

# A Year in the Life of an Australian Member of the PNG Judiciary



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*In September 2011, the author was one of two Federal Court of Australia judges appointed to the Supreme and National Courts of Papua New Guinea (PNG) to sit on civil and commercial appeals. The article provides a personal account of the author's first year as a member of the PNG judiciary. This was an eventful and tumultuous year which saw the PNG Supreme Court order that the Hon. Sir Michael Somare be restored to the office of prime minister; simmering political tensions which followed that decision; the arrest of the Chief Justice, Sir Salamo Injia; a permanent stay of criminal proceedings against the Chief Justice; the enactment of the Judicial Conduct Act 2012 (PNG), which undermined the independence of the judiciary, and subsequent challenge to the validity of that Act; a further sedition charge being laid against the Chief Justice; and a national election. The author explores the impact of these events on the PNG judiciary. He also discusses options relating to the proposed establishment of a permanent Court of Appeal and an ultimate appellate court for PNG.*

The rear driveway of the Law Courts complex at Waigani, Port Moresby, exits onto Sir John Guise Drive.<sup>1</sup> In the late afternoon of February 2012, as I was being driven down that driveway, en route back to my hotel after a day sitting in court, I noticed a stocky man in rolled-up shirt sleeves and dungarees supervising a group of workers and laying out a plumbline for a rock retaining wall, then in the early stages of construction on the border of the driveway. He looked very like my new colleague, Sir Salamo Injia, the Chief Justice of Papua New Guinea (PNG), then of but recent acquaintance.

On arriving at court the following morning, I encountered the Chief Justice. I asked him whether it was indeed he who had been working on the wall. He confirmed that it was. He said that when he had assumed office the courthouse surrounds were stark so he had decided to commence

planting gardens. The rear driveway border was the latest part of that project. He said that at his official residence he had some staff whom he thought were underemployed at the time so he had asked them to volunteer to build the wall to retain a garden bed. He added that he had found that they didn't know how properly to lay its foundation or align it so he had been down showing them how to do that and helping.

Not every chief justice in the common law world has either that inclination or those skills. As I have come to know though, what I saw that day is a metaphor for Sir Salamo personally and for each of my other, PNG resident-judicial colleagues. Their line is true, their foundations are solid, and they are committed to the improvement of their country by the application of their knowledge and experience.

The Independent State of PNG lies immediately to the north of the eastern Australian mainland, separated by the Torres Strait. PNG is Australia's nearest neighbouring country, a mere four kilometres away from Saibai Island, the northernmost Australian island in the Torres Strait. PNG comprises the eastern half of the island of New Guinea,<sup>2</sup> together with many offshore islands to the east in the Bismarck and Solomon seas. It has a population of about 7,060,000 people,<sup>3</sup> the next largest after Australia in the South Pacific area.<sup>4</sup>

The southern half of PNG was once the 19th-century British Protectorate of Papua, administered by Australia from 1906. The northern half and the offshore islands were once the 19th-century German colony of New Guinea, which became an Australian League of Nations mandated territory in the aftermath of the First World War. They were administered together as an external territory of Australia following the Second World War.



PNG became independent from Australia on 16 September 1975. It is a constitutional monarchy with Queen Elizabeth II, in her capacity as Queen of PNG, as its Head of State. PNG has a unicameral system of responsible government. The Queen is represented by a resident governor-general. PNG's post-independence constitution provides a separation of powers in the Westminster model.<sup>5</sup>

PNG is experiencing a period of major economic development, led by its mining and resources sector.<sup>6</sup>

On 7 June 2010, the Hon. Ano Pala, then minister for justice and attorney-general for PNG, wrote to his then Australian counterpart, the Hon. Robert McClelland, supporting a proposal which had been made to their respective governments the previous year by the Chief Justice of PNG, Sir Salamo Injia, and then Chief Justice of the Federal Court of Australia, the Hon. Michael Black. In his reply, the Australian attorney-general confirmed that this support was reciprocated by the Australian Government, which viewed the proposal as consistent with the Papua New Guinea–Australia Law and Justice Partnership (PNGLJP).

By this stage, Chief Justice Black had reached the mandatory retiring age for Australian High Court and Federal Court judges (70 years). His successor, the Hon. Patrick Keane, maintained the Federal Court's support for the proposal. Chief Justice Keane sought expressions of interest from the Federal Court judges to be considered for appointment to the Supreme and National Courts of PNG.

Limiting factors for some judges who would otherwise have been interested in such an appointment proved to be the combination of the requirement under PNG law that the maximum term of judicial office for non-PNG citizens is three years<sup>7</sup> and the then requirement that, ordinarily, a judge was not to be appointed for a period that would extend beyond his or her 60th birthday.<sup>8</sup> Sir Salamo Injia and Justice Hartshorn, who is responsible for the 'commercial track' case list at Waigani, visited Australia to interview those who had expressed interest. Following this, Sir Salamo made a recommendation to the Judicial and Legal Services Commission, which is the appointing authority under the PNG constitution for all judges other than the chief justice.<sup>9</sup>

In the result, two judges of the Federal Court, Justice Berna Collier and I, came to be appointed to the Supreme and National Courts of PNG on 27 September 2011. The understanding between the courts is that we shall sit in the Supreme Court hearing civil and commercial appeals, rather than criminal appeals or constitutional references. The occasion for that understanding lies in the possibility that knowledge of local cultural norms may be important in some criminal cases and sensitivity to any suggestion, however misconceived, that the outcome of such a reference might be the result of a foreign influence.

The intention was that that Justice Collier and I would alternate in undertaking duty in PNG to the end that we would each undertake three deployments, each of one week's duration per year. That would mean that one of us would be present during each sitting of the Supreme Court during the year. As it transpired, Justice Collier was only able to undertake one period of duty in the latter half of the year. To compensate, and in circumstances I shall shortly relate, I undertook an additional week's duty in PNG in 2012.

In time perhaps our duties may occasionally extend to undertaking some work in the commercial list in the PNG's National Court. The constraint with that is that our primary commissions are as Australian Federal Court judges and the demands of that and other Australian appointments which we each hold mean that there is limited scope for the assumption of additional work in PNG. The recent relaxation of the judicial retirement age in PNG may offer scope for additional appointments from the Federal Court, but there remains limited capacity within the present judicial establishment of the Federal Court for the assumption of additional commissions by the judges.

The terms of our appointment include a car and driver at call with an armed member of the Royal Papua New Guinea Constabulary (RPNGC) as escort. The latter is a precautionary measure. Law and order in Port Moresby is not all that PNG or its government would wish for, the product of a drift of population from villages to the city, stretched police resources and insufficient employment opportunities. With growing prosperity, that

problem should diminish but, at present, prudence dictates that we live in a guarded hotel compound and travel with an escort.

We took the required oaths of office and allegiance before the Governor-General, Sir Michael Ogio, at Government House, Port Moresby, on 1 December 2011 at a ceremony witnessed by the Chief Justice, the Deputy Chief Justice and most of the other judges of the Supreme and National Courts. We were welcomed at a ceremonial sitting of the Supreme Court at Waigani the following day.

And so began a year to remember.

On 12 December 2011, in *In re Reference to Constitution section 19(1) by East Sepik Provincial Executive* [2011] PGSC 41, the outcome of which was determined by majority of three to two, the Supreme Court made the following orders:

1. The Hon. Sir Michael Somare<sup>10</sup> was not lawfully removed from office as prime minister by parliament on 2 August 2011.
2. The Hon. Peter O'Neill was not lawfully appointed as prime minister by parliament on 2 August 2011.
3. The National Court has exclusive jurisdiction to determine any questions as to whether the seat of a member has become vacant.
4. The Speaker's decision of 6 September 2011 to declare that Sir Michael Somare had lost his seat was in breach of the constitution, sections 104 (2)(d), 135; and the Organic Law on National and Local Level Government Elections 1997, sections 228, 229.
5. The Hon. Sir Michael Somare is not a person of unsound mind within the meaning of section 103(b) of the constitution and the Public Health Act 1973 (Chapter 226).
6. The Hon. Sir Michael Somare is restored to office as prime minister forthwith.

Chief Justice Injia was a member of the majority. The order for restoration to office was not implemented. Instead, a series of extraordinary events occurred. It is not my place or purpose to pass any opinion on whether the various votes taken prior to last year's election by parliament in favour of

the prime ministership of Mr O'Neill were lawful. Instead, I want to focus on the year as it affected the judiciary.

It fell to me to undertake the initial deployment. So it was that in February 2012, I became the first serving Australian judge to sit in PNG since independence. As some with an intimate knowledge of PNG's post-independence history might know, judges of the former Australian Territory of PNG, on independence, became judges of the Supreme and National Courts of PNG. In 1979, in an event which has passed into PNG history as the 'Rooney Affair', these expatriate, former Territory judges, resigned.<sup>11</sup> There were times last year when I wondered whether history might repeat itself.

In the week prior to the first Supreme Court sittings for 2012, a judicial education workshop was held at Port Moresby under the combined auspices of the PNG Supreme and National Courts Judicial Education Committee, the Commonwealth Magistrates' and Judges' Association and the Commonwealth Secretariat. The theme of the workshop was 'Judicial Ethics'. As events proved, the chosen theme was prescient.

The workshop was attended by virtually the entire PNG Supreme and National Courts Bench, including Justice Collier and me, and the Chief and Deputy Chief Magistrates of PNG. Speakers and facilitators for the workshop were Mr Justice Carl Singh, OR CCH, Chancellor of the Supreme Court of Judicature of Guyana, District Judge Shamim Qureshi from England and Wales and Mr Mark Guthrie, legal adviser at the Commonwealth Office.

Over the course of two days we explored various aspects of judicial independence, including the Commonwealth (Latimer House) Principles, via a combination of formal presentations and scenario-based discussion. I found the workshop immensely rewarding. It was not just that the content was first rate. I had attended other, similarly themed, judicial education activities in Australia. What made this workshop so worthwhile was the participation in it of judges and magistrates drawn from four Commonwealth jurisdictions and from both developed and developing nations. I was struck, powerfully, by the benefits such Commonwealth-based activities offer over unilateral equivalents. It is impos-

sible with such multilateral participation to dismiss common solutions to common problems as neo-colonialist. Equally, as I now well know, it is easy for a judge in a developed nation to become complacent about respect for judicial authority, the rule of law and a constitutional separation of powers. The experience of jurisdictions of common heritage but different political conditions can serve as a powerful reminder of the constant need for vigilance in respect of such seeming givens.

The Supreme Court of PNG does not have a fixed composition but, instead, is constituted as required from the judges of the National Court in the same manner as the Full Court of the Federal Court and as the Full Court of those Australian states which have not established a permanent court of appeal. Both last year and this year, Sir Salamo has administered the appeals list such that for me this has had, and continues to have, the advantage of progressively sitting, in turn, with most of my PNG colleagues. I have found them able, collegiate and robustly independent.

In the week following the workshop, I sat on a number of civil appeals in the Supreme Court as a member of a three-person Bench. As it turned out, notwithstanding simmering political tensions as a result of the Supreme Court's December 2011 decision concerning the status of Sir Michael Somare, all too evident at the time from local newspaper reports, the February appeal sittings passed uneventfully.

In early March, on the weekend following the conclusion of the first sittings for the year and at the invitation of the Queensland Bar Association, Sir Salamo travelled to Australia to address the Bar's annual conference. His speech was well received. He was accompanied by Justice Joseph Yagi, who is the judge responsible for liaison with the practising profession.

On 6 March 2012, within days of his return to PNG, while he was travelling with his assigned police escort along Sir John Guise Drive in his official car on his way to court, Sir Salamo's vehicle was stopped by armed members of the police force. That such an event could occur in broad daylight in such a place underscores how flagrant it was.

Sir Salamo's escort was replaced by these armed officers. The Chief Justice was informed that he

was under arrest in respect of a charge of perverting the course of justice. He was conveyed under this armed escort first to his chambers so as to attend to pressing personal business and then to police headquarters and later that day to the Magistrates Court where he was formally charged and then bailed.

The charge arose out of a direction which the Chief Justice had made in respect of the payment of money into court in connection with the administration of the estate of the late the Hon. Timothy Hinchcliffe, following a dispute about entitlements to that estate. The deceased had been a judge of the Supreme and National Courts who had died in office in 2009. The Supreme and National Courts' Registrar, Mr Ian Augerea, whom I have come to know as an dedicated court administrator, was also arrested on a like charge on the basis of his compliance with the Chief Justice's direction.

This same alleged conduct had formed the basis of the purported suspension from office of the Chief Justice on 10 November 2011.<sup>12</sup> That suspension had been rescinded later that month by the National Executive Council, but only after then deputy prime minister, the Hon. Belden Namah, and then minister for justice and attorney-general, the Hon. Allan Marat, had been charged with, and briefly imprisoned for, contempt of court. A further, purported suspension of the Chief Justice on the same basis on 2 February 2012 was shortly thereafter stayed by court order.

At the time when the second suspension occurred a further case touching on the lawfulness of Mr O'Neill's assumption of the office of prime minister was pending in the Supreme Court and due to be heard in April 2012. In the result, in May, the Supreme Court, again by majority, affirmed the earlier conclusion that Sir Michael Somare remained the lawful prime minister of PNG.<sup>13</sup>

Following the arrest of the Chief Justice, a meeting of the judges was convened in Waigani on 8 March 2012 by the Deputy Chief Justice, the Hon. Gibbs Salika. All available judges of the Supreme and National Courts participated in that meeting either in person or, in the case of those posted elsewhere in PNG or non-resident in PNG, by telephone. Justice Collier and I participated in the meeting by telephone. After this meeting and on

behalf of the judges, the Deputy Chief Justice issued a public statement which commenced in this way: 'It is recognised that no judge is above the law. Notwithstanding this, the apprehension and treatment of the Chief Justice Sir Salamo Injia on the morning of 6th March 2012 by armed members of the police requires our comment.'<sup>14</sup>

Having made reference to the circumstances of the Chief Justice's arrest, the statement continued:

The actions of the police exhibit a complete lack of respect for the office of the Chief Justice, the Judiciary and its independence. Regardless of whether the offence with which the Chief Justice has been charged has merit, and on this point it is to be clearly understood that the Judges by making this statement are not to be taken as expressing any view, the above actions of the police on 6th March, breach the established understanding that a person holding high office is to be accorded the necessary courtesy and opportunity to present himself to an investigating authority for questioning. This courtesy and the opportunity were not given to the Chief Justice.

The actions of the police were amongst others, threatening, intimidatory and disrespectful not only of the Chief Justice but of the other Judges and court staff who happened to be at the Judges' Chambers complex when the armed police arrived. Moreover, the actions of the police in apprehending the Chief Justice and entering the Judges' Chambers complex as they did are unprecedented in Papua New Guinea and we believe in other jurisdictions where the rule of law is respected. We deplore and condemn these actions in the strongest possible terms. Such actions should not and will not be tolerated. The Commissioner of Police is urged to immediately enhance relevant procedures to ensure that such actions are not repeated.<sup>15</sup>

This statement came to be widely publicised both in PNG and abroad.

Also in the aftermath of the arrest of the Chief Justice and in the context of deliberations amongst the judges as to what collective response, if any,

ought to be made to that event, my colleague, Justice Kirriwom circulated a confidential memorandum amongst his colleagues in which he expressed his view as to the course of events on and from November 2011. Somehow, that memorandum was published to a wider audience.

On 13 March 2012, the National Court ordered a permanent stay of the criminal charges upon which Sir Salamo and Registrar Augerea had been arrested. The basis for the stay was that the charges were fundamentally flawed. Far from perverting the course of justice, the prosecution case at its highest revealed nothing other than an endeavour to ensure that the estate of the late judge was administered according to law and, further, that the funds paid into court had since been paid out to the beneficiary concerned, the late judge's adopted son, in accordance with the terms of the will.

Later that month, the parliament enacted the Judicial Conduct Act 2012 (PNG). That Act was based on a particular understanding, unsupported by precedent, for there was none, as to what was authorised by a parenthetical reference to 'other than the Parliament through legislation' in section 157 of the constitution. The Act provided that if it appeared to parliament that a judge had failed to disqualify himself on one or more of various bases set out in section 5(1), the judge might be referred to the Head of State for investigation and report by a specially constituted tribunal (section 5(2)). That tribunal was directed to report to parliament which was, in turn, then to take whatever action was necessary, including referral of the matter to the National Executive Council or the Judicial and Legal Services Commission 'for their consideration of the commencement of a process to remove the Judge in accordance with Section 197, 180 and 182 of the Constitution' (section 5(5)).

It is not immediately apparent how the procedures set out in this Act were reconcilable with the express provision for the removal and suspension of the Chief Justice and other judges in 'Subdivision H — Removal from Office of Senior Judicial and Legal Office-holders' of the constitution (sections 178–182). It is neither necessary nor appropriate for me to express any concluded view on that subject and I expressly refrain from so doing.

The Act also provided that where parliament had made a referral of a judge to the Head of State, the judge concerned was not, pending the provision of the tribunal's report to parliament, to hear or continue to hear a proceeding (section 5(7)). Yet further, it provided that, until the provision of that report, any order made by the judge in the proceeding concerned was stayed (section 5(8)).

On 4 April 2012, parliament resolved under the Judicial Conduct Act to refer the Chief Justice and Justice Kirriwom to an investigatory tribunal. That referral would, under the terms of that Act, have prevented each of them sitting on the further constitutional reference concerning the lawfulness of the O'Neill government, which was to be heard later that month. A week later, the Supreme Court stayed the operation of that decision pending the hearing and determination of a by then instituted challenge to the validity of that Act (*In re Judicial Act 2012; Special Reference by Morobe Provincial Executive* [2012] PGSC 12 at [25]).<sup>16</sup>

On 17 April 2012 a bill to amend the Judicial Conduct Act was introduced into the parliament. The proposed amendment made it a criminal offence, punishable by imprisonment for up to seven years, for a judge to sit while under a suspension by parliament. A further sanction was loss of all retirement benefits. It was also made an offence to sit with a judge who was subject to such a suspension. At the same time, the government introduced into parliament the Supreme Court (Amendment) Bill which purported to reverse the outcome of the November 2011 decision as to the reinstatement of Sir Michael Somare and to limit the power of the Supreme Court to grant interlocutory injunctive relief pending the hearing of a constitutional reference. That would, for example, have removed the power to stay the operation of the parliamentary referral of judges to a tribunal under the Judicial Conduct Act.

Justice Collier was unable to undertake the next deployment to PNG for the Supreme Court sittings at the end of April. I had a trial listed in Brisbane for that period but volunteered to Chief Justice Keane to take the place of Justice Collier if another judge could be found to sit on that trial.

In light of events, there was a degree of apprehension on the part of the Australian Attorney-

General's Department and our Department of Foreign Affairs and Trade about the dispatch of an Australian judge to PNG at that time. I took that view that the understanding between the courts needed to be honoured and that this was the very time in which my PNG colleagues would most value the presence of one of their Australian colleagues. In this I was fully supported by Chief Justice Keane. His Honour went to some length to find a substitute to hear the Brisbane trial. Off I went to PNG.

The atmosphere at the Waigani court complex was notably tense. What struck me though at each regular, early morning judges' meeting when the court business past, present and prospective was reviewed was the collective determination of the judges and registry staff to undertake 'business as usual'. The appeal list for that week was particularly heavy. The Chief Justice continued to make the requisite arrangements to ensure that the cases on the list were heard. And so they were.

In the course of hearing one of those appeals I was a member of a Bench when an application was foreshadowed that another member ought to recuse himself on the basis of alleged apprehended bias. The basis for the submission was completely unmeritorious but the prospect of action under the Judicial Conduct Act, however unconstitutional and misconceived, lent an insidious undercurrent to discussion with my colleagues about this foreshadowed application. In the result, the application was made. I closely questioned the counsel concerned as to the factual and legal foundation of the application. Thereafter, the application was not pressed.

On Monday, 21 May 2012 the Supreme Court delivered its judgment concerning the further reference in relation to whether Sir Michael Somare was lawful prime minister. The following day, Mr Namah made a statement giving Sir Salamo and two other judges 24 hours within which to resign lest they be arrested and charged with sedition. The occasion for that proposed charge would seem to have been the judgments which they had delivered in court.

Mr Namah is not unacquainted with the law of sedition. In the 1990s, when a junior officer in the PNG Defence Force (PNGDF) and in the aftermath of the 'Sandline Affair',<sup>17</sup> he engaged in conduct

which led to him being charged with, convicted of, and jailed for the offence of sedition. He was released from prison on parole in 2002 and granted a pardon by governor-general Sir Paulius Matane on the advice of the National Executive Council in 2005 on the occasion of PNG's 30th Independence Day.

On Thursday, 24 May 2012, accompanied by some soldiers and police, Mr Namah entered the courtroom in the Law Courts at Waigani where the Chief Justice was sitting. He attempted to arrest the Chief Justice. Sir Salamo was able to exit the courtroom before this could be effected. Something of a stand-off then occurred at the courthouse. After negotiations, the Chief Justice was formally interviewed at the court and then charged with sedition and released on bail. The following day the charge was adjourned until 25 July 2012. Those proceedings have since been discontinued, as have like proceedings which were brought in late May 2012 against Justice Kirriwom.

This second arrest of the Chief Justice was widely reported, including in a report by the Australian Broadcasting Commission's (ABC) PNG correspondent, Mr Liam Fox (Fox 25/7/2012). As published, that report includes the following statement of action taken and an observation made by Australia's then foreign minister, the Hon. Bob Carr:

Foreign Minister Bob Carr has also contacted the PNG government and urged it not to take action against Sir Salamo.

He says the PNG government should ignore any decisions they resent from the judiciary and press ahead with the elections. (Fox 25/7/2012)

This report did not come to my attention until late last year. If accurately reported, a statement by Australia's Foreign Minister that the PNG government should ignore a decision of that country's highest court would be profoundly subversive of the rule of law in our nearest neighbour. The reported statement was so outrageous that I wondered whether the report was accurate. Upon checking the interview transcripts at the minister's website, I found that he had been interviewed by Michael Vincent on the ABC's AM program on 25 May 2012 (Carr 25/5/2012). Nowhere in that inter-

view did the minister state that the court's decision should be ignored. Instead, the tenor of his remarks is captured in the following quote:

[We] would advise that in the interests of the country's reputation, its reputation as a democracy in a community of democracies, the Pacific Island community, that action around the Chief Justice should cease and all sides should act with restraint.

And the focus should be on the one route by which authority and legitimacy are conferred in a democracy and that is the elections. (Carr 25/5/2012)

I cannot find any support in any other contemporaneous interview transcript for the report. As I have come to know, the ABC enjoys a repute in PNG akin to that which the BBC enjoys elsewhere. Its reports are regarded as reliable and objective. This news report caused great dismay amongst the judges of PNG.

Through the good offices of Mr Sean Dorney AM MBE, the widely respected ABC journalist who well knows and loves PNG and its people, I have secured what I regard as the most likely explanation for how the report of the remarks attributed to Senator Carr came about. He made some enquiries about the report within the ABC. The story as originally filed by Mr Fox did not contain the controversial statement attributed to Senator Carr about ignoring the court's decision. What appears to have happened is that, in the course of sub-editing and in an endeavour to summarise the contents of the lengthy interview with Senator Carr, a sub-editor erroneously attributed this statement to Senator Carr (the sub-editor was presumably endeavouring to convey the foreign minister's repeated references to a need for PNG to focus on conducting its election). Though the ABC practice was that the author byline remained that of Mr Fox, the contents of the story, also in accordance with practice, reflected that sub-editorial revision.

There is a lesson in this misreporting of Senator Carr, not just for the ABC, but also for others reporting about Australian political comment concerning PNG. Such comment invariably attracts interest in PNG. Misreporting of that comment can,

as occurred in this case, be productive of unnecessary angst in PNG to the possible detriment not only of relations between the two countries but also of relations within and between branches of government within PNG.

As to local PNG media, my observation of the two major Port Moresby daily newspapers, *The National* and the *Post-Courier* over the course of the period leading up to the elections was that each maintained a robust editorial independence of the government of the day. Letters to the editor were generally supportive of the Chief Justice and the independence of the judiciary. These same observations apply to a number of PNG-related web blogs.

It is a matter of history that since these events in May 2012, PNG conducted an election. Australia furnished PNG with considerable assistance in that regard. Following the election, Mr O'Neill came to be prime minister with the support of a majority in the newly elected parliament. Mr Namah was returned as a member of parliament but was not included in the new government. He is presently Opposition Leader. When parliament resumed, it was Sir Salamo in his capacity as Chief Justice who presided over the swearing in of newly elected members of parliament. Sir Michael Somare led Mr O'Neill into the chamber. Encouraging though this truly Melanesian public rapprochement is, a charge of contempt made against Mr Namah as a result of his actions in May last year remains to be resolved.

In August 2012, when I returned late in the month for other appeal sittings, the atmosphere at the court was noticeably calmer, as it was in October when Justice Collier sat, in December 2012 when I sat in the final appeal sittings for the year and in late February/early March 2013 when I returned for the first appeal sittings of 2013.

Before the election had been conducted, I chanced to attend a diplomatic dinner in Australia in June 2012 at which I was seated opposite a diplomat who was accredited both to PNG and Australia. I mentioned that I had an additional commission as a judge there. He remarked to me, 'It feels like Zimbabwe'. He had served in that country. Though I had never visited Zimbabwe, I knew exactly to what he was referring and it was not to the streetscapes.

While still in practice, I had attended an international conference of independent referral Bars known as the 'World Bar Conference' in Edinburgh in 2002. One of the speakers at that conference was the Hon. Anthony Gubbay, the former chief justice of Zimbabwe. He described the progressive deterioration of the rule of law there and the intimidation of judges by the government of President Mugabe after a series of court rulings declaring particular government initiatives illegal. In November 2000 a group of pro-government militants had stormed the main courthouse while police stood by and watched.

There were certainly some ominous similarities between PNG at that time to the situation in Zimbabwe related by Chief Justice Gubbay, but that is not how events unfolded, nor even at the time, were events all one way. Elections were held. There was an orderly change of government. The main body of the PNGDF and of the RPNGC did not support the actions of Mr Namah in May 2012. In conjunction with the RPNGC and with logistic assistance from the Australian and New Zealand defence forces and technical support from the Australian Electoral Office personnel, the PNGDF assisted the PNG Electoral Office in the conduct of the elections. In a country as rugged and with a population as widely dispersed as PNG that was no mean feat.

Democracy is alive and well in PNG, at times exuberantly so. As I have already recorded, the media remains free. When His Royal Highness the Prince of Wales and Her Royal Highness the Duchess of Cornwall visited PNG in November last year as part of the Diamond Jubilee celebrations, they were warmly and enthusiastically received by both the new government and the people. The visit focused international attention on a country which, for all the hubris of the first half of the year, had not in 2012 gone the way of Zimbabwe.

It is a noteworthy feature of the aftermath of the election not only that dissatisfied candidates bring their challenges to the National Court, sitting as a Court of Disputed Returns, but that the decisions of the court on these challenges are respected with by-elections being held as required. The new

parliament has repealed the Judicial Conduct Act.

Notwithstanding the tumultuous events of 2012, my observation is that the judicial branch of government in PNG is committed to the delivery of justice in that country and readily receptive to modern practice. That it operates as well as it does is a testament to the dedication of PNG's judges, registrars and court staff. They operate under conditions which their Australian counterparts would regard as inadequate.

The Waigani court complex, opened by Her Majesty the Queen in November 1974, was adequate for the needs of the time and for a paper-based justice system. It is no longer. The existing building is surrounded by an ensemble of demountables, rather in the manner of a Queensland primary school in the 1960s under the pressure of the postwar baby boom. Conditions in the provincial courthouses are, if anything, worse.

With its increasing population and a surge in development, PNG undoubtedly needs more judges. Delays in the disposal of cases are not, to my observation, due to a want of diligence or ability, but to the ever increasing volume of work in civil and commercial jurisdictions and to the need to give priority to criminal cases, touching as they do on the liberty of the subject.

In the future, PNG will consider whether as a matter of constitutional reform of the judicial branch of government, the appellate structure should be changed so as to establish a permanent Court of Appeal and perhaps a further, ultimate appellate court. Staffing such a structure with judges of suitable ability and experience would be difficult for PNG alone at its present stage of development. It is difficult enough for smaller, developed nations such as Australia and New Zealand to maintain these high quality institutions alone. Yet there are undeniable, inextricable links between general prosperity and the maintenance of the rule of law via all branches of government, not the least via a high quality, independent judiciary. Providing the present ability for non-PNG citizen judges to be commissioned is retained in any amendments, there is much scope for assistance to PNG in such appellate courts.

There are other options which might perhaps commend themselves in relation to appellate structures. However much one might lament the demise of appeals to the Judicial Committee of the Privy Council for the loss of uniformity in the common law this has brought, the tyranny of distance to London, related expense and access to justice issues, and lack of regional representation in the membership and related nationalist sentiments would probably operate against a return to using that body as PNG's ultimate appellate court, at least as the Judicial Committee is presently constituted. Yet a variant, a South Pacific Committee, on which were represented the best PNG judges, a Supreme Court or Court of Appeal judge from the United Kingdom, and Australian, New Zealand and other South Pacific judges might work if nationalist sentiments gave way to a realisation that smaller jurisdictions inevitably find it difficult adequately to staff high quality ultimate appellate courts. If not a regional committee of the Privy Council, the same judicial personnel might be appointed to a South Pacific Final Court of Appeal, an analogue in this region of the Caribbean Court of Justice. The project is one worthy of consideration in the wider councils of the Commonwealth, I respectfully suggest.

Such a court would, I further suggest, better provide a coherent body of precedent than current, ad hoc arrangements whereby smaller South Pacific nations individually constitute final appellate courts with the assistance of judges drawn from other South Pacific jurisdictions. There is a risk with these arrangements that judgments which usefully elucidate matters of principle having multi-jurisdictional application may not come to wider attention.<sup>18</sup>

There are also many other benefits to be had in such judicial cross-fertilisation within the Commonwealth.<sup>19</sup> I have seen these benefits first hand not only in my present, additional, judicial office in PNG, but when practising in Fiji on a case-specific basis in original and appellate jurisdictions prior to the 2006 coup. Such service increases mutual understanding, challenges and diminishes idiosyncratic development of the law in each of the jurisdictions concerned, provides a springboard for

wider professional development activities within the legal profession and with law students and, at a personal level, brings much satisfaction in the engendering and nurturing of judicial camaraderie.

A project is underway that will see the superior courts (Supreme and National) enjoy the benefit of digital court recording. From 2013, the National Court will also progressively introduce a docket system to allow judges to undertake more active case management. Under the auspices of the memorandum of understanding between the Federal Court and the Supreme and National Courts, judges and associates from PNG have visited the Federal Court registries in Sydney and Melbourne to observe and gain experience in case management techniques. More are to visit this year.

The PNG courts have also entered into a memorandum of understanding (MOU) with the Queensland Supreme Court under which PNG judges and court staff are to gain experience in modern criminal jurisdiction administration. That relationship is particularly apt as the criminal law of both Queensland and PNG is derived from the Criminal Code authored in the 19th century by Chief Justice Griffith.

In 2007, the Judicial Commission of New South Wales entered into an MOU with the Magisterial Services of PNG to assist with developing and providing a judicial education and training program for PNG magistrates. A second MOU was entered into in 2009. In February 2013, the Judicial Commission entered into an MOU with the PNG Supreme and National Courts to develop the PNG Sentencing Database, a computerised sentencing resource for PNG judges.

At entry level into the legal profession there are also encouraging developments. At the initiative of Chief Justice Injia, an engagement has been reached between the PNG Legal Training Institute (LTI) and the Queensland Bar Association which should see the deployment in 2013 of experienced members of the Queensland Bar to the LTI to assist in commercial litigation training and criminal law practice. This will supplement commendable work which the Victorian Bar has been undertaking in advocacy training at the LTI for a number of years.

Last year I visited the LTI with Mr John Bond SC of the Queensland Bar to co-present a session in relation to commercial litigation practice. I saw there a room full of students of lively intelligence and keen interest. The facility in which the LTI is housed and the training resources available to the students and staff are barely adequate. The same cannot be said of the Director, Mrs Mogish and her staff, who are adept at achieving much with little. Here, too, there is a real need for modern facilities.

The practising profession in PNG also has its needs. The standard of advocacy in the cases which I have heard in the Supreme Court is but occasionally only of a standard which I would expect in an appellate jurisdiction. There is a singular need for comprehensive and continuing professional development and for programs which would expose PNG practitioners to modern methods of legal practice both at the Bar and in the solicitor's branch. The engagement between the LTI and the Queensland Bar and the work of the Victorian Bar are but a start. I suspect that there is much more which Australian Law Societies and individual firms with PNG branches or affiliates could do. It is to be remembered that PNG's next generation of judges will be drawn from the profession.

I would leave you with these thoughts. None of them are novel but there is, I suggest, advantage to us all in their retelling. Evil can indeed triumph when good men and women stand by and do nothing. There was a form of evil abroad in PNG last year but it did not triumph. That it did not was the result of the actions of many good men and women in PNG, and certainly not just in the judiciary, respecting their constitution and valuing the benefits of the rule of law under that constitution, of good neighbourliness on the part of Australia and New Zealand, and of support from the wider Commonwealth for the democratic process. For judges faced with intimidation we have but one choice if we are to be true to the judicial oath. One way of describing that choice is what I think of as the 'Leonidas option' — Here obedient to your laws we lie.<sup>20</sup>

And what of that garden bordering the rear driveway? Well, as of last month, it is flourishing, just like PNG.

## Postscript

I have continued periodically to sit in PNG since the delivery of my paper at the Commonwealth Law Conference. By happy chance, I was sitting there in February 2014 and so participated in a ceremonial sitting of the Supreme Court, which was held in the Law Courts at Waigani on 28 February 2014 to welcome a new appointee<sup>21</sup> to the Supreme and National Courts. The Chief Justice of PNG, Sir Salamo Injia, presided at the sittings.

At the sittings, the Attorney-General and Minister for Justice of PNG, the Hon. Kerenga Kua OL, a former president of the PNG Law Society, took the opportunity to deliver a formal apology to the court for the behaviour of officers of the executive government towards the court in respect of events leading up to the 2012 election. The apology was delivered in a most sincere and dignified way by the Attorney-General and formally acknowledged by the Chief Justice on behalf of the court. Members of the local diplomatic corps, the legal profession and the wider public were present on the occasion.

Earlier in the year, in the 2014 New Year's Honours List, Sir Salamo was appointed by Her Majesty Queen Elizabeth II, in her capacity as Queen of PNG, on the advice of her PNG ministers, to the rank of Grand Companion in the Order of the Logohu (GCL). The Order of the Logohu is PNG's domestic order of chivalry and supplements the Imperial Honours System, which is still also in use in that country. The rank of Grand Companion in the Order of the Logohu is PNG's highest civil honour in that Order.

The Attorney-General's speech and the honouring of the Chief Justice were not mere matters of form. They were matched by increased appropriation to the judicature which will enable the much needed upgrading of provincial courthouses and related judicial residential accommodation, as well as the progression of planning for the further development of the Waigani court complex. Consideration is also being given to the reform of the structure of the judicature so as to create an intermediate appellate court and thus allow the Supreme Court to focus on its role as PNG's ultimate appellate court and forum for constitutional references.

The challenges faced in the delivery of justice according to law in PNG remain immense by Australian standards, but there is in PNG a will and goodwill abroad to address them. Australia continues to support her neighbour in that endeavour. It is a privilege to play a role in that.

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This is a revised version of a paper presented at the 18th Commonwealth Law Conference, Cape Town, 15 April 2013. The views expressed in this paper, though derived from my experience as a serving judge, are personal, not institutional. They do not represent the views of either the Federal Court of Australia or of the Supreme and National Courts of Papua New Guinea.

## Author Notes

John Alexander Logan was appointed to the Federal Court in September 2007 and made a senior counsel in 1999. He has worked in private practice in Queensland and was appointed to the Supreme and National Courts of PNG in September 2011.

## Endnotes

1. Sir John Guise Drive is not an isolated suburban street. It lies in the heart of Port Moresby's government and embassy district. The New Zealand High Commission is situated on this road, immediately opposite the court reserve. The National Library, the National Archives and the Parliament reserve each abut the court reserve. At the entry to the drive lies the Chinese Embassy compound and, not more than 400 metres beyond that, the Australian High Commission.
2. The world's second-largest island, the largest being Greenland. The western half of New Guinea is the Indonesian province of Irian Jaya.
3. As at its 2011 census (National Statistical Office 2012).
4. New Zealand, with an estimated 4,462,232 people, has the third largest population (Statistics New Zealand 30/3/2013).

5. [Constitution of the Independent State of Papua New Guinea](#).
6. According to International Monetary Fund (IMF) data quoted by the Hon. Richard Marles MP, then Australian parliamentary secretary for Pacific Island Affairs, PNG had the seventh highest rate of economic growth in the world in 2011 (Marles 2012). Recent research suggests that PNG's natural resources sector could quadruple by 2030, producing US\$25 billion in annual export revenues (*Papua New Guinea Post-Courier* 5/2/2013):16.
7. Organic Law on the Terms and Conditions of Employment of Judges 1997 (PNG), s. 2(c).
8. *Ibid.*, s. 7(1). As that law then stood, the Judicial and Legal Services Commission was permitted, in its deliberate judgment, in a particular case to extend the period to, but not beyond, age 65. These limits have recently been amended as a result of the certification of the Organic Law on the Terms and Conditions of Employment of Judges (Amendment) Law 2010 (PNG) to 72 and 75 respectively.
9. Constitution of the Independent State of Papua New Guinea (Constitution), s. 170(2). The Chief Justice is appointed by the Head of State on advice from the National Executive Council after consultation with the minister responsible for the National Justice Administration: Constitution, s. 169(2).
10. Grand Chief Sir Michael Somare, born 9 April 1936, was a major figure in PNG's evolution towards independence. He was PNG's first prime minister and has held that office for a number of periods since then: 16 September 1975–11 March 1980; 2 August 1982–21 November 1985; 5 August 2002–13 December 2010; and 17 January 2011–2012 election (by reference to Supreme Court determination). He de facto ceased office in August 2011 with the assumption of office of the Hon. Peter O'Neill, who was confirmed as Prime Minister following the 2012 national elections. Sir Michael Somare remains a member of parliament in PNG.
11. In that year, then minister for justice, the Hon. Nahau Rooney, published a letter highly critical of the Supreme Court judiciary's lack of sensitivity to what she described as a 'growing national consciousness'. At the time, the Bench entirely comprised expatriate Australian judges who immediately before Independence had held office as judges of the Supreme Court of the Territory of Papua New Guinea. Each of these had translated into the office of a judge of

the Supreme and National Courts of PNG upon independence.

In response to Mrs Rooney's letter, then chief justice, Sir William Prentice, convened a sitting of the Supreme Court to condemn what was perceived by the judges as an attack on judicial independence. The minister's response was to state that she had 'no confidence in the Chief Justice and other Judges ... It appears that the foreign judges on the bench are only interested in administration of foreign laws and not the feelings and aspirations of the nation's political leaders'. For this and the initial publication she was convicted of contempt by the Supreme Court and sentenced to eight months imprisonment. When after having served but one day she was released on licence by the then government, the Chief Justice and the remaining members of the court resigned. Another judge had earlier resigned in respect of a related matter.

12. In a press conference on 10 November 2011, then deputy prime minister, the Hon. Belden Namah, outlined the basis for the suspension in this way:
 

'Some of these allegations dated back to 2009 and evidence on file is overwhelming and beyond reasonable doubt to have those people implicated interviewed and possibly charged with conspiracy to defect the case of justice,' Mr Namah said. He said that before the death of late Justice Hinchliffe in March 2009, he signed a document pertaining his will for his adopted son Timothy Moere Sari (Jr), however, despite the cheque being cleared and paid to Mr Sari (Jr), the Chief Justice verbally directed Mr Augerea to recall the cheque.

'Thereafter the cheque in question was cancelled, causing the presiding Judge who granted the Grand of Probate Order, Justice Mark Sevua to start raising questions as to why the cheque had been recalled and cancelled,' Mr Namah said. He said that when the police were in the process of interviewing Augerea and the Chief Justice, they took out a restraining order. 'Consequently the matter has been pending till now, hence, Cabinet has appointed a Tribunal pursuant to section 181 of the constitution to investigate the allegations,' Mr Namah said. (*Papua New Guinea Post-Courier* 11/11/2011).
13. *In re Constitution Section 19(1) — Special reference by Allan Marat; In re Constitution Section 19(1) and 3(a) — Special reference by the National Parliament* [2012] PGSC 20. This case was heard on 2–5 April by a Bench which comprised Chief Justice Injia, Deputy

Chief Justice Salika, Justice Sakora, Justice Kirriwom and Justice Gavara-Nanu. Judgment was delivered on 21 May 2012.

14. The Hon. Gibbs Salika, public statement, issued following 8 March 2012 meeting.
15. Ibid.
16. The order made by the Supreme Court was:
  1. Pending the final determination of the Reference,
    - (a) the implementation of or the giving of effect to the decision made by the National Parliament on 4th April 2012 to refer the Chief Justice Sir Salamo Injia and Justice Nicholas Kirriwom are hereby stayed; and
    - (b) any person and or authority including those specified in section 5(2) of the *Judicial Conduct Act 2012* (the Act) are stayed from taking any step or action in pursuance of the said decision of the National Parliament made on 4th April 2012 to refer the Chief Justice and Justice Kirriwom; and
    - (c) a Tribunal if one has been appointed pursuant to section 5(2) of the Act is hereby stayed from taking all or any step to investigate any matter under section 5(1) of the Act in respect of the referral of the Chief Justice and Justice Kirriwom; and
    - (d) [a]ll or any of steps taken including a decision by the National Executive Council in respect of the referral of the Chief Justice is hereby stayed.
    - (e) the effect, force, operation and implementation of the whole Act is stayed and the Chief Justice and Justice Kirriwom shall hear and continue to hear legal proceedings and exercise all their powers as Chief Justice and Judge respectively and all or any of their Judgment or order shall continue to have full effect and be in force.
  2. These orders are effective forthwith.
  3. Costs follow the event.' (*In re Judicial Act 2012; Special Reference by Morobe Provincial Executive* [2012] PGSC 12 at [25])
17. In 1989, a secessionist insurrection broke out on the island of Bougainville, on which a large open-cut copper mine was then operated by a Rio Tinto subsidiary. The mine was then a major source of revenue for PNG. The secessionist rebels forced its abandonment and the evacuation of foreign mine staff. Dissatisfied with the failure of the PNG Defence Force (PNGDF) to put down the insurrection, the government of then prime minister Sir Julius Chan engaged the United Kingdom based private

military company, Sandline International, which sub-contracted tasks to a South African company, Executive Outcomes, to end the insurrection in cooperation with the PNGDF. The engagement of Sandline caused deep resentment within the PNGDF and brought to a head tensions arising from a perceived lack of support by successive governments for troops on the field. On 16 March 1997, elements of the PNGDF arrested the senior local representatives of Sandline International and Executive Outcomes. In the course of this and after Sandline's Lt Col (ret'd) Tim Spicer OBE had been wrestled to the ground, then Captain Namah held a loaded pistol to Spicer's head and whispered, 'Welcome to the land of the unexpected'. His words recalled a slogan which had been prominent in a PNG tourist campaign of the early 1990s. For a detailed account of the background to the Bougainville conflict, the engagement of the mercenaries, their arrest and the aftermath of events, see Dorney (1998).

18. An example drawn from personal experience in practice is *Ben v Suva City Council* [2008] FJSC 17, a decision of Fiji's Supreme Court. This case offers a superb analysis of the breadth of meaning in the word 'compensation' in land acquisition statutes found in many Commonwealth jurisdictions. It draws on an Australian case, *Marine Board of Launceston v Minister of State for the Navy* (1945) 70 CLR 518, and on one of the last appeals from Hong Kong to the Judicial Committee in *Director of Buildings and Lands v Shun Fung Ironworks Ltd* [1995] 2 AC 111. I found *Ben v Suva City Council* of considerable assistance when construing a statutory power to award 'compensation' to a beneficiary of a superannuation fund in respect of a breach of duty by a trustee of that fund: *Federal Commissioner of Taxation v Interhealth Energies Pty Ltd (No 2)* (2012) 204 FCR 423 (a subsequent appeal was dismissed, see *Interhealth Energies Pty Ltd v Federal Commissioner of Taxation* (2012) 209 FCR 33). I would not have known of *Ben v Suva City Council* but for my personal experience in Fiji. I strongly suspect the case, which was not referred to by counsel until I drew attention to it, would have been more widely known had it not been the product of the ultimate appellate court of a small, Pacific Island nation. I have also had the experience in PNG of becoming acquainted with locally decided cases in areas of law as diverse as administrative law and land law which have much wider value as precedents in these branches of the law.

19. For many years prior to mine and Justice Collier's PNG appointments, judges of the Federal Court of Australia have, with the approval of the Australian Government, undertaken judicial service in many South Pacific jurisdictions. These include the Privy Council and the Court of Appeal of the Kingdom of Tonga, the Supreme Court and Court of Appeal of Fiji (prior to the 2006 coup), the Supreme Court of Vanuatu and the Supreme Court of Samoa. Judges of the Supreme Court of Queensland and the Supreme Court of New South Wales have served on the Solomon Islands Court of Appeal. Judges from New South Wales and from New Zealand also served in Fiji's appellate courts prior to the 2006 coup.
20. Derived from Simonides's epitaph on the Kolonos hillock at Thermopylae, which is believed to be the location of the last stand of the 300 Spartan warriors and their Thespian allies, led by King Leonidas of Sparta, who resisted to the death the invasion of the Persians under King Xerxes. For details about the monument and its inscription, see 300spartanwarriors.com (n.d.).
21. The Hon. Goodwin Poole, an expatriate with lengthy experience as a legal practitioner in both PNG and Australia.

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