreed and a committee was established. This committee presented a report in late 1982, whereupon the premiers set up a committee of four of their own members to examine it in detail and follow up its implementation. The Premiers' Committee reported in 1983 and, being critical of some aspects of the financial report, persuaded the PC and the NEC to appoint a specialist committee to carry out a detailed review of the financial provisions and to make recommendations. The specialist committee's report was submitted in April 1984, and consideration deferred by the May 1984 PC to a special PC in July 1984. In the meantime, the report was discussed at a meeting organised by the islands region premiers but attended by premiers of most provinces, which ensured that the provinces had prepared and coordinated their case well and were able to agree on a number of significant recommendations with the national Ministers. These were subsequently endorsed by the NEC in 1985 under Prime Minister Somare and again in 1986 under Prime Minister Winti. However, only in December 1988 have drafting instructions been prepared. The delay has been largely due to lack of capacity in the Departments of Justice, Finance and Planning and Provincial Affairs, and to the general lack of interest in the issue shown by the NEC until the Namaliu government came to power in July 1988.

The provinces' experience with the financial review illustrates what has been a major weakness in the machinery of the PC. As stated, once a resolution has been passed, it is the responsibility of the PC secretariat to follow through with it. In the opinion of the provinces generally, the secretariat has been less than energetic. Although it may not necessarily be any fault of the secretariat, the NEC frequently does not get to consider the resolutions until a few days before the following year's PC! The remedial action the premiers agreed to in 1983 was to set up their own committee to oversee the follow up. The committee was not a success, bedevilled by, among other factors, a lack of financial and administrative resources. It was abandoned within months of being established. Frustrated at the continuing lack of follow up, the 1987 PC conference resolved to establish another implementation
committee and in the hope of giving it some status in the eyes of national government agencies, proposed that it should be chaired by the secretary of the Prime Minister's Department. Again, it was abandoned within months.

Mediation and Dispute Settlement

The difficulties of getting agreement between the national and provincial governments might suggest the value of another of the roles of the PC -- dispute settling. This was perceived to be a key role, on the assumption that intergovernmental disputes were political and should therefore be politically resolved. In practice, the PC has done little in the way of settling disputes and, as the proceeding discussion reveals, it has done very little to prevent disputes from arising. The PC is one of several bodies which are concerned with settling disputes; the other two important ones being the National Fiscal Commission (NFC) and the courts. Their respective roles are not clearly delineated, but both in the CPC report and the constitutional law, it is implicit that the PC should act as a check on the resort to courts. The NFC was envisaged as a technical body and in so far as there was a preference for political settlement of disputes, the PC was to be the pre-eminent, dispute-settling body. In most areas (not finance) made non-justiciable -- covering among others, the vast field of concurrent powers -- it is the only dispute-settling body. Why then has its role been so insignificant?

First of all, it is not clear what is meant by the term 'dispute' in this context. For example, when the provinces ask for more powers in relation to land, and the centre refuses, is this a dispute? Or when the national government says it regularly consults a province before it issues a fishing licence, which is operative in those provincial waters, and the province complains that it was not consulted, is this a dispute? Lawyers would readily see the second situation as a dispute because there is a clear question of entitlement or expectation and there is contention about facts. If the former is a 'dispute' it is perhaps less susceptible to 'dispute settlement' by an agency. It involves fundamental questions of policy and power (even if the discourse "provinces do not have the capacity" suggests otherwise) which are more appropriately dealt with by negotiations between the parties rather than adjudication or arbitration. Even if one could agree that the OLPG does provide criteria for the resolution of a dispute of this kind (for example, "national interest" as referred to in s.29 and s.114(3)), it is not easy to apply in particular instances. This may have been one argument for keeping the courts out. Up to this point, the overwhelming majority of 'differences' that have arisen in the PC have been of this nature.

If the ordinary processes of the PC -- discussions in the council -- are not able to resolve these 'differences', no other form of intervention by the PC is likely to do so. In fact, the
parties to the 'differences' cover all the members of the PC, so that there are no disinterested 'third' parties who may usefully act as intermediaries. However, this does not exclude the use of committees of its own by the PC as a negotiating forum -- a strategy that has not so far been deployed. 'Third' parties will then need to be called from outside.

The appointment of the specialist committee on fiscal relations may be an instance of this kind. Although it did not enter into formal mediation, it did formally consult with meetings of premiers from each of the four regions, as well as with key NEC members. It attempted to discover common ground as its starting point and avoided recommendations which were patently unacceptable to either side. It was perhaps the same kind of third party intervention which the premiers had in mind when, in 1984, they recommended the appointment of a consultant for an extensive review of the concurrent powers, over which the PC had itself managed to get relatively little movement. A more formalised possibility of third party intervention now exists through the Provincial Governments (Mediation and Arbitration Powers) Act 1981, which is discussed in detail later.

The political settlement of disputes is frequently contingent upon the configuration of political forces and pressures. If the dispute is about an issue which strongly arouses public opinion or where each of the parties can call upon a considerable degree of political support, the pressures for a settlement grow. This has patently not been the case for most of the issues before the PC. Provincial government remains controversial, but there is an abstract quality to the controversy and it appears not to engage public opinion -- a debate largely among the combatants. Meanwhile, in the one institution which has the constitutional responsibility and power to determine the balance between the centre and the provinces -- the Parliament -- there is considerable hostility to provincial government. The national executive itself must realise that were it to make significant concessions to the provinces, which required parliamentary sanction, it may be unable to secure it. That consideration, and its own self-interest, tends in favour of the status quo. Faced with its own impotence, the provincial members of the PC have turned to other fora for the settlement of disputes.

It was envisaged that an important part of dispute-settling activities of the PC would relate to 'bilateral' disputes between either a province and the national government or one province and another (CPC: 10/22/195). The members of the PC not involved in the dispute may be well placed to mediate in it. Although individual provincial complaints against the national government have been raised in the PC, for example, Milne Bay's complaint in 1981 regarding fisheries, or Morobe's complaints of 1984 about the appointment of the provincial secretary under OLPG s.50, these have been presented as general disputes between the provinces and the
centre and discussed as such. There have also been issues which
touch on interprovincial differences, as for example, the
submissions by the New Guinea island provinces on their powers to
pass laws limiting internal migration and to deport Papua New
Guineans originating in other provinces (Premiers' Council
secretariat 1982:181), the 1984 submission by New Ireland Province
that provinces should receive revenue in proportion to their
contribution to national income (Premiers' Council secretariat
1984:52) and the 1986 submission by Western Highlands Province on
labour recruitment practices (Premiers' Council secretariat
1986:64). However, the premiers have been anxious to avoid turning
them into interprovincial controversies. They appear keen to
maintain their solidarity against the centre, something they have
done successfully given the often tense relations between them and
the centre.

The PC's reluctance to become involved in the settlement of
disputes contrasts with the elaboration of its function at its first
formal meeting in 1978 when dispute prevention and settlement
appeared high on the agenda. In order to clarify how the council
could most effectively proceed to resolve disputes, it was agreed to
establish a working party of two representatives from the national
government and three from provincial governments to propose an
Organic Law to establish mediatory or arbitrarial powers of the PC (as
is authorised by s.187H(b) of the national Constitution). At the
next PC meeting, the national government introduced a draft of a
bill for an ordinary Act of Parliament on the subject as a basis for
discussion by the committee which, until then, had not been
established. There is no evidence that the bill was discussed at
the meeting or that the provinces were involved in subsequent
examinations of the draft. It was introduced in the Parliament with
only one change (to exclude fiscal disputes from the application of
the Act) and passed in that form. It remains on the statute book —
the Provincial Governments (Mediation and Arbitration Procedures)
Act C382, which is discussed in detail later. The justification for
the Act being prepared and passed as an 'ordinary' Act, not an
Organic Law (as envisaged in s.187H(b)), was the need to get it
quickly on the statute book. It is not really about the
dispute-settling functions of the PC. In fact, it establishes an
alternative machinery to the PC. Nothing in the Act prevents the PC
from having a major role in mediating and encouraging settlement of
disputes by negotiation, as is envisaged by the Constitution.

As far as the machinery under the Act is concerned, in
relation to eligibility for reference to the NFC, the only
connection the PC has is to appoint the panel of mediators (but not
arbitrators) who are available to help disputing parties. It plays
no role in the actual resolution of disputes. The key
administrative role is ascribed to the Minister for Provincial
Affairs who appoints mediators and -- where necessary -- initiates
arbitration procedures in cases where the Act is invoked -- an
unsatisfactory situation when the national government is likely to
be a party to a majority of the disputes.
As first enacted, the Act excluded the jurisdiction of courts, which served to increase the importance of the management role of the national Minister. The premiers have not liked the Act and until June 1988, did not nominate the panel of mediators, even though on the insistence of the PC (1981 PC Conference Resolution PC:19/4/81), the Act was amended in 1983 to allow some access to the courts. The premiers may have lost confidence in the mediatory process as far as intergovernmental disputes are concerned, and seem generally to prefer to take disputes to courts which are seen to be both neutral and authoritative. In December 1988, the Manus Provincial Government became the first to invoke the procedures under the Act, doing so in relation to a dispute with the national Minister for Forests concerning exploitation of forest resources in Manus Province. The response of the national government to the invoking of the dispute settlement procedures does not bode well for the future efficacy of those procedures. As discussed in more detail later in this paper, the provincial government was obliged to resort to the courts to restrain the Minister from making orders in relation to the resource, pending resolution of the dispute.

As far as the settlement of disputes is concerned, a number of institutions and procedures are available. However, the relationship between them is not clear although the CPC report and the approach taken in constitutional laws provide guidance. This allows a party to a dispute to have some scope for "forum shopping". An examination of what fora are chosen, why and how they deal with the dispute, provides useful insights into the nature of intergovernmental relations and is discussed later in this paper.

Assessment of the Role of the Council

If one assesses the PC by reference to the functions it outlined for itself at its first formal meeting, the record is mixed. It has not been able to foster much cooperation between the national and provincial governments. The NEC has not shown much regard for its views, so its role as adviser to the NEC has been minimal. The PC does not appear to have taken its role as the conscience of the nation seriously. Only once or twice has it raised questions about the severity of national policies and laws or the equity or wisdom of the expenditure of national revenue, while the submissions of some provinces have not been particularly mindful of either the need for equitable distribution of resources or the rights of citizens. It has failed, through no fault of its own, to clarify the proper limits of the respective powers of the centre and provinces. It appears to have made little effort in regard to the mediation or settlement of differences or disputes. Its ineffectiveness in this respect is a direct function of what has become its primary role -- the spokesperson of provincial interests. Due to circumstances already outlined, the PC reflects rather than resolves national politics and tensions.

The key role it has played is that which was implicit in its establishment, but is not express. The OLPG was seen as putting a
process into motion by setting up provincial governments with some minimal resources. According to that view, the precise power of the provinces then specified were not so important because the proper balance of functions between the centre and provinces would be determined by a political process and negotiations. Having a base to operate from, provincial politicians would be able to put considerable pressure on the centre. To do so effectively, they would have to cooperate and coordinate their efforts and the PC would be the primary means for this purpose.

The PC has performed its role as a pressure group with much success. It has encouraged provincial cooperation and refused to get involved in provincial differences. It has kept constant pressure on the national government in key areas such as the elaboration and devolution of concurrent powers and particularly the transfer of land, health, forestry and fishery functions and has experienced some successes. It has developed and put on the agenda, key aspects of intergovernmental relations. It has fought the amendments of the constitutional laws which would diminish provincial government. Examples of issues which have been the subject of PC efforts include the place of the national parliamentarians in provincial assemblies and executive, the suspension powers and procedures and the entrenchment of the provincial government system in an organic law. In each case, the PC has been able to persuade the national government to modify the original proposals. It has played a key role in the review of the financial relationship between the centre and provinces and the allocation of national revenue. It has, most importantly, demonstrated the political will and muscle of the provincial governments and shown itself willing to take on the national government. It has been particularly effective in mobilising support for provincial government when the basis of decentralisation has been under attack from the national government. If the national executive knows that in general it can count on the support of the MPs in its attacks on provincial government, it now realises that that is not conclusive. It also has to contend with the PC, with the sites of power -- however unknown the quantity -- that it represents and articulates.
With the establishment of provincial governments and the strengthening of provincial identities, the management of relations between provinces also becomes a political matter. The constitutional laws say relatively little about this aspect of decentralisation, other than to establish the Premiers' Council where all premiers meet, and to provide that the PC's role is to deal with relations between 'governments' generally, and not just between the national government, on the one hand, and provincial governments on the other. Some of the factors which may cause tensions among provinces are not unconnected with decentralisation:

- preservation of provincial culture and traditions (which necessarily implied a distinguishing of persons from another province);
- claims to control internal migration and establish provincial citizenship;
- the demarcation and the integrity of provincial boundaries; and
- the unequal development of provinces.

This not only limited the capacity of some provinces to participate in a uniform scheme of decentralisation but also raised difficult and potentially divisive problems of the future allocation of resources.

The potential for tensions was built into the OLPG. For example, the notion of gradations of provincial governments (s.100), the provincial secretariats (s.48) and the provisions for the assignment of public servants (s.49) are licences for "wantonism". The limited prescriptions for provincial constitutions in the national Constitution and OLPG may encourage notions of 'provincial origins' as qualifications for office (in fact, several provincial constitutions do give substantial preference to persons born in the province in terms of rights to vote and to stand for provincial office). The financial package is potentially divisive, with both the MUG and derivation grants related to contemporary levels of development, which might offend the less developed provinces, but with large sums of national revenue (largely dependent upon production in the developed provinces) open to other modes of distribution, which might upset the developed provinces. Scope for differential rates of provincial taxes can give rise to smuggling or to changing commercial patterns across provincial borders. Problems may also arise with attributing the place of production or adding value to exported goods for the purpose of calculating derivation grants. There is a distinct possibility that decentralisation could result in tensions between the centre and the provinces being displaced by tensions between the provinces.
As discussed later, a few matters touching on interprovincial differences have been raised at PC conferences and there have been occasions where there have been serious public differences between provinces, or groups of provinces. The most bitter clashes have been about proposals — usually from provinces in the islands region — that restrictions on freedom of movement or systems of registration of citizens be imposed as crime prevention measures. Such proposals have been seen by premiers of the highlands provinces as intended to discriminate against people from the highlands, who often migrate from their densely populated home provinces seeking economic opportunities in coastal areas. The large copper mine in the North Solomons is a particularly attractive destination and large squatter settlements around towns in the vicinity of the mine are often alleged to be a breeding ground for the increasing criminal activities in the area. Moves by the North Solomons Provincial Government in 1977 and 1978 to repatriate unemployed people from other provinces gave rise to strongly worded attacks from the Eastern Highlands and Western Highlands premiers (Post-Courier: 30 December 1977, p.3; 17 January 1978, p.4; 30 August 1978, p.16).

A 1982 PC conference submission from the North Solomons premier proposing controls on internal migration and use of vagrancy laws and registration systems as the means of curbing law and order problems brought a fierce response from the highlands premiers, claiming 'discriminatory and repressive practices and devices aimed against Non-Bougainvilleans, particularly the highlands people' (Highlands Region Premiers' Council 1982:1). They proposed court action to seek an injunction 'to prevent further repatriation to the highlands' (ibid.:5).

An open conflict between highlands and islands premiers was avoided, with the islands premiers indicating they were trying to address a law and order problem facing all provinces, and the agreement of the PC to establish a committee to 'examine causes and possible solutions giving rise to vagrancy, crime and associated problems' (PC Resolution: 18/5/82) (As requested by the PC, such a committee was established and submitted a major report in December 1983, the first of several studies of law and order issues, none of which have made much progress towards finding solutions to the problems raised by the PC — Department of Provincial Affairs 1983). Similar efforts have been made to avoid conflict erupting over other potentially divisive issues such as the New Ireland submission to the 1984 PC conference that allocation of National Public Expenditure Plan (NPEP) funding should 'take into account the revenue generating role of more developed provinces' (Premiers' Council Secretariat 1984:52-56).

If more autonomous institutions with substantial powers to deal with intergovernmental relations had been established, tensions between the provinces may have been given a forum in which to develop. But as yet, the increasing national government control of major affairs has tended to push tensions along a centre-province
axis. The PC has not been a forum for interprovincial issues, and where such issues have reached the PC, they have been handled — as the two examples just discussed indicate — in order to avoid the danger to provincial solidarity, vis-à-vis the national government.

The more important fora for interprovincial relations have been the four regional premiers' councils which have helped foster the emerging concept of regionalism. The Papuan, highlands and islands regions had had degrees of distinct identity long before provincial governments were established, and as a result, premiers from these three regions in particular, tended to associate and cooperate at the PC conferences. Early disputes over freedom of movement and law and order issues probably heightened regional cooperation on the part of highlands and islands region provinces. By 1980, regional meetings of premiers were already established as a convenient means of preparing for the national PC conferences. Gradually, the regional meetings have come to be held more frequently — generally three or four times a year for a day or two at a time. In addition to encouraging cooperation at national PC conferences, they have become the basis for cooperation in other ways in:

* providing 'technical services to the provinces';
* taking combined political action against national government moves likely to cause problems for provinces; and
* efforts to cooperate in regional economic development projects.

Cooperation in the provision of technical services has been evident mainly in the establishment and operation of regional secretariats in three of the four regions. The Islands Regional Secretariat was established in late 1982 with the twin aims of organizing the regional premiers' meetings and providing technical services to the provincial governments, which they had difficulty getting elsewhere, particularly legal advice and advice on planning and project evaluation. It has been a highly successful organization ever since, employing two or three technical officers and an administrator.

The Highlands Regional Secretariat commenced operation late in 1983, with stated aims of both providing technical advice and promoting regional economic development. It focused almost entirely, and unsuccessfully, on its second aim until mid-1987 when the highlands premiers decided it should concentrate on being a source of technical advice to the provinces. The Papuan Regional Secretariat commenced late in 1985, with similar aims to the islands. It has employed a lawyer and an administrator. The North Coast (Momase) region has discussed the establishment of a secretariat on several occasions, but no concrete steps have ever been taken.
The regional secretariats have played a role in other major areas of regional cooperation, both political and economic. The Islands Regional Secretariat in particular has, at the direction of the islands region governments, organised regional meetings in 1983 and 1984 to oppose national government proposals to make the OLPG an ordinary law and to hold a referendum on the future of provincial governments. The secretariat has also represented the provincial governments from the islands region on national government committees and negotiating teams dealing with proposals for major fishing and fish-processing projects in the islands region. Cooperation between provinces has, on occasion, been remarkable. For example, in 1984, the East New Britain Provincial Government opposed national government proposals that a fish-processing plant be established in East New Britain and instead supported New Ireland Province’s claim for the project, largely on the basis that New Ireland was more in need of development projects than East New Britain.

But on the whole, attempts at more active cooperation on regional economic development have not been very successful. Several joint ventures on the part of the Papuan provinces in fishing and shipping were spectacular failures, leading to the liquidation of the corporations. The provinces in the Momase region established a regional development corporation in 1983, but high hopes for its future were dashed by a consultant’s report which suggested the concept of such a corporation was seriously flawed. The Highlands Regional Secretariat used about K300,000 of provincial contributions (from late 1983 to early 1987) largely in an effort to promote rural industrialisation and other forms of economic development in the highlands, with no visible results (Regan 1987).

A degree of regionalism is certainly emerging, and the islands region premiers in particular have sought to promote development of regional identity by promoting a regional cultural festival, and arranging for senior education and other officials to meet on a regional basis. The stronger regional identity in the islands is fed by a sense of being culturally distinct from the mainland. Provincial politicians and senior public servants in most of the islands provinces have a sense that their provinces are managing better than most mainland provinces, and there is some resentment at being 'held back' by lack of progress elsewhere, and by lack of sensitivity on the part of the national government. Leaders in the region sometimes discuss the possibility of secession from Papua New Guinea and have also been prepared to threaten secession publicly when the future of provincial government was seen to be under threat by the 1984 referendum proposal (Post-Courier: 23 October 1984, p.1; and 26 October 1984, p.1). However, despite its appeal to many at this stage, secession is not seen as a real option, but the threat of it remains a bargaining tool, provided it is not used too often.

The main significance of regionalism so far has been as a force linking provinces in opposition to the centre. To this end,
it emphasises links and common interests which are not always as strong as suggested. Indeed the differences and tensions between provinces within regional groups have often been substantial -- for example, disputes between provinces have resulted in non-payment of agreed contributions to regional secretariats in the Papua and highlands regions, and to regional companies in Papua. Differences between the provinces mean that with the exception of the islands region, regionalism is unlikely to develop much beyond the level of cooperation amongst the premiers.
5. THE NATIONAL FISCAL COMMISSION (NFC)

Composition and General Role

The genesis of the NFC lies in the CPC report following on the recommendations of Tordoff and Watts (1973). It was conceived to solve the problems related to the method, criteria and procedure for the transfer of funds from the national government to provincial governments. The CPC rejected the notion of negotiations between the national government and provincial governments to determine the financial allocations as it would create tensions and conflicts. It would have been difficult to provide for these exhaustively in the law, as this would have become cumbersome and inflexible. To leave the matter entirely up to the discretion of the national government would not have sufficiently protected the interests of the provinces. The recommendation of the CPC was to interpose the NFC between the national government and the provinces, as a "counter to excessive centralism in the National Executive Council". At the same time, because the NFC was to consist of professionally qualified experts (non-citizens if necessary), it would provide a considered evaluation of the demands made by the provinces (CPC: 10/17: para. 155). The NFC was to report every four years and to be adviser to the NEC and the Parliament.

The constitutional provisions differ in some respects from the CPC proposals. First, the commission consists of five members, who must be citizens. No qualifications are prescribed (s.76, OLPG). Indeed the NFC Act (C 351) sets up different criteria for membership than the CPC's -- stature in the community, experience and ability to "contribute to the solution of national problems" (s.2(2)). Members should include a broad cross-section of the community and reflect at least the following interests:

- urban and non-urban;
- employer and employee;
- governmental and non-governmental; and
- professional and non-professional (s.2(3) the relevance of which to the function of the NFC is not obvious).

Although in the Bougainville Agreement it was decided, at the request of the Bougainvillians, that the members should be citizens, it is not clear why the Act should have broadened the qualification in this way, so that the professional element emphasised by the CPC is downgraded to the extent that there is no guarantee of it. The lack of expertise of the NFC has contributed significantly to its decline.

Second, unlike the CPC's recommendation that the NFC should meet once every four years to advise on the following four years' transfer, it has met on an annual basis. The Constitution leaves open the possibility of four-yearly reviews, but the OLPG (s.79 (2)) and the NFC Act (s.11) imply annual reviews, although without requiring them. The advantages that the CPC saw in four-yearly reviews was that it would lay the basis for orderly planning by both
the national and provincial governments since each would have a reasonable idea of its finances for a substantial period of time. The annual reviews have not only produced uncertainty but also led to delays in transfer.

Third, in regard to intergovernmental financial transfers, the constitutional role of the NFC is narrower than the CPC had envisaged. Both Tordoff-Watts and the CPC were, understandably, vague on the precise proportions and the criteria of the different components -- derivation, equalisation, stabilisation and so on -- of the transferred funds. Under their proposals, the NFC would recommend on the criteria and proportions from time to time. This would provide a measure of flexibility as well as enabling the NFC to review and determine the financial balance between the national and provincial governments. The NFC's broad-ranging powers would thus build into the law the basis of a periodic review of overall intergovernmental financial relations. By disaggregating the different components of the funds unconditionally transferred to the provinces and providing the proportions and modalities for their transfer as well as pre-appropriating the minimum unconditional grant according to a prescribed formula, the ability of the NFC to perform this role has been considerably reduced.

Two additional factors have had an adverse effect on the NFC's potential in this respect. The first was the decision of the national government to channel the bulk of the "extra" funds through the National Public Expenditure Plan (from 1987, the Public Investment Programme) rather than the NFC. The second was the decision, implicit in the OLPG (s.79) and the NFC Act (s.11(2)) that the NFC advises only on funds that the national government has set aside in a particular year for unconditional grants. The CPC had envisaged a more broad-ranging and monitoring role for the NFC, in which it would have some say on the size of the total amounts to be transferred.

It can be argued that the Constitution envisages a broader role for the NFC than either the OLPG or the NFC Act provides. In setting out the functions of the NFC that an organic law shall provide, the Constitution mentions recommendations on "the allocation of unconditional grants by the national government to provincial governments and as between provincial governments,...." (s.18(1)(1)). This formulation assumes a two-stage process -- the first when the NFC advises on the overall amount to be transferred to provinces, and second, the distribution of that amount to different provinces. This formulation is repeated in s.78(b) of the OLPG, but s.78(b) has to be read subject to s.79(3) which appears to restrict the function of the NFC to recommendations on distribution "within the limits of finance available".  

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6 Pre-appropriating means that the MUG is allocated to provinces without the need of annual approval of the Parliament.
From the very beginning, contrary to an opinion from the Department of Justice, the national government proceeded on the basis that this enabled it to determine the overall amount for distribution to provinces. The concept of "the limits of finance available" is nowhere defined and is certainly compatible with a prior recommendation of the NFC on what that amount might be. However, it must be conceded that this is not expressly provided either in the OLPG or the Act. It is not irrelevant that the OLPG uses a somewhat similar expression, "moneys lawfully available", when referring to conditional grants where of course the NFC has no explicit role (s.65(1)). It is possible that these expressions are used to emphasise the Parliament's ultimate control over finance—that any allocation must have parliamentary authority. Parliamentary control of finance was strongly emphasised by the CPC (CPC:10/17, para. 151) and included in the Constitution (s.209).

It is also possible to argue that the Constitution does not restrict the NFC to unconditional grants, since after mentioning unconditional grants, it goes on to state "and any other fiscal matters relating to provincial government" (s.187H(1)). Such a broader view of the NFC's function has not been taken up in the OLPG or the Act. However, it is not ruled out either because the OLPG provides for it to recommend on "other fiscal matters relating to provincial government referred to it by the national government or a provincial government" (s.78(1)(c)). Some views on the general financial balance between the centre and provinces may well come within this provision. The difference therefore between a broader interpretation of the NFC's role under the Constitution and the provisions in the OLPG is that, under the former, the NFC could consider these issues on its own initiative, while under the latter it would have to wait for a reference. In its early days, the NFC took the first position, but a contrary opinion from the Department of Justice put a halt to an expansive role of the NFC. The failure of either the national or provincial governments to use the NFC, except in the two instances discussed later, and the small allocation for unconditional grants, has meant that its role has been minor and formal.

The present arrangements mean that there is no independent review of the financial expenditures, needs and performance of the national government and thus no real possibility to search for and strike the right financial balance between the centre and the provinces. While in some ways the constitutional provisions ensure certain financial guarantees to the provinces that are not found explicitly in the CPC, the diminution in the role of the NFC has significantly altered the balance of power between the centre and the provinces. This has advantaged the former and shifted the burden of an equitable sharing of resources from an autonomous, quasi-judicial body to more overtly political bodies and processes. Perhaps it was unrealistic of the CPC to assume that:
an autonomous body with the responsibility and functions it proposed for the NFC could be established;
- the distribution of a key resource like finance could be isolated from the mainstream of politics; and
- the central government's control over finances could be loosened.

Settlement of Disputes

If in many ways the constitutional provisions for the NFC fell short of the CPC proposals, in one respect they provided a more extensive role. The CPC had not seen the NFC as a dispute-settling body, other than in its general task of recommending on allocations. The more precise financial provisions and the exclusive taxing powers of the provinces that emerged out of the Bougainville negotiations pointed to the need for some machinery to settle disputes if resort to courts was to be prohibited. Since disputes might involve technical points, it was considered desirable that the NFC should have a role in settling them, although in no instance does it have any powers of decision.

One aspect of its dispute-settling function is specific while the other is general. The specific point relates to a preliminary determination on the complaint of the national government that a provincial tax is unreasonable or discriminatory (OLPG ss.78(a), 61 and 62), and the general to comment on any fiscal matter, which may be an intergovernmental dispute, referred to it by the national or a provincial government (s.78(c)). Given the centrality of finance to the exercise of provincial powers, and the numerous complaints that the provinces have made about the manner of the implementation of the financial provisions of the OLP, these provisions could have become the basis of an expansive role of the NFC. In practice, little use has been made of this function of the NFC, with only two references being made.

Report on the Distribution of Sectoral Funds

The first reference concerned a dispute about the disbursement of the "sectoral" funds to the provinces. The matter was referred by the Sandaun Provincial Government in October 1981, under s.78(1)(c), under which the NFC is required to "consider and make recommendation to the national government and provincial governments, on other fiscal matters relating to provincial government referred to it by the national government or a provincial government". The NFC was requested to consider all aspects of sectoral funds, in particular whether they should be retained and to recommend to the NEC that the national Minister for Finance should have 'overriding' power in all finance matters pertaining to a province. This power was to include decisions over sectoral funds as well.
Sectoral funds were established in 1979 with the intention of helping the less-developed provinces. Previously all provinces had to apply through the National Public Expenditure Plan (NPEP) processes for extra assistance in areas which came under their jurisdiction. However, the standards of and procedures for application for NPEP funds meant that the less-developed provinces, most in need of these funds, were the least able to present timely and adequate applications. Consequently, the National Planning Committee (NPC) decided to set aside block allocations for rural health, community education and provincial high schools, and to divide them among provinces according to criteria which took account of their needs. Provinces were instructed to prepare projects within the sums allocated to them.

In 1980, this scheme was extended to some other areas within provincial responsibility as the provincial applications for funding in these areas did not coincide with national government priorities. The arrangements for the scheme were that the NEC decided on the total amount to be allocated to each program, the national Minister responsible for the oversight of the program decided on the allocation of the funds available between provinces according to approved criteria which favoured disadvantaged provinces, and the provincial governments proposed the actual content of each program in their province, subject to the consent of the national Ministers. They were therefore regarded as conditional grants.

From 1980, the national Ministers for Transport and Civil Aviation, and Primary Industry, obtained NEC approval to vary the procedure in relation to sectoral funds under their ministries. They required consultation with the national parliamentarians from a province, in addition to the provincial governments, on provincial projects to be supported under the scheme. The provincial governments complained that in practice the Ministers did not consult them and disbursed the funds largely through the national parliamentarians to be spent as they wished. The consequence was that provincial plans, drawn up on the premise of continued sectoral fund support for approved projects, were disrupted. Funds were inefficiently used and were being spread over a number of small projects, without any coordination. Also there were difficulties of proper accountability. The parliamentarians often did not follow established financial procedures in disbursing the funds, but the administrative secretaries of the provinces might be held accountable for the funds. In some instances, it was alleged that these funds were distributed to favour particular political parties and that certain parliamentarians were denied funds altogether.

The provinces also raised the question of the legality of the disbursement, on the ground that as these were conditional grants, s.65 of the OLPG requires the agreement of the national government and provincial governments on the purposes and conditions of the grants. On the other hand, if they were not conditional, they should have been referred to the NFC.
The two national Ministers concerned refused to make any submissions to the NPC. The national government representatives were largely sympathetic to the position of the provinces and accepted their arguments. The Minister for Decentralisation argued that the manner in which the two Ministers had managed the sectoral funds was inconsistent with the aims of decentralisation as well as the sectoral program. The Ministers for Finance and Justice were also uneasy with the procedure followed by the two Ministers. The representatives of the national government, which included senior public servants, were of the view that this procedure was inconsistent with the NEC decision on sectoral funds and that the Ministers concerned had not referred actual disbursement to the NPC as required. Other sectoral programs had worked well.

Several national parliamentarians also made submissions. While they felt that their own participation in the sectoral funds scheme was vital, they conceded that some aspects of the distribution were unsatisfactory and placed an unfair burden on the MPs.

The commission came out against the procedure which had been followed by the two Ministers and recommended that provincial governments should be fully consulted on the distribution of funds and that national parliamentarians should also be consulted. It was suggested this might be done by their participation in the provincial assembly, which along with the provincial executive, should be the forum for consultation. As to the continuation of the sectoral program, it recommended that an interdepartmental enquiry, with provincial representation, should make a proposal after examining how far the aims of the program had been met. It stressed the need to follow the procedures laid down under the law for expenditure and urged the Ombudsman Commission to investigate for breaches of the leadership code. It recommended to the parties concerned that they should refer to the Supreme Court for an opinion on whether the sectoral grants in 1980-81, being 'conditional grants', were made in accordance with s.65(1) and (2) of the OLPG, as well as for an opinion on the relevance of the NEC decisions on their special mode of allocation in the two ministries and the conformity by the two Ministers to these decisions (National Fiscal Commission 1982).

The reference by the Sandaun Provincial Government and the manner of its disposal by the NFC, throw considerable light on the tensions in intergovernmental relations and the machinery to resolve them. At one level, there is the tension between national parliamentarians and the governments of the provinces from which they come. Both want to be seen as contributing to the development of the province, primarily by securing funds for projects from the national government. After the establishment of provincial government, the parliamentarians were no longer able to claim direct credit for financial transfers from the national government, as these were now negotiated by the provincial governments. The
resulting loss of patronage at the disposal of the parliamentarians was an important cause of their dissatisfaction with provincial governments which is so evident in almost all of the frequent National Parliament's debates concerning provincial government.

The dissatisfaction became linked to another source of tension, within the national government itself. Ever since independence, the NEC in successive governments has been divided on its attitudes to decentralisation. Some Ministers like Fr. John Momis have been consistent supporters while others like the late Iambakey Okuk almost always opposed it. Some ministries, like education, have been willing to cooperate with and delegate to provincial governments while others like lands have, until 1986, wished to retain powers themselves. Those opposed to decentralisation have sought to harness the discontent of the parliamentarians to undermine provincial governments. The special procedures for sectoral funds allocations in transport and primary industry not only achieved that but also helped to increase the personal followings of the Ministers concerned. The failure to establish the collective responsibility of the NEC in these and other areas (as stipulated in the Constitution and as political expediency would suggest) was well demonstrated when a number of Ministers as well as the official governmental submissions to the NFC attacked the policies of the two Ministers.

It is certainly no function of the NFC to enforce the collective responsibility of the NEC, yet this role was being forced on it by the submissions of the government. Equally, the NFC was being asked to hold the ring between national Ministers and their officials, keeping the former to their proper role of policy and not administration. If the central government was divided, the provincial governments provided an impressive show of unity. Twelve provinces made submissions in support of the complaint and a joint case was presented on their behalf by the premier of East New Britain. The divisions within the NEC (and the coalition nature of most post-independence governments) caution against assuming too readily that conflicts are as between the centre and the provinces. More complex and subtle analyses are necessary to establish parties to and points of conflicts.

Provincial governments had tried to seek redress through other channels provided by the Constitution and the OLPG before resort to the NFC. At both the 1980 and 1981 Premiers' Councils, provinces had expressed their dissatisfaction with the allocation of sectoral funds. The council had adopted resolutions (PC:19/80 and PC:14/81) asking the national government to reconsider the method of allocation in order to devolve greater responsibility to provincial governments. Yet no satisfactory action was taken on resolutions adopted at two successive council meetings.

It is then understandable that the provinces decided to go to the NFC, although the decision may seem strange in the overall
constitutional scheme for the resolution of intergovernmental disputes. It is known that the NFC is a considerably less prestigious or authoritative body than the Premiers' Council. In this particular dispute, the NFC could only make 'recommendations' which may not appear to carry the same weight as resolutions of the council. On the other hand, the provinces had already made unsuccessful resort to the PC. Further, the commission as an impartial and technical body, would be expected to bring a different and dispassionate consideration to bear on the dispute and its recommendations would have considerable persuasive value.

The manner in which the NFC disposed of the reference is perhaps explicable, at least partly, by its consciousness of its ambiguous role in the settlement of the dispute. It recommended the full consultation and agreement between provincial governments and national parliamentarians as long as sectoral funding was operative. However, it wisely refrained from commenting on the desirability or otherwise of the sectoral programs themselves. It recommended that the parties should make a reference to the Supreme Court to determine the legality of the grants. This was an odd decision in view of the position taken by the CPC that court action tends to produce unnecessarily rigid and legalistic solutions to what are often essentially political disputes (CPC:10/23/196). It could be argued that the NFC should have taken a preliminary view on the legality. Perhaps it might have done so, if the Department of Justice (reflecting perhaps the government's downgrading of the NFC) had not turned down its request for legal assistance. On the other hand, the commission may have considered that, if the resolutions of the PC had failed to settle the dispute, its own recommendations were unlikely to be any more effective and that the only resort left was a binding judicial determination. On conditional grants, the OLPG does establish an important principle -- consultation with and the agreement of provincial governments -- which is a basic part of the framework of intergovernmental relations not subject to political negotiations and settlement.

The recommendations of the NFC appear to have had little influence on the recalcitrant Ministers or the national government.

7 It may be argued that the NFC itself could have made a reference to the Supreme Court as under s.19(3)(ec) of the Constitution, included amongst the governmental authorities which are empowered to make constitutional references is the PC "or any other body established by a constitutional law or an Act of the Parliament for the settlement of disputes between the national government or between provincial governments". However it is not clear that s.19(3)(ec) is intended to encompass the NFC, and it may be argued that as its role in fiscal disputes is limited to reporting and recommending (ss.62 and 78) its role is not one of dispute settlement. These issues were given no consideration by the NFC.
and the modalities of the sectoral funding in the two ministries remained unchanged. The government practice had been attacked by Michael Somare, then leader of the Opposition, when he talked to the premiers in October 1980. He claimed it went completely against the spirit and intention of the decentralisation program. When he returned to power in 1982, he announced its abolition but provided an alternative means to supply funds to the MPs for provincial projects. However, the abolition was not regarded as a triumph of the NFC.

Report on Retail Sales Tax in Oro Province

This was a reference under s.62 of the OLPG. During the Bougainville negotiations, the national government, reluctant to concede taxing powers to the provinces, insisted upon its right to disallow a provincial tax on the grounds that it was discriminatory or excessive. The Bougainvilleans were unwilling to concede such wide powers to the centre, especially as the notion of excessive rates was subjective. The compromise was to require that the Parliament could not disallow a tax on these grounds except after a review by the NFC on a reference from the NEC (now s.62). The reference here was from the NEC to determine whether the sales tax on a carton of beer was unreasonably high. The Oro Province increased the tax from 6.63 percent to 10.05 percent, well in excess of what the national government regarded as the acceptable maximum rate of five percent (Manning 1979:15).

By the time the reference was made (27 February 1984) the composition of the NFC had changed from experts with technical background and experience to political appointees with little relevant expertise. It wrote to the provinces and national departments on 3 March 1984 inviting submissions by 21 March 1984 and put a public announcement in the Post-Courier. This may seem very short notice but the NFC is required to present its report within 30 days of the reference (s.62(3)), failing which Parliament may proceed to disallow the tax.

The response to the invitation was poor, with no national departments putting in a submission or appearance and only Oro Province responding. The justification for the national government's powers to intervene in provincial taxes is the need to maintain national economic policies across the country and to ensure that the public's capacity to pay national taxes is not injured. Yet the government presented no evidence as to why five percent was an optimum rate and in what ways the 10 percent rate would damage national interests. The Oro defence of the rate was brief, relating to the small size of financial transfers from the centre and its needs for greater funds for development. The only other evidence presented came from various individuals and groups in Oro, who took the opportunity to criticise the provincial government for the lack of financial discipline, extravagance and the neglect of the needs of the people of the province.
Far from dealing with any intergovernmental dispute, the NFC found itself dealing with relations between the provincial government and its people. The discussion, reflected largely in its report, was not concerned with the manner in which the rate adversely affected the economic interests of the national government but rather the way the tax would cause hardship to the people of Oro. The tone of the proceedings, where oral evidence was presented, as well as the report, was highly populist. The NFC recommended a reduction in the rate to just below five percent but provided no clear justification for it. The report was submitted on 7 May 1984 -- nearly two and a half months after the reference (National Fiscal Commission 1984). Although it secured a favourable determination, the national government, other than tabling the report in Parliament, has taken no steps towards the disallowance of the tax, which still remains. This gives rise to the suspicion that it was less interested in the rate of tax than in hammering the provincial government.

The ineffectiveness of the first reference and the tone of the second can have done little for the prestige of the NFC. Indeed provinces have formed a negative view of the NFC. They do not consider it sufficiently independent of the national government, despite the provision in the OLPF for its independence (s.77). This impression has not been helped either by the Act which makes the provision of staff, funds and other facilities of the NFC the responsibility of the national Ministry of Finance (s.13), or the procedure used by the national government for the appointment of the members of the NFC in 1983. The OLPF requires the national government to consult with the provinces on the appointments (s.76(2)) and the Act says that there is sufficient consultation if the premiers are notified of the proposed appointments and no objection is received within 30 days (s.3).

In 1983, no notification was given to the provinces before the appointments were gazetted. Despite their objections and a resolution of the Premiers' Council that the national government should rescind the appointments and follow the procedure laid down in the Act (resolution PC 10/6/83), the appointments have remained in place. There is widespread feeling that the members are not really equal to the tasks of the NFC and that membership has become a sinecure -- a form of political patronage. It is therefore not surprising that when the Premiers' Council sponsored two major reviews of the financial provisions of the OLPF and intergovernmental fiscal relations in 1982 and 1983, the NFC was kept out of them. Indeed the second of these reviews found that the NFC served little useful purpose and recommended its abolition (Department of Provincial Affairs 1984:Vol. II:71), a proposal which found wide support.

In the ultimate analysis, the responsibility for the failure of the NFC must be placed on the national government, as it wanted neither a significant nor an autonomous role for it. Its own
control over financial policies and allocations of money and the
management of the economy would have diminished if there was a
larger role for the NFC. By reducing the NFC to impotence, the
national government undermined one of the basic principles and
institutions of decentralisation.
6. THE ROLE OF THE COURTS IN INTERGOVERNMENTAL RELATIONS

Introduction

The role of the courts in intergovernmental disputes, as provided in the constitutional laws, reflects closely the view of the CPC. The CPC wanted to limit the role of the courts but its views were not without some ambiguity. In its general discussion of the role of the courts in the enforcement of the Constitution as a whole, it rehearsed the arguments for and against judicial review. However, while it recommended non-judicial procedures and institutions for certain types of disputes, it did accept the courts as the main guarantor of the constitutional order. Indeed by its proposals for the wide availability of advisory opinions from the Supreme Court, it unintentionally set the stage for a freer use of the courts in intergovernmental disputes than it would have itself approved (see CPC: 8/13-8/17).

For a variety of reasons, the CPC saw a very restricted role for the courts in intergovernmental relations. First, its view of decentralisation was that of consultation and cooperation between the centre and the provinces, with a premium on flexibility, and on institutions and procedures that facilitated an exchange of views and reduced disputes. For this reason, the primary responsibility for resolving conflicts was to lie with the Premiers' Council, exercising its mediation and arbitral functions.

Second, certain aspects of intergovernmental relationships were regarded as technical and best handled by expert bodies; the outstanding example being the National Fiscal Commission. Third, the committee believed that disputes between governments could best be resolved by political means and that court action tended to produce unnecessarily rigid and legalistic solutions to essentially political disputes. Legalism is a particular problem in federal or other systems of power sharing and the CPC attempted to minimise it by declaring important constitutional provisions non-justiciable. In other instances, resort to the courts would be allowed only on points of law and only after political and arbitral procedures had failed to resolve the dispute (CPC: 10/22-23).

The CPC's views were supported by the Government and the Opposition, as well as by the negotiators of the Bougainville Agreement and became the basis of the Constitution and the OLPG.

The Constitution makes a number of provisions non-justiciable:

1. the minimum number of members of a provincial legislature and the maximum who may be appointed, as provided in an Organic Law;
2. the adequacy of the taxing power and other revenue sources of the provinces;
whether an Organic Law has provided for the devolution and delegation of "substantial powers of decision making" and "substantial administrative power" to provinces in respect of matters of direct concern to the provinces; and the provision of legislative power of provincial governments (s.187G.(7)).

It also enables the Parliament -- "in order to avoid fruitless controversy and litigation" -- to declare by an Organic Law, non-justiciable (completely or partially), the effect of s.187D.(1), a provision which deals with the conflict of national and provincial laws, except in proceedings between governments (s.187D.(3)). Advantage was taken of this authorisation in the OLPG which provides that a question whether a provincial law deals with a concurrent subject or whether it is inconsistent with an Act of the Parliament is non-justiciable except at the instance of the national or a provincial government (s.28(2)). The OLPG also provides that whether an Act of the Parliament on a concurrent subject is "in relation to a matter that is of national interest" or "to the extent that the matter is of national interest" (conditions necessary for its validity, s.29(1)), is non-justiciable, although in not restricting this to proceedings where governments are not parties, the OLPG may be regarded as going beyond the authorisation in the Constitution. 8

The OLPG provides additionally that the question whether the national government has given two months notice of a proposed bill to provinces as required by s.31(4), is non-justiciable except at the instance of a province (s.31(5)), whether the failure of a province to follow the requirements to provide the national government with a text of a bill before enacting it, does not invalidate the law (s.35(1)), and whether the notice given of a law repealing or altering a law which has delegated powers of one government to another is reasonable (s.44(2)). Finally, the question whether a provincial tax is discriminatory or unreasonable (and therefore beyond the competence of the province) or the action taken by the Parliament is proper, is not-justiciable (s.61(3)). As already discussed, a more political process has been established for this.

The Constitution emphasises the importance of non-judicial methods of dispute settlement by stating that a major function of the Premiers' Council is to provide these in order to avoid legal proceedings between governments (s.187H.(5)), that an Organic Law may vest mediation or arbitral powers or functions in it

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8 This a complex issue since an Organic Law may make a provision non-justiciable (Constitution, Sch.1.7.), which is what the OLPG does in relation to its s.29. However, it could be argued that, by its wording in s.187D.(3), the Constitution intends that governments should have the right to litigate.
(s.187H.(6)) and other laws may provide for consultation between
governments (s.187H.(7)). The dispute-settling function of the
Premiers' Council is emphasised by the OLPF (s.84), although it does
not specifically vest mediation or arbitral function in it, while
specific tasks are given to the NFC. However, in the Provincial
Governments (Mediation and Arbitration Procedures) Act C.382, which
began as legislation to implement s.187H.(b) of the Constitution, an
attempt has been made to place further restrictions on the role of
the courts and an alternative machinery for dispute settlement is
provided.

Provincial Governments (Mediation and Arbitration Procedures) Act,
Chapter 382

The Act is extraordinarily muddled and may be ultra vires. It
applies to any dispute between a provincial government and either
another provincial government, the national government or any
statutory authority (as designated for this purpose by the national
government -- none so far) (ss.2 and 3). However, disputes in which
a third party is also involved or which are eligible for reference to
the NFC, are excluded. For example, a third party might be
involved where its interests are affected in an intergovernmental
dispute.

In the Milne Bay fishery licence case, the province tried to
join the fishing company, which had been licensed, in its
proceedings against the national government for failure to consult
the province before the issue of the licence, in order to take the
dispute outside the ambit of the Act (Milne Bay Provincial
disputes are eligible for reference to the NFC. The national
government's allegations that a provincial tax is unreasonable or
discriminatory undoubtedly qualify, and differences on other fiscal
matters can be raised with the NFC by any government.

As the Act was originally enacted in 1981, it had purported to
exclude the jurisdiction of courts over any dispute to which it
applied, but this exclusion met with considerable opposition from
the premiers at the 1981 PC conference. Consequently, it was
amended in 1983 to provide for the courts' jurisdiction if either
the dispute concerns a matter certified by the Prime Minister to be
a matter of law or the dispute has not been resolved to the
satisfaction of either party after all the procedures in the Act
have been exhausted (s.4). Parties to a dispute are required to try
to settle it by themselves, but if these efforts fail, either party
writes to the Minister (presumably of provincial affairs) to appoint
a mediator (from a panel established by the PC) to settle the
dispute (ss.7-9). If the mediator is unable to settle the dispute,
the Minister is required to order the parties to go to arbitration
(s.12). If the parties cannot agree on an arbitrator, the Chief
Justice appoints one (ss.13-15). Unlike the mediator, the
arbitrator has the power to make a decision binding on the parties
-- subject to the possibility of reference to the courts by a dissatisfied party.

The scope of access to the courts, which parties to an intergovernmental dispute have, remains obscure, despite the intention behind the Act to prevent or regulate that access. In so far as the Act is deemed to restrict access on all questions of law, it is invalid at least to the extent that constitutional issues are concerned. Under s.19 of the Constitution, both the national government and provincial governments have a constitutional right to go to the Supreme Court for an opinion on such issues (thus covering disputes about the Constitution or the OLP). The provision that disputes on law can now go to courts on a certification of the Prime Minister is not sufficient to save the section (s.4), since the constitutional right of access is not qualified except on provisions made 'non-justiciable' which only the Constitution or an organic law can do (Constitution, Sch. 1.7). Even if access on other points of law can validly be restricted, there is no easy way to sever it from the invalid part and therefore it would seem that the entire section is invalid (Constitution, s.10).9

If severability were possible and the restricted access applied only to ordinary questions of law, the jurisdiction of the courts cannot be ousted completely, because the Constitution gives the National Court an inherent power of review in the exercise of judicial authority (even if the Act were to prohibit or restrict it) "where in its opinion, there are overriding considerations of public policy in the special circumstances of a particular case" (s.155(5)). However, the courts may be reluctant to take jurisdiction under that section because overriding public policy in intergovernmental disputes is likely to be the avoidance of litigation, unless there are exceptional reasons. In any case, s.155(5) of the Constitution is not inconsistent with requirements to seek any other settlement first. On the contrary, it assumes that, and hence the section as amended in 1983 (whereby a party dissatisfied with the arbitration can go to court) is quite consistent with s.155(5).

Another difficulty with trying to restrict access to the courts is that it is quite likely that the mediators and arbitrators

9 Peter v. South Pacific Brewery Ltd. [1976] PNGLR 537; Constitutional Reference No.2 of 1978; Re: Corrective Institutions Act 1957 [1978] PNGLR 404; and SCR No.2 of 1984; Re New Ireland Constitution [1984] PNGLR 81; but cf. In the matter of the Organic Law on National Elections: Malipu Balakau v. Paul Torato and anor [1983] PNGLR 242 at pp.246 and 256. (It may be that the courts would be prepared to excuse that part of the section which refers to the certificate by the Prime Minister -- but the effect of doing that would of course be to render the effect of the section nugatory, and the consequence would be the same as if it was held invalid.)
dealing with a dispute may, under the Constitution, be required (s.18) or at least authorised (s.19) to refer questions of constitutional law to the Supreme Court except where a specific provision is declared non-justiciable by the Constitution or an organic law. Section 18(2) requires a court or tribunal, where any question relating to the Constitution arises, to refer it to the Supreme Court for its determination. The word 'tribunal' is not defined in the Constitution or the Interpretation Act C.2 but it would seem wide enough to cover an adjudicator like an arbitrator or even a mediator.

The definition of the body entitled to refer constitutional issues for an opinion under s.19 is even broader and would certainly cover mediator and arbitrator -- Subsection 3(e) covers not only the Premiers' Council but also "any other body established by constitutional law or an Act of the Parliament specifically for the settlement of disputes between the national government and a provincial government, or between provincial governments". Thus a basic contradiction arises within the structure of the Provincial Governments (Mediation and Arbitration Procedures) Act C.382.

There is some uncertainty about the precise jurisdiction of the court (following the amendment of s.4) when the dispute has not been resolved to the satisfaction of either party. It is clear that the jurisdiction arises only after the final phase of arbitration, but it is unclear what the court can do. If the court can hear the case de novo, it makes nonsense of the Act, for then all we are in fact talking about as prior procedure is really mediation, for which a law is scarcely necessary. If the court cannot do so, then it is a matter of review. But the extent of jurisdiction of the courts to review arbitral proceedings and awards is normally very limited. Review can normally be obtained only in exceptional circumstances, if for example, the award has been improperly obtained (viz. material evidence fraudulently concealed), or there has been misconduct on the part of the arbitrator or of the proceedings, or there has been an error of law on the face of the award, or there is a challenge to jurisdiction (Halsbury, 4th Ed. Vol.2:para.621-625; Russell and Walton 1979:425-484). A far more general right of review is apparently envisaged by s.4 and if so, the Act should provide some guidance as to the extent of the right and procedures to be followed.

The Act has had little importance in practice, either as a barrier to the courts or as providing alternative modes of dispute settlement. It has been invoked only twice. The first was in the Milne Bay fishery licence case, Milne Bay Provincial Government v. Evara [1981] PNCLR 63, before the 1983 amendments, and in that case the national government offered to compromise to forestall an appeal on the validity of the Act, pointing to its weakness. The second, more than seven years later, was the Manus Provincial Government's dispute with the national Minister for Forests, a dispute which is yet to be resolved at the time of writing (December 1988) and which
-- ironically -- has itself given rise to court proceedings, as is discussed later in this part of the paper. Until June 1988, the PC failed to nominate a panel of mediators thereby preventing the use of the mediatory and arbitral powers. The PC initially refused to do so as a sign of its disapproval of the Act and after the 1983 amendment, the lack of appointments under the Act has not been formally considered by the PC, indicating lack of faith in the likely success of the procedures under the Act on the part of both levels of government.

Litigation on Intergovernmental Relations

The role of the courts in intergovernmental relations is determined in part by legal provisions on access and non-justiciability. But the role is also determined by the success or otherwise with which other institutions perform the tasks assigned to or expected of them. This in turn depends on the ability of the political system to sustain a consensual or conciliatory style of decision making. If the political system cannot sustain that, parties dissatisfied with its operation would turn to the courts when access is allowed. As already mentioned, a particularly easy mode of access is a special reference (under s.19 of the Constitution) to the Supreme Court for its opinion. This has the same effect as a judgement on any question relating to the interpretation or application of any provision of a constitutional law, including the validity of a law or a proposed law. Any provincial legislature or executive or the Premiers' Council is authorised to make a reference (s.19(3)). Through this method, many matters of contention between the governments can be brought up for the determination of the court, because they can be easily linked to the provisions of the Constitution or the OLPG.

However, questions which relate to a provincial constitution but are unconnected with the national Constitution or Organic Law, cannot be referred to the court. Section 19 allows references only in relation to constitutional laws, which is defined as the national Constitution and Organic Laws (Sch. 1.2). While the OLPG states that a provincial constitution takes effect as if it were an Organic Law (s.13), the Constitution restricts the status of organic laws to Acts of the Parliament expressed to be organic laws, on a matter "provision for which by way of an Organic Law is expressly authorised by this Constitution" (s.12(1)). The question whether the OLPG s.13 has the effect of making a provincial constitution an Organic Law for the purposes of a reference under s.19 arose in the SCR No.2 of 1984 [1984] PNGLR 81. However, the point was not fully argued before the court, and as the court was able to dispose of the case on another point, it was reluctant to pronounce on this question. But Kidu CJ (p.83) and McDermont J (pp.91-93) inclined to the view that it was not an Organic Law, while Kapi DCJ (p.86) took a more open position.

The matter was, however, resolved in 1987 when Robert Seeto, a member of the New Ireland Provincial Assembly and a former premier
of the province, wishing to challenge the election of his successor, Pedi Anis, referred a number of questions relating to the provincial constitution to the Supreme Court. The court (Amet, Barnett, and Wilson, JJ) held that a provincial constitution was not an Organic Law, and could therefore not be the subject of a reference under s.19 of the Constitution (SCR No.2 of 1987 (1987 Unreported) SC330). A matter relating solely to a provincial constitution is unlikely to affect intergovernmental relations and there may be other ways in which it could reach the courts (for example, an action for a declaration). Were a provincial constitution to be amended by an Organic Law (under s.11 of the OLPG), the provisions covered by the Organic Law would presumably be referable, leading to the unsatisfactory situation that a part of the constitution would be referable, but not the rest.

The litigation about decentralisation falls into two types of cases. One type relates solely to internal matters concerning provincial constitutions, electoral laws and other provincial laws and is not of direct relevance to this paper. The other type of case deals with intergovernmental relations and is discussed here. The courts have now dealt with a number of important issues, particularly the obligation of the national government to consult with or follow the recommendations of the provincial government before taking a particular course of action and also the exercise of its powers to suspend a provincial government — two of the central features of the scheme of the OLPG. The Supreme Court has also dealt with intra-provincial relations in a constitutional reference concerning the possible operation of provincial sales tax laws across provincial boundaries.

The Milne Bay Fishing Licence Case

One of the earliest cases concerned the obligation of the national Minister for Primary Industry to consult with the provincial government before issuing to an applicant, under the Fisheries Act 1974, a licence to fish within its provincial waters. (Milne Bay Provincial Government v. Evara [1981] PNGLR 63). Milne Bay Province argued that the Minister was in breach of his obligations under s.85 of the OLPG (which requires the national

10 In this instance it would appear that the person making the reference was not eligible to do so, but the court did not rule on this question.

government and provincial governments to consult with each other concerning any major investment or proposed investment in the province) as he had not consulted the provincial government before issuing the licence. The court (Andrews J) accepted the defendant's argument that it had no jurisdiction to hear the case, as s.4 of the Provincial Governments (Mediation and Arbitration Procedures) Act, as passed in 1981, ousted its jurisdiction in relation to intergovernmental disputes.

As already indicated, the court was probably mistaken here, since the plaintiff had raised an issue touching the application of a constitutional provision which could not have been ousted by an ordinary law. The proper course would have been for him to refer the issue to the Supreme Court (Constitution, s.18(2)). The Act was passed on 2 March 1981 and brought into operation the following day, after the writ was issued. The court held that the Act operated retrospectively as it affected questions of procedure only and left open the possibility of the plaintiff returning to the court under s.155(5) of the Constitution if it failed to get satisfaction under the Act. The plaintiff appealed against the decision, but before the appeal could be heard, the parties reached a settlement whereby the Minister agreed to suspend the fishing licence in question and to consult with the province in the future.

A number of interesting questions as to the scope and validity of the Act were thus avoided, as also was the breach of s.85 of the OLFG and the meaning of consultation under it, since the Minister claimed to have sent some kind of telex before the issue of the licence, (s.255 of the Constitution says that, in principle, where a law provides for consultation, it must be "meaningful and allow for a genuine interchange and consideration of views").

The Manus Forestry Case

The Manus Forestry Case was commenced in an effort to protect the Provincial Government's position while it attempted to resolve a dispute through the procedures under the Provincial Governments (Mediation and Arbitration Procedures) Act. For some years the provincial government had been developing a policy concerning, and plans for, development of the Manus forest resources on a sustained yield basis (selective logging designed to maintain the viability of the resource indefinitely). Only one forest operator was to be selected to process the annual harvest in facilities in the province, thereby creating employment and adding value to the product. Difficulties in arranging purchase of timber rights from some landowners meant that when the developer was selected in mid-1988, substantial areas of the Manus resource were not covered by the forestry licences issued under the Forestry Act, Chapter 216. Later in 1988, the Minister for Forests indicated his intention of declaring those areas to be 'local forest areas' under the Forestry (Private Dealings) Act, Chapter 217. Once such declarations are made, landowners can deal directly with whatever
developers they wish and development can proceed with minimum
government control. The Manus Provincial Government feared that the
result would be uncontrolled logging with attendant rapid depletion
of the resource and the processing facility becoming non-viable.

After numerous attempts to persuade the national Minister not
to make the declarations, in November 1988 the provincial government
invoked the mediation procedures under the Provincial Governments
(Mediation and Arbitration Procedures) Act. Upon being advised by
the State's lawyers that, in their view, the mediation procedures
did not impede the power of the Minister to make the declarations
under the Forestry (Private Dealings) Act, the provincial government
sought and obtained an ex parte injunction preventing the Minister
from making the declarations. The State then sought discharge of
the injunction, arguing - inter alia -- that the Milne Bay case
prevented the provincial government from having recourse to the
courts in relation to any dispute or any aspect of any dispute with
the national government, and that this principle extended to the
application for the injunction in the proceedings before the court.
The court (Amet J.) accepted the argument and, in addition, decided
that as the provincial government had no legal or equitable
interests under the Forestry (Private Dealings) Act, it had no right
to an injunction. The Court ordered discharge of the injunction and
the striking out of the provincial government's proceedings (see
Manus Provincial Government v. Karl Stack and the State and Jaha

The provincial government then appealed to the Supreme Court
and obtained a temporary stay of the National Court's orders for one
week while the Court (Hinchcliffe J.) considered the matter
further. The main effect of the stay was to preserve the original
injunction against the Minister. But shortly afterwards, the
Minister gazetted the declarations under the Forestry (Private
Dealings) Act. Subsequently, the Supreme Court (Hinchcliffe J.)
granted the stay pending the outcome of the provincial government's
appeal. But, in addition, using its powers under Constitution
s.155(4), the court ordered that the Minister's gazetted declaration
was null and void.12 Further, the Minister, the Secretary of the
Department of Forests, the State's lawyers who had conduct of the
matter and the government printer were all summoned before the court
to explain why the declaration had been gazetted in the face of the
stay order. While initially considering contempt proceedings, the
court accepted explanations involving breakdowns in communications
between lawyers, administrators and politicians, but nevertheless
reprimanded the Secretary of the Department of Forests and a senior

12 Section 155(4) gives the Supreme Court and the National Court
power to make 'orders as are necessary to do justice in the
circumstances of a particular case'.

state lawyer (Post-Courier, 20 December 1988). At the time of writing, both the provincial government's appeal to the Supreme Court and the mediation proceedings are pending. The outcome of both will be of great significance for the future of intergovernmental dispute settlement procedures.

As the Manus forestry case is still before the courts, it is not appropriate for us to comment upon it in detail. However, the case illustrates that for the non-judicial dispute settlement procedures to operate effectively, both levels of government must be committed to the process. It is ironic that the use of the mediation process has itself given rise to complex court proceedings.

The Morobe Provincial Secretary Case

An important constitutional question was considered by the Supreme Court, on a reference from the National Court, as to the meaning and validity of s.50 of the OLPG. In 1984, contrary to normal practice, the national government disregarded the recommendation of the Morobe Provincial Government and appointed a provincial secretary who was unacceptable to the provincial government. The provincial government asked the National Court for a declaration that the appointment was void. The court assumed jurisdiction after a brief discussion of the effect of the ouster provision of the Provincial Governments (Mediation and Arbitration) Act, the plaintiff contending that it was inapplicable since the issue concerned the validity, rather than the desirability, of an administrative decision. The Act had meanwhile been amended (Act of 1983) allowing courts to hear an intergovernmental dispute if the Prime Minister certified that it concerned a matter of law (as apparently he was willing to do). Since the national government's position was that s.50 of the OLPG was inconsistent with certain provisions of the Constitution and hence void, the judge referred the matter to the Supreme Court. The court rejected the national government's contention that the appointment of the provincial secretary (the appointee under s.50 of the OLPG) was governed by ss.191-194 of the Constitution, since he was not a member of the national public service, but held a position established by the OLPG.

A clear procedure for the appointment to that post was set out in s.50 of the OLPG. The Prime Minister makes the appointment on the recommendation of the provincial government, following its consultation with the Public Services Commission. This means that the government should seek the views of the commission but may choose to ignore its advice and that although the Prime Minister may not accept the nominee of the provincial government, he cannot appoint one on his own. If he disagrees with the recommendation, he must seek another, until the two agree (SCR No. 1 of 1984, Morobe Provincial Government v. Papua New Guinea [1984] PNGLR 212). The court also questioned the legality of the institution of the 'department of the province', as an entity separate from or
encapsulating provincial government, as an unjustified qualification of the autonomy of a province.

National Water Supply and Sewerage Board and Electoral Commission

Cases

On at least two occasions the courts have been called upon to determine questions affecting the relationship between a provincial government and a statutory public authority. In the first instance, the Morobe Provincial Government sought (on behalf of the schools in Lae) leave to apply for judicial review seeking to prevent the National Water Supply and Sewerage Board -- a statutory authority -- from cutting off water supply to the schools until such time as the provincial government obtained funds to pay for the water supplied. The dispute had arisen over the amounts claimed by the board, difficulties of metering and the inability of the provincial government to find the money. But Woods J dismissed the application, holding that the case as submitted to him presented no legal issues: "there was no failure to follow statutory procedures and requirements whereby an individual's rights are affected", however unwise the board and the national Minister for Works and Supply responsible for it would be to cut off the supply (In the matter of William Warmari Asst. Secretary for Education Department, Morobe v. The National Water Supply and Sewerage Board, 18 February 1985 unreported).

The dispute between the board and the province remained unresolved, although a case that the board and the national government had filed against Lae City and the provincial government for payment of water fees was in effect settled when the government paid K500,000 in October 1984.

The other case concerned the power of the Electoral Commission to postpone the holding of provincial elections. (Whisky Maniho v. James Yanepa and Electoral Commission of Papua New Guinea, OS 103 of 1986, unreported). According to the constitution of the Eastern Highlands Province (s.43), elections to the provincial assembly were expected to be held towards the end of 1986. On 22 August 1986, the Electoral Commission set a tentative program whereby the writs would be issued on 2 October and polling would start on 11 November. However, on 2 October it published a notice in the National Gazette to defer the provincial elections until after the completion of the 1987 National Election. Its right to defer provincial elections was challenged.

The Electoral Commission is established by the Organic Law on National Elections and consists of a sole commissioner (s.4). His functions in relation to provincial elections arise from ss.112 and 113 of the OLPG. The Constitution (s.126(8)) provides that an Organic Law may be made about the commission's functions in relation to provincial elections. Section 112 enables a province to provide for its elections, while s.113 provides that if a province has
placed a function in relation to its elections in the hands of the commission and the commission considers that the function would or may interfere with or hinder its functions in relation to national elections, it has to give priority to national elections and may defer or cancel provincial elections. The Eastern Highlands Provincial Government Electoral Act (a law passed by the provincial assembly) provides for provincial elections to be conducted by the commissioner. The commission's gazetted notice announced as the reason for the deferment that the provincial elections would interfere with the national elections.

The commission took the preliminary point that it was not obliged to conduct provincial elections since under s.126(8) of the Constitution, that obligation could only be imposed by an Organic Law, and that had not been done. The argument turned on whether s.126(8) was mandatory or directory. If the latter was the case, then the obligation could also be imposed by ordinary law. The court (Cory J), following re Moreeb North-East Election Petition [1977] PNGLR 429, held that it was directory. That would be enough to dispose of the preliminary objection but the judge went on to state a further ground for the decision. Although his precise argument is not clear, it turned on the consideration that under s.13 of the OLPG, a provincial constitution is to be treated as an Organic Law for the purpose of any law of Papua New Guinea. As already discussed, the Supreme Court has since decided in another case, that s.13 of the OLPG does not make provincial constitutions, organic laws -- SCR No.2 of 1987 (1987) (Unreported) SC330 at pp.7-8). However, even if it had been correct that a provincial constitution is an Organic Law, it is not clear how that would have been relevant to the case since the commission's obligation to conduct provincial elections arose not from the provincial constitution but from an act of the provincial assembly.

The plaintiff's evidence established that the electoral office in Goroka was well prepared for both the provincial and national elections. Electoral rolls and boundaries had already been updated and returning officers appointed. Anticipating that writs would be issued on 2 October, a number of intending candidates had resigned from their jobs, with considerable financial loss. The commissioner's justification for his action was that the occasion for national elections could arise at any time within the succeeding months (under s.105(1) of the Constitution) and they would then have to be held within three months.13

13 The court did not comment on the claim that elections have to be held within three months. The commissioner appears to have misconstrued the provisions of s.105(1) to which he referred. Section 105 envisages general elections in three circumstances: first, when the normal life of the Parliament (of five years) has expired; second, when the Parliament (Continued next page)
If it did, he would be unable to do that properly if the provincial elections were also to be held. He intended to hold seminars and discussions to educate the public on the voting system and election laws. The court (Cory J) held that there was little likelihood of a contingency (the defeat of the government in the Parliament on its resolution for early dissolution, as per s.105(1)) which would necessitate the holding of national elections in the succeeding months, nor was it the Electoral Commission's job to educate people on the electoral system. He had exercised his discretionary power to unlawfully postpone provincial elections. "Elections are a vital aspect of the democratic system of government in Papua New Guinea, and the people's right (under s.50 of the Constitution) to vote and stand for public office was affected by the commissioner's decision," he said. Discretionary powers have to be exercised for a proper purpose. They would not, in view of the relevant circumstances here, appear to have been so exercised, and in the Electoral Commission's failure to give proper reasons, the court assumed that in fact there were no good reasons.

The commission appealed to the Supreme Court, even though the Department of Justice which had represented them before the National Court, considered that the appeal had no merit and so was not involved in the appeal. The main grounds argued on appeal were that the commission had a discretion to delay provincial elections, and that the exercise of the discretion should not have been interfered with by the court, and that in any event, the grounds for deferral of the provincial election were valid.

The Supreme Court took the view that not only could it review the exercise of a discretion exercised improperly, but also that it had power under s.57 of the Constitution to enforce the constitutional rights of citizens. Amongst those rights is the right to vote and stand for public office (s.50), a right jeopardized by the commission's deferral of the provincial elections. Further, the power to defer could only be exercised if the Electoral Commissioner had determined first that a provincial election would or might interfere with a national election, and if

Footnote 13 (Cont'd)

resolves on its own dissolution; and third, which operates only in the fourth year of a Parliament, when the government loses a vote of confidence. In the first instance, the elections must be held within three months of the fifth anniversary of the return of writs during the previous election. In the second and third instances, "as soon as may reasonably be" after the resolution or the vote of the Parliament (which is the cause of the elections). There should be no difficulty about the timing in the first instance. As to the others, there is more flexibility than the commissioner thought.
so, whether holding the elections together would result in interference or less effective conduct of one or both of the elections. In this case, the main reason for deferral being the commission's wish to conduct political education campaigns -- something the court held was not a function of the commission -- the court held the deferral to be invalid and rejected the appeal (Electoral Commissioner of Papua New Guinea v. Whisky Maniho and James Yanepa (1988 Unreported) SC336). As a result, the provincial elections proceeded late in 1986, some weeks later than planned.

It is the delays caused by the court actions and the legalisms typified by the Electoral Commission's arguments, that inclined the CPC to limit the role of the courts, although, given the independent status of the commission, it is difficult to see what real alternative there is to a court action. Perhaps the trial judge could have speeded up the process by directing a reference to the Supreme Court under s.18(2) of the Constitution. Although the question before it related to the interpretation of provisions of an Organic Law, he must have proceeded on the assumption that that was not relevant (otherwise he would have had to refer); the true issue being the common law about the exercise of discretionary power. Nevertheless he raises a number of constitutional considerations in his decision which suggest that it might have been better to have referred the matter to the Supreme Court.

The Cross-border Sales Tax Case

A case with important implications for interprovincial relations was the 1988 Constitutional Reference by the Enga Provincial Government concerning provincial powers to tax cross-border sales of goods by wholesalers in neighbouring provinces to retailers situated in Enga Province. The reference was made because Enga Provincial Government had reached tentative agreement with the neighbouring Western Highlands Provincial Government whereby the latter would collect sales tax on behalf of Enga on sales by wholesalers in Western Highlands to retailers in Enga. Under the OLPG (s.58) a provincial government can impose sales tax on sales of goods either by retailers to consumers or by wholesalers to retailers. However, the OLPG (s.21) also prohibits provincial laws from having extra-territorial effect. Thus, in essence, the question was whether a law passed by Enga imposing tax on wholesale sales by sellers in Western Highlands to retailers in Enga would offend the prohibition on laws having extra-territorial effect.

By a majority decision, the court (Woods and Los JJ, Bremmeyer J dissenting) held that such a provincial law would be invalid (SCR No. 1 of 1988; Re Enga Provincial Government (1988 Unreported) SC 538). The majority took a very restrictive view of the prohibition on extra-territorial effect. They rejected as irrelevant, Australian High Court and Privy Council decisions to the effect that laws made by provincial or state legislatures could have effect outside the province or state provided there was sufficient
connection between the subject matter of the legislation and the province or state concerned. The minority decision, on the other hand, regarded those cases as providing the basis for a correct understanding of provincial powers, and held that where goods were sold in another province for the purpose of resale in Enga, there was sufficient connection with Enga for an Engan Provincial law to tax the initial sales.

The minority decision is, in our view, to be preferred both because it produces a workable outcome, in line with the aims of the OLPF, and because it is based on an approach to interpretation of the constitutional arrangements which is better suited to the quasi-federal system operating in Papua New Guinea, than that of the majority. Unless provincial governments can tax cross-border wholesale sales, the practical problems of sales tax collection from small retailers make the tax inordinately difficult to administer. On the majority view, neither the province where the wholesalers operate nor those where the retailers operate will be able to tax cross-border wholesale sales. The provinces where the wholesalers are operating will be obliged to exempt such sales, greatly increasing complexity of collection for them and for the wholesalers themselves. The provinces where the retailers are based will be obliged to collect tax direct from all retailers -- an extremely difficult task, as many have small turnovers and almost no sales records. The approach to interpretation taken by the minority was deliberately liberal. Bredmeyer J saw the practical difficulties that would flow from the majority view. He gave recognition to the kinds of problems which arise in federal systems which have given rise to the lines of decisions of Australian Courts on extra-territoriality which he relied upon.

The provincial government system in Papua New Guinea has many federal elements, something particularly evident in the division of legislative and taxing powers. The solutions to normal problems arising from federal systems for division of powers which have been developed by other jurisdictions should not be lightly discarded. In the Enga case, the approach of the minority would have enabled sales tax systems in all provinces to operate as intended -- with tax imposed largely at the wholesale level. Cooperative collection arrangements between neighbouring provinces -- as was being developed by Enga and Western Highlands -- would have become the basis for efficient collection systems. But unless the OLPF is amended to enable cross-border wholesale sales to be taxed, such arrangements will not be possible.

The Suspension of Provincial Governments

The most important cases the courts have had to deal with have concerned the powers of the national government to suspend a provincial government. To safeguard for authority and autonomy of provincial government, the CPC was concerned that suspension should not be at the complete discretion of the national government. The
spirit of its general recommendations was expressed in the provisions of the OLPG whereby a provincial government could only be suspended for a reason specified in the Constitution, after following a stringent procedure of investigation, consultation with the provinces and a review by an independent committee, and only if measures short of suspension would not be adequate to correct the circumstances which constituted the ground for suspension.

In 1983 those provisions were amended to simplify the procedures for suspension, but important safeguards still exist and the general principles of the CPC recommendations are still relevant. The amended procedures do, however, make it easier for the national government to suspend a provincial government. It can do so on a provisional basis, for a period that can amount to several months, before there is an opportunity for parliamentary review. The national government has not hesitated to use its powers of suspension. The effect that the courts are willing to give to the remaining safeguards becomes therefore a matter of major importance.

The decision of the Supreme Court in the first of the cases concerning suspension was not -- from the province's point of view -- an auspicious start (Tindiwi v. Nilkare [1984] PNGLR 191). On 8 February 1984 the NEC approved the provisional suspension of the Enga Provincial Government on the recommendation of the Minister for Provincial Affairs, John Nilkare. He had made no attempt to discuss the affairs of the province with the provincial government before his report to the NEC and the provincial government sought a declaration that this failure invalidated the provisional suspension. The case turned principally on the provisions of s.90 of the OLPG, as amended in 1983. Under the original provisions, the NEC could move a motion for suspension only after it had negotiated or attempted to negotiate with the province. The 1983 amendments provide instead for an 'explanation' by the premier of the province for the Minister and the NEC before a provisional suspension by the NEC. Section 90 provides that if the Minister considers that grounds for suspension exist, he may:

(a) require the premier to explain the matter; and
(b) report to the NEC on any matters which he thinks constitute grounds for suspension.

By a majority decision, the court (Bredmeyer and Amet JJ, Kaputin J dissenting) held that the Minister was not bound to give the premier an opportunity of an explanation; whether or not he sought such an explanation being entirely a matter for his discretion. The majority also rejected the plaintiff's argument that if the Minister or the NEC do not give an opportunity for an explanation to the premier, this is a violation of the rules of natural justice as prescribed by the Constitution. The court held that by vesting the discretion in the Minister the OLPG intended to disapply the rules of natural justice (which in any case were only relevant when a
person suffered a 'pecuniary loss'). In our view this judgement is wrong in law. It not only encourages bad administration, but also seriously undermines a safeguard for the provinces against a capricious exercise of central authority and negates a carefully constructed balance between the centre and the provinces.

In the Tindiwi case the plaintiff did not challenge the suspension on the grounds that it was an abuse of power or that the matter could be remedied, short of suspension. Both these issues arose, however, in Kapal v. Independent State of Papua New Guinea (1987, Unreported) N616. On 19 March 1987 the NEC suspended the Western Highlands Provincial Government for gross financial mismanagement. The Minister for Provincial Affairs based his recommendation to the NEC on the report of the Auditor-General (dated 23 February 1987) which found severe instances of financial mismanagement. Encouraged no doubt by the erroneous doctrine of the Tindiwi case, the Minister appears not to have consulted with the premier before forming his views on suspension. Further, the judgement suggests that the Minister failed to present to the NEC a copy of a letter from the Auditor-General to the provincial secretary raising some queries about facts connected with the alleged mismanagement and asking about measures to improve the situation. The secretary had reported on 17 March 1987 indicating many wrongs that were being put right, clearing up several queries and setting out rectification that was being planned. The Auditor-General's own report to the NEC had suggested that provincial deficiencies could be remedied and made specific recommendations towards this end. On the basis of this evidence the National Court (Hinchliffe J) held that had the NEC been aware of all the facts, it could not have concluded that the only way to correct the matter was by suspension (as required under s.91A(d) of the OLPG). On this ground, he gave a declaration in the favour of the plaintiff.

The plaintiff had also raised the question of abuse of power -- an issue which had arisen because the Prime Minister, Paias Wingti, had attended a meeting of the opposition members of the Western Highlands Provincial Assembly, to which some provincial ministers had been invited, shortly before a motion of no confidence against the premier was to be introduced. It was alleged that the Prime Minister warned them that if they did not support the motion, he would suspend the provincial government. The Prime Minister admitted that he was at the meeting but denied the threat about the suspension. Nevertheless, ten days after the loss of the motion, the NEC suspended the provincial government.

As further evidence to support its allegation of bad faith on the part of the Prime Minister, the plaintiff produced to court a copy of a memorandum to the NEC from the Minister for Provincial Affairs in which he recommended against suspension pointing out that most instances of mismanagement noted by the Auditor-General occurred during previous governments and that the present premier
was in fact trying to correct matters. The court considered it unnecessary to determine whether the Prime Minister was motivated by bad faith, since even if he was, the decision to suspend was not his alone but that of the NEC, a proposition of law which we question. There is considerable authority to the effect that the bias or bad faith of one member of a body or tribunal may be enough to invalidate its decision. The size of the body and the prominence of the part played by the member in bad faith are among the factors to be taken into account (de Smith 1980:273). In this instance, the Prime Minister is the head of the NEC, presides at meetings, chooses and dismisses the other members of the NEC and has a decisive influence on its policies and decisions. Under the circumstances, it is an artifice to say that he is merely a member of a wider body and that his bad faith can be isolated from the decision.

The National Court decision was subsequently overturned on appeal in Independent State of Papua New Guinea v. Kapal (1987 Unreported) SC344. The main reason for reversing the decision related to evidentiary questions -- the Supreme Court found there was no evidence that the NEC did not consider the letters from the Auditor-General and the provincial secretary. But the court went further and on the basis of the Tindili case held that there was no obligation for the NEC to consider any material provided by a provincial government. The result appears to be that even where the Minister is in possession and aware of adequate explanations from a provincial government, he or she can deliberately keep that material away from the NEC -- something which was clearly not intended by the OLPG and the Constitution. In our view, that aspect of judgement is wrong in law, because it would mean that the NEC could be making decisions which it would not do if all the relevant material was available. This would validly open NEC decisions to attack as making decisions which no reasonable authority could have made, the main ground upon which the National Court found in favour of the provincial government. Unfortunately, the Supreme Court decision exacerbates the unfortunate consequences of the Tindili case.

The National Court in the Kapal case was influenced by an interesting and important decision of the Supreme Court which had been given a few months previously on a reference from the Simbu Provincial Executive -- SCR No.3 of 1986 (1987 Unreported). The reference raised a number of complexities concerning the suspension of a provincial government. The background to the reference was that the Simbu Provincial Government was suspended provisionally by the NEC on 14 December 1984 under s.187B(1) of the Constitution, for the gross mismanagement of its financial affairs. A motion was then introduced in Parliament to confirm the suspension, and was referred to the committee on suspensions. The committee took a long time to report and it was not until 22 August 1985 -- over eight months later -- that Parliament confirmed the suspension. Meanwhile on 17
June 1985, the Parliament had extended what was still a provisional suspension by six months (by an absolute majority vote). 14

No steps towards the rehabilitation of provincial government or the holding of elections appear to have been taken when, on 20 February 1986, the NEC decided to amend the Simbu Constitution, purporting to act under s.97 of the OLPC. The intent of the amendment was to enable the national government to dissolve the provincial assembly and hold fresh elections to it at a time when the provincial government was suspended. On the same day the NEC resolved to advise the Governor-General to direct the holding of elections. These decisions were not forwarded to the Governor-General until 4 March 1986, when he signed the instrument amending the Simbu Constitution as well as that directing the electoral commissioner to hold the elections. It is arguable that the order of direction was not lawful, because under s.97(c) of the OLPC, provincial laws made by the NEC during suspension must be confirmed by the Parliament, and so it is possible that as the law in question had not been confirmed, the order directing that an election be held could not take effect (which had not happened). However, s.97(c) is not clear whether confirmation is necessary before a law takes effect, and so it is possible the law can be in force after being made by the Head of State, until considered for confirmation by the Parliament. A law would continue in effect if confirmed and lapse if not confirmed. The court made no clear ruling on this point, with only one judge (Amet J) referring to the possibility of the invalidity of the amendment (p.21).

No elections had been held by 14 March 1986, when the national government asked the Parliament to approve the extension of the suspension by another six months, but failed to muster the necessary absolute majority. (The government sought an extension when the suspension still had more than two months to run under the previous resolution because the next meeting of the Parliament was due in three months.) The elections had still not been held when the period of suspension expired and the provincial government was restored on 12 May 1986. The restored government proceeded to repeal the NEC's amendment of the Constitution on 8 July 1986. On 12 August 1986 -- more than six months after it received the directions -- the Electoral Commission issued writs for the

14 The government must have sought the extension believing it necessary because of the terms of s.187F of the national Constitution which requires re-establishment of a suspended provincial government "within nine months from the effective date of the provisional suspension". However, it is not clear that such an extension is required in law, since there is no time limit as such on the term of a provisional suspension (as the time within which the committee must report to the Parliament is not prescribed).
elections. The provincial government obtained an injunction against the commissioner and made the reference to the Supreme Court.

There were in effect two principal matters for the decision of the Supreme Court. The first was whether elections were necessary before a suspended provincial government could be re-established and whether, in the event that the suspension lapses, the members of the provincial government return to office. The second matter concerned the powers of the NEC to amend a provincial constitution during the suspension. These questions raised issues of the greatest importance for the relation between the national government and provincial governments and the balance of power between them. If elections were necessary before the restoration of provincial government, the national government would be able to interfere in provincial affairs to a large degree, and if suspended members could not return to office, this would open up fresh possibilities of victimisation of provincial politicians who were unpopular with the national government. If upheld, the power of the NEC to amend provincial constitutions would have even more far reaching consequences -- those laws could then be amended with relative ease, thereby enabling the NEC to make major changes to provincial structures, something which would vitiate the autonomy of the province and the principles of its political order.

The decision of the court, by a majority of two to one, is a strong vindication of provincial autonomy (and was delivered when there seemed evidence of abuse of the power to suspend provincial governments). If the views of the minority (Kapi DCJ) had prevailed, the system of provincial government would have suffered another major setback at the hands of the courts. He held that elections must always be held before a provincial government can be restored, even when the suspension is lifted by the Parliament. He held (at pp.5-6) that there was no time limit to a suspension confirmed by the Parliament; the references in s.187F of the Constitution to periods of nine and six months were to the periods within which elections must be held and not to the duration of the suspension. A necessary consequence of this view is that once the Parliament has confirmed a suspension under s.187E(1), the NEC could keep it in force forever, never needing fresh parliamentary authority (unless the Parliament lifted it under s.87 of the OLPG). Kapi DCJ also upheld the right of the NEC to amend a provincial constitution by regulation. However, he did hold that s.187F(1) imposed an obligation on the NEC to hold elections within the nine months or the extended period, an obligation which may be enforced.

The majority judges, unlike Kapi DCJ, answered questions under the reference by examining the purposes of the constitutional provisions about provincial government and the safeguards that were established to protect provincial autonomy. Barnett J, in particular, discussed in great detail the views of the CPC regarding provincial autonomy and the balance it attempted to provide between the centre and the provinces, and in view of the injunction to
interpret the Constitution liberally and fairly (Sch.1.5(2) of the Constitution), to effectuate the National Goals and Directive Principles (which include decentralisation) (s.25) and to have regard to historical materials (s.24), he held that there was a clear intention to limit the period of the suspension, and that nine and six months were periods of the maximum duration of the suspension. Amet J also referred to the intention of the Constitution, reflecting the views of the CPC, to safeguard provincial autonomy, and came to the same conclusion. Both held that if elections had not been held by the time the suspension lapsed, the members of the suspended government would be restored to office. Fresh elections were not necessary in all cases of restoration (as the original suspension may have been unrelated to any delinquency or misbehaviour of the provincial government), and indeed, as Barnett J said (at p.48), in some cases might be disruptive of law and order.

The majority acknowledged the right of the NEC to amend the provincial constitution during suspension, but both sought to impose restrictions on it. They said that the amendment had to be approved by the Parliament by a two-thirds absolute majority vote — provincial constitutions were "home grown" and autochthonous laws to which the national constitutional laws accorded a high status, and the two-thirds majority was consistent with s.11 of the OLPG which provided that if the national government wished to amend a provincial constitution, this could normally only be done through an organic law, as well as s.13 which specifies that a provincial constitution would take effect as if it were an organic law. This interpretation, while consistent with the spirit of the Constitution and the OLPG, nevertheless involves considerable, judicial "creativity" since there is little to justify it in s.97 of the OLPG. That section requires parliamentary confirmation of a provincial law made by the national government by resolution, which according to the normal rules of interpretation means a simple majority (National Constitution s.114).

A further restriction on the NEC's power to amend a provincial constitution is hinted at by Amet J when he said that the "national government is precluded from arbitrarily amending" it. Barnett J is, however, very explicit; the power can only be exercised in "appropriate circumstances"; it should only be used as a "last resort if that course of action is necessary to enable it to carry out duties and functions imposed upon it by the Constitution". He added, "if the power is used to make unnecessary or arbitrary amendments to a provincial constitution, if its use is disproportionate to the needs of the circumstances, then it would be ultra vires and open to challenge in the Supreme Court".

The 1984 suspension of the Simbu Provincial Government gave rise to another reference when, in 1988, the provincial government asked the court for a ruling as to the power of the Parliamentary Salaries Tribunal to order termination of payment of salaries and
allowances to elected members of a suspended provincial government. Until a constitutional amendment made in 1988, under s. 131 of the Constitution, the tribunal was solely responsible for fixing salaries and allowances of all members of provincial legislatures. In June 1985, it had determined that no salaries or allowances should be paid to members of suspended provincial governments after two months had elapsed from the date of suspension. The Supreme Court (Kiku CJ, Kapi DCJ and Bredmeyer J) decided that the power under s. 131 to fix salaries did not include a power to decide whether or not a member should or should not receive such salary during any period a member was part of a suspended provincial government. Hence the decision of the tribunal was beyond its powers (SCR No. 3 of 1988; Re Simbu Provincial Government (1988 Unreported, Decision of 30 November 1988). Although not a decision of major significance, it does serve as a reminder to national government agencies that they must act within their powers when dealing with suspended provincial governments. Hence the decision may have some importance in influencing the national government to use its powers with restraint -- something not always evident in the use of the suspension powers.

Approaches of the Courts

The record of the courts in dealing with constitutional issues has been mixed. Sometimes there are two approaches that the courts have adopted in their judgements. The first is a narrow, legalistic one and attaches little importance to the fact that it is the Constitution that it is interpreting, and the issues before it regulate intergovernmental relations. The clearest examples of this approach are the judgements of Bredmeyer J in the Tindiwi case, the full Supreme Court in Kapal's case, and of Kapi DCJ in his minority judgement in the Simbu case. The other approach is more purposive, taking into account that the underlying assumptions of the OLPG are a wide measure of provisional autonomy within a framework of cooperation, consultation and political settlement.

In the Education Department, Morobe v. The National Water Supply and Sewerage Board case, Woods J characterised the dispute before him as political, not legal, and warned against the dangers in encouraging a climate of indiscriminate judicial activism. "Too often we see the courts being made the battleground for government infighting. That is not our role," he added.

In SCR No. 1 of 1984, Re Morobe Provincial Government v. Papua New Guinea [1984] PNGLR 212, Kapi DCJ said about the provisions relating to the appointment of the provincial secretary that they "were enacted in a spirit of cooperation and mutual understanding between the Prime Minister and the provincial government", that the administrative arrangement demands that both parties "develop a good and harmonious relationship" and that their continued deadlock defies the spirit of this provision and, as a consequence, the people of the province suffer" (p. 219). In the same case,
McDermont J said that the spirit of the devolution process was "consultative cooperation" and urged a "commonsense" approach which recognised the importance of cooperation between the constituent parts of the government (p. 220). In the Milne Bay case, Andrews J quoted the CPC's preference for political not judicial settlement of intergovernmental disputes (p. 64).

The clearest examples of this broad approach are the majority judgements in the Simbu case which constantly refer to the spirit and substance of the CPC's recommendation as a guide to interpretation. Justice Barnett, in particular, devotes a large part of his judgement to establishing guidelines for constitutional interpretation, drawing upon instructions in the Constitution itself.

"When interpreting the details of a provision in a constitutional law therefore, it is an essential prerequisite for the judicial mind to be enlightened by the spirit of the Constitution itself. This enlightenment comes from developing a thorough understanding of the National Goals and Directive Principles, by taking an overview which will place the particular provision in the context of the total legislative scheme of which it forms a part and by seeking to understand the intention of the founding fathers as they expressed it on behalf of the people, when enacting the Constitution and subsequent amendments".

Indeed he says that judges should seek this enlightenment even before turning to the text, so that it is not only when an ambiguity arises that one turns to history and intention — a significant extension even upon the usual school of broad constructionists.

Courts and Alternative Methods of Settlement

Provided that the courts continue to bear in mind the underlying assumptions of the OLPG, there may be less of a case than Tordoff-Watts or the CPC considered for keeping the courts out of intergovernmental disputes. Both had favoured non-judicial settlement of such disputes largely on the assumption that decentralisation would be accommodated largely within the framework of a unitary state in which goodwill rather than law would be the real safeguard of provincial interests.

The scheme of decentralisation that emerged from the Bougainville negotiations and is established in the OLPG is, however, somewhat different. It attempts a more precise legal regulation of the powers of the respective governments and the relations among them. It also establishes political institutions and processes for the full implementation of the system and the resolution of disputes. The assumptions of the CPC that these institutions and processes would be effective have not so far been validated. The absence of any machinery for making binding determinations on the provisions of the OLPG works to the disadvantage of the provinces.
As the administrative system in Papua New Guinea was centralised to begin with, affirmative action is necessary for decentralisation (as compared to systems of power sharing which result from the coming together of previously separate units). Moreover, the national government has many sanctions against a province (outside of court adjudication) -- withholding of funds, withdrawal of functions, even suspension of its government -- while a province has hardly any against the centre. Under the circumstances, the entry of the courts may well be necessary, contrary to the expectations of the CPC, to bring about the balance of power as between the centre and the provinces. A further irony is that it is the courts, of all the institutions under the OLPG, which at times seem most conscious of the political purposes and dimensions of decentralisation, and are attempting to infuse the spirit of the CPC into intergovernmental relations. Litigation, now likely to increase, will force greater adherence to the letter of the law. This may in turn lead to increased resentment of devolution on the part of the national government. Thus while court intervention may resolve the ambiguities in the legislation, it will do little to mitigate the tensions between the centre and the provinces. Indeed, it is probable that the greater adherence to the law jeopardises the entire scheme of legislation for devolution.

Our examination of the role of the courts provides insights into the general conduct of intergovernmental disputes. Although the resort to the courts has been limited so far, it is likely that in the future, issues will be taken to them more frequently. This is not only because the knowledge of the OLPG is growing, but also with the increasing capacity of provinces and further transfers of powers, there will be uncertainties about powers, functions and procedures. Unless the capacity of the political system to solve the resulting disputes improves greatly, these will be taken to the courts. Almost all of the litigation that has taken place so far can be attributed to the failure of the political system.

In the Tindiwi and Kapal cases (and to some extent in the 1987 Simbu case), the issue before the court was the obligation of the national government to consult with the province under s.90 and s.91 of the OLPG (dealing with the suspension). However, over and above those sections, there is a fundamental obligation implicit in the whole constitutional scheme of decentralisation for the governments to consult and to settle differences. It is not even necessary for the formal procedures of the Mediation and Arbitration Act to be used. The Premiers' Council or other informal means are available. There is no evidence that the national government made the least attempt to bring its complaints to the provincial government, much less try to persuade it to introduce reforms. By its precipitate acts, the national government left the provincial governments with no real alternative to court action.
The Milne Bay fisheries licence, the Manus forestry and the Morobe provincial secretary cases all arose because the national government disregarded the recommendations of the Premiers' Council. The issue of some form of shared responsibility in the granting of fishing and forestry licences (and the transfer of some powers in the fishing and forest industries to provinces) had been raised repeatedly in the council and -- at least in the Milne Bay case -- the national Minister was understood to have agreed to consultations. As regards the appointment of the provincial secretary, the council had passed a resolution urging that the province's wishes should be given due consideration (res. 12/6 of 1983). On the disregard of it by the national government, Morobe had interceded unsuccessfully in an attempt to obviate the necessity for litigation. In the Manus forestry case, the provincial government was forced to resort to the Court because of the national Minister's refusal to accept that he should await the outcome of the mediation procedures.

In none of these cases therefore would it have made much sense for the province to invoke further formal or informal procedures for consultation or mediation. The resort to courts emphasised their ultimate responsibility to hold the constitutional balance between the centre and the provinces and the binding nature of their decision puts an end to the controversy.
7. REVIEWS OF DECENTRALISATION AND THE BALANCE BETWEEN THE CENTRE AND THE PROVINCES

From the analysis already described it is clear that the institutions for intergovernmental relations have not worked according to original expectations. The balance of power between the centre and the provinces that the law had tried to establish has not materialised. Policy making about intergovernmental relations has proven difficult to achieve and implement. Even the concept of provincial government remains controversial. It may therefore be worthwhile to briefly examine and review the future of decentralisation.

An aspect of intergovernmental relations concerns the principles and procedures for a fundamental transformation of these relations. In Papua New Guinea, since the CFC envisaged decentralisation as a radical departure from the previous system, to be implemented in stages, it recommended a review of its progress three years after its inauguration by persons nominated by the Premiers' Council (CFC:10/28, paragraphs 243-246). At the proposal of the government (Papua New Guinea 1974:Chap. 1), the review was generalised to cover the entire Constitution, but in the process, the special role of the PC disappeared (s.260). Nevertheless it was proposed that the body charged with the general review would be assisted by reviews of specific parts of the Constitution by committees and commissions, and one of these must be on provincial government. This was recognised (through an amendment to s.260) when provincial government was restored to the Constitution in 1976 (s.262(1)(a)). The Bougainville Agreement also provided for a preliminary review, at Bougainville's request, within one year of its coming into effect (s.11(c)).

In spite of the continuing political controversy over decentralisation as well as the administrative and financial difficulties attendant upon its implementation and operation, the constitutional provisions for review have facilitated neither the resolution of the controversy (nor indeed always helped to clarify it) nor the particular difficulties. The legislation for the General Constitutional Commission was established in 1978 (Constitutional Commission Act Ch.21A) and appointments to it were announced at the end of that year. No committee was established to make the separate examination of provincial government suggested by s.262(1)(a).

The commission itself did not come up with any definitive analysis of or recommendations on provincial government although it devoted its interim report (1981) solely to provincial government. While it had no doubt that provincial government was 'the biggest political achievement in our nation' (General Constitutional Commission 1983:171) and was supportive of it, the commission believed that it was premature then to have a 'full understanding' of its operation and recommended that a committee be established
three years after its own report to make a thorough review. The commission did, however, make a number of specific proposals relating to the proper implementation of the OLPG and intended to strengthen the position of provincial governments.

Regarding intergovernmental relations, it recommended that MPs should no longer be members of provincial executives (p.173), the national government should review its legislation on concurrent subjects with a view to delegating some to provinces (p.174), a proper legislative framework should be established for the delegation of powers by the national government (p.174) and there should be a corresponding reduction in the number of staff at the centre as more and more staff were decentralised (p.175). It endorsed the proposals of the 1982 Committee of Review of Financial Provisions (Papua New Guinea 1982) as well as the proposed amendments to simplify the procedure for the suspension of provincial governments (although it did not discuss them), and made a number of proposals to strengthen the machinery for intergovernmental relations in favour of provinces.

One specific recommendation of the commission had far reaching implications for provincial government. It proposed the repeal of the status of organic laws, which, 'complicated both in wording and procedures', contributed to the complexity of constitutional laws (p.277). Although it did not rule out the possibility that some provisions of the organic laws turned-into-ordinary laws might be entrenched by specifying a special majority for their repeal, it did not recommend what provisions should qualify for this treatment. The commission therefore put into jeopardy the hard-fought constitutional status of provincial government.

The report of the General Constitutional Commission was presented to the Parliament on 1 March 1983 and the debate on it commenced on 9 May 1983. The national government proposed a chapter by chapter debate, at the conclusion of which instructions would be sent to the parliamentary counsel to draft the necessary legislation (Siaguru, Hansard 9 May 1983). Although it was announced that the government would make specific proposals on the recommendations, this was not done consistently, nor were the debates conducted in a manner which would clarify parliamentary view of individual recommendations sufficient to constitute guidance for the counsel. In the end the Parliament merely 'noted' the chapters separately; the exercise was not completed until March 1987, four years after the submission of the report.

The first parts of the report to be debated were Chapter 12 (proposing the abolition of organic laws) and Chapter 8 (provincial government). On the former, the government supported the recommendation and stated that most of the organic laws would nevertheless be entrenched. Unfortunately it did not specify which ones and said little about the future of the OLPG, although most MPs interpreted the recommendation and the stance of the government as
an attack on provincial government, and on that basis, gave it enthusiastic support (discussing no other organic law). On the latter, the position of the government (as outlined by the Minister for Decentralisation, John Nilkare) was that it intended to proceed with the amendments to simplify the procedure for the suspension of provisional government and to have further discussions with premiers on the financial proposals of the OLPG. He indicated, however, his intention to seek greater control over the allocation of financial and personnel resources to provinces and to strengthen local government (Hansard 10 May 1983). The Minister's overall approach differed in principle and detail from that of the commission, but as he did not explicitly deal with it, the MPs cannot have clearly known what the government was proposing to do with the individual recommendations. The ensuing debate provided them with yet another opportunity to attack provincial governments.

The gravamen of the parliamentarians against provincial governments was that provincial governments had become more powerful than themselves (to whom they showed no respect); provincial ministers had bigger cars and houses than the MPs, who occasionally suffered the ignominy of having to use public transport -- something provincial ministers never did when in Port Moresby; and provincial governments were expensive, corrupt and inefficient and provided few services to the people. Hardly a single member referred to the analysis and recommendations of the commission, the policies or specific practices of provincial governments they objected to, or substantiated any of their criticisms. The only point of substance to emerge from the debate was that the MPs did not like provincial governments because they compete with parliamentarians for prestige and influence and consequently they should be abolished.

Alarmed by the intentions of the government and the parliamentarians, the premiers made the proposal to turn organic laws into ordinary laws a major issue at the 1983 Premiers' Council (which started on 23 May 1983, less than a fortnight after the parliamentary debate). The Prime Minister, Michael Somare, when opening the meeting, stated that there was 'almost total collapse of confidence in relations between the national and provincial politicians' for which he blamed the provinces. According to him, the premiers had shown a lack of responsibility in dealing with the national government and treated parliamentarians 'with contempt'; failed to maintain levels of services; failed to account properly for their actions and spending; and had appropriated provincial and sometimes national powers to themselves. Unless the provinces improved their performance and accepted a wider measure of control from the centre, there would be no way to stop the Parliament from abolishing provincial government (Somare 1983).

The premiers in turn accused the national government of undermining provincial governments and eroding their autonomy. They wanted the national government to declare its commitment to provincial government and drop the proposal to abolish organic laws
and the amendments to the suspension provisions, until after full discussions with the premiers. After heated discussions for more than two days the national government declared its commitment to provincial government, agreed to promote certain changes to the suspension amendments as safeguards for provinces, and promised that if the Parliament abolished organic laws (which it had not yet resolved to do), the government would ensure that the basic provisions of the OLPG would be incorporated into the Constitution.

In June 1983, New Guinea islands' provincial governments convened a meeting of premiers and parliamentarians from the region to discuss 'important political and economic issues' affecting the region. The parliamentarians, including three national Ministers (Namaliu, To Vadek and Tito), the deputy leader of the Opposition (Momis) and the leader of the People's Progress Party (Chan), pledged to oppose in 'all forums' the national government's proposal to change the OLPG into an ordinary act, and wrote to the Prime Minister about their opposition to the proposal (Post-Courier 18 July 1983).

Impressed perhaps by the political difficulties that a serious attack on the provinces would cause and the divisions within his own cabinet, the Prime Minister appeared to let the matter drop. Relations between the national government and the provinces improved somewhat during the next year (although three provincial governments were suspended in the year following the November adoption of the suspension amendments) and in 1984 good progress was made on the revision of the financial provisions of the OLPG. However, a number of national Ministers opposed to provincial government seemed anxious to press on with the attack. They felt that if a popular mandate could be established for abolishing provincial government, the political difficulties stemming from the opposition of the premiers would be overcome. They appear to have persuaded the Prime Minister to hold a referendum, confident of a favourable result.

On 26 September 1984, the Prime Minister stated that he intended to hold a referendum to decide whether or not provincial government should continue; each province was to decide for itself. Confronted by the supporters and opponents of provincial government, each claiming to have the support of the people, his view was that a referendum was 'a better means to gauge public opinion on this issue, which would be too complex to decide at a political party level' (Niugini Nius 27 September 1984). Although he claimed that he was not opposed to provincial government, his proposal was widely interpreted as an attack on it. Several premiers, the leader and deputy leader of the Opposition (Okuk and Momis respectively) and Chan criticised the proposal and warned of the threat in it to national unity. The New Guinea islands' premiers threatened to secede and called a well attended meeting with their parliamentarians and other leaders to protest against the referendum (Niugini Nius 30 October 1984).
The Prime Minister, Somare, did not proceed with the referendum, which was quietly dropped without explanation. Various factors accounted for the change of policy. The NEC decision appeared to have been taken impetuously, without a written submission, as is the normal procedure. It did not have the support of all the Ministers, especially after Momis replaced Wingti (who now became the leader of the Opposition) as the deputy prime minister. The proposal was further undermined by the reports of officials and the Electoral Commission which pointed to numerous administrative and financial difficulties that would attend a referendum. Since then, intergovernmental relations have been less fraught, although parliamentary attacks on provincial government continue, several governments have been suspended and major proposed amendments to the OLPG which would give MPs greater say in provincial affairs have been gazetted.

In August 1985, the national government made another effort to reach some conclusion on the future of provincial government when it supported a motion by Sir Pita Lus, in the Parliament, to establish a select committee to review the system of provincial government, assess the views of the people on its operations, assess its success or failure and recommend on its modifications or abolition, and on better alternatives (Hansard 22 August 1985). The committee was headed by Tony Siaguru, who until shortly before, had been a senior Minister, and was given until 31 July 1986 to complete its task. Considerable emphasis was placed on the need to know people's views (although the General Constitutional Commission set up to do that had already reported), but some people considered that its conclusions were foreordained, which is perhaps not surprising in view of the statement of the mover of the motion to set up the committee, Sir Pita Lus, who said that 'the establishment of provincial government throughout Papua New Guinea is like a disease' (Hansard 22 August 1985).

In October 1985, in an effort to counter the criticism about the bias of the committee, its chairman sought the approval of the Parliament to change its terms of reference by substituting 'decentralisation' for 'provincial government'. He informed the house that the committee (whose budget was nearly K500 000) had commissioned an advertising company to conduct a nationwide opinion poll to 'provide a statistically valid indication of the opinions and major concerns of village people regarding provincial, local and community government' and it had itself meanwhile begun a nationwide tour to meet the people and their leaders (Hansard 3 October 1985). (The committee later abandoned the public opinion poll, after it was persuaded by its staff, of methodological difficulties). The Opposition, led by Palas Wingti, Okuk, Chan and Dutton attacked the formation of the committee. Okuk alleged that its sole purpose was to provide jobs for certain politicians and to destroy provincial government since 'the Prime Minister's party never wins provincial elections', while Wingti attacked the government for the indecisiveness implicit in the setting up of the committee (Hansard
30 October 1985). So it was not surprising that when Wingti defeated Somare's government, one of his first acts was to abolish the committee (Hansard 22 November 1985).

Under the Wingti Prime Ministership (November 1985 to July 1988) there were fewer direct confrontations between the national government and the provinces. Nevertheless, the basic antagonism on the part of national government continued, with frequent attacks on the provincial government system being made by both backbench MPs and individual Ministers. A proposed amendment to the OLPG was gazetted soon after the 1987 National Election which would have made national MPs full voting members of their provincial assemblies, but the proposal was not proceeded with following strong provincial opposition expressed at the 1987 Premiers' Council Conference. An indication of the underlying attitude of the Wingti government was provided some months after its defeat in July 1988 in a motion of no confidence when Wingti, as Opposition Leader, stated that if he had been able to do so when he was Prime Minister, he would have 'abolished' the provincial system. He claimed that: the country was over-governed; provincial governments hindered effective coordination by the centre; the system was expensive; goods and services were not being delivered; provinces were increasing inefficiency, misappropriation and political instability; and provinces were breaking down national unity (Post-Courier, 4 November 1988). Other than providing extremely inaccurate figures of costs of the system, the allegations were not substantiated. Nevertheless, they probably accurately represent the views of a majority of MPs.

Under the Namaliu Government, in power from July 1988, intergovernmental relations appear to have substantially improved. Namaliu himself, and several of his key Ministers, are firmly committed to the provincial government system. Major efforts are being made to improve relations, with improved financial allocations to the provinces in the 1989 budget, and the promise of the introduction into Parliament of long awaited amendments to the financial provisions of the OLPG early in 1989. But a number of Ministers and many backbenchers on both sides of the Parliament remain opposed to the system, so that the passage of the amendments is by no means assured. Within the elements of the national government opposed to provincial government, there continues to be discussion of possible ways of emasculating the present system, and should Wingti or another member replace Namaliu before the next general election (due in mid-1992) the underlying tensions are likely to emerge once more in the form of open conflict about the future of the system.
8. CONCLUSION

Several comments about decision making in areas affecting intergovernmental relations may be made. A large number of reports and enquiries have been made.\textsuperscript{15} There would appear to be several reasons for the proliferation of reports. In the beginning of decentralisation, there was both considerable uncertainty about the legal provisions and the best method to implement them as well as a general anxiety about the consequences of decentralisation. Initial reports by Ghai and Isana, Barnett, Saldhana and McKinsey may be accounted for in this context.

Subsequent reports and enquiries have served a different function. They have generally been initiated when the relevant authorities have been unable to resolve a controversy. The appointment of a committee has been a way to avoid a confrontation and sometimes a device to avoid making a decision. Financial reviews would fall into this category, as would the FC resolution (never carried out) to review national legislation in the concurrent areas.

On the whole, the reports have had little effect (the exception being the first McKinsey report). This phenomenon is not surprising when the intention behind the establishment of a committee is to avoid confrontation or a decision. How does one explain the inaction over reports where this has not been the intention? It may be that the heat has gone out of an issue by the time the report is presented or that there is a new Minister. A major factor has been the failure of the various government coalitions at the national level to develop or pursue a consistent policy on provincial government. It may also be that despite all the controversy about provincial government, it does not affect the basic national social and economic systems in any fundamental way. Nor should one discount the element of inertia, which also helps the national government, best able to implement change but which is favoured by the status quo. A likely explanation for inaction over

\textsuperscript{15} Apart from the reports discussed in this paper, there were several others. In 1978, Ghai and Isana reviewed the legal provisions and Ross Garnaut prepared a report on the economic impact of the OLPG; Ghai made another review in 1982; Justice Barnett reported in 1977 on the transfer of powers to provinces; Justice Saldhana reviewed the OLPG in 1977; and in 1984, an interdepartmental committee of officials (Prime Minister's Office, Justice and Provincial Affairs) reviewed various practical difficulties arising from the operation of the laws, and made specific recommendations which the Minister for Provincial Affairs endorsed (see Appendix 1). In addition, there have been a number of reviews of the public service, which have included an examination of public service in the provinces.
those recommendations which are non-controversial or have been endorsed by the NEC is the low priority given by national departments to decentralisation and the lack of technical ability to deal with the complexity of the recommendations.

The piecemeal approach to the review process and the implementation of recommendations has led to considerable uncertainty about many aspects of the system of provincial government and sometimes about the very future of the system. Much effort and energy are wasted on fruitless debate and on attempts to counter proposals that may have little chance of implementation. The seeming irrationality of the system is compounded by the number of occasions on which important changes have been proposed or made without any preparatory work.

We have already reviewed constitutional changes which led to the membership of the MPs in the assemblies of their provinces, or the simplification of the suspension procedure, or the proposed change to the OLPG which would give MPs representation in the provincial executive and a vote in the assembly. All these are matters on which there are considered reports. Little use appears to have been made of them when embarking on the changes. Nor does there appear to be much reflection before traumas like the referendum proposal are inflicted upon the system. Perhaps these are not as irrational as they seem. They are inextricably connected to the kind of political and economic system that has developed in the country. They reflect the growing mistrust between the politicians and public servants, the fluidity of political forces, the lack of party discipline and the absence of collective responsibility, and the consequent inability of the government to manage parliamentary business effectively. Provincial government both adds to and suffers from these circumstances.

If policy about fundamental changes in the constitutional structure is so fraught with controversy and indecisiveness, success in more technical areas where reform is desirable is scarcely better. A good example is the review of the financial provisions of the OLPG. It became clear soon after the implementation of the law that there were several unsatisfactory features of the financial arrangements, particularly in the formula for the MUG. It was reduced progressively as a proportion of national revenues and the provinces whose financial transfers were dependent upon it were increasingly unable to maintain previous levels of services or assets. Even the national government recognised the problem and persuaded the PC at its conference in 1980 to set up a joint committee to review the financial provisions and make recommendations for amendments. The committee (composed of senior officials of the national government and provincial governments) reported in 1982 that the formula for the MUG should be altered, either by tying it to a proportion of the national revenue or negotiations between the national government and provincial governments. It made several other recommendations including strengthening the independence of the NFC (Papua New Guinea 1982).
Although the committee had consulted widely with all the governments and other interested groups, and even though its chairman was the deputy secretary of the national Department of Finance, the PC was unable to take a decision on its recommendations and instead appointed an implementation committee to advise the NEC on the report. The implementation committee reported to the PC at its 1983 conference with its views on the recommendations, but also stated that in its opinion the financial committee had not provided sufficient data about the operations of the financial provisions of the OLPG nor considered, in adequate detail, the financial implications of its recommendations. It proposed the appointment of a specialist committee to carry out a detailed assessment of the situation to date and make recommendations. Four persons from outside the government were selected for their technical expertise and submitted their report in April 1984, shortly before the conference of the PC in May.

The 'specialists' held several meetings with politicians and officials from the national government and provincial governments and made a considerable effort to discover the common ground between them. On that basis, they made a large number of recommendations, including the revision of the MUG and five-yearly reviews for the allocation of national revenue to the provinces. The PC conference in May 1984 only had time for a brief consideration of the report but in view of the importance of the subject, agreed to hold a special meeting in July to discuss it. Various premiers met before the PC meeting to agree on a common position, and achieved a large measure of consensus. Matters were more problematic at the PC, primarily because the national government seemed ill-prepared. Most of its officials at the meeting were new to the subject and therefore not familiar with the specialists' recommendations or the background to them.

After a day's adjournment to allow the national Ministers to consider the report, the PC made good progress and at the end of the meeting there was, at least notionally, a common position on most recommendations. A large majority of the recommendations were accepted, a few with modifications. The NEC did not consider the matter until almost a year later, in fact just before the following PC, but accepted most of them, and Prime Minister Somare was able to tell the 1985 PC that drafting instructions had been issued and that the amendments would be in place shortly. However Somare's government fell from power before the amendments were introduced in the Parliament, but his successor Wingti, accompanied by his Minister for Finance, Chan, assured the PC in 1986 that his government would proceed with the amendments. There was, however, no movement on this until mid-1988 when an interdepartmental working group prepared some financial changes which were introduced administratively in the 1989 budget. In October 1988, the working group was expanded with the addition of provincial representatives, and drafting instructions for the main changes recommended in 1984 were prepared. Whether the Namaliu Government will agree to direct
the preparation of the necessary amendments, and whether such amendments will gain the necessary support in Parliament remains to be seen. Given the basic antipathy towards provincial government in the Parliament, there must be some doubt. So eight years after the review process began, its outcome remains far from certain. Similar accounts may be told of reviews of other parts of the constitutional provisions about provincial government.
## APPENDIX I

Reviews of the Constitutional Laws on Provincial Government —
Summary of Recommendations Proposing Legislative Amendments

<table>
<thead>
<tr>
<th>Proposed Amendment</th>
<th>Implementation</th>
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<tbody>
<tr>
<td><strong>A. 1978, &quot;Review of the Constitutional Laws on Provincial Government&quot; by Y.P. Ghai and M. Isana, a Report to the Minister for Decentralisation.</strong></td>
<td></td>
</tr>
<tr>
<td>(1) Constitution s.38: Amend to give provincial governments clear power to qualify the qualified rights under the Constitution (p.11).</td>
<td>Nil</td>
</tr>
<tr>
<td>(2) Constitution s.117: Amend to give National Parliament clear power to legislate to give effect to international treaties even in primarily 'provincial' legislative areas (p.13).</td>
<td>Nil</td>
</tr>
<tr>
<td>(3) Constitution s.100: Amend to make it clear that exclusive provincial legislative powers do not offend s.100 (3) (p.15).</td>
<td>Nil</td>
</tr>
<tr>
<td>(4) Organic Law s.71: Amend to remove loophole allowing &quot;roll over&quot; of six-month loans (p.24).</td>
<td>Nil</td>
</tr>
<tr>
<td>(5) Constitution s.131: Amend to give the Parliamentary Salaries Tribunal authority over provincial assembly members' salaries (p.26).</td>
<td>Constitutional Amendment No. 6 (in 1981).</td>
</tr>
<tr>
<td>(7) Public Service provisions under the Organic Law — review of provisions needed to make Public Service a &quot;national&quot; rather than a &quot;central government institution&quot; (p.29).</td>
<td>Nil</td>
</tr>
</tbody>
</table>
(8) Introduce other legislation to implement OLPG, namely:

(a) Commission on Suspensions Act (p.30)  
No implementation needed after amendment to OLPG provisions for suspension made in 1983.

(b) Transfer of Powers Act (p.32)  
Provincial Governments (Transfer of Activities) Act C 401 implemented to small degree.

B. November 1980: 'General Constitutional Commission Interim Report' (This Report followed a 1979 'Interim Report' which examined most aspects of the Constitution except provisions on provincial and local-level government which are the sole subjects of this Report).

(a) OLPG to be amended (within three years of National Parliament adopting the Commission's Report to provide for a 'Provincial and Local-level Governments Review Commission'. The details of operation of the commission should be spelt out in an Act of Parliament. The commission should examine: distribution of powers and functions and conflicts between levels of government and administration of local and provincial government (pp.i-iii).  
Nil

(b) Make stocktake of powers on primality provincial and concurrent legislative subjects and of national laws on concurrent subjects with view to delegating some powers by legislation (p.iii).  
Nil
(c) Simplify procedure on notification of provincial laws (p.iii).
Nil

(d) Pass Act setting out procedures for meaningful consultation.
Nil

(e) Pass Act implementing OLPG s.43 (p.iii).
Nil

(f) Develop principles to guide determination of provincial and national boundaries on sea beds and international seas (p.iv).
Nil


- Committee of Review on Financial Provisions of the OLPG established pursuant to a 1981 PC resolution. (Made wide-ranging recommendations on amendment of financial provisions of the Organic Law, but the Premiers’ Council rejected the Report and a new committee (the 'Specialist' Committee was established (see 'F')). For that reason, the recommendations are not listed here.
Nil

D. February 1983: Memo to the Secretary, Department of Provincial Affairs, by Y.P. Ghai (a report commissioned by the Department of Provincial Affairs).

Recommended consideration of introducing a schedule to the OLPG setting out basic principles and rules to which every provincial constitution should conform.
Nil


1. Chapter 8 of the Report stated support for the recommendations of its 1980
Interim Report (see 'B') and also made additional recommendations as well as endorsing the recommendations of the Committee of Review on Financial Provisions of the Organic Law on Provincial Government (see 'C'). The recommendations of that Committee of Review were listed in Appendix I to the GCC Report. As those recommendations were superseded by the 'Specialist' Committee (see 'C' and 'F') they are not repeated here. Recommendations additional to those made in the 1980 Interim Report (see 'B') are wide ranging, mostly covering administrative matters. Those with legislative implications include:

(a) Provisions for nominated provincial assembly members to be phased out - OLPG s.16 (Recommendation 1.1 (A)).

Nil

(b) National Parliament Members not to be part of provincial executive bodies - OLPG s.17 (Recommendation 1.1 (B)).

Nil

(c) Salaries of premiers and speakers as far as possible comparable - Constitution s.131 (Recommendation 1.1 (C)).

Nil

(d) Provincial assemblies to adopt committee system recommended by CPC - OLPG s.17 (Recommendation 1.1 (D)).

Nil

(e) All public servants in a province to come under umbrella of provincial government (Recommendation 3.3 (A)).

Nil

(f) Provincial governments not to directly recruit overseas staff (Recommendation 3.3 (D)).

Nil

(g) Most essential and skilled staff to be distributed equitably amongst provinces according to needs (Recommendation 3.3 (E)).

Nil
(h) New provinces should not be created until system implemented for some time (Recommendation 4.4 (C)).

(i) Provisions on public servants standing for provincial elections should be the same as for national elections (Recommendation 5.5 (A)).

(j) Prohibition on educational qualifications for candidates for provincial elections (Recommendation 5.5 (B)).

(k) Uniform electoral laws in all provinces (Recommendation 5.5 (C)).

(l) Electoral Commission functions to remain centralized (Recommendation 5.5 (D)).

(m) Clarification needed as to whether Premiers’ Council resolutions bind the national government and other authorities (Recommendation 6.6 (C)).

(n) Provincial governments to be permitted to take the national government to court on some matters (Recommendation 6.6 (D)).

(o) Proposed amendments to OLPF re-suspension, to be passed as a matter of urgency (Recommendation 7.7.).

(p) Provincial governments to be directed to develop effective local-level governments (Recommendation 8.8 (A)).

(q) Suitable form of government to be established for National Capital District (Recommendation 1.1, p.179).

2. Chapter 12 of the Report (National Legal System) recommended that "the system of Organic Laws in the Constitution be done away with" (Recommendation 1.1).
F. April 1984: 'Review of Inter-governmental Fiscal Relations in Papua New Guinea', a Report of a committee established by the NEC on the recommendation of the Premiers' Council on 1 December 1983 (the 'Specialist' committee).

(The 63 recommendations contained many proposed amendments which are summarised in tabular form below by reference to the following: the recommendation numbers; the numbers of the Sections of the OLPG where amendment was recommended; and the subject of the recommendation and/or section in question).

<table>
<thead>
<tr>
<th>Recommendation</th>
<th>Section</th>
<th>Subject</th>
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<tbody>
<tr>
<td>4</td>
<td>Schedule 1</td>
<td>Formula for Minimum Unconditional Grant (MUG)</td>
</tr>
<tr>
<td>5</td>
<td>s.66 [1]</td>
<td>Deduction of royalties from derivation grant</td>
</tr>
<tr>
<td>6</td>
<td>ss.75-81</td>
<td>Abolition of NFC</td>
</tr>
<tr>
<td>12</td>
<td>New provision</td>
<td>Requirement of consultation on nationally funded projects</td>
</tr>
<tr>
<td>23</td>
<td>New provision</td>
<td>Establishment of a special fund for equalisation</td>
</tr>
<tr>
<td>25</td>
<td>s.58</td>
<td>Retail Sales Tax</td>
</tr>
<tr>
<td>30</td>
<td>s.59</td>
<td>Land Tax</td>
</tr>
<tr>
<td>32</td>
<td>s.69</td>
<td>Court fees and fines</td>
</tr>
</tbody>
</table>

Most amendments proposed in this document were accepted by the NEC under the Somare Government, in May 1985, and again under the Wingti Government in May 1986. Some of the proposals were modified by NEC either: (a) on recommendation of a special PC conference held in July 1984; or (b) on advice by national government departments. Prime Minister Wingti promised the 1986 Premiers' Council conference in May 1986 that the amendments as approved by NEC would be included in an amending law proposed to be introduced into Parliament during 1986. Although the Office of Legislative Counsel did some work on drafting the amendments, amending legislation had not been introduced to Parliament by October 1987.
33  s.71  Borrowing
40  Schedule 1.3  Salary deductions from NUG
41  s.49  Redeployment of public servants
47  New provision  Availability of national records on provincial finance
49  New provision  Prohibition of deficit budgets by provinces
50  s.73  Require financial report by end of April
52  New provision  Intermediate sanctions against provinces
55  New provision  Recognition of criteria, etc; for full financial responsibility
57  s.36  Publication of provincial laws
59  s.31  Notice of proposed national laws on concurrent subjects
62  s.17  Size of provincial executives
61  New provision  Establishing of Intergovernmental Relations Commission

(1) Legal status of provincial constitution - repeal OLPG s.13.

(2) Amend OLPG s.16 (technical)

(3) Set four-year maximum term of office for provincial legislatures.

(4) Limit provincial executives to maximum number of one-third of assembly members.

(5) Repeal OLPG s.31 and replace with provision requiring publication in National Gazette (proposed laws on concurrent subjects).

(6) OLPG ss.34 - 36 to be repealed, and replaced with provisions saying provincial laws don't come into force until published in the National Gazette.

(7) Amend OLPG s.37 to simplify procedures for disallowing provincial laws.

(8) Amend OLPG s.69 to clarify reference to s.41.

(9) Amend OLPG s.112 to make consistent with s.126(8) of the Constitution.

(10) Amend OLPG s.50 to make provincial "Secretaries" appointed by Head of State on advice of NEC (no input from provincial governments appointments).

(11) New provisions on financial controls on provincial governments following suspension.

(12) Amendment of suspension provisions to include some recommendations made by the 1983 Premiers' Council conference.

(13) Amendments to clarify some aspect of the suspension provisions.
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