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The risk of proposed amendments to Bougainville's Mining Act

JUBILEE AUSTRALIA RESEARCH CENTRE

Jubilee Australia Research Centre

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About this paper

Jubilee Australia sought legal advice surrounding the Bougainville Mining (Amendment) Bill 2019. Jubilee Australia instructed New Chambers Lawyers to advise on whether these amendments may violate the PNG or Bougainville Constitutions, and whether these amendments may violate international law. This paper is a summary of the advice that we received. That advice concluded that the Bill, if passed into law, could violate international law and be unconstitutional.

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Contents

Abbreviations	4
Executive summary	5
Introduction	6
1 About the amendments	7
2 Key concerns with the amendments	10
2.1 Free, prior and informed consent	10
2.2 Landowner revenues	12
2.3 Lack of clarity regarding environmental assessment process	14
2.4 Potential monopoly granted to SBE	15
3 The amendments and constitutional law	16
3.1 The Bougainville Constitution	16
3.2 The amendments and the Bougainville Constitution	16
4 The amendments and international law	19
4.1 Potential violations of international human rights law	19
4.2 Obligations of certainty and transparency	21
4.3 Principles of due diligence under international environmental law	22
Conclusion	25
Endnotes	26

Abbreviations

ABG	Autonomous Bougainville Government
BCL	Bougainville Copper Limited
BEC	Bougainville Executive Council
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
PNG	Papua New Guinea
SBE	Special Bougainville Entity
SMLOLA	Special Mining Lease Osikaiyang Landowners Association
UNCLOS	United Nations Convention on the Law of the Sea

Executive summary

In 2019, proposals were made by the Autonomous Bougainville Government to amend Bougainville's mining laws.

The new legislation aims to develop a new mining regime in Bougainville that grants 'Special Bougainville Exploration Licences' or 'Special Bougainville Mining Leases,' to a new 'Special Bougainville Entity.'

The proposed legislation raises four key issues that are important to consider.

First, the new entity could be exempt from current legal requirements regarding **landowners' rights**, especially consultation and consent.

Second, the legislation is vague and unclear about **the financial benefits that will be available to landowners**. While the legislation purports to provide benefits that exceed what is currently available, there is no certainty or transparency surrounding this within the text of the legislation.

Third, the draft legislation is highly ambiguous on the requirements surrounding **environmental assessment** processes, which could lead to significant environmental damage in the future.

Fourth, under the amendments, the entity may be given permission to explore or mine anywhere in Bougainville that is not subject to an existing lease – this risks establishing a **monopoly**.

If the legislation is passed, the new regime would effectively override current legislative requirements and protections available to communities and the environment under the current Act.

Jubilee Australia engaged legal advice to advise on whether the proposed amendments could violate constitutional or international law.

Rights that could be potentially violated by this proposed legislation include the rights to:

- adequate food and housing;
- water;
- work;
- be free from arbitrary or unlawful interference with privacy, family and home;
- the rights of indigenous people to cultural integrity and associated protections with respect to their land;
- rights to self-determination;
- free, prior and informed consent;
- the right to life.

The amendments also do not adequately protect landowners' rights to free, prior and informed consent, which could lead to a range of violations of human, property and cultural rights, both at international law and under constitutional law.

The amendments may also violate various principles of international environmental law, certain human rights and environmental treaties and principles of customary international law.

If this legislation were passed, any such violations of law could lead to devastating impacts on both the environment and the communities who live in areas affected by mining. These impacts could last decades or for many generations.

Therefore, it is absolutely essential that any proposed legislation dealing with mining adequately protects the rights of the people of Bougainville, and ensures that the environment will be adequately protected in the long term.

Introduction

In December 2019, the people of Bougainville voted overwhelmingly for independence from Papua New Guinea (PNG). The future of Bougainville continues to be underpinned by questions about its financial future, and the viability of funding its independence through reopening its Panguna mine.

Earlier in 2019, the Autonomous Bougainville Government (ABG), led by its President, Grand Chief Dr John Momis, announced its intention to amend Bougainville's mining laws. The amendments are contained in three bills, one of which would amend the *Bougainville Mining Act 2015*.

On 19 February 2019, the Bills were referred for the second time for inquiry and report to the Legislation Committee of the ABG.²

News reports in 2019 suggest that a number of companies have expressed interest in mining in Bougainville, including Caballus, Kalia Limited, RTG Mining and Bougainville Copper Limited (BCL) – the holder of the previous exploratory licence and former subsidiary of Rio Tinto.³

News reports have previously contended that Caballus Mining has been involved in pushing to change the Mining Act, and would retain a 40 per cent share in a new company to be created by the amendments, Bougainville Advance Mining.⁴ The company is headed by high profile Perth based businessman, Mr Jeffrey McGlenn,⁵ and has no public profile in the industry.

In early June 2019, Vice President and Mining Minister Raymond Masono asserted that

'recent consultations have helped to inform people' and he was 'confident the majority of Bougainvilleans would now support the planned changes.'⁶

In mid-June 2019, the parliamentary committee tasked with inquiring into the bills rejected the proposed legislation as 'poorly drafted, ambiguous and drawn up without meaningful public consultation.'⁷ The committee's report also said that there was 'overwhelming public opposition to the bills.'⁸ The committee further recommended the legislation should be reassessed, redrafted and resubmitted after referendum on independence from PNG,⁹ which the ABG agreed to do.¹⁰

In June 2019, a customary landowner group from the Panguna region obtained legal advice on the amendments.¹¹ The advice, obtained from an Australian mining lawyer, Mr Michael Hunt, emphasised that the removal of landowners' property and rights was 'unreasonable, unfair and unconstitutional.'¹²

On 20 June 2019, Mr Masono stated, 'We are not going to withdraw the amendments. What we will do is defer its re-introduction in parliament.'¹³

1 About the amendments

The proposed amendments include the following bills:

- Bougainville Mining (Amendment) Bill 2019;
- Bougainville Advance Holdings Trust Authorisation Bill 2019; and
- Bougainville Advance Mining Holdings Limited Authorisation Bill 2019.¹⁴

The first Bill, the Bougainville Mining (Amendment) Bill 2019, proposes to amend the Bougainville Mining Act 2015 through adding a new 'Part 17' to create provisions that relate to a 'Special Bougainville Entity' (SBE). A SBE will be a company, controlled by the ABG and resource owners of Bougainville, with 60 per cent of shares 'owned by the ABG and the resource owners of Bougainville'.¹⁵

Under Part 17, a SBE may be issued a Special Bougainville Exploration Licence or Mining Lease, by the Bougainville Executive Council (BEC), in conjunction with the Minister for Mineral and Energy Resources.¹⁶

These licences or leases may be granted 'over all land in Bougainville available for reconnaissance, exploration and mining, that is not subject to an existing exploration licence or mining lease'.¹⁷ If an existing exploration licence expires and is not renewed, that area will be available for a Special Bougainville Exploration Licence or Mining Lease.

Under the new section 378(3)(b), all fees, annual rent, royalties, levies and other rights and interests that are currently granted to landowners under the Mining Act will 'not apply' to a SBE, or a Special Bougainville Exploration Licence or Mining Lease.¹⁸

This amendment is substantial, as it will remove the protections that landowners had under the existing Act. This change may therefore result in the SBE having very few obligations and responsibilities. Depending on

how the Bill is interpreted, this could extend to any 'rights' of landowners, perhaps even obligations of remediation and environmental protection.

The new Part 17 provides that instead, landowners will receive 'preferential benefits pursuant to the terms of negotiated agreements'.¹⁹ These agreements, between the ABG and landowners, will be mandatory, and must be entered into prior to any mining activities occurring on landowners' land.²⁰

These preferential benefits are required to 'exceed the entitlements that landowners were granted' under the existing Act.²¹ However, it is unclear as to what 'preferential benefits' could look like, how they will be decided, or when landowners would be entitled to receive them. This involves a significant lack of transparency.

Under the new legislation, the Bougainville Executive Council will also determine the identity of the landowners who are affected by the granting of the licence.²² Given that identifying landowners in Bougainville can be contentious, and that any entitlement to preferential benefits will directly flow from this decision, the lack of transparency surrounding this decision is concerning. It is unclear as to whether there will be an avenue to appeal this decision.

Under the proposed legislation, a SBE is required to comply with the 'ordinary application processes' for exploration licences and mining leases set out in the current Act.²³ This is laid out in the new section 378(3)(c). Yet Part 17 remains unclear as to what extent the SBE will need to comply with the 'ordinary application process' under the Mining Act and the Act more broadly.

The proposed legislation remains ambiguous as to what specific obligations are imposed on the SBE, BEC and ABG. For example, there is no requirement that the BEC must reject applications if they do not meet relevant requirements.²⁴ There is also no clear legislative requirement that such licences or leases must be issued only after relevant applications have been assessed and determined as acceptable.

Another example: under the current Act, there is an obligation to consult with certain landowners as part of the application process for normal exploration licences. However, one interpretation of the new section 378(3) (b) may be that this is a 'right' of landowners that is not to apply to the SBE. Depending on how narrowly the obligation in section 378(3) (c) is read, combined with how broadly the exemption in section 378(3)(b) is read, these amendments may impose very few additional obligations on the SBE.

Further, the specified time frame for mining lease or exploration licence applications can be varied, either orally or in writing,²⁵ at the discretion of the BEC. It remains unclear whether these variations could be appealed. This new Part 17 would prevail over the entirety of the Act.²⁶ This means that where there is inconsistency between Part 17 and the legislative protections available under the existing Mining Act, the terms of Part 17 will prevail.

The new Part 17 is reproduced below.

Part 17 - Special Bougainville Exploration Licence or Mining Lease

378 Special Bougainville Exploration Licence or Mining Lease

(1) *The Bougainville Executive Council, in*

conjunction with the Minister for Mineral and Energy Resources, shall have the power to issue a Special Bougainville Exploration Licence or Mining Lease to a Special Bougainville Entity.

(2) *A Special Bougainville Exploration Licence or Mining Lease may be granted over all land in Bougainville available for reconnaissance, exploration and mining, that is not subject to an existing exploration licence or mining lease.*

(3) *For avoidance of doubt:*

(a) *In circumstances where an existing exploration licence expires and is not renewed then that area of Bougainville shall be available for reconnaissance, exploration and mining under the Special Bougainville Exploration Licence or Mining Lease.*

(b) *All fees, annual rent, royalties, levies and other rights and interests granted to landowners under Parts 1 to 16 of the Act shall not apply to a Special Bougainville Exploration Licence or Mining Lease or a Special Bougainville Entity, however, such landowners affected by a Special Bougainville Exploration Licence or Mining Lease, as determined by the Bougainville Executive Council, shall be entitled to and shall be granted the following:*

(i) *the landowners shall receive preferential benefits pursuant to the terms of negotiated agreements that are required to be entered into on a mandatory basis between the Autonomous Bougainville Government (or a subsidiary of the Autonomous Bougainville Government) and the said landowners prior to any mining activities occurring on the landowners' respective lands; and*

(ii) pursuant to the terms of the negotiated agreements, the Autonomous Bougainville Government (or a subsidiary of the Autonomous Bougainville Government) are required to provide benefits to the landowners that exceed the entitlements that such landowners were granted under Parts 1 to 16 of the Act (prior to the enactment of the Bougainville Mining (Amendment) Act 2019), be it in one form or another as agreed upon by the landowners and the Autonomous Bougainville Government (or a subsidiary of the Autonomous Bougainville Government).

Note: The purpose of the flexibility of benefits to be received by landowners pursuant to the negotiated agreements, is to support the differing needs of the landowners on a case by case basis.

(c) The Special Bougainville Entity shall be required to comply with the ordinary application processes in relation to the grant of the Special Bougainville Exploration Licence or Mining Lease, as those processes set out in Parts 1 to 16 of the Act, in relation to

*(i) the application of an exploration licence (if applicable); and /or
(ii) the application of a mining lease (if applicable).*

(d) In circumstances, where the Bougainville Executive Council, in conjunction with the Minister for Mineral and Energy Resources deems it necessary, the Bougainville Executive Council may exercise its discretion to vary the specified time frame(s) either orally or in writing in relation to the application processes referred to in subsection (c) above.

The second Bill, the Bougainville Advance Holdings Trust Authorisation Bill, aims to establish the Bougainville Advance Holdings Trust (BAHT). This discretionary trust would 'hold the rights and interests in companies taken to be registered in and governed by the laws of Bougainville'²⁷. The income would be held on trust for the ABG and the people of Bougainville, with the Bougainville Executive Council as trustee.

The third Bill, the Bougainville Advance Mining Holdings Limited Authorisation Bill 2019, seeks to establish Bougainville Advance Holdings (AROB) Ltd as a commercial enterprise and business platform. Its assets are not public assets.²⁸ All of the shares in the company would be owned by the Bougainville Advance Holdings Trust²⁹ and the Bougainville Executive Council would appoint the chairman of the company, and the majority of its directors.³⁰ It may be assumed that this is intended to be the first SBE, with the shares potentially held on trust for the ABG and landowners.

2 Key concerns with the amendments

There are four key areas of concern within the proposed amendments:

Free, prior and informed consent

First, the amendments undermine existing rights of free, prior and informed consent provided under the current mining legislation. The new entity could be exempt from current legal requirements regarding landowners' rights, especially consultation and consent.

Landowner revenues

Second, the legislation is vague and unclear about the financial benefits that will be available to landowners. Existing financial entitlements that landowners are currently eligible to receive under existing legislation are not guaranteed, such as fees, royalties, and equity, and it is unclear whether they will be able to be claimed. The amendments suggest that landowners, as identified by the ABG, will be entitled to 'preferential benefits' which will be negotiated and laid out in contractual agreements. However, no further detail, certainty or transparency is available about these benefits within the legislation.

Environmental assessment

Third, the amendments are vague and highly ambiguous on the requirements of a SBE to engage in environmental assessment processes and other components of the Mining Act. This could lead to significant environmental damage in the future.

Potential monopoly

Fourth, under the amendments, a SBE may be given permission to explore or mine anywhere in Bougainville that is not subject to an existing lease – this risks establishing a monopoly.

On the whole, the amendments lack clarity regarding responsibilities of the ABG and of a SBE. This lack of transparency and certainty is concerning.

2.1 Free, prior and informed consent

In PNG, much of the land is customary land, where land is owned by individual citizens or community of citizens, and regulated by custom. This is also the case in Bougainville. Customary land in Bougainville is generally owned communally (for example, by a clan lineage), though it can be sold to individuals in certain circumstances.³¹

In Bougainville, the *Bougainville Mining Act 2015* (Mining Act) provides that all minerals existing on, in or below the surface of the land in Bougainville are the property of either the owners of any customary land or, if the minerals are not on, in or below the surface of customary lands, the ABG.³²

Landowners give up this right of ownership of minerals once they enter into an agreement with a mining company, as part of the process by which companies obtain exploration and mining leases. Under the existing 2015 Act, there is a process by which landowners give up the right of ownership, but this happens in a way that establishes other rights of landowners during this process negotiation.

Jubilee Australia Research Centre has previously examined the limitations of the 2015 Mining Act.³³ While the 2015 Act falls short of meeting the principle of 'free, prior and informed consent' in several important ways, Parts 1 to 16 of the Mining Act as it stands do provide some important protections on the rights of landowners.

These rights include:

- their consent be obtained in order for a person to be issued with a mining lease for their land³⁴ and a right to be involved in consultation and mediation with respect to this;³⁵
- to have, via an application made by a Council of Elders, land areas reserved for mining under community licences;³⁶
- an ability to deny physical entry onto their land to persons holding reconnaissance or exploration licences;³⁷
- a right to enter into an exploration licence, land access and compensation agreement with any person wishing to enter their land for exploration;³⁸
- a right to acquire certain interests in mining licenses³⁹ and apply themselves for an exploration licence;⁴⁰
- the ability to receive certain compensation, rents or royalties from mining activities on their land.⁴¹

Points 1 and 4 above, provide a limited form of free, prior and informed consent for landowners. Under the existing Mining Act, in theory, they can only give up ownership to the minerals on their land if they do so willingly and in a process that respects their autonomy, their ability to choose this path, and their ability to be compensated for it.

In contrast, the new Bill specifically states that **all rights and interests granted to landowners under the existing Mining Act will not apply to a SBE or its mining licence or exploration lease.**⁴² It follows that the **rights of landowners** which flowed from their ownership of the minerals (namely, **consultation and consent**) will also be removed.

Proponents of the proposed legislation have claimed that landowners will still have to be consulted before any mining activities can happen on their lands.

The Minister for Mining, the Hon. Raymond Masono implied this when, during the second reading of the Act in February 2019, he said that the Bill: 'requires the special Bougainville Entity to comply with ordinary application processes in relation to the grant of the Special Bougainville Exploration Lease and Mining Lease as set out in Part 1 to 16 of the Bougainville Mining Act 2015'.⁴³

However, while these ordinary application processes will be required to be followed, it remains unclear how components of the Bill will be interpreted and applied in practice, including with other components of the Bill.

2.1.1 Process to determine applications is unclear

Firstly, the current Mining Act enshrines some protections for landowners, including, as correctly noted by Minister Masono, within the application process.

However, there is no requirement in the new Bill that an exploration licence or mining lease must only be issued after applications have been assessed and determined as acceptable.

On one view, the amendments may require a SBE to make an application,⁴⁴ yet there is no requirement on the Executive Council to reject that application (or for any approval to be challenged) if the application does not meet the requirements of Parts 1 to 16.

Therefore, it may be questioned as to whether the application process would be adequately effective.

2.1.2 Legislation is unclear regarding landowners' rights

Secondly, it is unclear how the provisions of the new Bill will interact with each other while being interpreted and applied. In particular, it is unclear to what extent the existing protections on the rights of landowners will continue throughout a SBE's application process for a licence or lease, or whether they will be nullified via the operation of s 378(3)(b) (which states that 'all fees, annual rent, royalties, levies and other rights and interests granted to landowners under Parts 1 to 16 of the Act shall not apply').

Under the legislation, a SBE is required to make an application for a lease or licence 'under ordinary processes' under the existing Act.⁴⁵ However, concurrently, 'any right or interest' previously held by landowners will not apply to a SBE.⁴⁶ As but one example, for normal exploration licenses, the Mining Act imposes an obligation of consultation with certain landowners as part of the application process.⁴⁷ One interpretation of s 378(3)(b) may view this as a 'right' of landowners that will not apply to the SBE.

2.1.3 Unclear whether landowners may withhold consent

Thirdly, it is unclear whether, under the new legislation, landowners will have the ability to give or withhold their consent to a mining project on their land – or whether they will only have the option to negotiate 'preferential benefits' in contractual agreements with the ABG. Further, the ABG will have the power to determine who these affected landowners will be.

2.2 Landowner revenues

Under the Bill, a SBE will be able to apply to mine over any land in Bougainville that is not otherwise the subject of existing tenements. This will **remove the opportunity or ability of landowners to seek to exploit the minerals on their lands themselves**, or to reserve their lands for community mining licences.

The Minister for Mineral and Energy Resources, the Hon. Raymond Masono, in his second reading speech of the Bill, claimed that landowners will still receive 5 per cent equity (free carry) and the option to acquire a further 5 per cent at cost, on the basis that 'this is what the Bougainville Mining Act Part 1-16 clearly stipulates'.⁴⁸

However, there is no provision within the new Bill that appears to support this statement. For example, clause 378(3)(b) states that:

'All fees, annual rent, royalties, levies and other rights and interests granted to landowners under Parts 1 to 16 of the Act shall not apply to a Special Bougainville Exploration Licence or Mining Lease or a Special Bougainville Entity ...'

Further, where the existing Mining Act and the Bill are inconsistent, the terms of the new Bill will apply. Therefore, in the absence of a specific reference to an entitlement to 5 per cent equity within the new Bill, we conclude that these financial rights for landowners are not in fact secured by the new legislation.

Instead, the Bill asserts that landowners who are affected⁴⁹ by the licence will be 'entitled to preferential benefits pursuant to the terms of negotiated agreements that are required to be entered into on a mandatory basis between the ABG, (or a subsidiary of the

ABG), and the landowners prior to any mining activities occurring on the landowners' lands.⁵⁰ These preferential benefits must 'exceed the entitlements that landowners were granted'⁵¹ under the current Act.

In the second reading of the legislation before the BEC, Mr Masono also claimed that 'the proposed changes will enable the landowners to receive better benefits than the 5 per cent free equity that they are currently entitled to under the existing Mining Act. These would be in addition to preferential treatment with training and employment opportunities in our mining projects and the associated infrastructure that would be constructed around Bougainville.'⁵²

Mr Masono referred to this preferential treatment, arguing that: 'this flexibility recognizes that different landowner groups have different needs and face different challenges. In terms of the Panguna mine affected landowners, the needs of the SML landowners are different from those of the Lower, Upper or Mid Tailings, Port Mine Access Road, Loholo Port and the Arawa Township.'⁵³

However, no legislative detail is provided regarding these preferential benefits, and no minimum entitlements have been specified that must be exceeded.

It is entirely unclear as to what these 'preferential benefits' or 'negotiated agreements' will be, or who will decide as to whether such benefits 'exceed' current entitlements.

It is also unclear as to whether such agreements will be confidential. This draws questions as to how landowners will be able to compare their agreements with other communities, and how they will be able to ascertain if they received a 'good deal' on their

land.

In Mr Hunt's letter to the parliamentary committee tasked with enquiring into the proposed legislation, Mr Hunt identified further problems with the negotiated agreements:

- 'The negotiation will take place only after all the landowners' existing rights have been abolished;
- The negotiation will be about an entitlement to receive preferential benefits "in one form or another" (i.e. there can be no certainty on the amount or the types of benefits);
- These "preferential benefits" will probably be determined only at the time mining is about to commence (i.e. many years down the track) at which stage the landowners will have no bargaining power;
- There are no interim payments to landowners under the Bill;
- The landowners will have to survive by themselves till the mine is about to start; and
- There is no requirement that the ABG negotiate in good faith.⁵⁴

Mr Hunt further noted that:

'in the period between the issue of the Special Bougainville Exploration Licence or Mining Lease and the negotiations prior to mining, no doubt the landowners will have no access to their land and no access to their minerals and yet they will receive no benefits for being deprived of such access and they can't be assured the ABG will negotiate in good faith to give them "preferential benefits". This is bound to lead to open conflict, thus putting the Peace Agreement at risk.'

2.3 Lack of clarity regarding environmental assessment process

The scope for environmental damage to occur within mining activities can be high. It is therefore concerning that the process for environmental assessment under the proposed legislation remains ambiguous.

Under the proposed amendments, the process of environmental assessment is not clear, and neither are the obligations of a SBE or of the ABG within that assessment process.

The Bill states that a SBE will be required to comply with the ordinary application processes in relation to the grant of a Special Bougainville Exploration Licence or Mining Lease, as set out in the current Act.⁵⁵ (Under the Bill, the required time frames for this may be varied by the BEC.⁵⁶)

Currently, when an application is made for a mining lease,⁵⁷ documents need to be provided, such as a resettlement management plan;⁵⁸ a mine site plan;⁵⁹ a mine waste management plan;⁶⁰ a rehabilitation and closure plan;⁶¹ a community engagement plan;⁶² and proof that all required permits and approvals have been

issued under the Environment Act, or such applications have been submitted to relevant authorities.⁶³

However, it remains unclear as to whether a SBE will be required to submit all of these documents, and the specific nature of the obligations imposed on a SBE or the ABG. It is also not clear whether some of these documents may be perceived as falling under the ambit of section 378(3)(b), and be counted as an 'other right and interest granted to landowners under Parts 1 to 16 of the Act' that will not apply to an SBE.

It also remains unclear as to whether a SBE will be bound by other requirements within the Mining Act, such as reporting requirements,⁶⁴ how applications must be assessed,⁶⁵ decisions on applications, expansions of mining leases and further provisions.

At present, it also remains unclear to what extent s378(3)(c) requires the ABG to undertake a relevant environmental assessment. For example, s 378(3)(c) does appear to require a level of assessment, in that it picks up the application processes for exploration licenses and mining leases within the current Act and applies them to the SBE.⁶⁶ The issue arises in whether the ABG will

conduct the proper assessment required by s 120 (and similar provisions).

To the extent that the ABG does, through these measures, conduct a proper environmental assessment, then it may not be in violation of those international obligations. In other words, the Bill itself may not, on its face, violate international obligations. However, the exercise of the ABG's powers under the Bill (were it to pass into law) may subsequently violate international obligations if the ABG does not, in fact, conduct the proper assessment required of s 120 (and similar provisions).

2.4 Potential monopoly granted to SBE

The amendments propose to grant a SBE a mining lease 'over all land in Bougainville available for reconnaissance, exploration and mining.⁶⁷ The exception to this would be any existing exploration or mining licences in Bougainville.⁶⁸ However, landowners in these locations would also fall under the new regime if such existing licences expired and were not renewed.⁶⁹

Exploration licences have been previously granted to Toremana Joint Venture (TJV), Isina Resource Holdings Limited (IRHL) and SRMI Bougainville.

However, there is no certainty regarding what may happen when these companies wish to apply for a mining licence – and if they will be able to under these new arrangements. This could, in essence, establish a monopoly for a SBE.

3 The amendments and constitutional law

3.1 The Bougainville Constitution

It is important to consider the protections within constitutional law when assessing these proposed amendments.

The Autonomous Region of Bougainville was established following the post-civil war peace agreement that was signed in 2001.⁷⁰ Bougainville has its own constitution, which prescribes certain rights and protections for the people of Bougainville, and sets out the powers (and limitations of) the ABG.

The Bougainville Constitution is to be the 'supreme law as regards matters that fall within the jurisdiction of the Bougainville Government in accordance with this Part and the [Peace] Agreement, and Bougainville laws and institutions shall be consistent with the Bougainville Constitution.⁷¹ The ABG is granted functions and powers in relation to land, natural resources and mining.⁷² The ABG House of Representatives, for example, has the power to make laws for the peace, order and good government of Bougainville.⁷³

However, the ABG's power is presently limited by the scope of the functions and powers given to the ABG in s 290 of the PNG Constitution. As other nations' parliamentary authority are laid out in their founding Constitution, so Bougainville's authority is presently derived from the PNG Constitution.⁷⁴

With the successful independence vote in Bougainville, it may be anticipated that in the coming years Bougainville's Constitution will become completely autonomous from the PNG Constitution, and a new founding document for Bougainville may be created. However, in the interim, any laws that are made in Bougainville, continue to be made within the bounds of the PNG Constitution.

Section 206(1) of the Bougainville Constitution itself states that the PNG Constitution remains valid and effective in Bougainville.

The Bougainville Constitution, and any laws passed by the ABG, are part of the laws of PNG.⁷⁵

Currently, the laws made by the ABG, and by the Bougainville Constitution itself, are to be subject to the PNG Constitution,⁷⁶ and in the event that these laws are inconsistent with the PNG Constitution, these laws are invalid and ineffective.⁷⁷

The Bougainville Constitution cannot abrogate guaranteed rights and freedoms (or procedures to ensure their enforcement) laid out in the PNG Constitution.⁷⁸

To determine whether the proposed legislation is constitutionally valid, it is therefore important to address both the Bougainville and PNG Constitutions.

3.2 The amendments and the Bougainville Constitution

The proposed legislation effectively removes ownership rights of customary landowners in the minerals located on, in or under their lands.

3.2.1 Recognition of traditional leaders

Bougainville's current Constitution contains certain provisions relating to the roles and functions of traditional leaders and owners of customary land which appear to be contravened if these customary land rights are removed.

Under s 44 of the Constitution, the ABG is obliged to develop a land policy which, 'as

far as is practicable; recognises the 'roles of traditional chiefs, other traditional leaders and owners of customary land in relation to customary land matters.'⁷⁹ Insofar as any new laws affect land, they should be developed to be consistent with these principles.

As the proposed legislation removes the roles of chiefs, leaders or owners of customary land with respect to being consulted on, and consenting to, mining activities on their land, it arguably may be in violation of such principles.

Similarly, this effect of the proposed legislation may arguably be in contravention of section 51(1) of the Bougainville Constitution, which requires the recognition of traditional systems of government and the roles and responsibilities of traditional chiefs and other leaders as custodians of custom by all levels of government.

3.2.2 Recognition of customary rights and future generations

Further, section 23(1) of the Bougainville Constitution provides that the laws 'shall be directed towards recognition of customary rights of the People of Bougainville in relation to the land and the sea and natural, mineral and oil resources of Bougainville and any law relating to the development of such resources shall take that into account.'

Section 23(2) further provides that 'the utilization of the land and the sea and natural resources of Bougainville shall be managed in such a way as to meet the development and environmental needs of present and future generations of the People of Bougainville and the Autonomous Bougainville Government shall take all possible measures to prevent or minimize damage and destruction to land, seas, air and water resources from pollution or other causes.'

A law which removes the ownership interests from customary landowners, and fails to adequately meet the environmental needs of present and future generations, or take all possible measures to prevent or minimise damage to the environment could appear to be in contravention of this section.

3.2.3 Human rights

Under s 178 of the Bougainville Constitution, the basic rights contained in the PNG Constitution also apply in Bougainville. If the proposed legislation violates any of these rights, it is also in violation of s 178 of the Bougainville Constitution.

A further important restriction on the powers of the ABG is contained in s 293(2) of the PNG Constitution, which provides that the powers and functions available to the ABG 'will not be exercised in a manner inconsistent with Papua New Guinea's international obligations and human rights regime.'

'International obligations' is defined in the PNG Constitution as including treaties and other written international agreements to which Papua New Guinea is or becomes a party,⁸⁰ which means that it also likely includes obligations arising under customary international law.

The powers of the ABG are thereby limited to only enacting laws that are in conformity with Papua New Guinea's international obligations – i.e. enacting laws that do not violate principles of customary law, or treaties to which Papua New Guinea is a party. This is so notwithstanding that international law is not otherwise part of the domestic law of Papua New Guinea, unless specifically incorporated by legislation or regulation.⁸¹

3.2.4 Protection from unjust deprivation of property

Section 44 of the Bougainville Constitution provides that in developing a land policy under s 44(1), 'the ABG shall ensure that its proposals comply with Section 53 (protection from unjust deprivation of property) of the National Constitution.'⁸²

The proposed legislation effectively removes ownership rights of customary landowners in the minerals located on, in or under their lands. This amounts to a taking of property, or at least the acquisition of an interest in or right over property, which would be relevant to this section.

Section 53 lays out certain requirements which must be fulfilled in order for deprivation of property to be lawful; the acquisition of a right or interest must be for a public purpose or for a reason that is reasonably justified in a democratic society; and necessary for the attainment of that purpose or, by reason of necessity, affords the reasonable justification.

Removing ownership of minerals from customary landowners does not appear to be the acquisition of a right or interest that is for a public purpose nor justifiable in a democratic society. This is especially since, under the existing Mining Act, the minerals could still be exploited through the ABG issuing tenements and leases, while maintaining the ownership rights of the customary landowners in those minerals. For the same reasons, removing the customary landowners' ownership rights is unlikely to be necessary for any purpose of exploiting minerals for the development of Bougainville.

Further, in 2016, the National Court appears to have found that a lack of consultation with customary landowners prior to an acquisition of their land would amount to a violation of s 53 of the Constitution.⁸³

3.2.5 Other constitutional rights

Section 48 of the National Constitution provides for the 'freedom of employment in any calling' that is lawful. The National Court has previously described this right as 'critically important' in considering laws relating to natural resources and the environment, because 'most people in PNG keep themselves employed in their own cultural settings and environments, in their gardens or bushes or sea to sustain themselves.'⁸⁴ The amendments do not give adequate consideration to this right, as people working in subsistence farming could be excluded from the land on which they choose to be employed, without their consultation or free, prior and informed consent.

The removal of the rights of landowners associated with ownership of the minerals and their land (including rights of consultation and requirements surrounding their consent) would also appear to contravene certain constitutional rights. These include the right to protection against any arbitrary search and entry of a person and property;⁸⁵ freedom of religion;⁸⁶ right to employment;⁸⁷ and right to privacy⁸⁸ of the National Constitution.

4 The proposed amendments and international law

Jubilee Australia requested legal advice on whether the amendments proposed could, if passed, violate international law.

Under Papua New Guinean law, if the amendments were to violate international law, this would not, in and of itself, render those amendments invalid.⁸⁹ However, if the amendments were to violate international law, then the exercise of the power by the ABG, in passing the Bill, would be the exercise of a power by the ABG in contravention of s 293(2) of the PNG Constitution. Under s 11 of the PNG Constitution, that could render the passage of the Bill invalid.⁹⁰

The power of the ABG must be exercised in accordance with Papua New Guinea's international obligations and human rights regime.⁹¹ Until Bougainville is independent, PNG remains responsible under international law for the conduct of the ABG - such that if actions of the ABG were to violate international law, PNG would be in violation of international law.⁹²

There are a number of grounds on which it is reasonable to argue that the amendments proposed by the Bill could violate international law. These include principles arising under international human rights law, a principle of transparency and certainty that has been recognised in a number of areas of international law, and requirements of due diligence arising under international environmental law.

4.1 Potential violations of international human rights law

PNG has ratified the following treaties on matters concerning human rights:

- International Covenant on Civil and Political Rights (ICCPR);
- International Covenant on Economic, Social and Cultural Rights (ICESCR);
- Convention on the Elimination of All Forms of Racial Discrimination (CERD);
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).⁹³

Many people within PNG and Bougainville rely on their customary lands for subsistence.⁹⁴ However, the proposed legislation could be used to remove communities from their lands, or otherwise lose their ability to live off the land, due to the approval of mining activities without their consent.

These features of the Bill, if passed into law, would give rise to possible breaches of the following rights under international human rights law:

The right to adequate food and housing:

Under article 11(1) of the ICESCR, and **to work** under article 6(1) of the ICESCR (each is also included in articles 5(e)(i) and (iii) of the CERD);

By excluding a SBE from the requirements for landowner consultation and consent under the Mining Act, while also failing to provide for or control the circumstances under which a SBE may enter or use their lands, the Bill fails to meet these requirements.

(This is supported by the preliminary views reached by the Committee on the Elimination of Racial Discrimination in response to a complaint regarding PNG's use of 'Special Agricultural and Business Leases,' under which non-indigenous companies were granted long-term leases over indigenous lands. The Committee expressed the view that, if the landowners' consent was not previously obtained or if they were otherwise not adequately consulted or informed of the purposes of the lease and the environmental impact of the activities which were planned, the practice of granting the leases would infringe rights under the CERD, and corresponding rights under the ICESCR.⁹⁵)

The right to water under article 11 of the ICESCR and article 14(2)(h) of CEDAW. Although article 11(1) of the ICESCR does not expressly mention water, the Committee on Economic, Social and Cultural Rights (CESCR) indicated that it is an indispensable part of the right to an adequate standard of living provided by article 11(1).⁹⁶

This right may be directly violated, in the event that the interpretation or application of the Bill may exclude a SBE from the requirement to adequately plan for and manage the maintenance and quality of water supplies as part of its mining activities.

The right could also be violated if people were resettled onto land with inadequate water supplies in order for a SBE to undertake its mining activities.

The Bill may also breach the right to water due to the lack of legislative detail as to the circumstances under which a SBE may infringe this right and associated protections to people subsequently affected.

The right to life under article 6(1) of the ICCPR;

The right to life guaranteed under article 6(1) of the ICCPR imposes an obligation on States to take positive measures (including through legislation) to protect the lives of people against a range of threats.⁹⁷

If passed, the Bill could cause PNG to be in breach of this most fundamental of human rights. The Bill remains ambiguous as to the obligations imposed on a SBE, including to what extent the ordinary application process continues to apply; and on the ABG, including to what extent it will review and reject applications that do not meet a requisite standard.

If the legislation is passed, the ABG may subsequently not adequately ensure that those mining activities are carried out in a manner that protects against the loss of life. Examples of this could include unsafe work practices, improper construction or excavation causing landslides or toxic contamination. The proposed legislation may also be in violation of this right where the customary landowners depend on the land on which they reside for their own subsistence.

Whether or not the Bill violates the right to life, however, will also likely depend upon the extent to which other laws of Bougainville or PNG regulate matters that serve to protect life (such as workplace safety laws, environmental laws, resettlement obligations, etc) and with which a SBE will be obliged to comply.

The right to free, prior and informed consent;

The principle of free, prior and informed consent has been generally accepted as derivative to various rights under the ICESCR, ICCPR and CERD.

One such right often relied upon is article 27 of the ICCPR, which concerns the rights of minority groups to enjoy their own culture. The Committee on Civil and Political Rights has explained this right as extending to protecting indigenous peoples' way of life where it is closely associated with the use of land and resources, and from which a requirement for obtaining their free, prior and informed consent arises for any proposals to undertake mining activities interfering with their use of the land.⁹⁸ If the legislation were to be passed, any subsequent violation of treaty obligations has the result that the law passed by the ABG could be beyond power, and therefore invalid.⁹⁹

Therefore, the Bill, by removing the rights of landowners to be consulted and consent to various mining activities by a SBE, may infringe the requirement of free, prior and informed consent that is associated with rights arising under the ICCPR, ICESCR and CERD, and could be, to that extent, invalid.

The right of self-determination: Article 1(1) of both the ICCPR and ICESCR provide that 'all peoples have the right of self-determination. By virtue of that right they freely... pursue their economic, social and cultural development'. Article 1(2) provides that 'all peoples may, for their own ends, freely dispose of their natural wealth and resources... In no case may a people be deprived of its own means of subsistence'. The right of self-determination is recognised as a principle of customary international law.¹⁰⁰

The amendments proposed by the Bill could violate the right of self-determination in two key ways. Firstly, the new sections 378(1) and 378(2)(b) removes the ownership of minerals from customary land owners, and therefore removes their freedom to dispose of those resources themselves. Secondly, the potential

exemption of a SBE from obligations to consult with, and obtain the consent of, landowners¹⁰¹ interferes with various of the aspects of self-determination referred to above, together with principles of free, prior and informed consent that likely forms part of the right of self-determination.

Even though the Autonomous Bougainville Government is itself an example of self-determination, if a government is duly elected by people holding the right of self-determination, and that government limits those peoples' rights to 'pursue their own initiatives for resource extraction within their territories', that government may violate the peoples' right to self-determination.¹⁰²

4.2 Obligations of certainty and transparency

A principle of transparency and certainty exists across a range of areas of international law – this requires that laws must be both accessible and clear as to what norms, rules or procedures are to be followed.¹⁰³

Principles of transparency have arisen in the context of international economic law. For example, the Appellate Body of the World Trade Organization found state regulations to be in violation of the General Agreement on Tariffs and Trades where they lacked a 'transparent [and] predictable' process.¹⁰⁴ The Appellate Body appears to have viewed the obligations of transparency as forming part of fundamental international law principles of due process.¹⁰⁵

Beyond the context of international economic law, the European Court of Justice has similarly held that it is a fundamental principle of law

that rules should be clear and precise so that individuals may ascertain what their rights and obligations are and take appropriate steps.¹⁰⁶ The Human Rights Council has described the same principle as part of the 'fundamental guarantees of due process'.¹⁰⁷ The Committee on Economic, Social and Cultural Rights has also stated that the ability to protect and enforce the rights under the ICESCR depends upon states acting transparently.¹⁰⁸

Given the connection between transparency, clarity and due process, it is reasonably arguable that obligations of transparency and clarity at least form part of the protections afforded within human rights. This is because, in order for landowners to be adequately consulted, and for infringements of their rights to be adequately restricted and regulated, the laws affecting landowners must be accessible to them and sufficiently clear so that they may avail themselves of the protections those laws are supposed to afford.¹⁰⁹

The amendments proposed by the Bill do not appear to conform with such principles of transparency and certainty in the following ways:

- The Bill is unclear regarding the 'preferential benefits' to be extended to landowners and the contractual agreements within which they will be laid out;
- The Bill is unclear regarding what provisions of the Mining Act the SBE will need to comply with, in light of what is captured by s 378(3)(c);
- The potential for varying the timing of applications 'orally'¹¹⁰ within the Bill lacks transparency;
- There is a lack of adequate criteria in the Bill for determining these issues, and from which it may then be possible to review any decisions of the ABG in the courts.

4.3 Principles of due diligence under international environmental law

The amendments proposed by the Bill could violate certain principles of due diligence arising under international environmental law that require states to assess the environmental impacts of proposed mining activities and regulate such activities. These principles arise both from treaties to which PNG is a party, as well as principles of customary international law.

On matters concerning international environmental law, PNG is a party to the following relevant treaties:

- United Nations Convention on the Law of the Sea (UNCLOS);
- Convention for the Protection of the Natural Resources and Environment of the South Pacific Region [1986] PITSE 15 (24 November 1986) (Noumea Convention); and
- Convention on Biological Diversity, 1760 UNTS 79 (5 June 1992) (Biodiversity Convention).

Article 14(1) of the Biodiversity Convention calls on its member states 'as far as possible and as appropriate' to 'introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity.'

Mining activities on the island of Bougainville could conceivably have effects on marine areas, including through runoff, water contamination and erosion. The Noumea

Convention¹¹¹ requires its members to take appropriate measures to prevent, reduce and control environmental damage caused by mining activities.¹¹²

To the extent that any mining activities of a SBE may extend to the seabed, article 139(1) of the UN Convention on the Law of the Sea (UNCLOS) requires States to 'ensure' that contractors engaged in such activities comply with their obligations to protect the marine environment. The obligation has been interpreted as requiring States 'to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result.'¹¹³

Beyond Papua New Guinea's treaty obligations, there is also a well-accepted principle of customary international law that states must act to prevent causing environmental harm to other states.¹¹⁴ In discharging that duty, an obligation of 'due diligence' is increasingly being recognised, which includes a requirement for states to take legislative, administrative or other actions as are necessary to prevent or minimise the risk of such environmental damage occurring.¹¹⁵ This includes the obligation to conduct an environmental assessment of any activity with the potential risk to cause environmental harm to other states.¹¹⁶ The obligation cannot be met by imposing certain requirements in a contractual agreement with the person conducting the activity; there must be requirements set out in legislation or regulations.¹¹⁷

The customary law obligation to engage in a process of environmental assessment (with that process to be provided for in laws or regulations) is limited to activities that may cause damage to other states.¹¹⁸ However, as the activities of a SBE may extend to the majority of the land of Bougainville and its

offshore areas, it is conceivable that some of a SBE's activities may impact other states (especially given the proximity of the Solomon Islands to Bougainville) such that Papua New Guinea must, under international law, ensure that a SBE's activities are properly assessed and any environmental risks managed. Subsequently, the amendments proposed by the Bill may violate these treaty obligations of Papua New Guinea. This is due to the following reasons.

Under the amendments, it is unclear to what extent a SBE will be required to submit various plans and proposals for assessment by the ABG, and the role of the ABG in assessing them.

The amendments do appear to require a level of assessment, requiring application processes for exploration licences and mining leases.¹¹⁹ However, the manner in which this law is interpreted and applied, and the extent to which the ABG conducts a proper environmental assessment, will be the test as to whether these amendments violate international obligations.

In short, the Bill may not, on its face, violate the law, however the exercise of the ABG's powers under the Bill (were it to pass into law), may subsequently do so if the ABG does not conduct proper environmental assessment.

It is unclear whether in practice the amendments would involve the kinds of environmental assessments envisaged by the treaty obligations identified above, including assessments that occur before the mining activities are undertaken, or whether the ABG has sufficient powers under the Act to order a SBE to cease mining activities or direct it as to the manner of its activities, where an environmental assessment indicates

significant effects on the marine environment or biodiversity.

It would be more appropriate if the Bill were to specify more precisely what the requirements are for the SBE to apply for an exploration licence or mining lease, and what the obligations of the ABG are in respect of assessing the same. International best practice would also require a review mechanism to be expressly included. Without these clarifications, there is a risk that the Bill violates the obligation to undertake proper environmental assessments and, in any event, violates obligations of transparency and certainty.

To the extent that the interpretation or application of the amendments exclude a SBE from an environmental assessment

process and removes the ability of the ABG to appropriately regulate the environmental impact of a SBE's activities, there is a reasonable argument that the Bill could place Papua New Guinea in violation of its obligations under customary international law. In so doing, the Bill would be invalid by reason of s 293(2) of the PNG Constitution.

Conclusion

The legislative package that has been proposed to amend the Mining Act comprises the Bougainville Mining (Amendment) Bill 2019, the Bougainville Advance Holdings Trust Authorisation Bill 2019, and the Bougainville Advance Mining Holdings Limited Authorisation Bill 2019. This legislative package creates a new regime for Special Bougainville Entities within Bougainville's mining industry.

The proposed legislation is unclear and lacks appropriate detail regarding how landowners' rights will be protected.

The proposed legislation is ambiguous regarding the degree to which landowners will be consulted regarding mining projects on their lands, and whether they may withhold consent to mining projects.

The legislation is concerning in its proposal that 'all fees, annual rent, royalties, levies and other rights and interests granted to landowners' under the current Mining Act will not apply. While the legislation states that 'preferential benefits' will be provided to landowners, these are not specified. Subsequently, there is no certainty or transparency about what landowners may receive, and no way in which landowners will be able to determine if they have received a good deal for their land.

The legislation also lacks appropriate detail about the application process for mining leases and licences, and how this intersects with other components of the proposed legislation. As a consequence, it is uncertain whether the environment of Bougainville will be sufficiently protected.

Environmental damage from mining projects can be vast, and impact upon an entire ecosystem, a community's way of life and their access to basic needs such as water, food and livelihoods. Any mining project carries with it a risk of potential and substantial damage to the lives and communities of customary landowners, and surrounding communities.

Therefore, it is important that any legislation that governs mining projects, the rights of landowners, and the responsibilities of operating companies, is appropriately clear and specific. This is essential to ensure that companies operating are held to appropriate standards, and so that landowners and surrounding communities are assured that their rights are protected and enforceable, and the environment in which they live is kept safe.

Constitutional law and international law provide a yardstick by which to measure the efficacy of a domestic law in protecting these essential rights.

This paper has provided an assessment of the legislation against this yardstick, and the proposed legislation appears to be lacking in its protection of these essential rights.

If the proposed legislation were to violate international law, this could in turn also violate section 178 of the Bougainville Constitution.¹²⁰ Such a finding may also lead to the legislation being invalid if the passing of the legislation by the ABG was held to be beyond power.¹²¹

Endnotes

- 1 See Bougainville Mining (Amendment) Bill 2019, Part 17, cl 378. The Bills can be viewed in full at the ABG, Department of Minerals and Energy Resources' website: <http://www.abg.gov.pg/government/departments/mining> (accessed 29 January 2020).
- 2 Autonomous Bougainville Government, 'Mining and energy', available at <http://www.abg.gov.pg/government/departments/mining> (accessed 23 December 2019).
- 3 Sarah Danckert and Ben Bohane, 'This derelict mine caused a bloody war. Now Aussie companies are fighting over it again', *The Sydney Morning Herald*, 15 November 2019, available at <https://www.smh.com.au/world/oceania/this-derelict-mine-caused-a-bloody-war-now-aussie-companies-are-fighting-over-it-again-20191113-p53a8y.html> (accessed 7 January 2020).
- 4 Aaron Clark and Dan Murtaugh, 'The remote island sitting on \$58 billion of gold and copper', Bloomberg, 11 February 2019, available at <https://www.bloomberg.com/news/articles/2019-02-11/-58-billion-pacific-mine-claim-seen-at-risk-as-referendum-nears> (accessed 7 January 2020).
- 5 RNZ, 'Bougainville to change Mining Act for new investor', 31 January 2019, available at <https://www.rnz.co.nz/international/pacific-news/381258/bougainville-to-change-mining-act-for-new-investor> (accessed 7 January 2020).
- 6 'Bougainville pressing ahead with Mining Act changes', RNZ, 5 June 2019, available at <https://www.rnz.co.nz/international/pacific-news/391280/bougainville-pressing-ahead-with-mining-act-changes> (accessed 3 June 2020).
- 7 'Committee slams changes to Bougainville's mining law', ABC Pacific Beat, 13 June 2019, available at <https://www.abc.net.au/radio-australia/programs/pacificbeat/committee-slams-changes-to-bougainvilles-mining-law/11204984> (accessed 5 May 2020).
- 8 Ibid.
- 9 Ibid.
- 10 'Bougainville postpones mining bill', RNZ, 14 June 2019, available at <https://www.rnz.co.nz/international/pacific-news/392046/bougainville-postpones-controversial-mining-bill> (accessed 3 June 2020).
- 11 The group, known as the Special Mining Lease Osikaiyang Landowners Association (SMLOLA) are one of the groups customary landowners at the Panguna mine. The SMLOLA has ties to the Australian-based mining company RTG.
- 12 'Top Lawyer Queries ABG's Interpretation of Mining Act', PNG Post Courier, 21 June 2019, available at <https://postcourier.com.pg/top-lawyer-queries-abgs-interpretation-mining-act/> (accessed 1 June 2020). See also 'Letter from HopgoodGanim Lawyers' Mr Michael Hunt to SMLOLA Chairman, Mr Philip Miriori in response to the ABG Submission titled Interpretation of Part 17, Pacific News Service – Arawa, Bougainville, 19 June 2019, available at <https://pacificnewsservice.blogspot.com/2019/06/letter-from-hopgoodganim-lawyers-mr.html> (accessed 1 June 2020).
- 13 Liam Fox on Pacific Beat with Catherine Grau, 'Bougainville government refuses to withdraw controversial mining laws', ABC Pacific Beat, available at <https://www.abc.net.au/radio-australia/programs/pacificbeat/bougainville-govt-rejects-criticism-of-changes-to-mining-law/11226770> (accessed 5 May 2020).
- 14 The Bills can be viewed in full at the ABG, Department of Minerals and Energy Resources' website: <http://www.abg.gov.pg/government/departments/mining> (accessed 29 January 2020).
- 15 Bougainville Mining Amendment Bill 2019, Schedule 1, cl 3.
- 16 Bougainville Mining Amendment Bill 2019, cl 378(1).
- 17 Bougainville Mining Amendment Bill 2019, cl 378(2).
- 18 Bougainville Mining Amendment Bill 2019, cl 378(3)(b)(i).
- 19 Bougainville Mining Amendment Bill 2019, cl 378(3)(b)(i).
- 20 Bougainville Mining Amendment Bill 2019, cl 378(3)(b)(i).
- 21 Bougainville Mining Amendment Bill 2019, cl 378(3)(b)(ii).
- 22 Bougainville Mining Amendment Bill 2019, cl 378(3)(b).
- 23 Bougainville Mining Amendment Bill 2019, cl 378(3)(c). Note, a former version of the Bill provided discretion for a SBE to be exempt from the entire Act.
- 24 The Bill only states that SBEs would be required to comply with the ordinary application processes in relation to the grant of a Special Bougainville Exploration Licence or Mining Lease, as those processes are set out in Parts 1 to 16 of the Act, in relation to the application of an exploration licence or application of a mining lease: cl 378(3)(c).
- 25 Bougainville Mining Amendment Bill 2019, s378(3)(d).
- 26 Bougainville Mining Amendment Bill 2019, Part A. Part A states that 'Notwithstanding any other provision in this Act, to the extent that there are any inconsistencies between: Part 1 to Part 16... and Schedule 1 to this Act and Part 17 of this Act, then Part 17 shall prevail.' However, Parts 1 to 16 and Schedule 1 is the entirety of the existing Bougainville Mining Act 2015.
- 27 Bougainville Advance Holdings Trust Authorisation Bill 2019, at (c)(ii), available at http://www.abg.gov.pg/images/misc/Bougainville_Advance_Holdings_Trust_Authorization_Bill_2019.pdf (accessed 6 January 2020).
- 28 Bougainville Advance Holdings Limited Authorisation Bill 2019, at (e).
- 29 Ibid, clause 8(1).
- 30 Ibid, clause 7(1), 7(2).
- 31 Joshua Pietras, 'An (Indigenous) Rights-Based Approach to Deforestation in Papua New Guinea' (2014) 22 *Waikato Law Review* 137 at 138.
- 32 *Bougainville Mining Act 2015*, s 7 – 9.
- 33 See Jubilee Australia, *The Devil in the Detail: Analysis of the Bougainville Mining Act 2015* (October 2015).
- 34 See *Bougainville Mining Act 2015*, s 126.
- 35 See *Bougainville Mining Act 2015*, s140 and 142.
- 36 See *Bougainville Mining Act 2015*, Part 6, Division 2.
- 37 See *Bougainville Mining Act 2015*, ss 91 and 105.
- 38 See *Bougainville Mining Act 2015*, s105.

39 See *Bougainville Mining Act 2015*, ss 41 and 159.
40 See *Bougainville Mining Act 2015*, s113.
41 See *Bougainville Mining Act 2015*, ss 289, 291, 292 and Part 11.
42 Bougainville Mining Amendment Bill 2019, cl 378(3)(b).
43 Autonomous Bougainville Government, Office of the Vice President and Minister for Mining, , Second reading speech on a bill entitled 'Bougainville Mining (Amendment) Bill 2019, presented by Hon. Raymond Masono MHR on Wednesday 13 February 2019 ('Second reading speech').
44 Bougainville Mining Amendment Bill 2019, cl 378(3)(c).
45 Bougainville Mining Amendment Bill 2019, cl 378(3)(c).
46 Bougainville Mining Amendment Bill 2019, cl 378(3)(b).
47 Bougainville Mining Act 2015, s 98.
48 Second reading of speech.
49 The identity of the landowners who are affected will be determined by the ABG: Bougainville Mining Amendment Bill 2019, cl 378(3)(b).
50 Bougainville Mining Amendment Bill 2019, cl 378(3)(b)(i).
51 Bougainville Mining Amendment Bill 2019, cl 378(3)(b)(ii).
52 Second reading speech.
53 Second reading speech.
54 Letter from HopgoodGanim Lawyers' Mr Michael Hunt to SMLOLA Chairman, Mr Philip Miriori in response to the ABG Submission titled Interpretation of Part 17, Pacific News Service – Arawa, Bougainville, 19 June 2019, available at <https://pacific-newsservice.blogspot.com/2019/06/letter-from-hopgoodganim-lawyers-mr.html> (accessed 1 June 2020).
55 Bougainville Mining Amendment Bill 2019, cl 378(3)(c).
56 These may be varied orally or in writing, see Bougainville Mining Amendment Bill 2019, cl 378(3)(d).
57 *Bougainville Mining Act 2015*, s119.
58 *Bougainville Mining Act 2015*, s124.
59 *Bougainville Mining Act 2015*, s205.
60 *Bougainville Mining Act 2015*, s206.
61 *Bougainville Mining Act 2015*, s231.
62 *Bougainville Mining Act 2015*, s297.
63 It must be noted that already under the current Act, entities can be exempt from some of these requirements: *Bougainville Mining Act 2015*, s125.
64 *Bougainville Mining Act 2015*, s106.
65 *Bougainville Mining Act 2015*, s120.
66 That should include, for example, various plans under s 119(1)(vi) that are then to be assessed by the ABG under s 120.
67 Bougainville Mining (Amendment) Bill 2019, cl 378(2).
68 Bougainville Mining (Amendment) Bill 2019, cl 378(2): 'all land...that is not subject to an existing exploration licence or mining lease.'
69 Bougainville Mining (Amendment) Bill 2019, cl 378(3)(a).
70 The ABG is provided for in Part XIV of the PNG Constitution, and this Part prevails over any other provisions in the PNG Constitution that would be inconsistent with it: see PNG Constitution, s 276(2).
71 Under s 286(1), PNG Constitution.
72 PNG Constitution, ss 290(2)(zd) and (zm).
73 Bougainville Constitution, s 65.
74 Section 280 of the PNG Constitution provides for a Bougainville Constitution. It establishes the various branches of the ABG, including the Bougainville Legislature, comprising a House of Representatives, which is vested with the legislative power of the ABG. The Bougainville Executive Council (BEC) is vested with the executive power of the ABG. The BEC has the power to do all things that are necessary or convenient to be done for or in connection with the operations and activities of the ABG, subject to the PNG Constitution, Bougainville Constitution and laws made by the House of Representatives: Bougainville Constitution, Part V, section 54, section 79 and sections 79(2) and 85).
75 PNG Constitution, s300, s9. The laws made by the ABG, and by the Bougainville Constitution itself, are to be subject to the PNG Constitution: PNG Constitution, s10. In the event that these laws are inconsistent with the PNG Constitution, these laws are invalid and ineffective: PNG Constitution, s11.
76 PNG Constitution, s10.
77 PNG Constitution s11.
78 PNG Constitution, s304(3).
79 Bougainville Constitution, s44(1),(2).
80 PNG Constitution, s 293(1).
81 PNG Constitution, s 117(7).
82 Bougainville Constitution, s 44(2).
83 *Puipui v Pat* [2016] PGNC 326 at [140].
84 *Bernard v Duban* [2016] PGNC 12 at [24].
85 PNG Constitution, s 44.
86 PNG Constitution, s 45.
87 PNG Constitution, s 48.
88 PNG Constitution, s 49.

89 PNG Constitution, s 117(7).

90 Section 11 of the PNG Constitution relevantly states: '(1) This Constitution and the Organic Laws are the Supreme Law of Papua New Guinea, and, subject to Section 10 (construction of written laws) all acts (whether legislative, executive or judicial) that are inconsistent with them are, to the extent of the inconsistency, invalid and ineffective. (2) The provisions of this Constitution and of the Organic Laws are self-executing to the fullest extent that their respective natures and subject-matters permit'

91 PNG Constitution, s 293(2).

92 See, e.g., *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136 at [149]-[151].

93 Note, however, that PNG has not ratified their Optional or Additional Protocols.

94 See, e.g., Letter dated 31 January 2011 from two NGOs to the Special Rapporteur on the rights of indigenous peoples triggering early warning and urgent procedures of CERD: "Only 14% of Papua New Guineans live in urban centres, the remaining 86% of the population are almost exclusively employed in semi-subsistence agriculture and small, local trading networks" at [2]. This has also been recognised by the National Court; see *Bernard v Duban* [2016] PGNC 121 at [24]: 'most people in PNG keep themselves employed in their own cultural settings and environments, in their gardens or bushes or sea to sustain themselves.'

95 UNHCR, Letter from the Chair of the Committee on the Elimination of Racial Discrimination to Papua New Guinea of 11 March 2011, GH/cbr; UNHCR, Letter from the Chair of the Committee on the Elimination of Racial Discrimination to Papua New Guinea of 14 December 2018, CERD/EWUAP/Papua New Guinea/2018/JP/ks.

96 CESCR, *General Comment No 15: The Right to Water (Arts 11 and 12)*, Un Doc E/C.12/2002/11 (2003).

97 CCPR, *General Comment No. 6: Article 6 (Right to Life)* (1982) at [5].

98 CCPR, *General Comment No. 23: The rights of minorities (Art. 27)*, UN Doc. CCPR/C/21/Rev.1/Add.5 (1994). See also James Anaya, *Report of the Special Rapporteur on the rights of indigenous peoples: Extractive industries and indigenous peoples*, UN Doc A/HRC/24/41 (2013) (Extractive Industries Report) at [19]. Yet, note that PNG is not a party to the optional protocols that enable individual complaints to be made to the committees in charge of overseeing those treaties.

99 PNG Constitution, s 293(2).

100 See *Case Concerning East Timor (Portugal v Australia)* [1995] ICJ Rep 90 at [29].

101 The degree of exemption relates to the manner in which s 378(2)(b) and s 378(3)(c) are interpreted.

102 *Extractive Industries Report* at [9].

103 See the discussion of the meaning of transparency in Carl-Sebastian Zoellner, "Transparency: An Analysis of an Evolving Fundamental Principle in International Economic Law" (2006) 27 *Michigan Journal of International Law* 579 at 583-85. Note, in relation to investors from Australia, PNG has also agreed to a specific treaty obligation to make its laws public and readily accessible. *Agreement between the Government of Australia and the Government of the Independent State of Papua New Guinea for the Promotion and Protection of Investments* [1990] PITSE 17 (3 September 1990) ('Australia-PNG Investment Agreement'), art 6.

104 *Turtle/Shrimp*, WT/DS58/AB/R, DSR 1998: VI 2755 (12 October 1998) at [180]-[181].

105 *Ibid* at [182]-[184].

106 *C-169/80: Gondrand Frères and Garancini* [1981] ECR 1931; *C-143/93: Van Es Douane Agenten* [1996] ECR I-431 at [27].

107 HRC, *Opinions adopted by Working Group on Arbitrary Detention*, A/HRC/WGAD/2018/10 (2018) at [50].

108 See CESCR, *Concluding Observations on Azerbaijan*, E/C.12/1/Add.20 (1997) at [29]; CESCR, *Concluding Observations on Democratic Republic of Congo*, E/C.12/COD/CO/4 (2009) at [13].

109 See CESCR, *Concluding Observations on Azerbaijan*, E/C.12/1/Add.20 (1997) at [29]; CESCR, *Concluding Observations on Democratic Republic of Congo*, E/C.12/COD/CO/4 (2009) at [13].

110 Bougainville Mining Amendment Bill 2019, cl 378(3)(d).

111 *Convention for the Protection of Natural Resources and Environment of the South Pacific Region* (1986)

112 *Ibid*, Article 13.

113 *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, ITLOS Advisory Opinion, Seabed Chamber, Case No. 17 (1 February 2011) (Seabed Advisory Opinion) at [110].

114 See, e.g., *Trail Smelter case (United States, Canada)*, Awards of 16 April 1938 and 11 March 1941, III Reports on International Awards 1905 at 1982; *Corfu Channel Case (UK v Albania) (Merits)* [1949] ICJ Rep 4. See also International Law Commission, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries* (2001), Commentary to Art 3 at 153[1].

115 *Draft Articles on Transboundary Harm*, commentary to art 3 at 154[6]-[7].

116 See *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* [2015] ICJ Rep 2015 at [105]; *Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2010] ICJ Rep 14 at [101]; ITLOS, *Seabed Advisory Opinion* at [131] and [145]; ITLOS, *Land Reclamation (Provisional Measures)*, ITLOS No. 12 (2003) at [96]; UNGA Res 37/7, *World Charter for Nature* (1982) at [11](c) and [16].

117 ITLOS, *Seabed Advisory Opinion* at [223]-[225].

118 It may be arguable that this principle extends to causing global harm more generally, including by the emission of greenhouse gasses through large-scale mining. See Benoit Mayer, "Climate Impact Assessment as an Emerging Obligation under Customary International Law" (2019) 68(2) *International & Comparative Law Quarterly* 271.

119 Bougainville Mining Amendment Bill 2019, cl 378(3)(c).

