

TAMING THE ROBBER BARONS? THE REFORM OF FORESTRY LEGISLATION IN PAPUA NEW GUINEA

by

David Mossop*

These ... studies demonstrate some aspects of the fog which is casting its cloud over forestry in this country. It is a mixture of meandering intellectual neglect, bureaucratic inefficiency and lack of honest political commitment to the visionary ideals of the Constitution. Underneath this fog of inertia there are very active timber companies (in partnership with some very greedy citizens) which are using many devices to manipulate landowners and politicians for one end only. Their aim is to cut down trees and transport them to log ships ... and in this activity they are being very successful ... Unless our authorities take control, the resource will be destroyed and a great opportunity for this and succeeding generations will be gone for ever ...¹

The Independent State of Papua New Guinea lies in the Pacific Ocean to the north of Australia and east of Indonesia. It comprises the eastern half of the island of New Guinea, the islands of New Britain, New Ireland and Bougainville, as well as numerous smaller islands. Papua New Guinea has a population of 3.9 million people and a land area of 462,840 square kilometres. Of this area, approximately 77% is forested. The forestry industry contributes 4.6% of the gross domestic produce of Papua New Guinea and timber exports represent 8.5% of the total value of exports. Around 95% of timber exports are in the form of logs and in recent years there has been a decline in onshore timber processing.²

The purpose of this article is to provide an overview of the recent history of the regulation of the forestry industry in Papua New Guinea and to critically examine the impact of the *Forestry Act 1991*.

Constitutional Background to Forestry Law

At the centre of any discussion of natural resources law in Papua New Guinea must be the Constitution. It is within the Constitution that is to be found the vision of the type of society that it was hoped could be achieved by the Papua New Guinean people. Because of this, and because of its centrality to law, it is in the context of the Constitution that forestry legislation and its effectiveness must be judged. Of particular importance to forestry law are the National Goals and Directive Principles.³ The National Goals and Directive Principles are statements in the preamble to the Constitution that provide the goals by which "all persons and bodies, corporate and unincorporate" are to be guided. While they are not directly justiciable⁴ "it is the duty of all governmental bodies to apply and give effect to them as far as lies within their respective powers".⁵

* BSc, LLB, Solicitor of the Supreme Court of New South Wales.

1 TE Barnett, *Report of the Commission of Inquiry into Aspects of the Forestry Industry*, Commission of Inquiry, Port Moresby (7 Interim Reports and Final Report) [hereafter Commission of Inquiry], Interim Report No.5 1987-1979 at 32.

2 World Bank (1990) *infra* n.30 at 10.

3 Constitution of the Independent State of Papua New Guinea [hereafter Constitution]. Preamble: National Goals and Directive Principles 1-5.

4 Constitution s.25(1).

5 Constitution s.25(2).

Particularly important to forestry law is the fourth set of National Goals and Directive Principles relating to Natural Resources and Environment:

We declare our fourth goal to be for Papua New Guinea's natural resources and environment to be conserved and used for the collective benefit of us all, and be replenished for the benefit of future generations.

We accordingly call for:

- (1) wise use to be made of our natural resources and the environment in and on the land or seabed, in the sea, under the land, and in the air, in the interests of our development and in trust for future generations; and
- (2) the conservation and replenishment, for the benefit of ourselves and posterity, of the environment and its sacred, scenic and historical qualities; and
- (3) all necessary steps to be taken to give adequate protection to our valued birds, animals, fish, insects, plants and trees.

Read in the context of the other National Goals and Directive Principles, it is evident that, according to the Constitution, natural resource development should emphasise small scale, Papua New Guinean owned, sustainable development that is compatible with traditional community and culture.⁶

Division of Power Between National and Provincial Government

Under the *Organic Law on Provincial Government*⁷ power is granted to Provincial Governments to make laws in relation to specified heads of power. These heads of power are grouped into two categories, those of primarily provincial subject matter and those of concurrent subject matter. In matters within the primarily provincial heads of power the national parliament only has power to make laws to the extent that the Provincial Government has not made exhaustive laws on the subject, and a law of the National Government can only have effect in so far as it is not inconsistent with the provincial law on that subject.⁸ In relation to concurrent legislative powers, a Provincial Government can make laws and they have effect so far as they are not inconsistent with those of the National Parliament.⁹ Unlike s.109 of the Australian Constitution, the question of inconsistency is only justiciable at the instance of the National Government or a Provincial Government.¹⁰

Matters relating to forestry, land development and natural resources are subjects of concurrent legislative powers.¹¹ As a result it is possible for provincial legislatures to make laws in so far as they are not inconsistent with national laws.

Brief History of Forestry Policy¹²

The *Forestry Act*¹³ is derived from the *Forestry Ordinance* 1936-71 of the Territory of Papua and the *Forestry Ordinance* of the Territory of New Guinea 1936-71 which were adopted at Independence. This legislation reflects the highly centralised colonial model of forestry administration.

It was in order to overcome the extremely centralised and cumbersome administration of the

6 Papua New Guinea Law Reform Commission *New Directions in Resource Management for Papua New Guinea*, Occasional Paper No.20, Law Reform Commission, Boroko 1990 at 5-10; B Brunton & D Colquhoun-Kerr, *Annotated Constitution of Papua New Guinea*, University of PNG Press, Port Moresby 1985 at 624.

7 Revised Laws of Papua new Guinea [hereafter Revised Laws], Chapter 1.

8 *Organic Law on Provincial Government*, ss.23-26.

9 Sections 27-29.

10 Section 28.

11 Sections 27(n), 27(y).

12 This brief history of forest policy is drawn largely from the discussion in the Commission of Inquiry (1989) *supra* n.1, Final Report (Vol.1 at 41-54; Vol.2, Appendix 1, at 1-56).

13 Revised Laws, Chapter 216.

Forestry Act that, in 1971, the *Forestry (Private Dealings) Act*¹⁴ was introduced. This brief Act essentially allowed landowners to dispose of their forest resources with very little intervention from any government authority. It allowed the Minister for Forests, "on application by any interested person ... or of his own motion" to declare an area to be a Local Forest Area.¹⁵ Within Local Forest Area customary owners were permitted to sell or dispose of timber rights to any person.¹⁶ The agreement reached between the landowners and the purchaser of forestry rights required the assent of the Minister, but this could only be refused on limited grounds.¹⁷

It was only after this Act was introduced that the government sought to establish any national forest policy. This policy came out of the traditional foresters perspective on forest management. The emphases of the policy were on protecting and managing the forest estate as a national asset. It aimed to promote the establishment of permanent forest processing industries, an effective scheme of reforestation, full local participation and protection of the environment.

However, neither the reality of the *Forestry (Private Dealings) Act* nor the growing log export industry received consideration in the policy. These matters "were too distasteful for the professional foresters who drafted the policy to mention".¹⁸

In 1975 Papua New Guinea became an independent state. The *Forestry Act* and the *Forestry (Private Dealings) Act* were both adopted under the new Constitution without amendment.¹⁹ The legislation remained unchanged after *Constitutional Amendment No.1* of 1976 and the *Organic Law on Provincial Government* which radically altered the structure of government and the administration of the legislation.

Although in 1974 large scale log exports were ignored in the formulation of policy, by 1979 when the Revised National Forestry Policy was published, log exports had apparently become central to forestry policy. At more or less the same time as quite sophisticated environmental legislation was enacted²⁰ the Revised National Forestry Policy provided guidelines within which to allow increasing export of logs (as opposed to processed timber products) from Papua New Guinea. Policy on forms of forestry other than large scale log exporting or processing were not dealt with. The guidelines related to four areas:

- (1) Proposals and guidelines for the formation and operation of Papua New Guinea Log Exporting Enterprises
- (2) Investment guidelines for enterprises involved in timber processing
- (3) Guidelines for foreign enterprises involved in large log export operations and not processing within Papua New Guinea
- (4) Guidelines for foreign enterprises involving in limited log export/road construction contracts.

Of the first two sets of guidelines, the Commission of Inquiry found that they had been of little success in promoting Papua New Guinean owned enterprises, or large scale domestic processing industries. Of the third, the Commission concluded that "the observer could be excused for believing that the guidelines were prepared for a different country. It became apparent ... that virtually none of these guidelines are being followed".²¹

Because of ongoing concern over transfer pricing,²² in 1986 the National Executive Council

¹⁴ Revised Laws, Chapter 217.

¹⁵ Section 4.

¹⁶ Section 5.

¹⁷ Section 6.

¹⁸ Commission of Inquiry (1989) Final Report, Appendix 1 at 24.

¹⁹ Constitution, Schedule 2.6-2.7.

²⁰ The *Environmental Planning Act* (Revised Laws, Chapter 370), the *Environmental Contaminants Act* (Revised Laws, Chapter 368) and the *Water Resources Act* (Revised Laws, Chapter 205) were all passed in 1978.

²¹ Commission of Inquiry (1989) Final Report, Vol.2, Appendix 1 at 43.

²² Transfer pricing or profit shifting is the undervalue of exports or the overvalue of imports by a company - see Law Reform Commission of Papua New Guinea *Transfer Pricing Manipulation in PNG*, Occasional Paper No.12, Law Reform Commission, Port Moresby 1980; Commission of Inquiry (1989) Final Report Vol.2 at 270-290.

decided to allow the Forest Industries Council²³ to become the State Marketing Authority and exercise the State Purchasing Option of 25% of a company's log export quota.

In 1988 when the Namiliu government came to power the National Forest Development Programme 1987-1991 was updated and then approved by the National Executive Council. The basic aim of the policy was to increase the area allocated to logging by over four million hectares and to increase the volume of log exports.

Commission of Inquiry Into Aspects of the Forestry Industry

On 29 April 1987 a Commission of Inquiry was established to inquire into allegations concerning the involvement of the Forest Industry Council of large scale marketing of timber on behalf of the State. Originally the inquiry was expected to be completed within six months. After preliminary investigations, the documents subpoenaed by the Inquiry revealed to the Commissioner improper relationships between the Forest Industry Council, the Minister for Forests and members of the timber industry. Furthermore, the Commissioner found that "all trails led to transfer pricing".²⁴ Consequently he sought and obtained amendment to the terms of reference for the Commission of Inquiry to include these matters.

Ultimately the Commission of Inquiry ran for over two years, produced seven interim reports and a final report in two volumes. In total the report of the Commission comprises 4842 pages.

The report of the Commission of Inquiry is a:²⁵

highly regarded piece of research into the actual operations of the PNG timber industry. It reveals the entire mechanisms of the timber industry as it currently operates in PNG and shows that there has been corruption and use of privilege at all levels.

The Report reveals widespread transfer pricing, corruption throughout government and government agencies, destruction of the timber resource and few benefits from resource exploitation flowing to either landowners or to the nation. To gain a full impression of the scale of the problem or the pervasiveness of corrupt practices throughout the industry, readers should refer to either the excellent summary of the report provided Marshall²⁶ or to the report itself which provides in graphic and meticulous detail the extent of the malaise in the administration and execution of forestry in Papua New Guinea.²⁷ A much quoted passage from Interim Report No.4 will give readers an impressionistic view of the extent of the problem:²⁸

It would be fair to say, of some of the companies, that they are now roaming the countryside with the self-assurance of robber barons; bribing politicians and leaders, creating social disharmony and ignoring laws in order to gain access to rip out, and export the last remnants of the provinces valuable timber.

These companies are fooling the landowners and making use of corrupt, gullible and unthinking politicians. It downgrades Papua New Guinea's sovereign status that such

23 The Forest Industries Council was established by the *Forest Industries Council Act* (Revised Laws, Chapter 215). It was comprised of forest industry participants and its prime function was "to promote and develop the forest products industry". It had power to register forest products operators and to allocate distinguishing timber marks to those operators.

24 Commission of Inquiry (1989) Final Report at 7.

25 G Marshall, *Summary of the Commission of Inquiry into Aspects of the Forestry Industry*, Asia Pacific Action Group, Hobart (1990). This is more widely available both within PNG and Australia and provides a good summary of the findings of the Commission.

26 *Ibid.*

27 Because of the damning nature of the report of the Commission of Inquiry, the report itself has been suppressed. Although the interim reports and the Final Report were all presented to the National Parliament of Papua New Guinea, few were ever printed and very few copies were made available to the public. In 1991 a photocopy reprint of the Final and Interim Reports was produced which has made the report more widely available. The 1991 "reprint" has a uniform pagination from 1 to 4842 in addition to the pagination in the original reports. References herein are to pagination in the original reports.

28 Commission of Inquiry (1989) Interim Report No.4 at 84.

rapacious foreign exploitation has been allowed to continue with such devastating effects to the social and physical environment, and with so few positive benefits.

It is doubly outrageous that these foreign companies ... have then transferred offshore secret and illegal funds ... at the expense of the landowners and the PNG government.

In virtually all areas of policy the government's stated policy bore little relation to what the Commission referred to as "de facto forestry policy". putting forestry policy, legislation and practice in the context of the National Goals and Directive Principles, the Commission stated:²⁹

Although "lip service" has been paid towards some of these constitutional goals in the legislation and policy statements ... it became sadly apparent during the course of this inquiry that none of them have been achieved, or even energetically pursued, in practice.

The trend of forestry practice had been to move away from the centralised conservative model of colonial forestry to the radical version of forestry that developed under the *Forestry (Private Dealings) Act*. Initially policy espoused values consistent with first, the conservative colonial forestry policy and then, the visionary aims of the Constitution that emphasised benefit to all Papua New Guineans through local processing and national involvement in forest resource utilisation. Since the revised forest policy of 1979, policy has moved closer to the radical log export policy which has characterised the reality of forestry since prior to independence.

The Tropical Forestry Action Plan Report

At the same time as the Commissioner, Justice Barnett, was preparing the Final Report of the Commission of Inquiry, a report was being prepared by the World Bank, under the auspices of the Tropical Forestry Action Plan (TFAP) for the reform of the Papua New Guinean forestry industry. The TFAP is an initiative of the World Bank, the Food and Agriculture Organisation of the United Nations, the United Nations Development Program and the World Resources Institute. In February 1990 the World Bank's report entitled "Papua New Guinea The Forestry Sector: A Tropical Forestry Action Plan Review" was released.³⁰

The report recommended a programme for action by the government of Papua New Guinea focussing on "six problem areas that most warrant urgent attention". These "problem areas" and the responses proposed in the report are summarised in Table 1.

Table 1: Major Problem Areas and Priorities for Action identified by the World Bank in the TFAP Report³¹

Problem Area	Proposed Actions
Inadequate Resource Assessment	(i) rapid resource inventory in 12 months (ii) 4-5 year inventory of forest resources
Breakdown in effective management of forest resources	New approach to forest administration including (i) National Forestry Board to advise Minister (ii) Specialised standing committees to the Board (iii) Four Regional Forestry Boards to administer forestry plans (iv) a new Forest Service (v) new financial framework with guaranteed income for special purpose funds

29 Commission of Inquiry (1989) Final Report, Vol.2, Appendix 1 at 33.

30 World Bank *Papua New Guinea The Forestry Sector: A Tropical Forestry Action Plan Review*, A report prepared by the World Bank under the auspices of the Tropical Forestry Action Plan, February 1, 1990.

31 *Ibid* at 77-86.

Table 1 (continued)

Problem Area	Proposed Actions
Failure to maximise returns from logging	(i) comprehensive review of royalty, export tax and other revenue measures (ii) State Purchasing Option (SPO) on timber should be extended, becoming autonomous and self funding (iii) Employ marketing firm to market timber from the SPO
Uncompetitive Forest Processing Sector	(i) adopt measures other than a ban on log exports (ii) consider development of (a) integrated sawmill board manufacturing plant (b) woodchipping and (c) a pulp mill
Serious environmental problems arising from logging	(i) World Heritage proposal to cover large part of upland areas and some island and coastal areas (ii) formulation of a national conservation strategy (iii) rehabilitation of national parks (iv) improvement of ecological survey and monitoring (v) training for local leaders in negotiation and land use management (vi) fund activities of non government organisations in forestry and conservation area (vii) feasibility study for land use research council

Proposed in the report was a reduction of timber cutting to a "sustained yield" of 3.6 million cubic metres annually³² and the creation of World Heritage Areas.³³ The losses flowing from this "reduction" in timber extraction would be compensated for by international donors underwriting revenue losses for up to \$US15 million per year for five years.³⁴ In addition, the actions proposed by the TFAP were to be made possible through the provision of funding and technical assistance by international donors. Budgets for projects detailed in annexures to the report totalled just under \$US20 million.

The meeting in April 1990 of proposed donors to the TFAP provided a focus for opposition to the World Bank's proposals. The TFAP Review was comprehensively criticised on environmental, economic and social grounds including:

- (1) its focus on industrial forestry development;
- (2) the commodification of rainforests as a timber resource;
- (3) being founded on the unproven and uncertain concept of "sustained yield";
- (4) being premised on the maintenance of Papua New Guinea as a supplier of unprocessed resources;
- (5) the failure to take into account the political and constitutional framework in which it was meant to operate;

32 *Ibid* at 56.

33 Convention for the Protection of the World Cultural and Natural Heritage, ATS 1975 No.47, UKTS 1985 No.2.

34 World Bank (1990) *supra* n.30 at 79-80. The reduction is a reduction from logging levels proposed by the Department of Forestry of 6 million cubic metres per annum. Actual logging was approximately 2 million cubic metres in 1988 and 2.2 million cubic metres by 1992. Thus to refer to the "sustained yield" figure as a reduction may be misleading as may be the figure of \$US75 million which would be dependent upon harvesting levels reaching 3.6 million cum/yr.

- (6) the failure to recognise the importance of customary landowners in the development process; and
- (7) the inappropriateness of the World Heritage Area concept as a vehicle for conservation in Papua New Guinea.³⁵

In the light of the criticisms that had been made of the TFAP Review proposals the Minister for Forests announced at the end of the meeting that:

- (1) there would be a two year ban on the issuing of new logging permits commencing June 1990; and
- (2) no new permits issued after that point would be allowed to export timber as logs -only timber processed within PNG would be allowed to be exported from new logging areas.

The moratorium had named exceptions to it when it was initially agreed to by the National Executive Council in May 1990. A further five areas were exempted in December 1991. The moratorium was extended to 23 July 1993 but a continuing flow of new permits claimed to be extensions or renewals of existing projects and projects under negotiation at the start of the moratorium has meant that the effectiveness of the moratorium has been questioned.³⁶ The actions of the Minister and Secretary of the Department of Forests in the allocation of new forestry areas in the lead up to both the national elections and the introduction of the new Act in breach of the moratorium suggests, at least, an improper rush to beat the more comprehensive legislation.³⁷

The New Forestry Act

Prompted by the findings of the Commission of Inquiry and the recommendations of the World Bank, the government introduced a new Forestry Bill in mid-1991. Government amendments to the bill on the floor of the parliament made the Papua New Guinea Forest Authority, which was to play a central role under the proposed act, subject to Ministerial direction.³⁸ This destroyed the independence of the Authority which was to be one of the significant reforms of the legislation. The amendments also gave to the Minister the power to "delegate to any person all or any of the powers and functions of the Board" under the Act.³⁹ The only limitation on this power was that the Minister must consult with the Board prior to the delegation. The Act was passed in July 1991.

Although the Act sets up a series of foci of power which are designed to balance each other and avoid the failure of accountability which was the feature of previous legislation, the amendments are a significant erosion of this control and accountability. While the rhetoric of the parliamentary debate was admirable, stressing local control and benefits, railing against the large foreign owned companies destroying the forests, there was at the same time a strong distrust of bureaucrats and the desire to retain ministerial power.

Despite being passed in July 1991 the *Forestry Act* 1991 came into force one year later. The initial date set for its introduction was 1 April 1992 which was later revised to April 15. This was later set back to 25 June on the grounds that there were administrative difficulties in bringing the Act into force earlier. During the extra two months (which was also the two months prior to the national election in June 1992) a number of timber permits were renewed or extended under the

35 BD Brunton, *Critique of the World Bank's Tropical Forestry Action Plan Review for Papua New Guinea*, Working Paper No.26, Papua New Guinea Law Reform Commission, Boroko (1990); and GM Marshall, *The World Bank Tropical Forest Action Plan for Papua New Guinea: A Critique*, unpublished.

36 For example, "Stack Sticking to Forestry Plans", *Post Courier* 15 November 1990; "New Log Permits Granted", *Post Courier* 22 November 1990; "Stack Denies Turnabout", *Post Courier* 11 December 1990 at 2; "Forests Fiasco - Minister Will Ask for More Moratorium Exemptions", *Post Courier* 8 May 1991 at 1.

37 "FTMC Advised About Breach of Moratorium", *Times of Papua New Guinea*, 28 May 1992 at 1; "Genia Action Over Timber Permits is Questioned", *Post Courier* 1 June 1992 at 3; "PM: Proposals Rushed in Bid to Beat New Act", *Post Courier* 2 June 1992 at 3; "State Accused of Breaking its Own Policies", *Post Courier*, 2 June 1992 at 12.

38 *Forestry Act* 1991 s.7.

39 Section 19.

old legislation, hence avoiding the stricter requirements of the new legislation.⁴⁰ On the current schedule, the Papua New Guinea Forest Authority established under the Act is anticipated to be operational at the beginning of 1993.

Despite the amendments which put the Board at the mercy of the Minister, the Bill is a great advance on the unfettered discretion afforded the Minister under the old legislation. The most important elements of the legislation are:

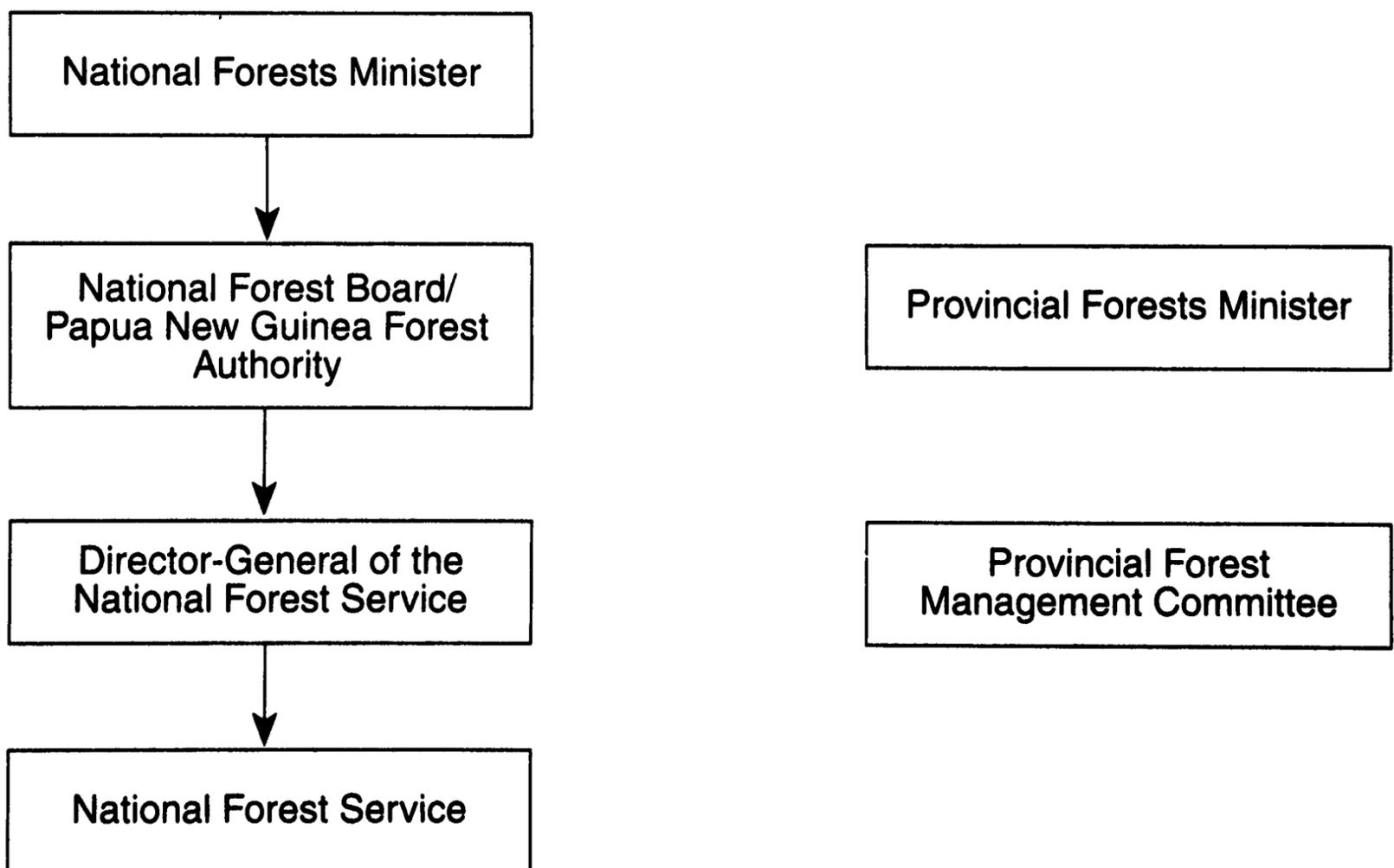
- (a) the creation of a National Forest Board and Provincial Forest Management Committees to be involved in the administration of the Act;
- (b) the introduction of a legislative basis and procedure for forestry planning;
- (c) the reform of resource allocation procedures including the repeal of the *Forestry (Private Dealings) Act*.

One of the most noticeable features of the new Act is the existence of differing levels within the administration established by the Act. Whilst under the old legislation all power lay with the Minister, under the new Act, while the Minister has retained substantial power, other institutions are established which should temper its use. Some of these are shown in Figure 1.

Administration

The Act establishes a corporation called the Papua New Guinea Forest Authority. The Authority has a central role, advising the Minister and implementing most aspects of the Act and any other forestry related legislation.⁴¹ As mentioned above, it is subject to direction by the Minister.⁴² However this situation should be contrasted with the old *Forestry Act* under which all power resided with the Minister.

Figure 1: Major institutional players under the *Forestry Act 1991*



40 "An Unhealthy Delay for Our Forest Resources", *Times of Papua New Guinea*, 16 April 1992 at 7; "New Forests Act in force from June 25", *Post Courier*, 22 April 1992 at 12; "Why Postpone the Gazettal of the New Forestry Act", *Times of Papua New Guinea*, 21 May 1992 at 8; "Forestry Act in force June 25", *Post Courier*, 2 June 1992 at 14.

41 Section 7 - Functions of the Authority.

42 Section 7(2).

The functions of the Authority are carried out by a National Forest Board (the Board) which comprises ministerially appointed representatives of the National Government, the Forest Industries Association, the National Alliance of Non-Governmental Organisations and of Provincial Governments. Provincial Forest Management Committees (PFMCs) are also established with members appointed by the Board from the provincial administration, the National Forest Service, members of the National Parliament, local and community governments, landowner and non-government organisations.⁴³ Members of the PFMC are kept accountable to their constituencies by allowing the nominating group to request the termination of the appointment of their representative on the PFMC.⁴⁴

Also created is the National Forest Service, headed by a Director General, which constitutes the staff of the Authority.⁴⁵ The Minister may also establish a State Marketing Agency to exercise the State option to purchase at least 25% of the logs which a holder of a timber permit is allowed to export each year.⁴⁶

The core of the legislation is in Part III of the Act entitled "Forest Management and Development". There are three important elements of this Part: (1) forestry planning; (2) resource acquisition; and (3) resource allocation.

However, before dealing with these three aspects of Part III it should be pointed out that these elements of the legislation are to be read in the context of the blunt assertion that:

The rights of customary owners of a forest resource shall be fully recognised and respected in all transactions affecting the resource.⁴⁷

The effect of this section is unclear, particularly in relation to the other sections of the Act. It might be read as a non-justiciable guide to action, the failure to comply with which does not affect the validity of acts done under the legislation. This, however, would make it a mere legislative superfluity. On the other hand, it might be read as being in addition to the other provisions of the legislation, providing an additional requirement for acts under the legislation to be valid. If this is the case then one must attempt to grapple with the section's meaning and implications. The two pivotal terms are "respected" and "resource". If read as being a substantive provision, that "the rights of customary owners shall be fully ... respected" provides a limitation in addition to, for example, the exercise of rights under a forestry permit. It should also be noted that the interests that need to be respected are those in the **forest resource**. The second question relates to what is a "right of a customary owner in a forest resource". The rights of customary owners in a forest resource are not simply limited to the timber values, since customary owners find value in other forest products, in wildlife and also recognise non-material values in forests. When these values crystallise into a right is unclear although the adoption of a western property based approach to the concept of rights in this regard would be singularly inappropriate given the statutory and constitutional context in which it occurs.⁴⁸

A possible limitation on this section is that it is limited to "transactions affecting the resource". Transaction may be considered to be either a transaction involving proprietary interests or be read in the wider sense of the carrying out of the scheme of the Act.

Forestry Planning

There are two levels of forestry planning: (a) the preparation of a National Forest Plan;⁴⁹ and

43 Section 22.

44 Section 25(3).

45 Sections 33-34.

46 Sections 42, 43 and 115. The exercise by the State Marketing Agency of the State Purchase Option is designed to reduce the impact of transfer pricing - see note 22 above.

47 Section 46.

48 Constitution Preamble - Adoption of Constitution, National Goals and Directive Principle 5, Schedule 2.2.

49 Sections 47-48.

(b) the preparation of Provincial Forest Plans.⁵⁰ This contrasts markedly with the old *Forestry Act*, which contained no provision for forestry planning.

National Forest Plans

The Authority must now prepare a National Forest Plan (NFP) which is "a detailed statement of how the National and Provincial Governments intend to manage and utilise the country's forest resources".⁵¹ The NFP as a whole must be consistent with the National Forest Policy and relevant government policies, and be based on the National Forest Inventory which is to be defined by the regulations.⁵² The NFP consists of three elements:⁵³

- (i) National Forestry Development Guidelines prepared by the Minister in consultation with the board and endorsed by the National Executive Council; and
- (ii) the National Forest Development Programme; and
- (iii) a statement, prepared annually by the Board, of allowable cut volumes, being the amount of the allowable cut for each province for the next succeeding year which will ensure that the areas of forest resource set out in the Provincial Forest Plan, for the present or future production, are harvested on a sustained yield basis.

How these potentially conflicting aims will be reconciled with each other and with the National Forest Policy is difficult to imagine. The only element of the NFP that could provide objective standards to be met are the allowable cut volumes which must ensure that forest resources of the provinces are "harvested on a sustained yield basis".⁵⁴

The overt subordination of the plan to the "national forest policy" and other government policies is unfortunate. It creates a potential conflict between the subjective standards of the "national forest policy" and the objective standard of a "sustained yield" harvest.

Sustained Yield

The concept of "sustained yield" is borrowed from earlier government documents⁵⁵ and the TFAP Review.⁵⁶ There are three difficulties with the concept. The first is that nowhere has it been adequately defined. Whilst one might expect that it would be interpreted in terms of the wise management of the resource for future generations, the Commission of Inquiry reported that Department of Forestry officers interpreted it as "the maximum volume for annual harvest which will ensure that the forest will not be cut out before the end of the permit period" [!]⁵⁷ Clearly, in the light of such differences some clarification of the concept is desirable.

The second difficulty is that it focuses on forests as a timber resource. The sustained yield is a sustained yield of timber, rather than sustained yield of forest products, or sustainable forest management. Under a sustained yield management trees regrow, rather than the original forests. Other forest values are allowed to suffer.⁵⁸

The final difficulty with the concept is whether, even if the concept is limited to timber resource, it can be achieved in Papua New Guinea. Based on current practice there is little evidence that replanting of forests or regeneration of logged forests occurs at anywhere near the rate of loss from commercial timber operations.

50 Sections 49-51.

51 Section 47(1).

52 Section 135(1)(zg).

53 Section 47(2).

54 Cf, Constitution, National Goal 4.

55 *The Forestry Subsector in the Medium Term Development Strategy 1989-93*, summarised in World Bank (1990) *supra* n.30 at 11.

56 World Bank (1990) *supra* n.30 at 16-22.

57 Commission of Inquiry (1989) Interim Report No.5, Appendix 4 at 14.

58 Cf, the concept of "ecological sustainability" in the context of forest management "The resource which provides all the values of forests is the forest ecosystem. Ecological sustainability requires that such ecosystems continue to exist and function in a natural way in perpetuity" - Resource Assessment Commission *Forest and Timber Inquiry Draft Report Vol.1*, AGPS, Canberra (1991) at 20.

While read out of its statutory and political context the concept of sustained yield could be equated with sustainable forest management, its subservience to government policy and the history of the forestry in Papua New Guinea makes this unlikely. Its achievement is not simply a question of biology or resource assessment, it is a political question which, in its statutory context is unlikely to guarantee sustainable forest management.

Plan Revision

Apart from the annual statements detailing allowable cut volumes, it is unclear how the National Forest Plan is to be revised. On its face the provisions provide no mechanism for alteration. However, if the National Forest Plan is to be consistent with government policy it would appear that it would have to be altered whenever government policy was altered. Such uncertainty is not conducive to the stability or effectiveness of the planning process.

What Plans Regulate

The importance of the National Forest Plan is that "forest resources shall only be developed in accordance with the National Forest Plan".⁵⁹ The concept of "forest resources" is not defined and it is not clear whether it is limited to timber resources or encompasses all aspects of forests that are of use to humans. If this second meaning is adopted the plans are of very great importance in that they will need to consider a wide range of forest uses that pass the threshold of being considered to be forest development. The latter approach is the better one given that authorities may be issued "for the purposes of harvesting of other forest produce".⁶⁰ It would be anomalous if on the one hand the NFP was limited to timber resources yet authorities could be issued for the exploitation of other forest resources.

Provincial Forest Plans

Provincial Governments are required to produce a Provincial Forest Plan "in conformity with" the National Forest Development Guidelines. These plans must include provincial Forestry Development Guidelines and a "five year rolling forest development programme". Provincial Forestry Development Guidelines must:⁶¹

- (a) provide an overview of the role of forestry in the economy of the province; and
- (b) be broadly directed towards areas of industrial, rural, economic and social development objectives; and
- (c) set out broad objectives and predictions for the long term of 40 years and, in greater details, for the medium term of 10 years; and
- (d) state how the forestry sub-sector is expected to contribute to the economy; and
- (e) be renewed every three years.

Completed plans must be submitted to the Board which may require that any inconsistencies with the National Forest Plan or the National Forest Development Guidelines be removed.⁶²

The requirement that Provincial Forest Guidelines be renewed every three years creates similar uncertainties as those in the National Forest Plan as to how they are renewed or revised. While guidelines are renewed every three years, the forestry development programme is a five year one. It is unclear whether Provincial Forest Plans will need to be resubmitted to the Board every three years or every five years.

Despite these uncertainties in relation to resource planning, the fact that there is to be planning is a great step forward. Elements of the system of planning that make it subservient to political direction rather than to objective goals of sustainable forest management are unfortunate. With the control over the Board that can be exercised by the Minister there is potential that the planning

59 Section 54.

60 Section 87(1)(c).

61 Section 49(3).

62 Section 50.

process will be reduced to an ad hoc process of incorporating political decisions into plans which will become little more than a register of resource allocation decisions rather than a genuine forestry planning process.

Resource Acquisition

One of the important features of the Act is that it repeals the *Forestry (Private Dealings) Act*. This means that the State is now required in all major forestry developments to be an intermediary between resource owners and resource developers.

The mechanism that the State does this is through acquisition of rights to the forest resource through a Forest Management Agreement (FMA)⁶³ which is similar to the timber rights purchase under the old Act.⁶⁴ The parties to an FMA are the State and the customary owners of the land. The customary owners are those in whom the land is vested under the *Land Groups Incorporation Act*⁶⁵ or registered under a law providing for the registration of customary title to land. If this is not possible then the written consent to the FMA of 75% of the customary resource owners of each customary landowning group resident on the land is required.⁶⁶

An FMA gives the State, and persons claiming under the State, the exclusive right to harvest, grow and manage timber in the area covered by the agreement. Timber harvesting must be in accordance with the agreement.⁶⁷ FMAs must specify their length, the area that they cover, an estimate of the harvestable timber in the area and the monetary or other benefits to be received by the resource owners in consideration for the rights granted to the State.⁶⁸ Once the FMA has been entered into, the only responsibility of the Board is to consult with the landowners and the Provincial Government about its intentions to grant timber permits over the area.⁶⁹

It appears the FMA is a statutory contract between the State and the customary landowners. It is from its terms that the obligation of the State arise. Thus, the contract should be enforceable against the state and if not subject to the same doctrines of discharge for breach and frustration as are available in contract, would be subject to the doctrine of *ultra vires* if the State acted other than in accordance with the agreement.

Resource Allocation

Once the State has acquired rights to the timber resources on customary land it is then in a position, subject to the FMA, to allocate that resource to others. A forest development project is "a project to develop forest resources" on land subject to an FMA or on government land.⁷⁰ The three forms of permission that the State can grant to allow forest development projects are: (1) timber permits; (2) timber authorities; and (3) timber licences. Generally speaking, timber permits will be for large scale export logging, timber authorities for logging of an annual volume of less than 5,000 cubic metres for domestic processing, and licences are required to engage in activities related to forestry such as harvesting, transport, sale or marketing of timber.

The Act provides an extensive procedure for the issuing of permits which will be the appropriate authorisation for most large scale operations. An indication of the process is given in Figure 2. Figure 3 shows the process that is applicable to the granting of timber authorities. From these figures it should be apparent that power is distributed between the PFMC, the Provincial Minister, the Board and the National Minister. Although, as a result of the amendments to the Act, the influence of the National Minister has been greatly increased through the power

63 Section 56.

64 Section 8.

65 Revised Laws, Chapter 147.

66 Section 57.

67 Section 60(b)(1).

68 Section 58.

69 Section 59.

70 Section 2.

to give directions to the Board, the complicated process will tend to mitigate against abuses of power.

One of the important aspects of the process for the granting of timber permits is the integration of the requirements of the *Environmental Planning Act*.⁷¹ The Minister must require, and all applications for timber permits must be accompanied by, an environmental plan that is acceptable under the *Environmental Planning Act*.

In contrast to timber permits, timber authorities do not require that a Forest Management Agreement be entered into with the State.⁷² This allows landowners some of the freedom to deal with their own resources without the State acting as an intermediary. However, unlike the situation under the *Forestry (Private Dealings) Act*, logging can only be on a limited scale with authorities being restricted to an annual harvest of less than 5,000 cubic metres of timber which must be for domestic processing. Furthermore, although the resource is not acquired by the State, the consent of the State is still required. The authority is evaluated by the PFMC and the Provincial Minister may grant the authority with the consent of the Board.

It is at this level that there may be some conflict with resource owners who are developing an alternative model of tropical forestry – that using the Wokabout Somil. The Wokabout Somil is a small portable sawmill which can be used to mill the timber where it falls in the forest. While the output of such mills are small, processing about one cubic metre of timber per day, the returns for the landowners on timber are high.⁷³ These small operations will require timber authorities if they are to be operated within the law.

While there are provisions that regulate dealing in timber permits⁷⁴ there remains no explicit requirement to consult the owners of the resource or to receive their consent to the transfer. While licences are not transferable⁷⁵ there are no provisions relating to the transferability of timber authorities.

Enforcement

It is an offence to “carry out forest industry operations” other than in accordance with a timber permit or timber authority. Forest industry operations includes the harvesting, sale, export or processing of timber or other forest produce for commercial purposes, but does not include traditional uses of trees or forest produce. Penalties are fines up to K100,000 or imprisonment for up to five years.⁷⁶ Engaging in activities such as harvesting, transport, sale or marketing without a licence is an offence punishable by a fine of K100,000.⁷⁷ In addition to penalties imposed for breaches of the Act, the guilty party is also liable for loss or damage caused by the offence.⁷⁸

As part of the ongoing control of forestry operations, holders of timber permits must submit five yearly and annual logging plans to the Director-General.⁷⁹ The contents of these plans are to be specified by regulation.⁸⁰ The National Forest Service is required to check on the work proposed in the annual logging plan and where it is satisfied that the work has been completed it must issue a certificate to that effect. Where such a certificate has been issued the holder of the permit may continue operations.

71 Revised Laws, Chapters 370.

72 Section 55(1)(e).

73 “Sawmill Earns Money”, *Post Courier*, 30 April 1991 at 22; see also Commission of Inquiry (1989) Final Report, Vol.1 at 173-174.

74 Sections 79-84.

75 Section 96.

76 Section 122(1).

77 Section 122(3).

78 Section 127.

79 Sections 101-102.

80 Section 135(1)(zh).

Figure 2: Simplified schematic diagram of timber permit approval process

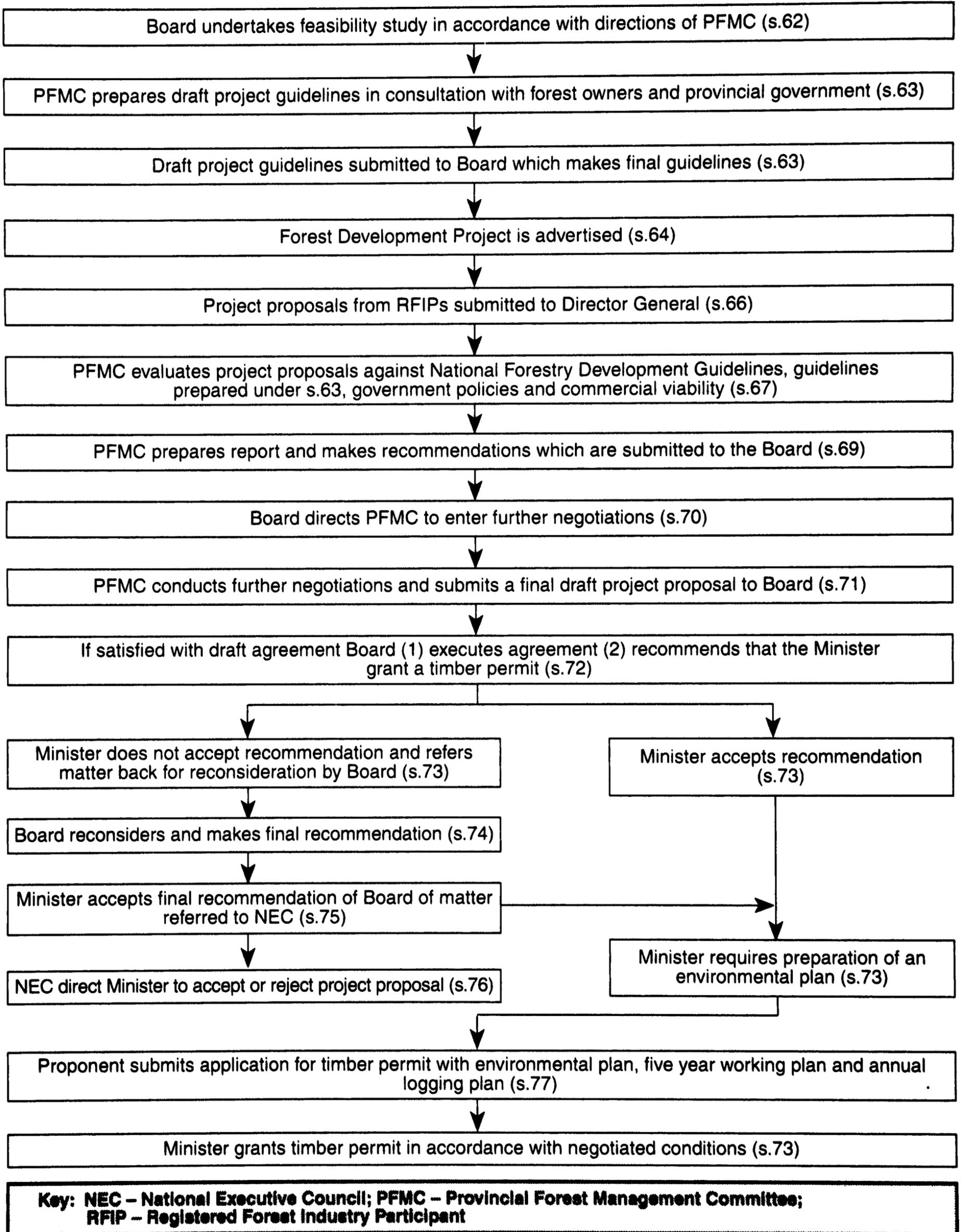
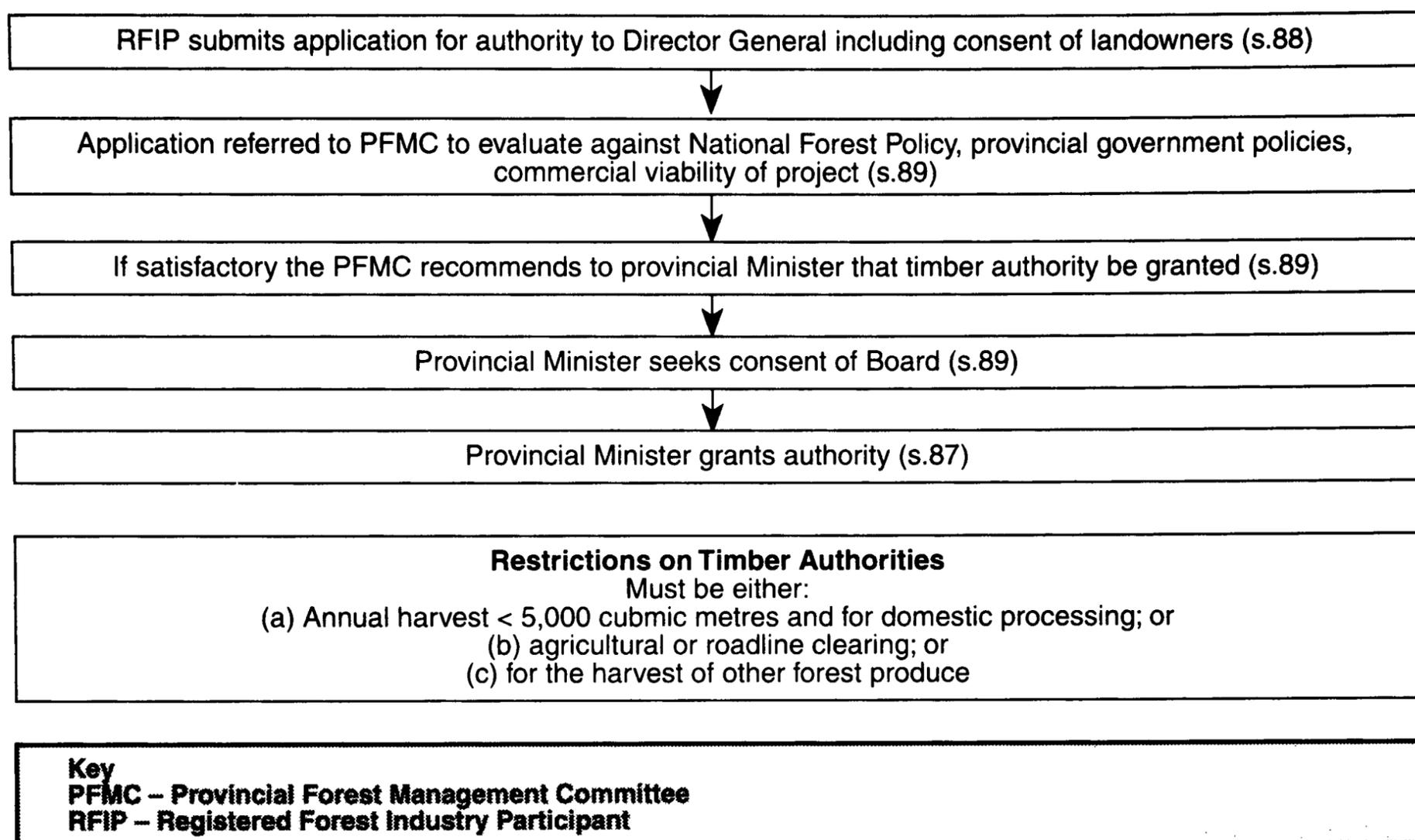


Figure 3: Simplified schematic diagram of timber authority approval process

While these provisions are poorly drafted⁸¹ and much of their content remains to be specified, they are an important enforcement mechanism. They mean that at least annually a public official is required to certify that the requirements of an annual logging plan have been performed. In addition, these logging plans will need to comply with the conditions on the permit.

There are other provisions to ensure compliance with the Act including performance bonds,⁸² requirements for the keeping of records,⁸³ the requirement that all those involved in forestry be registered forest industry participants,⁸⁴ and the power to seize timber involved in a breach of the Act.⁸⁵

While these provisions are important, more important is the degree to which the legislation can be enforced. Despite the reforms in the legislation and the administration of forestry it is likely that there will remain significant problems for enforcement. The division of powers between the National and Provincial Governments, and between the National Minister and public servants is likely to make enforcement a difficult process.

It is because of these difficulties that the potential for third party enforcement is important. Third parties may include landowners, rival timber companies and non-government organisations. For example, injunctions have been gained to restrain the Minister from proceeding to negotiate large timber concessions pending the coming into force of the new forestry legislation.⁸⁶ It is this kind of action which will provide an important element of accountability in the new

81 There is no clear prohibition on forestry operations in the absence of a certificate.

82 Section 98.

83 Section 103.

84 Sections 104-114.

85 Section 123.

86 "Genia Logging Plan Halted - Court Rules in Favour of Small Timber Operator", *Times of Papua New Guinea*, 21 May 1992 at 1.

Forestry Act.

While there are a variety of possible enforcement actions, there are four types of action that are particularly apparent. The first is action to restrain or remedy breaches of permit, authority of licence conditions. The second is enforcement of the Forestry Management Agreement by landowners against the State. The potential for such an action depends largely on the terms of the agreement but may make the State liable for the actions of the permit holder operating under the FMA. The third is enforcement of the requirement for an adequate environmental plan under the *Environmental Planning Act* and, where a plan has been approved, enforcement of the conditions attaching to that approval.⁸⁷ The fourth is action to restrain the operations of permit, authority or licence holders where those instruments were granted without compliance with the mandatory procedural requirements detailed above.⁸⁸

Standing to bring these actions should present few obstacles. The *Environmental Planning Act* provides that any person may take action for offences against the Act.⁸⁹ Although there is no statutory open standing provision in the *Forestry Act*, in most instances applicants will be landowners, Provincial Governments or persons immediately affected by forestry operations. As a result they would have standing under the traditional tests.⁹⁰ If this were not the case then strong arguments could be made that in the context of the National Goals and Directive Principles, any person, or at least a wider range of persons, should be able to bring an action to restrain a breach of the *Forestry Act*.^{91,92}

Potential for Action by Provincial Governments

Because of the division of legislative powers between the Provinces and the National Government in relation to forestry,⁹³ Provincial Governments retain the power to make laws in relation to forestry in so far as those laws are not inconsistent with any Act of Parliament.⁹⁴

On at least two occasions this power has been exercised by Provincial Governments. In 1989 the Manus Provincial Government was involved in a dispute over the Minister for Forests proposal to declare Local Forest Areas under the *Forestry (Private Dealings) Act* in Manus Province. Having failed to get an injunction to restrain the Minister from making the declaration the Provincial Government passed the *Forest Resource Management Act* 1989.⁹⁵ This was designed to ensure that logging under the national law only took place on a sustained yield basis, that is, a basis that would ensure the viability of the timber resource indefinitely. Harvest limits were set under the Act and once the timber companies operating under the national law exceeded the limits set under the provincial laws they were successfully prosecuted by the Province.⁹⁶

More recently, East New Britain Provincial Government has passed the *Forestry Operations*

87 *Environmental Planning Act* s.19.

88 For example, *Scurr v. Brisbane City Council* (1973) 133 CLR 242.

89 Section 27.

90 *Boyce v. Paddington Borough Council* [1903] 1 Ch.109; *London Passenger Transport Board v. Moscrop* [1942] AC 332; *Baker v. Carr* (1962) 369 US 186; *Australian Conservation Foundation v. Commonwealth* (1980) 54 ALJR 176.

91 National Goals and Directive Principles, s.25(2); see also *Gupta v. President of India* (1982) AIR(SC) 149, *Environmental Defence Society Inc v. South Pacific Aluminium Ltd (No.3)* [1981] 1 NZLR 216, *Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses* [1981] 2 All ER 93, *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)* (1973) 412 US 669.

92 Despite being not directly justiciable, the potential impact of the National Goals and Directive Principles should not be underestimated - cf, Constitution of India, Art.32; *MC Mehta v. Union of India & Ors* (1992) AIR(SC) 382.

93 Discussed above.

94 *Organic Law on Provincial Government* s.28(1).

95 Commission of Inquiry (1989) Interim Report No.5, Appendix 4, Schedule 7.

96 AJ Regan, "The decentralised system of government and the future management of national resources in Papua New Guinea" (1990), in *New Directions in Resource Management for Papua New Guinea*, Papua New Guinea Law Reform Commission, Boroko at 21.

Control Act 1992.⁹⁷ Like the Manus legislation this requires forestry companies to comply with additional requirements before being allowed to exercise their rights under National Legislation. Prior to commencing forestry operations a logger must provide the Provincial Executive Council with:

- (1) copies of its timber permit or licence;
- (2) a copy of any agreement entered into with any other person regarding forestry operations;
- (3) a "forestry operations development plan"; which includes – details of community and rural development and improvements in transportation that will result from forestry operation; measures that will be taken to ensure that wildlife is adequately protected; details of employment and training that will result from the project and reforestation measures to be taken during and after timber harvesting.

While the enforcement of such legislation is uncertain, the creation of these procedural requirements greatly enhance provincial control over forestry operations authorised under national legislation. However the potential for provincial legislation is more limited than was the case under the old legislation. The *Forestry Act 1991* is a much more comprehensive piece of legislation than were its predecessors. Arguably, it demonstrates an intention to "cover the field" in the area of forestry hence, indirectly, making later provincial legislation inconsistent with it and hence inoperative to the extent of the inconsistency.⁹⁸ Because of this, the procedural measures such as those in the *East New Britain Forestry Operations Act* may represent the limits of the exercise of Provincial Government legislative powers in this area.

Conclusion

Forestry development is in many ways a microcosm of many of the social and political tensions in Papua New Guinea. These include tensions between national control and foreign control, environmental protection and development, centralisation and decentralisation, the emerging capitalist bourgeoisie and people living largely traditional lifestyle. One can also characterise the tension as being that between the type of development advocated in the Papua New Guinean Constitution and the type of development that is currently practiced in the country.

Viewed more narrowly, the problems in the forestry industry can be confined to systemic corruption and a breakdown of accountability and administration. Whilst the new *Forestry Act* is yet to be tested, the indications are that it will significantly alter the administration of forestry in Papua New Guinea.

However, even if these problems can be tackled – and the depth of the malaise in the administration revealed by the Commission of Inquiry and events since make it questionable that this will be possible – there is a deeper problem. Beyond the procedural questions of the administration of forestry in Papua New Guinea there lies the substantive policy.

The substantive policy question is whether or not the tropical rainforests will be "mined" for their timber resources at the expense of the entire ecological system and long term benefits that would flow from their conservation. The policy question is not divorced from the procedural questions because the failure in administration is largely attributable to the same interest groups that support unsustainable forest management. However, it is only on the substantive issues that these interests have overt institutional support and hence at a procedural level there is potential for forcing change. Yet while there is always a substantive impact of procedural laws, challenges of the scale necessary to conserve tropical rainforests are too great for procedural reforms such as the *Forestry Act*.

Unlike Western Nations however, where natural resource administration is achieved by

97 "New Britain Gets Tough with Loggers", *Post Courier* 5 May 1992, Provincial News at 1.

98 *Organic Law on Provincial Government* s.28; on indirect inconsistency under the Australian Constitution see P Hanks, "'Inconsistent' Commonwealth and States Laws: Centralising Government Power in the Australian Federation" (1986) 16 *Fed L Rev* 107 at 114-132.

bureaucratic means,⁹⁹ in Papua New Guinea the position is fundamentally different. Because the forest resource is owned by its traditional owners there is necessarily decentralisation of decision making power. This has potential to be disastrous, as experience under the *Forestry (Private Dealings) Act* proved. But, on the other hand, there is power in property rights. There is the potential that informed resource owners will exercise their property rights in a manner that recognises that they have a choice of the type of resource development which they accept. It is the recognition on the part of landowners that industrial forestry may not be in their long term interests that is the key to the wise exercise of the power that flows from their proprietary rights. While this realisation is common in most resource use decisions and, once again, the forces working against such informed choice are great, in a country of such diversity as Papua New Guinea there is hope that there will be areas where such choice is possible.

The achievement of either procedural or substantive reform of the forestry industry is a daunting task. To date, the initiative for reform has not come from the government or the forestry industry. This will remain the case. In the short term, the new procedural weapons in the legal armoury are waiting to be tested. If landowners and non-government organisations can make use of them the forestry industry in Papua New Guinea is destined for an interesting future.

99 EF Murphy, *Native Bureaucracy and the Rules of Property*, Holland Publishing Company, Amsterdam (1977).