

THE DEVIL IN THE DETAIL

Analysis of the Bougainville Mining Act 2015

October 2015

ACKNOWLEDGEMENT

This report is a publication of the Jubilee Australia Research Centre (JARC). The report was made possible by the generous financial support of the McKinnon Family Foundation and private donors.

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AN ANALYSIS OF THE BOUGAINVILLE MINING ACT 2015

October 21, 2015

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EXECUTIVE SUMMARY

The *Bougainville Mining Act 2015 (Mining Act or Act)* was passed in March 2015 and is now the law that governs resource extraction in the Autonomous Region of Bougainville. This Act creates the legal framework for reintroducing mining on Bougainville and for reopening the Panguna mine, a project which triggered a decade-long conflict that cost up to 20,000 lives.¹ The reintroduction of mining is a significant issue for many people living in the Panguna region, as it is for people across the region.

Many claims have been made about the contents of Mining Act. Some of these claims are strongly established in the text of the Mining Act. For example, the Mining Act gives the Autonomous Bougainville Government (**ABG**) exclusive control over the regulation of mining on Bougainville. It also limits the number of large-scale mines to two, creates a regulatory regime for small-scale, community licenses, and governs compensation and distribution of royalties, profits and revenues, giving an equity ownership interest to landowners in mining lease areas.

Other claims made about the Mining Act require further scrutiny. Given the technical nature of the Act, many stakeholders are forced to rely on the statements of politicians, proponents and consultants about its effect. There has been no detailed independent analysis of the Mining Act. This means that Bougainville communities and other concerned stakeholders may not fully understand the Mining Act and the terms under which mining will re-enter their lands after a long absence.

Without a clear, evidence-based understanding of the Mining Act and its implications, it will be impossible for stakeholders to engage in meaningful discussions over the recommencement of mining in the region.

The Australian government through the Department of Foreign Affairs and Trade (**DFAT**) has funded a range of advisers, experts and volunteers supporting mining negotiations, legislative drafting, strategic and legal advice, policy development and analysis. The purpose of the activities has been stated as ‘to support the ABG’s efforts to ensure policy decisions on mining are transparent, consultative, and acceptable to Bougainvilleans, as well as conducted in a way to minimise the risk of conflict.’²

¹ Alley, R. (2003) ‘Ethnosecession in Papua New Guinea: The Bougainville Case’, in Ganguly, R. and Macduff, I. (eds.) *Ethnic Conflict and Secessionism in South and Southeast Asia: Causes, Dynamics, Solutions*, London: Sage Publications, p 231. 20,000 is the upper estimate of deaths that occurred during this time; however the recent survey data from the UNDP appear to support this estimate: see: <http://www.partners4prevention.org/sites/default/files/p4p-bougainville-report.pdf> pages 12-13.

² Senate Foreign Affairs, Defence and Trade Legislation Committee Supplementary Budget Estimates 2014 (23 October 2014) question 82.

Given the sensitive nature of the re-introduction of mining to Bougainville, the substantial expenditure required to re-establish mining on Bougainville and the profound impact on the social, environmental and cultural as well as economic wellbeing of the people involved, it is vital that there be full understanding about, and agreement regarding, its provisions.

PURPOSE OF THIS REPORT

In this spirit of promoting such understanding, this report compares key public statements about the Mining Act against the text of the Act itself. In doing so, the report builds on previous feedback provided by Jubilee Australia to Bougainville's Secretary for Mining, Mr Stephen Burain, who in February 2015 invited Jubilee Australia to comment on the draft Act. In particular, this report examines the impacts of the Act on customary landowner rights.

This report also analyses parts of the Mining Act that have not been publicly discussed, yet deserve proper attention and consideration. Bougainvilleans have been informed that 'the referendum timetable places pressure on us to achieve fiscal self-reliance rapidly' and that the only 'realistic option for rapid fiscal self-reliance and improved levels of services is large-scale mining.'³ The possibility thus exists that the pressure to facilitate mining may have expedited the passage of the draft bill before communities have had a meaningful chance to analyse the proposed legislation, and ensure that essential reforms and safeguards have been provided.

The importance of such a thorough-going process must be set against the history of Bougainville. For almost two decades the island hosted a large-scale copper and gold mine, operated by Rio Tinto subsidiary Bougainville Copper Limited (**BCL**). A campaign of industrial sabotage administered by local landowners caused BCL to close the mine in 1989, which led to a decade-long war.

Jubilee Australia's previous research in the mine-affected region found that the large-scale industrial operation instigated processes that led to multiple forms of dispossession and socio-ecological trauma, which laid the foundations for the subsequent sabotage efforts. In particular stakeholders reported that the economic, environmental, cultural and political footprints of large-scale mining were deeply incongruent with the sovereignty, cultural sustainability and social security of their communities.⁴

³ Speech by Chief John Momis, President, *Inauguration of the 3rd Autonomous Bougainville Government* (House of Representatives, Hutjena, Buka, 15 June 2015), p 5.

⁴ Jubilee Australia, *Voices of Bougainville: Nikana Kangsi, Nikana Dong Damana (Our Land, Our Future)* (2014) at http://issuu.com/jubileeaustralia2/docs/jubilee_australia_2014_voices_of_/1?e=13530468/9287457.

In addition to these Bougainville-specific variables, Jubilee Australia notes more generally that there exist significant governance risks associated with the alienation of natural resources in the region. Landowner associations have proven to be fraught vehicles for promoting popular participation in consultation and decision-making processes, with serious allegations of bribery, patronage relations and lack of transparency.⁵ Furthermore, governments themselves have been found to be complicit in illicit processes designed to circumvent landowner consent and good governance. In this respect, it is important to note that the most recent financial report issued by the Auditor General's Office raises serious concerns over the integrity of the ABG.⁶

In light of the historical tensions that presaged armed violence on Bougainville, and the broader regional experience of resource mismanagement, it is essential that the governance of mining on Bougainville meets the very highest standards for accountability, stakeholder participation, free, prior and informed consent, transparency, independent oversight and human rights. This is not only essential for assuring landowner rights are protected; these principles will help ensure resource extraction projects have a genuine social license to operate in the long-term.

Given the above, it is critical that the more contentious parts of the Mining Act are brought to light before the first applications for tenements are accepted and large-scale mining is restarted on Bougainville. This report drills down into the processes shepherded through by the Mining Act, looking in particular at whether they deliver the sort of unqualified reforms that have been promised by political and international stakeholders. In particular, this report closely examines the processes designed to elicit a social license for mining projects through landowner consent; it also evaluates the governance processes set out in the Act for managing project negotiations, benefit distribution, mining oversight and local contention.

It is hoped that this report will assist key stakeholders, specifically, those involved in implementing and enforcing the Mining Act, in addition to those communities directly and indirectly affected by its provisions. The report offers an important independent review for careful consideration by the Australian government, given that the foreign aid program has been instrumental in supporting and enabling the Mining Act process.

⁵ The history and problems with incorporated land groups established for mining purposes was discussed in Chapter 5 of Jubilee Australia's report *Pipe Dreams: The PNG LNG Project and the Future Hopes of a Nation* (2012) at http://issuu.com/jubileeaustralia/docs/jubilee_australia_pipe_dreams_report_dec_2012/1?e=6370534/3711554.

⁶ Auditor General's Office (2014) *Report of the Auditor-General on the Accounts of Provincial and Local-Level Governments and Associated Entities 2011-2013*, Waigani at http://www.ago.gov.pg/images/Annual_Reports/Part_3/Part_III_2011-2013.pdf.

SUMMARY OF ANALYSIS AND RECOMMENDATIONS

Veto power of landowners

1. Landowners do not have 'veto' power over the grant of an exploration licence, which can still be approved despite dissent from landowners. While landowners can control access granted to their lands under an exploration licence by executing a land access and compensation agreement, this right is diminished by:
 - the minimal requirements governing the negotiation process;
 - a lack of independent oversight; and
 - the fact only substantial compliance with the Mining Act is required, as opposed to full compliance.

Recommendations

- a. *That landowners' power of veto at the exploration licence stage be strengthened.*
 - b. *That land access and compensation agreements fully comply with the Mining Act in order to properly regulate the relationship between the landowners and mining companies.*
 - c. *That an independent advisory service be set up by the ABG, to lend landowners expert technical assistance and level the playing field when negotiating exploration licence land access, compensation agreements and community development agreements.*
2. At the mining lease stage, even if landowners do not consent to a project, they are subjected to series of mechanisms which they cannot opt out of and which appear to have one possible outcome: to obtain at the end the landowners' consent to authorise mining activities on their land. It is unclear whether the Bougainville Executive Council (BEC) can override landowner permission via the mechanism of a 'mutually acceptable decision'.

Recommendations

- a. *That landowners' power of veto at the mining lease stage be strengthened.*
- b. *That mediation in accordance with explicitly prescribed requirements establish rigorous standards for a fair process and neutral moderation.*
- c. *That the ABG clarify the role and purpose of s 143, and whether it gives the ABG the final say in approving a mining lease.*

Landowner permission and control

3. The concept of ‘landowner permission’, a central category in the Mining Act, is poorly defined and does not uphold the principal of ‘free, prior and informed consent’. Attempts to withdraw consent by preventing access to land, or negotiating fairer terms of compensation, are criminalised under the Mining Act.

Recommendations

- a. *That the concept of ‘landowner permission’ incorporate the basic tenets of free, prior and informed consent (FPIC).*
 - b. *That landowner permission be qualified, dependent on the circumstances, at different stages of the project cycle.*
 - c. *That the Mining Act set up and empower a landowner advisory service to procure independent expert advice, delivered in the local dialect, so that communities have access to diverse streams of information before making a decision to give, or withhold, consent.*
4. Landowner permission can be given by an ‘approved landowner organisation’, which can be selected, created and disestablished by the BEC, giving ultimate power to the ABG to decide who is, and who is not, entitled to speak about land. The Mining Act does not alleviate historical concerns about the potentially unrepresentative nature of landowner associations.

Recommendation

- a. *That approved landowner organisations be subject to provisions that guarantee legitimacy, identity and representativeness.*

Community Mining Licences

5. The rights of the Council of Elders and community mining licence holders under the small-scale mining regime remain ultimately within the discretion of the ABG, which can suspend the Council of Elders’ granting power, revoke community mining licences and disestablish community reserve areas. This potentially allows community rights to be revoked if they stand in the way of a large-scale development or for an arbitrary or punitive reason.

Recommendation

- a. *That community rights be respected and communities have the authority to negotiate the terms under which mining licenses would be revoked if so agreed.*

Compensation

6. The Mining Act provides principles, but not standards, of compensation. There is no sufficient assurance that customary landowners will be compensated fairly or adequately for the loss of land rights.

Recommendations

- a. That the Mining Act include an inclusive, consultative process for determining what is fair and equitable compensation for the loss of land rights.
- b. That standardised rates for fees and compensation be introduced.

Landowner protection and ownership of minerals

7. The Mining Act overrules the customary law principle that entry onto land is only permitted once consent from landowners has been obtained, authorising trespass without permission onto land in certain circumstances.

Recommendation

- a. That trespass onto customary land not be allowed without landowner consent.

8. While customary ownership of minerals has been hailed as a world-first, this right is qualified by ownership ceasing upon the separation of the minerals from the ground and by the right to acquire land compulsorily for mining purposes as it is 'in the public interest'. The types of licences generally available to community members leave more profitable deposits for advanced commercial developers.

Recommendation

- a. That the qualifications on customary ownership of land and minerals be reconsidered, and communities be entitled to negotiate whether they would like their land to be acquired for mining purposes.

9. Resettlement management plans are only mandatory if people are displaced due to a large-scale lease. This provision is discriminatory as the protection afforded depends on the legal characterisation of the tenement and not on the impact on the affected people. The obligation to have a resettlement management plan can be avoided if it is considered that it is 'not necessary or imposes an unjustified burden'. This 'escape clause' means resettlement management plans can be avoided.

Recommendation

- a. That resettlement management plan are mandatory in relation to displacement caused by all types of resettlement leases, and the current exemption in the Mining Act be removed or qualified.

Checks and balances, independent oversight and grievance mechanisms

10. There are insufficient checks and balances over the power of the government, with key bodies lacking independence and limited rights of review.

Recommendation

- a. *That independent bodies be established to oversee implementation of the Act, with landowners and communities having recourse to challenge decisions perceived to be inappropriate or unjust made under the Act.*

11. Community Development Agreements, which govern the distribution of developmental assistance to communities, do not create a level playing field, due to the lack of independent oversight. Mining companies can also obtain an exemption from having a Community Development Agreement and are only required to 'substantially comply' with its terms.

Recommendations

- a. *That an independent advisory service be set up by the ABG to work with affected communities to level the playing field when negotiating community development agreements.*
- b. *That the Mining Act require companies to fully comply with the terms of their agreed Community Development Agreements.*

12. There is no mechanism for an independent grievance or accountability process. Leaving disputes to be negotiated between the parties is problematic given the inherent power imbalance and the lack of recourse to an independent adjudicator such as a court.

Recommendation

- a. *That international best practice in regards to dispute resolution, including mechanisms that are legitimate, accessible, predictable, equitable, rights-compatible and transparent, be incorporated into the Mining Act.*

Offences and conditions

13. 'Offences' under the Mining Act can be used to suppress the legitimate right of protest. The harsh strict liability penalties (often up to 10 times as severe as under the PNG Mining Act) stipulate that the offender pay compensation and prosecution costs as well as serve a lengthy prison sentence. This is particularly concerning given the lack of qualification or training required by people appointed to enforce these laws, which may result in further infringement of rights, as well as the lack of knowledge about the Act that can lead to unknowingly committing an offence.

Recommendations

- a. *That the offences are amended so that they are not as harsh and draconian, do not suppress the legitimate right of protest, do not unduly punish offenders, and require a court to have found that an accused had the intention to commit an offence before finding them guilty.*
- b. *That authorised officers are not given police powers.*
- c. *That minimum standards of training are required for authorised officers.*

- 14.** In contrast, a mining company's failure to comply with conditions of a mining licence is not an offence, despite the consequences of this conduct being potentially more severe than landowner offences.

Recommendation

- a. *That the regulatory regime that applies to breaches of the Mining Act when waste is being handled in a way that poses a hazard, or if the tenement holder uses hydraulic mining methods and fails to control the water discharge to protect natural waterways, be extended to every breach of condition or term of the Mining Act.*

Environmental concerns

- 15.** The continued application of the PNG Environment Act does not sufficiently allay environmental concerns, as justifiably raised from the impact of the Panguna Mine on land, communities and the Jaba River system.

Recommendation

- a. *That strict environmental laws and regulations for enforcement be established that protect the land, communities and waters, minimise degradation and the impact from the establishment and ongoing operation of mining.*

- 16.** The Mining Act introduces deep seabed mining without broad protections.

Recommendation

- a. *Detailed consultations regarding deep seabed mining should occur prior to applications for deep seabed mining being granted, given the possibility of serious impacts of this new technology on Bougainville's marine ecosystems.*

17. The Mining Act creates a lax regime for rehabilitation and mine closure which cannot be independently enforced.

Recommendations

- a. *That mining companies not be exempted from a rehabilitation and closure plan and from responsibility for remediation of land and waters.*
- b. *That the Mining Act give the ABG the power to compel additional security for remediation later in the project cycle if this is reasonably required.*
- c. *That a mechanism for monitoring and enforcing rehabilitation plans be introduced.*

18. The restriction on the number of mines to two large-scale mines does not guarantee that catastrophic environmental consequences will be avoided.

Recommendation

- a. *Control over the environmental and social consequences of mining would be better achieved through strengthening enforcement and environmental protection conditions, rather than limiting the number of mines.*

Constitutional rights

19. The Mining Act regulates and restricts a number of constitutional and human rights.

Recommendation

- a. *That the Mining Act be carefully reviewed to ensure that constitutional and human rights are not unjustifiably interfered with, limited or restricted by the Act.*

BACKGROUND

In the last week of March 2015, Bougainville's Parliament passed the *Bougainville Mining Act 2015*, replacing the *Bougainville Mining (Transitional Arrangements) Act 2014 (Transitional Act)* that ended Papua New Guinea's control over the region's mineral resources. This new law concluded a process of drafting and consultation which started nearly ten years earlier⁷, and set the terms for the resumption of mining in Bougainville after its abrupt cessation 26 years ago.

The 2015 Bougainville election was announced the same day the Mining Act came into force. President John Momis, a strong advocate for the reopening of the Panguna mine and Bougainville's return to an extractive resources economy⁸, was re-elected as President; he will lead the ABG during the stipulated window for Bougainville's independence referendum, which must take place between 2015 and 2020.

Transitional Act

The Transitional Act was developed by the ABG and its advisors internally, and was completed separately from the Mining Act now in force. Work on the Transitional Act commenced in July 2012⁹, amongst concerns about delays in appointing consultants to draft the long-term Act¹⁰, and a number of 'backdoor deals' being entered into between developers and Bougainville factions and leaders without approval of the ABG government.¹¹ Drafting instructions for the Bill (which was based on the PNG Mining Act) were considered by the Bougainville Executive Council (BEC) in October 2012; a first draft of the Bill was considered and approved by BEC

⁷ President John Momis, *Second Reading Speech: Bougainville Mining (Transitional Arrangements) Bill 2014* (8 August 2014), p 2. According to President Momis, '...the first request for transfer of mining powers was made by the late Kabui in 2006'.

⁸ For example, see comments of President John Momis in Radio New Zealand International, 'Panguna mine critical to Bougainville's progress' (4 February 2014) at <http://www.radionz.co.nz/international/programmes/datelinepacific/audio/2584577/panguna-mine-critical-to-bougainville%27s-progress>; John Momis, President John Momis, *Second Reading Speech: Bougainville Mining (Transitional Arrangements) Bill 2014* (8 August 2014), p 5; ABC Radio, 'Bougainville President in-depth on new mining legislation and more' (Pacific Beat, 8 March 2013) at <http://www.radioaustralia.net.au/international/radio/program/pacific-beat/bougainville-president-indepth-on-new-mining-legislation-and-more/1099044>; and Radio New Zealand International, 'Bougainville leader says Miningoro lying on mining' (16 May 2014) at <http://www.radionz.co.nz/international/programmes/datelinepacific/audio/2596197/bougainville-leader-says-miningoro-lying-on-mining>.

⁹ President John Momis, *Second Reading Speech: Bougainville Mining (Transitional Arrangements) Bill 2014* (Bougainville House of Representatives, Kubu, 7 August 2014), p 3.

¹⁰ President John Momis, *Second Reading Speech: Bougainville Mining (Transitional Arrangements) Bill 2014* (Bougainville House of Representatives, Kubu, 7 August 2014). The President notes that 'expert and independent consultants were to be provided under a World Bank funded project. But it took much longer than expected for the consultants to be selected and other arrangements to be made', p 2.

¹¹ President John Momis, *Second Reading Speech: Bougainville Mining (Transitional Arrangements) Bill 2014* (Bougainville House of Representatives, Kubu, 7 August 2014), p 2-3.

two months later,¹² with three further drafts of the Bill considered prior to its adoption into law.¹³

The Transitional Act was introduced in an environment of ‘unpredictable political leadership in PNG in regard to Bougainville resource security’.¹⁴ This included concerns that the PNG National Government might seize control of the Panguna mine as it had of the large-scale mine Ok Tedi on the PNG mainland earlier in the year.¹⁵ The Transitional Act was an interim law and the government did not intend to apply it to mining developments; it had no regulations in force guiding the enforcement of its powers, no applications for any type of tenement were considered, and the moratorium on mining remained in place until the final Mining Act.¹⁶

Bougainville Mining Act 2015 (Long-term Mining Act)

The development of Bougainville’s long-term mining policy and law was funded by a World Bank project that started in 2006 and was managed by the Mineral Resources Authority of PNG, with US\$2.21 million allocated to Bougainville.¹⁷ Adam Smith International (ASI) was appointed to assist in drafting the Mining Act and regulations.¹⁸ ASI worked with a Bougainville counterpart committee that comprised members of the Department of Mining and the Principal Legal Officer.¹⁹ The UK-

¹² President John Momis, *Second Reading Speech: Bougainville Mining (Transitional Arrangements) Bill 2014* (Bougainville House of Representatives, Kubu, 7 August 2014), p 3.

¹³ President John Momis, *Second Reading Speech: Bougainville Mining (Transitional Arrangements) Bill 2014* (Bougainville House of Representatives, Kubu, 7 August 2014), p 3.

¹⁴ ABG Department of Mineral and Energy Resources, *Bougainville Mining Legislation and Regulations Development: A Presentation to the People of Bougainville* (12 November 2014) at <https://bougainvillenews.files.wordpress.com/2014/12/bougainville-policy-act-and-regulations-presentation-to-landowners.pdf>, slide 7.

¹⁵ Anthony Regan, *The Bougainville Mining Act 2015: Process, Substance and Controversies* (Presentation given at the Coral Bell School of Asia Pacific Affairs, ANU College of Asia & the Pacific, 14 May 2015) at <http://ips.cap.anu.edu.au/news-events/podcasts/bougainville-mining-act-2015-process-substance-and-controversies#.VeWXAntC3-Y>.

¹⁶ According to President John Momis, the ABG cabinet decided that no exploration or mining tenements would be issued under the Transitional Act for reasons of practical administration due to the lack of forms, and major changes to landowner rights between the Transitional and the final Mining Act – see Bougainville Bulletin, ‘Bougainville’s ‘long-term’ mining bill – progress continues’ (edition 2, October 2014) p 12. See also ABG Department of Mineral and Energy Resources, *Bougainville Mining Legislation and Regulations Development: A Presentation to the People of Bougainville* (12 November 2014) at <https://bougainvillenews.files.wordpress.com/2014/12/bougainville-policy-act-and-regulations-presentation-to-landowners.pdf>, slide 8, which states ‘[Transitional Act] Cannot be implemented because it has no Regulations’. President John Momis confirmed that ‘only when the long-term mining act is operating will cabinet consider lifting the existing moratorium on mining exploration and development’ See The Guardian, ‘Bougainville president backs broader powers to veto mining projects’ (Helen Davidson, 6 October 2014) at <http://www.theguardian.com/world/2014/oct/06/bougainville-president-backs-broader-powers-to-veto-mining-projects>.

¹⁷ World Bank, *Papua New Guinea Second Mining Sector Institutional Strengthening Technical Assistance Project*, Component 4, ‘Strengthening the Foundations for a conflict-free mining sector in Bougainville’, at <http://www.worldbank.org/projects/procurement/noticeoverview?id=OP00011259&lang=en&print=Y>. This included capacity-building support including capacity-building support for the Bougainville Department of Mining.

¹⁸ Adam Smith International (ASI) is a London-based consultancy firm which grew out of the right-wing think tank Adam Smith Institute. According to the Telegraph in 2012, ‘[i]n 2011 it was paid £37million by the [Department for International Development] to promote the free market in the Third World. Its total turnover that year was £53.6million, with profits of £5million, up 10 per cent on 2010’ (The Telegraph, ‘Poverty Barons who make a fortune from taxpayer-funded aid budget’ (Andrew Gilligan, 15 September 2012) at <http://www.telegraph.co.uk/news/politics/9545584/Poverty-barons-who-make-a-fortune-from-taxpayer-funded-aid-budget.html>).

¹⁹ ABG Department of Mineral and Energy Resources, *Bougainville Mining Legislation and Regulations Development: A Presentation to the People of Bougainville* (12 November 2014) at

based ASI team visited Bougainville twice to consult on these documents. Their work concluded in November 2014 with the delivery of the draft Act and Regulations.²⁰

Following the delivery of the draft Mining Act, according to the ABG's Strategic and Legal Advisor, the working group oversaw amendments, 'taking account of things that had come from the consultation, ideas that had come from the landowner associations, ideas that had come from within the group.'²¹ As discussed below at 4.2, significant changes were made to the Mining Act during this period, including toughening up the penalty provisions.

The Mining Act was passed by the Bougainville Parliament on 26 March 2015. According to news website *Bougainville News*, former combatants attended Parliament and demanded that certain sections be removed before the law was passed.²²

The Mining Act came into effect on Wednesday, 1 April 2015.²³ From 1 October 2015, the Mining Registrar can accept applications for tenements. To date, the Regulations have not come into force, which means that they cannot be applied to guide the form, content and processing of mining tenement applications.²⁴ The Mining Policy, which sets out the guiding principles behind the regulatory regime, was approved for consultation in June 2014, however it has not been possible to locate a publicly available copy.²⁵

<https://bougainvillenews.files.wordpress.com/2014/12/bougainville-policy-act-and-regulations-presentation-to-landowners.pdf>, slide 11.

²⁰ ABG Department of Mineral and Energy Resources, *Bougainville Mining Legislation and Regulations Development: A Presentation to the People of Bougainville* (12 November 2014) at

<https://bougainvillenews.files.wordpress.com/2014/12/bougainville-policy-act-and-regulations-presentation-to-landowners.pdf>, slide 10.

²¹ Anthony Regan, *The Bougainville Mining Act 2015: Process, Substance and Controversies* (Presentation given at the Coral Bell School of Asia Pacific Affairs, ANU College of Asia & the Pacific, 14 May 2015) at <http://ips.cap.anu.edu.au/news-events/podcasts/bougainville-mining-act-2015-process-substance-and-controversies#.VeWXAntC3-Y>.

²² 'The bill did not go unchallenged but had to go through scrutiny by former combatants who demanded certain sections removed' as reported at *Bougainville News*, 'Bougainville Mining Bill Passed' (Aloysius Laukai, 26 March 2015) at <http://bougainvillenews.com/2015/03/26/bougainville-mining-news-bougainville-mining-bill-passed>.

²³ See ABG Bougainville (Gazette GN No 12/2015) Commencement Notice, Honourable Michael Oni, Minister for Mineral and Energy Resources (30 March 2015) at <http://www.bcl.com.pg/wp-content/uploads/2015/04/Gazette-Bougainville-Mining-Act.pdf>.

²⁴ See ABG Bougainville (Gazette GN No 12/2015) Commencement Notice, Honourable Michael Oni, Minister for Mineral and Energy Resources (30 March 2015) at <http://www.bcl.com.pg/wp-content/uploads/2015/04/Gazette-Bougainville-Mining-Act.pdf> which states: 'Further, under Section 1(3) of the Act, I direct that the Mining Registrar must not accept or register applications for tenements under the Act before Thursday, 1 October 2015.'

²⁵ ABG Department of Mineral and Energy Resources, *Bougainville Mining Legislation and Regulations Development: A Presentation to the People of Bougainville* (12 November 2014) at

<https://bougainvillenews.files.wordpress.com/2014/12/bougainville-policy-act-and-regulations-presentation-to-landowners.pdf>, slide 10. Note that this Presentation contains extracts of the policy.

Consultations

Bougainville's Constitution requires the ABG to consult with all people in Bougainville, as far as is practicable, in relation to proposed major new Bougainville laws.²⁶

Jubilee Australia previously raised concerns regarding the adequacy of consultations relating to the Mining Act in its letter to Stephen Burain, Bougainville's Department of Mining Secretary, noting:

Given that the legislation will lead to the temporary alienation of customary land, with wide ranging effects on the social, economic, cultural and physical life of impacted communities, it is important that the draft mining bill and regulations are subject to a widespread and thorough process of consultation, discussion and independent scrutiny. As the final draft of the mining bill was delivered during November by Adam Smith International, it would seem appropriate to allow a significant period for consultation and revision, in order to give communities across Bougainville adequate time to organise themselves, seek independent expert advice, discuss the legislation, and prepare their response.

While a prolonged consultation period would not be appropriate for all draft bills, given that mining has historically been a highly contentious issue on Bougainville, building a legislative framework over which all communities feel a sense of ownership is vital. Coupled to this, the legal complexity of the draft mining bill and associated regulations, make such a prolonged consultation period necessary, so that communities are afforded the time and space to appreciate all the relevant provisions and their long-term implications.²⁷

After the Transitional Law was passed, President Momis promised to 'take measures now to embark on a massive awareness program'²⁸, with the ABG Cabinet approving funding for public awareness and consultation in October and November 2014 regarding the long-term Act.²⁹ According to the DFAT-funded ABG Strategic and Legal Advisor, a public awareness and consultation program commenced in late November 2014 involving the following activities:

²⁶ *Bougainville Constitution*, s 14(5). It is noted that this is a non-justiciable right.

²⁷ Jubilee Australia, Letter to Mr. Stephen Burain, 12 February 2015, p 1.

²⁸ Radio NZ, 'Bougainville President hails mining law' (11 August 2014) at <http://www.radionz.co.nz/international/programmes/datetimepacific/audio/20145231/bougainville-president-hails-mining-law>.

²⁹ The Bougainville Bulletin, 'Bougainville's 'long-term' mining bill - progress continues' (Edition 2, October 2014) p 13.

1. 'A workshop held where the Bougainville Mining Department briefed the BEC on the detail of the Bill (this was a few days after there had been a long discussion of the Bill in the BEC meeting where the formal decision to approve release was made).
2. Four teams of personnel from the ABG Mining Department, Office of Panguna Negotiations and Law and Justice Department are holding about 25 public meetings in all three regions.
3. An awareness and consultation session on the Bill was held with the executives of the Panguna mine-affected landowner associations, and those associations have agreed to do further consultation with their members, with a view to making a submission(s) to the Government.
4. The whole House of Representatives will be briefed on the Bill in a workshop to be held during the budget sitting of the House a little later in December [2014]'.³⁰

However, the community consultation process has been criticised for being inadequate and misleading. Participants at one forum in Buka were reportedly 'shocked to discover that their political representatives could not explain the very basic features of the proposed legislation'.³¹ These participants alleged that 'from first hand experience...communities directly impacted by mining have yet to be consulted at all'.³² A presentation produced by the Department of Mineral and Energy Resources entitled 'Bougainville Mining Legislation and Regulations Development: A Presentation to the People of Bougainville' appears to have been used in these forums.³³ However, as discussed below at heading 1, this presentation omits features of the Mining Act that are critical if people are to make an informed evaluation of the legislation's impact on their communities.

In a presentation during May 2015, the former DFAT-funded Strategic and Legal Advisor detailed the consultation forums that took place:

The second draft of the long-term Act was received in November of last year, and from that point the ABG held public consultations in every district about the Act. Now, the Act is not small...it's 220 odd pages. The regulations are another 250 or 60 pages. I'm not pretending that the consultation involved people being able to read this in Tok Pisin and understand. It wouldn't matter if you translated it into Tok Pisin. Most people reading this who are not lawyers or mining experts are going to struggle. What the consultation

³⁰ Email from Anthony Regan to Brynnie Goodwill, 'Draft Bill for a 'long-term' Bougainville Mining Act' (12 December 2014 5:28:43 pm AEDT).

³¹ Ramu Mine Watch, 'Bougainville Mining Bill Condemned at Buka Forum' (25 March 2015) at <https://ramumine.wordpress.com/2015/03/25/bougainville-mining-bill-condemned-at-buka-forum/>.

³² Ramu Mine Watch, 'Bougainville Mining Bill Condemned at Buka Forum' (25 March 2015) at <https://ramumine.wordpress.com/2015/03/25/bougainville-mining-bill-condemned-at-buka-forum/>.

³³ ABG Department of Mineral and Energy Resources, *Bougainville Mining Legislation and Regulations Development: A Presentation to the People of Bougainville* (12 November 2014) at <https://bougainvillenews.files.wordpress.com/2014/12/bougainville-policy-act-and-regulations-presentation-to-landowners.pdf>.

was about was long, detailed presentations about what the Act contained. You know, Powerpoints, pictures, tables, etcetera etcetera. It was awareness about what the Act contained, and giving people the opportunity to ask questions and to make their views known. And make their views known they did. There was several thousand people who attended those meetings, but there's no way every Bougainvillean saw a copy of the Act, or attended such a meeting. Nevertheless, if you look at all the stages of consultation, there was a lot of consultation, and let me just summarise...Finally, when the second draft of the Act was ready, there was awareness and consultation in every district. By PNG standards, by most country standards, it was pretty good awareness and consultation. Was it perfect? Certainly not. Could more have been done? Certainly true.³⁴

President Momis has named 'public awareness' as a key task for the ABG in his second term, reflecting on the 'practical difficulties and high expense of conducting awareness and consultation campaigns' and the financial restrictions on broad-based consultation.³⁵ It is unclear whether consultations will now occur to inform people about the new Mining Act.

Bougainville Copper Limited

A major concern is whether the new Mining Act will provide sufficient protection from the activities of Bougainville Copper Limited (**BCL**), a Rio Tinto subsidiary, and a company connected with serious human rights and environmental violations during the Panguna mine's operation and closure.³⁶ As noted by Bougainville's Acting Principal Legal Adviser at a forum in May 2015:

The ABG has to take into account all the views of Bougainville in regards to mining, because Bougainvilleans see mining as a scar in their body. They have felt it since the 1970s and 80s. They are very much aware of the effects of mining, what they have suffered so far in regards to the aftermath of the Panguna mine...The effects of previous mining situation in Bougainville, the people have come out very sensitive to the future. The effects of mining is like a scar to the people of Bougainville, and any development in Bougainville must be a win-win for all.³⁷

³⁴ Anthony Regan, *The Bougainville Mining Act 2015: Process, Substance and Controversies* (Presentation given at the Coral Bell School of Asia Pacific Affairs, ANU College of Asia & the Pacific) at <http://ips.cap.anu.edu.au/news-events/podcasts/bougainville-mining-act-2015-process-substance-and-controversies#.VeWXAntC3-Y>.

³⁵ Speech by Chief John Momis, President, *Inauguration of the 3rd Autonomous Bougainville Government* (House of Representatives, Hutjena, Buka, 15 June 2015), p 5.

³⁶ Kristian Lasset, 'Australia' interest in Bougainville's independence is far from local's wishes' (The Guardian, 20 May 2015) at <http://www.theguardian.com/commentisfree/2015/may/20/australias-interest-in-bougainvilles-independence-is-far-from-locals-wishes>.

³⁷ Kearnneth Nanei, *The Bougainville Mining Act 2015: Process, Substance and Controversies* (Presentation given at the Coral Bell School of Asia Pacific Affairs, ANU College of Asia & the Pacific, 14 May 2015) at <http://ips.cap.anu.edu.au/news-events/podcasts/bougainville-mining-act-2015-process-substance-and-controversies#.VeWXAntC3-Y>.

It has been hoped, and promised, that the Mining Act would create a protective regulatory regime that would put Bougainvillean interests first and prevent the catastrophic consequences of mining experienced in the past. In this vein, the narrative of the ABG ‘standing up’ to BCL, and being unconcerned about whether it remained in Bougainville or not, was a dominant theme in public discourse surrounding the law.³⁸ For its part, BCL voiced its concern about the new laws since it first received the draft bill in June 2014.³⁹ In response to the enactment of the Transitional Act, Rio Tinto announced a review of its 53.85% shareholding in BCL,⁴⁰ which is still ongoing.

In spite of the ABG’s tough talk, behind the scenes the ABG has taken measures to facilitate BCL’s return. Despite allegations that the Transitional Law stripped BCL of all its rights by reducing BCL’s Special Mining Lease (**SML**) over the Panguna mine area to a mere exploration licence, the law in fact gave special recognition to BCL’s rights that had previously lapsed (explored below at **5.1**). President Momis offered reassurances to BCL via written correspondence, which confirmed that BCL would be vested with an exploration licence and, depending on the outcomes of negotiations with the Mineral Resources Forum, would have the right to apply for a mining lease under the new Mining Act.⁴¹

It is clear that BCL intends to return to Bougainville if the conditions are right. In BCL Chairman’s Peter Taylor’s report to the 2015 AGM, he announced that BCL will seek formal granting of the exploration licence and exclusive access to the SML area.⁴² This indicates that the Mining Act has created a regime that facilitates mining to BCL’s satisfaction. Mr Taylor and other BCL representatives continue to engage with the ABG in relation to the company’s legal rights over the Panguna area, and BCL is taking steps to protect its priority position, as the only holder of an exploration licence, should re-commencement of mining at Panguna be viable and approved.⁴³

³⁸ For instance, ABC News, ‘Bougainville Government strips Rio Tinto subsidiary of all exploration and mining licences’ (Jemima Garrett, 11 August 2014) at <http://www.abc.net.au/news/2014-08-11/bougainville-new-mine/5663620>, where President John Momis asserts ‘The critics are totally wrong - we have stripped Bougainville Copper of all powers’.

³⁹ Bougainville Copper Limited, *Press Release: Draft Bougainville Mining (Transitional Arrangement s) Bill* (25 June 2014) at <http://www.asx.com.au/asxpdf/20140625/pdf/42qfkf30vtsp11.pdf>.

⁴⁰ Rio Tinto, *Media Release: Rio Tinto to review options in Bougainville Copper Limited* (18 August 2014) at http://www.riotinto.com/documents/140818_Rio_Tinto_to_review_options_in_Bougainville_Copper_Limited.pdf.

⁴¹ Bougainville Copper Limited, *Press Release: Bougainville Mining (Transitional Arrangements) Bill* (14 August 2014) at <http://www.bcl.com.pg/latest-news/press-release-bougainville-mining-transitional-arrangements-bill>.

⁴² Bougainville Copper Limited, *Press Release: Chairman’s Address to the AGM of Bougainville Copper Ltd (29 April 2015)* at <http://www.bcl.com.pg/wp-content/uploads/2015/04/2014-AGM-Release.pdf> p 1.

⁴³ Bougainville Copper Limited, *Press Release: Chairman’s Address to the AGM of Bougainville Copper Ltd (29 April 2015)* at <http://www.bcl.com.pg/wp-content/uploads/2015/04/2014-AGM-Release.pdf> p 1.

International support and facilitation

Adam Smith International

Adam Smith International (**ASI**) is a consultancy firm with a history of advising on extractive industry regulatory regimes in post-conflict societies.⁴⁴ In 2012 ASI worked with the ABG and the PNG Mineral Resources Authority to evaluate the Bougainville Mining Department's institutional structure, functions and capacity, and recommend changes to its organisational structure. This included producing a detailed organisational design, staffing requirements, financial projections, as well as a strategic framework and implementation plan for the transfer of functions.⁴⁵ ASI was then appointed as the consultants on the new mining legislation⁴⁶ and they commenced work on the long-term Mining Act in early 2014.⁴⁷

The involvement of ASI in drafting the Mining Law has been a point of tension within Bougainville. Following the passage of the Mining Act, the Hon. Jim Miringtoro, member for Central Bougainville and Minister for Communication in the PNG National Government, said that 'the bill was written by outsiders like the Adam Smith International who have been involved in controversial development policies in the third world.'⁴⁸

In a paid article published in *The Guardian* in August 2015 – known in the print press as 'native advertising' – ASI stressed that the views of people in Bougainville have been incorporated into the drafting process, to ensure that the new mining law has local support, thus reducing risks of subsequent tension.⁴⁹ This article also discusses

⁴⁴ Adam Smith International assisted with new minerals laws for the Afghanistan Ministry of Mines and Petroleum which were enacted in 2014 (See <http://www.theguardian.com/global-development-professionals-network/adam-smith-international-partner-zone/2014/oct/30/new-minerals-law-afghanistan>) and between 2008-2013 they assisted the government of Sierra Leone to install an international standard mining sector institutional and legal framework, (see <http://www.theguardian.com/global-development-professionals-network/adam-smith-international-partner-zone/legislative-institutional-economic-reform-sierra-leone-mining-sector>). ASI's past involvement is detailed here: http://powerbase.info/index.php/Adam_Smith_International.

⁴⁵ Adam Smith International, 'Institutional reform of Bougainville's First Government Department' at <http://www.adamsmithinternational.com/explore-our-work/west/papua-new-guinea/institutional-reform-of-bougainvilles-first-government-department1>.

⁴⁶ ASI were appointed to deliver Component 4 - see World Bank, *Papua New Guinea Second Mining Sector Institutional Strengthening Technical Assistance Project*, Component 4, 'Strengthening the Foundations for a conflict-free mining sector in Bougainville', at <http://www.worldbank.org/projects/procurement/noticeoverview?id=OP00011259&lang=en&print=Y>.

⁴⁷ ABG Department of Mineral and Energy Resources, *Bougainville Mining Legislation and Regulations Development: A Presentation to the People of Bougainville* (12 November 2014) at <https://bougainvillenews.files.wordpress.com/2014/12/bougainville-policy-act-and-regulations-presentation-to-landowners.pdf>, slide 11.

⁴⁸ Bougainville News, 'Bougainville Mining Bill Passed' (Aloysius Laukai, 26 March 2015) at <http://bougainvillenews.com/2015/03/26/bougainville-mining-news-bougainville-mining-bill-passed>. See also PNG Exposed Blog, 'Leaked document reveals Adam Smith International's propaganda strategy for governments: Bougainville beware' (16 September 2014) at <https://pngexposed.wordpress.com/2014/09/16/leaked-document-reveals-adam-smith-internationals-propaganda-strategy-for-governments-bougainville-beware>.

⁴⁹ The Guardian Online, 'Bougainville: A New Dawn?' (Julia Baxter, 21 August 2015) at <http://www.theguardian.com/global-development-professionals-network/adam-smith-international-partner-zone/2015/aug/21/bougainville-a-new-dawn>.

the reopening of the Panguna Mine as a *fait accompli*, and implied that critique of the regulatory framework may threaten stability in Bougainville.⁵⁰

Australian Government

Although the Australian Government has not formally announced its support for the Panguna mine's reopening or the development of the extractive industries sector in Bougainville, its aid commitment includes a pronounced focus on mining. This includes its funding of consultants who have assisted in the drafting of mining laws⁵¹, funding the up-skilling of Panguna-based groups to negotiate a return to mining⁵², including the appointment of Mining Negotiations Advisor⁵³, in addition to a research project into illegal mining in Bougainville.⁵⁴

Approximately \$48.35 million in Australian aid during 2015-2016 has been directly earmarked for the Autonomous Bougainville Government.⁵⁵ This commitment to Bougainville is larger than the Australian aid programs in Samoa, Tonga or Kiribati.⁵⁶ As Bougainville moves closer towards a referendum on independence, the question of whether or not Australia will support an independent Bougainville appears to be undecided and is politically problematic for Canberra.⁵⁷ Recent moves to establish a

⁵⁰ The Guardian Online, 'Bougainville: A New Dawn?' (Julia Baxter, 21 August 2015) at <http://www.theguardian.com/global-development-professionals-network/adam-smith-international-partner-zone/2015/aug/21/bougainville-a-new-dawn>. The author previously spent three years providing strategic support for Rio Tinto's Simandou Project in Guinea: LinkedIn profile, at <https://www.linkedin.com/pub/julia-baxter/31/101/546>.

⁵¹ Australia has funded an ABG Strategic and Legal Advisor, Mr Anthony Regan, to advise the Bougainville Executive Council, and Chief Administrator and the Autonomous Bougainville Government on a broad range of legal, constitutional and policy issues. This has included advice on mining policy and negotiations on re-opening the Panguna copper mine and assistance with the development of the proposed Bougainville Mining Act and interim mining legislation. Total funding for this position, including work unrelated to mining, since 2010 was \$968,120. (Senate Foreign Affairs, Defence and Trade Legislation Committee Supplementary Budget Estimates 2014, 23 October 2014). Support for this position ceased in 31 March 2015 (Senate Foreign Affairs, Defence and Trade Legislation Committee Additional Estimates 2015, 26 February 2015, Question 60).

⁵² Australia co-funds with New Zealand the Governance Implementation Fund (GIF). The GIF expended \$436,264.65 up to 31 October 2014 to implement the Mining Community Negotiations and Consultations Project. This included workshops to strengthen the negotiating skills and positions of landowner groups around the former Panguna mine and establishing the Bougainville Negotiation Forum (Senate Foreign Affairs, Defence and Trade Legislation Committee, Supplementary Budget Estimates 2014, 23 October 2014).

⁵³ The GIF also funded a Mining Negotiations Adviser, Professor Ciaran O'Faircheallaigh, to support the ABG to consult and negotiate with relevant communities and stakeholders on the reopening of the Panguna mine. Funding provided since 2010 totalled \$796,302.40, including \$19,053.97 provided by DFAT in 2011 (Senate Foreign Affairs, Defence and Trade Legislation Committee, Supplementary Budget Estimates 2014, 23 October 2014). Concerns have been raised in Australian budget estimates hearings, after it was noted that Professor O'Faircheallaigh's Australian research is partly funded by Rio Tinto (Senate Foreign Affairs, Defence and Trade Legislation Committee Supplementary Budget Estimates 2013, 21 November 2013, Question 298).

⁵⁴ Griffith University, 'Digging the dirt on illegal mining' (Stephen O'Grady, 5 March 2015) at <https://app.griffith.edu.au/news/2013/03/05/digging-the-dirt-on-illegal-mining>. According to this article, Anthony Regan and Professor O'Faircheallaigh were awarded a three-year, \$613,267 grant by AusAid to lead an investigation into illegal mining on Bougainville.

⁵⁵ Australian Government, Department of Foreign Affairs and Trade, 'Development assistance in Papua New Guinea' (undated) at <http://dfat.gov.au/geo/papua-new-guinea/development-assistance/Pages/papua-new-guinea.aspx>.

⁵⁶ The Interpreter, 'Australia-PNG diplomatic spat needs swift resolution' (Jenny Hayward-Jones, 21 May 2015) at <http://www.lowyinterpreter.org/post/2015/05/21/Australia-PNG-diplomatic-spat.aspx>.

⁵⁷ Australian Strategic Policy Institute, *The Strategist* 'Bougainville: Hard choices looming for Australia? Part I' (James Batley, 4 August 2015) at <http://www.aspistrategist.org.au/bougainville-hard-choices-looming-for-australia-part-i/>.

diplomatic office in the capital of Buka received a sharp rebuke from PNG's Prime Minister Peter O'Neill.⁵⁸

⁵⁸ ABC News Online, 'Papua New Guinea bans Australians from travelling to Bougainville' (Liam Cochrane, 18 May 2015) at <http://www.abc.net.au/news/2015-05-18/png-government-bans-australians-from-travelling-to-bougainville/6478378>; Sydney Morning Herald Online, 'PNG imposes ban on Australians traveling to Bougainville' (Kate Adbusson, 18 May 2015) at <http://www.smh.com.au/national/png-imposes-ban-on-australians-travelling-to-bougainville-20150518-gh4cvh.html>.

IMPACT OF THE REPORT

This report aims to provide a detailed analysis of the Mining Act to uncover the actual impact of the new law. Rather than looking at particular provisions in isolation, this analysis considers the effect of the regulatory mining regime as a whole. The goal is to provide a resource that can help stakeholders fully understand the impacts and consequences of the law in its day-to-day operation. The summary of this analysis is included in boxes titled **'Analysis'**.

This report also compares the actual text of the Mining Act against public statements made by various stakeholders about its effect – referred to in this report as **'Claims'**. The purpose of this analysis is to identify which statements are accurate, and which reflect misunderstandings about the Mining Act. It is important that the actual effect of the Mining Act is understood so that all stakeholders are aware of their rights and obligations, prior to the commencement of mining activities. It is critical that unfounded expectations of the Mining Act are corrected now, otherwise there is the potential they could generate tensions and instability when the law and associated regulations are actively applied.

Finally, this report aims to identify certain sections of the Mining Act which the Bougainville people, through their consultative and democratic processes, may wish to reform. Laws are an expression of the will of the people, and if the Mining Act in its current form is not supported by the Bougainville people, then it is appropriate that it is changed. Our suggestions for reform are included in boxes entitled **'Recommendations'**.

ANALYSIS AND RECOMMENDATIONS

1 VETO RIGHTS

Claims

The rights and the needs of the owners of the minerals will be given the highest level of protection. In particular, the owners will have power to stop either or both:

- *exploration on their land, or*
- *the grant of a mining licence over their land.*

...[I]n fact, owners have more rights and powers under this Bill than landowners anywhere in the world. In particular they have an absolute power to prevent exploration and mining on their land.⁵⁹

... under legislation passed by the Bougainville government in March, Bougainville landowners have been given rights of veto over either exploration or development. So the Bougainville government's been saying from day one there will be no reopening of the Panguna mine if the landowners don't want it. And with the veto, the landowners will have the final say.⁶⁰

The right of customary landowners to 'veto' a mining project at the exploration and development stages has been heralded as a signature part of the Mining Act and evidence that mining will not go ahead unless and until it obtains a social licence to operate from affected landowners. An historical backdrop marked by a lack of Bougainvillean control over mining developments, and the previous sidelining of landowner interests, means enhanced landowner control is an absolute requirement for the new law.

The Mining Act ostensibly gives veto power at both the exploration licence and mining lease stages. The ABG initially envisaged a veto at the exploration licence stage only, believing that if landowners could refuse a mining lease after a proponent had invested significant capital in exploration, the ABG would be forced

⁵⁹ President John Momis, *Second Reading Speech: Bougainville Mining Bill 2015*, cited at Bougainville News, 'Press Release and Full Speech: NEW MINING LAW A REJECTION OF THE PAST: MOMIS' at <http://bougainvillegenews.com/2015/03/26/bougainville-news-press-release-and-full-speech-new-mining-law-a-rejection-of-the-past-momis>.

⁶⁰ Anthony Regan, ABC Radio, 'Bougainville at a Crossroads' (Rear Vision, Keri Philips, 2 June 2015) at <http://www.abc.net.au/radionational/programs/rearvision/bougainville-at-a-crossroads/6514544>.

to refund costs⁶¹ and this would discourage quality investors.⁶² The veto at the mining lease stage was added on the advice of Professor James Otto, a consultant engaged by ASI. According to President Momis, Professor Otto reassured the ABG that because of an international trend where miners recognise the need to operate with a social licence, 'it is possible to strengthen landowner rights by granting them a veto over mining development. He advises this will not destroy responsible mining investment'.⁶³

This addition has been referred to as evidence of ASI's independence from the interests of the extractive industries, with the implication that a two-stage 'veto' is against the interests of mining companies.⁶⁴

The absolute right of landowners to control mining developments on their land has been the major focus of official promotion of the Mining Act with local stakeholders. But how it might work in practice has not been adequately detailed in any forum. There is no legal mechanism in the Mining Act that approximates a 'veto' as this word is commonly understood. There is certainly no 'absolute power' to veto exploration and mining on their land, as the rights of landowners to reject or prevent development are qualified.

The scope of the 'veto' has been outlined in a series of official assertions that are not supported by the text of the Mining Act. The asserted right of landowners to 'halt any operation if they are not happy with the company or government', if followed, would actually expose landowners to criminal charges.⁶⁵ This incongruence between official advice and legislative text indicates a misunderstanding of the Mining Act that could create confusion and unrealistic expectations among Bougainvilleans with respect to their legal rights.

⁶¹ President John Momis, *Second Reading Speech: Bougainville Mining (Transitional Arrangements) Bill 2014* (Bougainville House of Representatives, Kubu, 7 August 2014), p 3.

⁶² The Guardian, 'Bougainville president backs broader powers to veto mining projects' (Helen Davidson, 6 October 2014) at <http://www.theguardian.com/world/2014/oct/06/bougainville-president-backs-broader-powers-to-veto-mining-projects>.

⁶³ President John Momis, cited in The Bougainville Bulletin, 'Bougainville's 'long-term' mining bill - progress continues' (Edition 2, October 2014) p 13.

⁶⁴ Anthony Regan, *The Bougainville Mining Act 2015: Process, Substance and Controversies* (Presentation given at the Coral Bell School of Asia Pacific Affairs, ANU College of Asia & the Pacific) at <http://ips.cap.anu.edu.au/news-events/podcasts/bougainville-mining-act-2015-process-substance-and-controversies#.VeWXAntC3-Y>. 'The Adam Smith institute that did the drafting of the policy and so on, is being attacked by PNG mine watch and PNG Exposed as a right wing think tank that has blood on its hands in all sorts of parts of the world, and dictated to the ABG on behalf of (inaudible). It's the Adam Smith Institute that recommended the two stage veto. They were the ones that come and said, you can have the right to veto both on the exploration level and the development level. They're very strange bedfellows with mining companies'

⁶⁵ 'Responding to comments...[Momis] said that under the new mining law Bougainville land owners are fully protected and on top of that they have the veto power to halt any operation if they are not happy with the company or the government' on New Dawn, '050115BOUGAINVILLE MUST MEET FISCAL SELF RELIANCE' (Aloysius Laukai, 5 January 2015) at <http://bougainville.typepad.com/newdawn/2015/01/050115bougainville-must-meet-fiscal-self-reliance-by-aloyus-laukai-the-abg-president-chief-dr-john-momis-says-that-bouga.html>.

1.1 EXPLORATION STAGE VETO

Claims

Customary owners will have many rights. In particular, they will have a right of veto over the grant of any exploration licence over their land. They have the power to say “no”.⁶⁶

Customary Landowner have right of Veto in Grant of Exploration License Applications [sic]...

Landowner have rights to withhold consent in Grant of Development Tenements (All Mining Lease Types)...

The Act allows grant of exploration license upon consultation and landowner consent, before physical entry through a specific interest area by the [exploration licence] holder through a land access and compensation agreement with the landowners in any particular part of the license area...landowners must also grant consent before granting of a mining lease on their area (they are the mineral owners, thus they should have veto power).⁶⁷

Analysis

The Mining Act does not give landowners the power to veto an application for an exploration licence nor stop an exploration licence being granted.

Recommendation

a. That landowners’ power of veto at the exploration licence stage be strengthened.

Before the exploration licence is granted

The Mining Act does not give landowners the power to veto an application for an exploration licence nor stop an exploration licence being granted. Landowner permission is not required⁶⁸ before the BEC decides to grant an exploration licence.⁶⁹

The procedure for granting exploration licences starts with the Mining Registrar receiving applications for exploration licences.⁷⁰ The Registrar then conducts a

⁶⁶ President John Momis, *Second Reading Speech: Bougainville Mining (Transitional Arrangements) Bill 2014* (8 August 2014), p 6.

⁶⁷ ABG Department of Mineral and Energy Resources, *Bougainville Mining Legislation and Regulations Development: A Presentation to the People of Bougainville* (12 November 2014) at <https://bougainvilleneews.files.wordpress.com/2014/12/bougainville-policy-act-and-regulations-presentation-to-landowners.pdf>, slides 13, 42.

⁶⁸ *Bougainville Mining Act 2015* s 97 sets out the requirements for an application for an exploration licence. Written evidence of landowner permission is not required, whereas it is required for other tenement applications such as mining lease (s 119(1)(x)) and a lease for mining purposes (s 172(b)(viii)).

⁶⁹ *Bougainville Mining Act 2015* s 100 gives power to the BEC to grant an exploration licence on the application of a person who satisfies the qualification criteria under Section 96 and in accordance with the advice of Advisory Council.

public consultation and reports to the Advisory Council, which assesses the application and any submissions received and provides advice to the BEC. The BEC will then, in accordance with the Advisory Council's advice, grant or refuse to grant the exploration licence.⁷¹

The Mining Act makes it possible for an exploration licence to be granted even if customary landowners express their objection through every means open to them and explicitly withhold consent. The means by which they can express their objections are through the Council of Elders, via a Warden's Hearing, or by making objections:

- **Council of Elders:** The Council of Elders must be given notice of an application for an exploration licence and afforded the opportunity to submit comments.⁷² The Advisory Council must take these comments into account when it considers the application.⁷³ If the exploration licence is awarded via a competitive bidding process, the requirement to give notice and obtain comments from the Council of Elders before granting the application is bypassed altogether.⁷⁴
- **Warden's Hearing:** Every exploration licence application must have a Bougainville Warden's Hearing.⁷⁵ At this hearing, the Warden will record the views of the attendees, including customary landowners, and whether they have given permission for the application.⁷⁶ The Warden will then assess the views and submit a written report about the hearing to the Advisory Council for its consideration.⁷⁷ The written report is the only way that the views of the landowners aired at the Warden's Hearing are considered by the Advisory Council.
- **Objections:** Customary landowners can submit objections to an exploration licence application, which must be considered by the Advisory Council when assessing the application and deciding whether to advise that the application be approved.⁷⁸

However, these forums are designed to be consultative and not deliberative. Landowner permission is not binding or required, and the opinions of landowners is just one of many factors the assessing body, the Advisory Council, takes into account

⁷⁰ *Bougainville Mining Act 2015* s 98(1).

⁷¹ *Bougainville Mining Act 2015* s 100(1).

⁷² *Bougainville Mining Act 2015* s 98(1).

⁷³ *Bougainville Mining Act 2015* s 98(2).

⁷⁴ *Bougainville Mining Act 2015* s 49(6).

⁷⁵ *Bougainville Mining Act 2015* s 246. Section 97(1)(e) requires an application for an exploration licence to comply with Part 10, Division 2.

⁷⁶ *Bougainville Mining Act 2015* s 250(3)(c).

⁷⁷ *Bougainville Mining Act 2015* s 251, s 252(2)(a)(iii).

⁷⁸ *Bougainville Mining Act 2015* s 249 for objections, and s 252(2)(b)(i) the Advisory Council's requirement to consider objections.

when reviewing an application and making its recommendations to the BEC.⁷⁹ Further, there is no way for customary landowners to directly object to the BEC other than through the intermediate channels of the Advisory Council or the Council of Elders.

Contradictory information about this veto power was apparently used in community consultations. In the ABG's Department of Mineral and Energy Resources presentation, a slide asserts that 'Customary Landowner have right of Veto in Grant of Exploration License Applications.'⁸⁰ This is contradicted by a slide buried much later in the presentation, which states 'Major companies will not apply for exploration license if they must obtain landowner consent before acquiring the licence... this means that only undercapitalized juniors may get involved'.⁸¹ This qualifying statement on the latter slide is the only attempt Jubilee Australia has seen to clarify the operation of the exploration 'veto'.

After the exploration licence is granted

An exploration licence gives a mining company the right to enter and occupy land to carry out exploration for minerals on that land; extract, remove and dispose rock and soil; divert water; and do all other things necessary or expedient for exploration.⁸² This right is subject to the right of landowners to deny access to land the subject of an exploration licence until certain preconditions are met.⁸³ Before entering upon and disturbing the land, the holder of the licence must:

1. Obtain 'landowner permission'; and
2. Enter into an Exploration Licence Land Access and Compensation Agreement (**ELLACA**) with respect to the land.⁸⁴

These two requirements seem to give landowners some right of control over their land. However, upon closer inspection, landowner rights are compromised by the form, procedure and governance issues within the ELLACA, and the problematic nature of 'landowner permission' as defined in the Mining Act.

⁷⁹ *Bougainville Mining Act 2015* s 100(1).

⁸⁰ ABG Department of Mineral and Energy Resources, *Bougainville Mining Legislation and Regulations Development: A Presentation to the People of Bougainville* (12 November 2014) at <https://bougainvillenews.files.wordpress.com/2014/12/bougainville-policy-act-and-regulations-presentation-to-landowners.pdf>, slide 13.

⁸¹ ABG Department of Mineral and Energy Resources, *Bougainville Mining Legislation and Regulations Development: A Presentation to the People of Bougainville* (12 November 2014) at <https://bougainvillenews.files.wordpress.com/2014/12/bougainville-policy-act-and-regulations-presentation-to-landowners.pdf>, slide 42. The term 'undercapitalised juniors' refers to small mining where a business cannot acquire the funds they need. An under-capitalized business may be one that cannot afford current operational expenses due to a lack of capital, which can trigger bankruptcy, may be one that is over-exposed to risk, or may be one that is financially sound but does not have the funds required to expand to meet market demand.

⁸² *Bougainville Mining Act 2015* s 103, s 105.

⁸³ *Bougainville Mining Act 2015* s 10(d).

⁸⁴ *Bougainville Mining Act 2015* s 105(1).

1.2 EXPLORATION LICENCE LAND ACCESS AND COMPENSATION AGREEMENT

Analysis

An ELLACA can be approved even if it does not comply with the Mining Act. The ABG exercises only minor quality control over the content of an ELLACA, with minimal requirements in the Act and Regulations for its form.

The Mining Act does not govern how an ELLACA is negotiated or agreed. For example, will decisions be made in accordance with local traditions, or will they take an alien and potentially inaccessible form, and then simply conclude with a landowner signature? The lack of regulatory clarity means that landowners do not have a free and fair ability to negotiate terms, and may have no option other than simply refusing to sign the agreement altogether.

Rates for compensation are currently negotiated by agreement. Without independent oversight or standardised rates for land access, it is foreseeable that customary landowners will not know what constitutes a fair deal for compensation and will be at a disadvantage when negotiating an agreement.⁸⁵

Recommendations

- a. That land access and compensation agreements fully comply with the Mining Act in order to properly regulate the relationship between the landowners and mining companies.
- b. That an independent advisory service be set up by the ABG, to lend landowners expert technical assistance and level the playing field when negotiating exploration licence land access, compensation agreements and community development agreements.

An ELLACA governs how mining companies compensate landowners for their use and disruption of customary lands caused by activities facilitated through an exploration licence.⁸⁶ It provides for the payment of a land access fee and compensation for activities that cause damage.⁸⁷

⁸⁵ The dangers of unregulated benefit agreements can be observed in the recent Commission of Inquiry into Special Agricultural and Business Leases. See <http://www.coi.gov.pg/sabl.html>.

⁸⁶ *Bougainville Mining Act 2015* s 105(2)(b). An ELLACA is between the licence holder and landowners, via an approved landowner organisation and/or each customary landowner individually – s 105(2)(b)

⁸⁷ *Bougainville Mining Act 2015* s 105(2)(d) for payment requirements. Note that an ELLACA is only required for the part or parts of the area of an exploration licence where the holder of the licence intends to enter upon and disturb the land (s 105(6)) – it is not required for all land, and possibly not where *unintentional* access and disruption occurs. Payment is only required for landowners in an exploration licence area whose land will be ‘accessed and disturbed’. Note that under s 10(e), landowners are entitled to receive the prescribed land access fee for land the subject of an exploration licence.

An ELLACA gives landowners some control over the terms of access to their land. However, the process for the creation of an ELLACA and its content is insufficiently regulated and does not give landowners free and fair ability to negotiate the terms offered by mining companies.

First, the Mining Act does not govern how an ELLACA is negotiated or agreed – are the decisions to be made in accordance with local traditions, or simply concluded with a signature? Furthermore, there is no independent body overseeing negotiations between the parties; nor is there a stipulated role for the ABG. While a template form of the ELLACA has been included in the last publicly available draft of the Regulations, this is not yet in force and does not clarify the process for negotiating an ELLACA.⁸⁸ The draft Regulations themselves are problematic, as they appear to absolve proponents from doing their own due diligence to ensure the other party is authorised to enter into the agreement, which could lead to fraudulent landowner organisations signing off on agreements without community consent.⁸⁹ The significant risk of fraud posed by unregulated transactions between developers and landowner representatives has been documented in detail by the Commission of Inquiry into Special and Agricultural Business Leases.⁹⁰

Second, the ABG can prescribe the rates for fees and compensation, but to date this has not been done and therefore compensation is determined by agreement.⁹¹ This is problematic as an ELLACA is the only way that customary landowners can request compensation for access and damage to their land.⁹² Without government intervention or standardised rates, customary landowners may not know what constitutes a fair deal in accordance with national market values and will be at a disadvantage when negotiating an agreement.

Third, the ABG exercises only minimal quality control over the content of an ELLACA. An ELLACA must only ‘substantially comply’ with the requirements of the Mining Act to be registered by the Chief Warden and become operational.⁹³ This is a lower standard than compliance, which leaves open the possibility that a prejudicial and unfair ELLACA will be legal because it otherwise ‘substantially complies’ with the form requirements.

⁸⁸ *Bougainville Mining Regulations 2015* (Not in force) Schedule 5, Model Exploration Licence Land Access and Compensation Agreement Department of Mineral and Energy Resources Autonomous Region of Bougainville.

⁸⁹ *Bougainville Mining Regulations 2015* (Not in force) Schedule 5, Model Exploration Licence Land Access and Compensation Agreement Department of Mineral and Energy Resources Autonomous Region of Bougainville, see specifically clause 8, where landowners must warrant that they are duly authorised and that the agreement will bind the landowners, landholding groups or any person or groups having an interest in the Agreement Area.

⁹⁰ The Commission of Inquiry findings are available at: <http://www.coi.gov.pg/sabl.html>

⁹¹ *Bougainville Mining Act 2015* s 105(2)(d).

⁹² If landowners attempt to be fairly compensated for access and use outside of this process, this can constitute a criminal offence of extortion – s 347.

⁹³ *Bougainville Mining Act 2015* s 105(4)(a), s 105(3)(b).

In order for the relationship between mining companies and communities to be properly regulated, the Mining Act should require that the ELLACA fully comply with the Mining Act, particularly when the provisions are general and the Mining Act provides no guidance about how the Chief Warden should interpret the requirement of substantial compliance. Furthermore, it is also critical that an independent advisory service is set up by the ABG, to lend landowners expert technical assistance when negotiating an ELLACA.

1.3 MINING LEASE VETO

Claims

Under our March 2015 Bougainville Mining Act, customary landowners also own minerals. They can reject mining exploration and development. So Panguna will not re-open without landowner agreement. That means clear agreement by a clear majority of landowners, with no manipulation of consent.⁹⁴

So the Bougainville government's been saying from day one there will be no reopening of the Panguna mine if the landowners don't want it. And with the veto, the landowners will have the final say.⁹⁵

Analysis

The process for community consultation over a large-scale mining lease appears to have one possible outcome, which is to obtain at the end the landowner's consent to authorise mining development on their land.

Whether landowner objections can be overruled by a 'mutually acceptable decision' under s 143 is unclear. A 'mutually acceptable decision' privileges economic benefits over landowner rights.

Recommendations

- a. That landowners' power of veto at the mining lease stage be strengthened.
- b. That mediation in accordance with explicitly prescribed requirements establish rigorous standards for a fair process and neutral moderation.
- c. That the ABG clarify the role and purpose of s 143, and whether it gives the ABG the final say in approving a mining lease.

⁹⁴ Speech by Chief John Momis, President, *Inauguration of the 3rd Autonomous Bougainville Government* (House of Representatives, Hutjena, Buka, 15 June 2015), p 5.

⁹⁵ ABC Radio, 'Bougainville at a Crossroads' (Rear Vision, Keri Philips, 2 June 2015) at <http://www.abc.net.au/radionational/programs/rearvision/bougainville-at-a-crossroads/6514544>.

A mining lease can only be granted if landowner permission for the mining lease has been obtained.⁹⁶ The Mining Act encourages landowner permission to be obtained early⁹⁷, and to make it a priority of every stage in a mining lease application and assessment process.

Accordingly, the requirement of landowner permission appears to give landowners significant power to block mining leases they do not consent to. However, a close reading of the Mining Act shows that ‘landowner permission’ appears to be something that can be eventually elicited from a reluctant group through a series of mechanisms which they have limited control over.⁹⁸ Coupled with concerns over how ‘landowner permission’ is defined and measured (see discussion below), the Mining Act does not empower customary landowners to reject unwanted mining projects incongruent with local culture and aspirations, rather its processes are designed in such a way as to virtually assure consent.

Mineral Resources Forums

If landowner permission has not been obtained by the time a large-scale mining lease application is lodged, the next opportunity to elicit consent is at the Mineral Resources Forum. Mineral Resources Forums provide an opportunity for disparate groups affected by a mining development to come together, obtain important information about the mining development and speak freely about their views. According to the Mining Act, one of the purposes of the Mineral Resources Forum is to obtain permission to grant the lease.⁹⁹

The Mining Act does not say how a Mineral Resources Forum will be conducted, how decisions are made, or how it is determined that landowner permission has been obtained.¹⁰⁰ With this ambiguity around the decision-making process, ‘landowner permission’ given in such a forum can be questioned.

Mediation

If the landowner permission is not obtained at the Mineral Resource Forum, the Minister must consult with stakeholders to obtain the outstanding landowner

⁹⁶ *Bougainville Mining Act 2015* s 126(2)(c).

⁹⁷ See for instance *Bougainville Mining Act 2015* s 119(1)(b)(x), which requires written evidence of landowner permission for the mining project with the application for a mining lease, if possible.

⁹⁸ Further, this process only applies to large-scale mining leases. It is unclear how landowner permission is obtained for other types of tenements.

⁹⁹ *Bougainville Mining Act 2015* s 140(5)(c).

¹⁰⁰ Note that the *Bougainville Mining Regulations 2015* Part 14 includes provisions for the process of a Mineral Resources Forum, however these are not in force.

permission.¹⁰¹ If the consultation is unsuccessful, the BEC can refer the matter to mediation.¹⁰²

Mediation is when an impartial third party works with disputing groups to reach an agreement. According to the Mining Act, the primary purpose of the mediation is to obtain outstanding landowner permission for the grant of the application.¹⁰³

Mediations are supposed to address and neutralise inherent power imbalances between the parties. However, the Mining Act appears to weigh the process against landowners. While the Mining Act gives landowners the right to 'participate' in this mediation¹⁰⁴, the BEC has the final say over the choice of mediator if the parties cannot agree.¹⁰⁵ In addition, landowners do not have the power to 'opt out' of the mediation process, and cannot unilaterally terminate the mediation if they are unhappy with the way it is being conducted.¹⁰⁶ These factors could create an environment where landowners feel pressured to give permission so the mediation will end.

In order to produce an equitable outcome, it is essential that the mediation be conducted in accordance with explicitly prescribed requirements that establish rigorous standards for a fair process and neutral moderation.¹⁰⁷ However, in its current form the draft Regulations do not set out any such requirements.

Mutually acceptable decision

If mediation has not achieved the 'desired outcomes' (namely obtaining landowner permission), section (s) 143 requires the BEC to use its 'best endeavours' to consult with approved landowner organisations, the applicant and other stakeholders and reach a 'mutually acceptable decision'.¹⁰⁸

Section 143 is a critical section, as it is the 'end of the road' for the process of obtaining landowner permission for large-scale leases. However, it is poorly drafted which leaves open room for its misuse. It is unclear how a 'mutually acceptable decision' is made. Without the requirement that it be written or signed, it is possible that a decision could be made without the agreement of all parties.

One possible misuse of s 143 would be to rely on it to override the requirement to obtain landowner permission. The President's comments in January 2013 about the powers of the BEC as the final decision-making body gives pause for thought:

¹⁰¹ *Bougainville Mining Act 2015* s 142(3)(a).

¹⁰² *Bougainville Mining Act 2015* s 142(2).

¹⁰³ *Bougainville Mining Act 2015* s 142(4).

¹⁰⁴ *Bougainville Mining Act 2015* s 10(g).

¹⁰⁵ *Bougainville Mining Act 2015* s 142(5).

¹⁰⁶ *Bougainville Mining Act 2015* s 142(5).

¹⁰⁷ *Bougainville Mining Act 2015* s 142(5)(b).

¹⁰⁸ *Bougainville Mining Act 2015* s 143(2)(a).

The views of all impacted groups will be represented through a Bougainville Mining Development Forum. If landowners are opposed to the development project, their concerns will have to be dealt with in the Forum. If they cannot be resolved there, mediation will be required. If the mediation fails to resolve the objections, *only then will the ABG have final authority to decide whether or not the project can go ahead.*¹⁰⁹ (emphasis added)

Clarification on the role and purpose of s 143, and whether it gives the ABG the final say, is critical. This is especially important given that subsequent provisions in the Act rely on this ‘mutually acceptable decision’ provision.

Consultations under s 143 privilege the benefit to Bougainville’s economy over the rights of the affected landowners and the impact of the development on their customary land. According to s 143, these consultations must take into account factors that centre on the economic benefits of the mine and the importance of mining development to Bougainville achieving autonomy and self-reliance, and how the mining company will contribute to economic, development and environmental needs of Bougainvilleans.¹¹⁰ Consultations do not have to explicitly consider how the project will impact on the culture, land and environment of host communities, or whether the proposed mine is congruent with local custom, aspirations or development strategies. The fact that the rights of landowners occupy a lesser position indicates that by this stage, landowners are expected to consent for the ‘greater good’.

2 LANDOWNER PERMISSION

Definition of Landowner Permission in the Mining Act (Section 32)

- (1) If landowner permission is required for a purpose under this Act, the person required to obtain such permission must obtain, for the land the subject of the requirement, permission for the purpose required from—
- (a) for customary land—
 - (i) each approved landowner organisation representing the owners of the land; and
 - (ii) each owner of the land not represented by an approved landowner organisation; and
 - (b) for land other than customary land – each landowner of the land.

¹⁰⁹ President John Momis, *Speech to the House of Representatives, The Draft Bougainville Mining Act 2013* (Buka, Autonomous Region of Bougainville, 13 January 2013), p 14.

¹¹⁰ *Bougainville Mining Act 2015* s 143(3).

(2) However, if land is held in common by more than 1 individual person, it is not necessary to obtain the permission of every individual person having an interest in the land, but permission must be obtained in the manner that is customary for decision-making for the group or groups comprising the landowners of that land.

The concept of 'landowner permission' is integral to the Mining Act and is central to the idea of landowner control over mining development. The definition of 'landowner permission' in s 32 is the only guidance as to the meaning of the term in the Mining Act. The lack of further explanation may be intentional so that it can be adapted to various situations and different local traditions. However, it is problematic in its current form, as landowner permission can be given without observing the principles of free, prior and informed consent, and by self-selected groups that may not represent the broader interests of their community. These deficiencies compromise the value of landowner permission and the extent to which it truly represents the wishes of the communities.

2.1 NO FREE, PRIOR AND INFORMED CONSENT

Analysis

Free, prior and informed consent to development is a principle enshrined in international human rights law but is not upheld in the Mining Act.

After landowner permission is given, it cannot be withdrawn or qualified. Attempts to withdraw consent by preventing access to land, or negotiating fairer terms of compensation, are criminalised.

Recommendations

- a. That the concept of 'landowner permission' incorporate the basic tenets of free, prior and informed consent (FPIC).
 - b. That landowner permission be qualified, dependent on the circumstances, at different stages of the project cycle.
 - c. That the Mining Act set up and empower a landowner advisory service to procure independent expert advice, delivered in the local dialect, so that communities have access to diverse streams of information before making a decision to give, or withhold, consent.
-

‘Landowner permission’ as defined by and procured in accordance with the procedures set out in the Mining Act does not meet the standard of ‘free, prior and informed consent’ (FPIC) enshrined in international law¹¹¹ and considered best practice according to international mining standards.¹¹² A concept of ‘landowner permission’, which incorporates the basic tenets of FPIC, would reflect the desires of affected individuals and deliver fair outcomes for communities affected by mining.

FPIC means that a community has the right to give or withhold consent to proposed projects that may affect lands they customarily own, occupy or otherwise use. This principle requires that affected individuals, communities and peoples are consulted in good faith, adequately informed in a timely manner about any resource project affecting their lands, and afforded the opportunity to approve or reject a project before it is started. This necessarily requires effective consultation and participation in the decision-making process.¹¹³

A law that upheld FPIC would require a clear majority of adult-aged landowning community members to consent to a mining project. This could only occur after communities had robust, inclusive consultation and had received comprehensive independent advice.¹¹⁴ Access to independent information, other than that provided by vested interests or the proponent, is critical in ensuring that consent is given freely, without coercion, intimidation, or manipulation, and with full knowledge of both the positive and negative implications of a development.¹¹⁵ Communities have the right to be given information in a language that they can easily understand.¹¹⁶

After landowner permission is given, there is limited scope for its qualification or retraction. In the current Mining Act, landowner permission is a once-off approval required at the commencement of the project only. Attempts to withdraw consent by preventing access to land, or negotiating fairer terms of compensation, are criminalised.¹¹⁷

As explained in Oxfam’s *Guide to Free, Prior and Informed Consent*, ‘consent requires that the people involved in the project allow indigenous communities to say “Yes” or “No” to the project and at each stage of the project, according to the decision-making process of your choice.’¹¹⁸ In order to fully recognise landowner rights to FPIC, the Mining Act should allow landowner permission to be qualified, dependent

¹¹¹ United Nations Declaration on the Rights of Indigenous Peoples, articles 10, 19, 28, 29, 32.

¹¹² International Council on Mining and Minerals, *Good Practice Guide: Indigenous Peoples and Mining*, p 24. See also International Council on Mining and Minerals, *Indigenous Peoples and Mining: Position Statement* (May 2013).

¹¹³ United Nations Declaration on the Rights of Indigenous People, article. 32, paragraph 2.

¹¹⁴ This comment was made to the ABG via Jubilee Australia’s Letter to Mr. Stephen Burain, 12 February 2015, p 3.

¹¹⁵ This comment was made to the ABG via Jubilee Australia’s Letter to Mr. Stephen Burain, 12 February 2015, p 3.

¹¹⁶ Oxfam, *Guide to Free, Prior and Informed Consent* (April 2014) at <http://resources.oxfam.org.au/?r=1321>, p 16.

¹¹⁷ For instance, see *Bougainville Mining Act 2015* s 347 (extortion), s 346 (interfering with operations authorised by this Act).

¹¹⁸ Oxfam, *Guide to Free, Prior and Informed Consent* (April 2014) at <http://resources.oxfam.org.au/?r=1321>, p 11.

on the circumstances, at different stages of the project cycle. It should also set up and empower a landowner advisory service to procure independent expert advice, delivered in the local dialect, so that communities have access to diverse streams of information before making a decision to give, or withhold, consent.

2.2 APPROVED LANDOWNER GROUPS

Claims

*...And of course, the landowners will continue to be represented by these landowner associations of the kind that were set up through consultation about Panguna. So any project in the future, there will have to be landowner associations set up.*¹¹⁹

Analysis

Given historical concerns about landowner organisations as representative groups capable of giving ‘landowner permission’, there are insufficient safeguards in the Mining Act to ensure the legitimacy, identity and representativeness of an approved landowner organisation.

The current model is not a robust mechanism for ensuring community-wide participation in the consultation process or when measuring consent.

The ABG can create its own landowner groups, has discretion whether or not to approve the establishment of an approved landowner organisation, and ultimately decides who is, and who is not, a ‘legitimate’ landowner organisation.

Recommendation

a. That approved landowner organisations be subject to provisions that guarantee legitimacy, identity and representativeness.

The Mining Act gives customary landowners the right to apply to form landowner organisations that will represent their interests during the mine negotiation process.¹²⁰ An ‘approved landowner organisation’ (**ALO**) can give consent on behalf of the owners of customary land for mining development activities.¹²¹ The law explicitly builds on the experience of the ABG in establishing organisations to

¹¹⁹ Anthony Regan, *The Bougainville Mining Act 2015: Process, Substance and Controversies* (Presentation given at the Coral Bell School of Asia Pacific Affairs, ANU College of Asia & the Pacific) at <http://ips.cap.anu.edu.au/news-events/podcasts/bougainville-mining-act-2015-process-substance-and-controversies#.VeWXAntC3-Y>.

¹²⁰ *Bougainville Mining Act 2015* s 10(a).

¹²¹ *Bougainville Mining Act 2015* s 32(1)(a).

represent the interests of landowners in the region affected by the Panguna mine.¹²² President Momis believes that landowner organisations are ‘absolutely essential if the landowners’ voices are to be truly heard.’¹²³

The clear preference is for ALOs to be the main vehicle that gives landowner permission for mining developments. This preference is built into the Mining Act and is demonstrated through comments of the President and the Minister for Natural Resources.¹²⁴ The Mining Act still recognises customary land ownership rights of people who are not ALO members;¹²⁵ however, given the ABG’s inclination towards groups, the ABG may refuse to deal with landowners unless they are represented by an ALO.

The policy of employing ALOs as the main vehicle for giving landowner permission is problematic for several reasons.

First, given historical concerns about landowner organisations as representative groups capable of giving ‘landowner permission’, there are insufficient safeguards in the Mining Act to ensure the legitimacy and representativeness of an ALO. Under the current Mining Act, a group of self-selecting landowners can apply to be an ALO. The Advisory Council must then assess whether the ‘proposed membership and structures of the organisation are such that it will be representative of the owners’¹²⁶ and that its constitution is ‘consistent with democratic principles, including the democratic election of the governing body’.¹²⁷ The law does not specify how it is determined that a body is ‘representative’, nor which ‘democratic principles’ it must conform with in order to be approved.

Landowner associations have been criticised in the past for poorly representing their constituents and siphoning benefits of mining to ‘elites’.¹²⁸ Recent examples show

¹²² President John Momis, *Second Reading Speech: Bougainville Mining (Transitional Arrangements) Bill 2014* (8 August 2014), p 3.

¹²³ President John Momis, *Presentation to a Workshop Session on Bougainville: Economic Opportunities and Constraints. Subject: The Bougainville Political Landscape 2014* (30th Australian Papua New Guinea Business Forum, 18-20 May 2014), p 6.

¹²⁴ President John Momis, *Speech to the House of Representatives, The Draft Bougainville Mining Act 2013* (Buka, Autonomous Region of Bougainville, 13 January 2013) at p 14, where “The ABG has decided to build upon that experience. Whenever there is a proposal for a mining exploration licence, the ABG will have to consult the landowners through one or more ‘approved organisations’ established to represent them. It will be those organisations that have the right to oppose the exploration licence”; and Hon. Michael Oni, ABG Minister for Natural Resources, *Speech to the Opening Session: Panguna Negotiating Forum Meeting* (Buka, 5th-6th August 2014) at p 3, ‘Owners of all areas likely to be covered by mining licences or licences for associated purposes, will participate in the Mining Development Forum, and must first be organised into democratic representative associations.’

¹²⁵ *Bougainville Mining Act 2015* s 32(1)(a)(ii). It appears from s 32(2) that if this were the case, permission would be obtained ‘in the manner that is customary for decision-making for the group or groups comprising the landowners of that land’, which is a more inclusive test than what is currently included in the law.

¹²⁶ *Bougainville Mining Act* s 34(5)(a)(iii).

¹²⁷ *Bougainville Mining Act* s 34(5)(a)(v)(A).

¹²⁸ Jubilee Australia, *Voices of Bougainville: Nikana Kangsi, Nikana Dong Damana (Our Land, Our Future)* (2014) at http://issuu.com/jubileeaustalia2/docs/jubilee_australia_2014_voices_of_/1?e=13530468/9287457, p 27 at footnote 11: ‘Bougainville elites and the landowners associations were also identified by 10 interviewees as contributing to the conflict by selling community land to BCL, abusing their privileges during the operation, and/or being divided and therefore not defending the people’s interests vis-à-vis BCL.’

that some landowner associations explicitly, through their Constitution, support certain positions and could be characterised as akin to lobby groups.¹²⁹ These special interest groups lack inclusive foundations that would enable them to be truly representative of landowner sentiment.¹³⁰ The Mining Act does not adequately guard against similar instances of biased or unrepresentative landowner groups.

Further, the constitution is likely to be in a language and cultural form inaccessible to most of their community. The application process does not ensure that the ALO is a representative group that reflects the diversity of the community, or that it can legitimately give consent on behalf of its community.

Second, an ALO can be established even if it does not meet the assessment criteria in the Mining Act.¹³¹ The Advisory Council must assess the application against criteria in the Mining Act to ensure it is legitimate, meets the requirements of the Act, and subsequently report to the Bougainville Executive Council (BEC). While the BEC must have regard to the Advisory Council's report, it does not have to follow it.¹³² Additional safeguards in the Regulations are not in force and they may not become law in the publicly available draft form.¹³³

Third, the BEC has absolute discretion whether or not to approve the establishment of an ALO, and ultimately decides who is, and who is not, a 'legitimate' landowner organisation.¹³⁴ As above, before making a decision, the BEC must consider the Advisory Council's assessment report, but it is not obliged to follow it.¹³⁵ The ostensible democratic involvement of the Bougainville House of Representatives, via an opportunity to debate the merits of the proposal¹³⁶, can be curtailed – an ALO could be approved despite dissent from the House of Representatives, or following a gagged debate. Further, the decision to refuse to approve an ALO cannot be challenged.

¹²⁹ For example, the United Panguna Mine Affected Landowners Association's Constitution states that the group's objective is to steward the reopening of the Panguna mine in a way that increases the benefits flowing to local communities: Panguna Mine Affected Landowners Association, *Panguna Mine Affected Landowners Association Constitution*, (2013), at <http://www.ipa.gov.pg>.

¹³⁰ Bougainville Copper Limited 'JPNCC brings mining transparency' (14 November 2013) at <http://www.bougainville24.com/abg/jpncc-brings-mining-transparency>. In a region like Panguna, where strong currents of opposition still exist to large-scale mining, special interest groups such as this lack the inclusive foundations that would enable it to be truly representative of landowner sentiment. Yet in UPMALA's case it was the key representative body for landowners at the Joint Panguna Negotiation Coordination Committee meetings involving the ABG, BCL and PNG government.

¹³¹ *Bougainville Mining Act 2015* s 35 which states 'The Bougainville Executive Council may, by notice in the Bougainville Gazette, approve the establishment of an approved landowner organisation'. There are no checks on this power.

¹³² *Bougainville Mining Act 2015* s 35(2)(a).

¹³³ *Bougainville Mining Regulations 2015* (not in force) cl 3 requires a group of owners to submit proof of legal registration or incorporation, a description of the relevant customary land, and a declaration that the membership and structures of the organisation are such that it is truly representative of the owners of the customary and other land and a detailed explanation of why this is so; and a copy of the constitution.

¹³⁴ *Bougainville Mining Act 2015* s 35(1).

¹³⁵ *Bougainville Mining Act 2015* s 35(2)(a).

¹³⁶ *Bougainville Mining Act 2015* s 35(2)(b).

Fourth, the Mining Act allows the ABG to set up its own ALOs to represent the interests of landowners, through an Advisory Council proposal.¹³⁷ As a result situations may arise where the Advisory Council proposes a landowner group, and then assumes responsibility for assessing it against the criteria in the Mining Act. This creates a conflict of interest as the Advisory Council cannot act independently when doing this assessment, and the ALOs so established could end up supporting interests different from those of landowners.¹³⁸

Fifth, the BEC's disproportionate power over ALOs is evidenced by how easily it can disestablish ALOs for minor instances of non-compliance with the Mining Act.¹³⁹ This leaves open the possibility that the BEC will dissolve ALOs that do not comply with development plans, or who are exercising their legitimate rights to withhold permission. ALOs are given a truncated process for remedying the offending breach of the law¹⁴⁰ and have no right of review of the BEC's decision.

3 LANDOWNER RIGHTS

3.1 COMMUNITY MINING REGIME

Claims

*Another critically important indicator of the fact that we are not focused solely on Panguna can be seen in the strong focus in this Bill on small-scale mining... This is an innovative system, another world first, as far as we know, directed to encouraging Bougainvilleans to generate their own revenues. At the same time, the aim is to ensure that they do small-scale mining in ways that are safe for their health, and for the environment... There is also provision allowing companies controlled by landowners to apply for exploration licences over land owned by those landowners. These and related provisions are new directions for mining law in Bougainville.*¹⁴¹

*But although we support resuming large-scale mining, we are not focused only on that. We want to see broad-based development. That includes in the mining sector. As a result, we support Bougainville's home-grown mining industry – the small scale gold mining industry.*¹⁴²

¹³⁷ Bougainville Mining Act 2015 s 34(2).

¹³⁸ Bougainville Mining Act 2015 s 34.

¹³⁹ Bougainville Mining Act 2015 s 39(1) the BEC, on the recommendation of the Advisory Council, may, by notice in the Bougainville Gazette, disestablish an ALO. Section 39(2) states that the Advisory Council can recommend disestablishment if it is satisfied, on reasonable grounds, *inter alia* the organisation has failed to submit an annual report or an audit report. It is foreseeable that many ALOs may fail to meet these requirements given the level of detail required by s 37 reporting requirements.

¹⁴⁰ Bougainville Mining Act 2015 s 39(3) An organisation has 30 days to make a submission in response to a notice that the Advisory Council is considering recommending the disestablishment of the organisation.

¹⁴¹ President John Momis, *Second Reading Speech: Bougainville Mining Bill 2015*, cited at Bougainville News, 'Press Release and Full Speech : NEW MINING LAW A REJECTION OF THE PAST: MOMIS' at <http://bougainvillemnews.com/2015/03/26/bougainville-news-press-release-and-full-speech-new-mining-law-a-rejection-of-the-past-momis>.

¹⁴² Hon. Michael Oni, ABG Minister for Natural Resources, *Speech to the Opening Session: Panguna Negotiating Forum Meeting* (Buka, 5th-6th August 2014), p 2.

Analysis

Despite the promises of sovereignty given by the community mining licences regime, the rights of the Council of Elders and community mining licence holders remain ultimately within the discretion of the ABG.

The legal protections offered by a community mining licence are weak, as the BEC can easily revoke a licence or an entire Community Mining Licence Reserve Area (**CMLRA**). A CMLRA can be dissolved by the BEC if another, more lucrative development opportunity, is proposed over the same land.

Recommendation

a. That community rights be respected and communities have the authority to negotiate the terms under which mining licenses would be revoked if so agreed.

A significant portion of the Mining Act is dedicated to creating a regulatory regime around community mining licences. By doing so, the ABG has distinguished its law from the PNG Mining Act, which either prohibited or did not specifically regulate small-scale mining. By making small-scale mining 'legal', the Mining Act attempts to regulate lucrative village-level mining activities. According to Minister Michael Oni, this industry directly involves between 5,000-6,000 Bougainvilleans who receive as much as K75 million or more from gold sales.¹⁴³

The Mining Act devolves the power to grant community mining licences to the Council of Elders, who can grant them within their local Community Mining Licence Reserve Area (**CMLRA**), an area approved by the BEC and reserved from further tenement applications.¹⁴⁴ The Council of Elders then has the power to control mining that occurs in its jurisdiction and ensure that appropriate guidelines are followed.¹⁴⁵ Only Bougainvilleans have the right to hold community mining licences.¹⁴⁶

However, despite the promises of sovereignty under the small-scale mining regime, the rights of the Council of Elders and community mining licence holders remain ultimately within the discretion of the ABG.

¹⁴³ Hon. Michael Oni, ABG Minister for Natural Resources, *Speech to the Opening Session: Panguna Negotiating Forum Meeting* (Buka, 5th-6th August 2014), p 2.

¹⁴⁴ *Bougainville Mining Act 2015* s 54(1). The power to grant community mining licences is at s 71(1).

¹⁴⁵ The Mining Act defines who is qualified to hold a community mining licence, and sections governing the community mining licence application, grant and rights are set out in ss 70-83.

¹⁴⁶ *Bougainville Mining Act 2015* s 72.

The Secretary will not establish a CMLRA unless the Council of Elders have received training from the Department.¹⁴⁷ This dependence could act as a real obstacle for small-scale miners to operate within the law. While up-skilling ensures that mining occurs safely and there is appropriate oversight by the Council of Elders, it also means that the Council of Elders are dependent on the Government's provision of funding and resources to be eligible to establish their own CMLRA and to start granting licences.

The BEC also has the unfettered power to suspend the powers of the Council of Elders to grant community mining licences, and it can revoke any or all community mining licences granted in a CMLRA.¹⁴⁸ Failure of the Council of Elders to submit an annual report is grounds for the exercise of these powers¹⁴⁹, however it appears from the wording of the Mining Act that the BEC can exercise this right without this happening. If a community mining licence can be revoked for no reason, the legal protection offered by a community mining licence is very weak.

Finally, the BEC can, in accordance with the advice of the Advisory Council, disestablish a CMLRA¹⁵⁰, without paying compensation for the loss of these rights.¹⁵¹ Once the CMLRA is disestablished, an application for another tenement can be made over the land.¹⁵² This leaves open the possibility that a CMLRA will be dissolved if a more lucrative mining development is proposed over the same land.

3.2 COMPENSATION STANDARDS

Assertion

*Land rents and compensation will be fairer than under PNG law.*¹⁵³

Analysis

The Mining Act does not give sufficient assurance that customary landowners will be compensated fairly or adequately for the loss of their rights over their land.

¹⁴⁷ *Bougainville Mining Act 2015* s 56(2) for the precondition, and s 60 for the requirements for training.

¹⁴⁸ *Bougainville Mining Act 2015* s 63.

¹⁴⁹ *Bougainville Mining Act 2015* s 62(2)

¹⁵⁰ *Bougainville Mining Act 2015* s 64(2).

¹⁵¹ *Bougainville Mining Act 2015* s 64(5).

¹⁵² *Bougainville Mining Act 2015* s 58(1) states that the Mining Registrar must not accept or register an application for a tenement if the area to which the application relates is located wholly or partly within a community mining licence reserve area. This means that while a CMLRA exists, other tenements (such as for large-scale leases) cannot be granted over the land.

¹⁵³ Hon. Michael Oni, ABG Minister for Natural Resources, *Speech to the Opening Session: Panguna Negotiating Forum Meeting* (Buka, 5th-6th August 2014).

Recommendations

- a. That the Mining Act include an inclusive, consultative process for determining what is fair and equitable compensation for the loss of land rights.
- b. That standardised rates for fees and compensation be introduced.

Under the Mining Act, landowners are entitled to compensation for loss and damages from mining development on their land in accordance with the principles in the Mining Act.¹⁵⁴ Compensation must be paid to the landowners of the land or other project-affected person for all loss or damage suffered or foreseen to be suffered by them from the exploration or mining or ancillary operations.¹⁵⁵ Entry onto land is not permitted until compensation has been agreed.¹⁵⁶

Despite the prominence of compensation, the Mining Act does not give sufficient assurance that customary landowners will be compensated fairly or adequately for the loss of their rights over their land. There is no standard for calculating reasonable compensation, or a process to determine the fair value of land rights lost. As in when negotiating an ELLACA (discussed at **1.2** above) the Mining Act lists factors to be considered¹⁵⁷, but the only substantive guidance is that compensation rates must be determined in reference to ‘prescribed values’, which have not yet come into force, or reference to ‘the values for economic crops and trees published by the Valuer General of Papua New Guinea’.¹⁵⁸

Valuing customary land in accordance with the value of cash crops, if any exist on the land, is a misunderstanding of customary land in Bougainville. This in turn illustrates conceptual issues with ‘compensation’ as outlined in the Mining Act. Land is not a marketable commodity in customary law, and no compensation can ever redress the loss of land. Given the principle of trans-generational ownership of land, if compensation was paid to an adult at a point in time, the next generation under customary law is just as entitled to claim compensation for the loss of the land.

Under the UN Declaration on the Rights of Indigenous Peoples, Indigenous peoples have the right to redress or, when this is not possible, to be compensated fairly and equitably for the lands, territories and resources which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.¹⁵⁹

An inclusive, consultative process for determining what is fair and equitable compensation for the loss of land rights needs to be established under the Act. This

¹⁵⁴ *Bougainville Mining Act 2015* s 10(m).

¹⁵⁵ *Bougainville Mining Act 2015* s 302. Different processes are set out for compensation agreements in relation to large-scale mining and the rest of the tenements covered by the Act – see s 307.

¹⁵⁶ *Bougainville Mining Act 2015* s 305.

¹⁵⁷ *Bougainville Mining Act 2015* s 302(4).

¹⁵⁸ *Bougainville Mining Act 2015* s 302(5).

¹⁵⁹ United Nations Declaration on the Rights of Indigenous Peoples, article 28.

must uphold the UN declaration principles, and go beyond the construct of the limited land rights recognised by Western-style law. Fair and equitable compensation is likely to be achieved once communities are informed about market value and reach agreement via a consultative process.

3.3 TRESPASS ONTO CUSTOMARY LAND

Claim

*The petition says making land available for reconnaissance licenses, exploration licenses and other mining licenses breaches customary law. But in fact, by giving all customary landowners the right to refuse access to their land for any such license, the Bill fully respects, supports and endorses customary law.*¹⁶⁰

Analysis

The Mining Act allows trespass onto customary land without landowner permission.

Recommendation

a. That trespass onto customary land not be allowed without landowner consent.

Contrary to the assertion that the Mining Act respects customary law, in some places it overturns the customary law principle that entry onto land is only permitted once consent from landowners has been obtained. Under the law, the Secretary (head of the Department of Mining) can authorise a person to trespass on customary land in order to:

- conduct a study for infrastructure or other works relevant to a mining project¹⁶¹; and
- mark out areas of a tenement, or proposed tenement, and maintain posts, markers or cleared lines to mark out the tenement.¹⁶²

In some cases, an authorisation from the Secretary is not needed – for instance, if an officer of the Department enters land to carry out a geological, geotechnical, safety or other investigation.¹⁶³ An authorised officer is allowed to enter onto any customary land for seemingly any purpose, as long as they do not pose a safety or security hazard or unreasonably interfere with mining operations.¹⁶⁴

¹⁶⁰ President John Momis, *Second Reading Speech: Bougainville Mining (Transitional Arrangements) Bill 2014* (8 August 2014).

¹⁶¹ *Bougainville Mining Act 2015* s 329.

¹⁶² *Bougainville Mining Act 2015* s 238(6).

¹⁶³ *Bougainville Mining Act 2015* s s 329(3).

¹⁶⁴ *Bougainville Mining Act 2015* s 331(2).

Together with the absent requirement of the landowner's consent, these legally-authorized instances of trespass unjustifiably interfere with landowner rights. If a landowner tried to enforce their customary rights and prevent this entry, depending on the circumstances, they could be committing an offence that attracts severe penalties.¹⁶⁵

3.4 LANDOWNER OWNERSHIP OF MATERIALS

Claims

*The Bill recognises that all owners of customary land own all minerals in, on or under their land. More importantly, the Bill gives special powers, rights and protections to such owners.*¹⁶⁶

*And the major thing is that we have now legally given the landowners the right of ownership. And I think this is the first time anywhere in the world where any government legally gives a right of ownership to the landowners...The landowners own all the resources in Bougainville. And any developer that wishes to develop the resources must have the consensus of the landowners otherwise it won't happen. Not even the government of Bougainville owns resources. It's the landowners.*¹⁶⁷

*We are especially proud that our bill is completely unique in the world in the focus it gives to protecting the interests of the people of Bougainville – that is, those who are Bougainvilleans by custom, and who own land by custom.*¹⁶⁸

Analysis

Landowners only 'own' minerals while they are 'on, in or below' their customary land. On one interpretation, this means that ownership does not extend to minerals existing in tailings piles or creek beds on tenement land.

Compulsory acquisition, allowed for mining purposes, permanently extinguishes customary ownership over land and therefore customary ownership of minerals.

The types of tenements generally available to customary landowners restricts their activities, which curtails their rights to extract the minerals they legally own.

¹⁶⁵ For instance, see *Bougainville Mining Act 2015* s 349 – offences in relation to authorised officers; and s 346 – interfering with operations authorised by this Act.

¹⁶⁶ President John Momis, *Second Reading Speech: Bougainville Mining Bill 2015*, cited at Bougainville News, 'Press Release and Full Speech : NEW MINING LAW A REJECTION OF THE PAST: MOMIS' at <http://bougainvillemnews.com/2015/03/26/bougainville-news-press-release-and-full-speech-new-mining-law-a-rejection-of-the-past-momis>.

¹⁶⁷ Radio New Zealand International, 'Bougainville President hails mining law' (Dateline, 11 August 2014) at <http://www.radionz.co.nz/international/programmes/datelinepacific/audio/20145231/bougainville-president-hails-mining-law>.

¹⁶⁸ President John Momis, *Second Reading Speech: Bougainville Mining (Transitional Arrangements) Bill 2014* (8 August 2014), p 5.

Recommendation

- a. That the qualifications on customary ownership of land and minerals be reconsidered, and communities be entitled to negotiate whether they would like their land to be acquired for mining purposes.

All minerals existing on, in or below the surface of customary land in Bougainville are the property of the owners of customary land.¹⁶⁹ Customary ownership of minerals is a main feature of the Mining Act and there has been widespread reporting of this ‘world first’ enshrinement of landowner rights.¹⁷⁰ The sole right of ownership has shifted from initial mining legislation discussions, when the BEC determined that minerals would be jointly owned by the ABG and landowners.¹⁷¹ Recognising customary ownership of minerals is a laudable goal, however it is worthwhile examining the substance of this right.

According to the Mining Act, landowners only ‘own’ minerals while they are ‘on, in or below’ their customary land.¹⁷² In practical terms, this means that if there is a tenement over customary land, the customary ownership right expires when the minerals see the light of day. Ownership does not extend to minerals existing in tailings piles or creek beds on tenement land, as once the minerals are ‘separated from the land’, the ownership of the minerals passes to the holder of the lease or licence.¹⁷³ President Momis has defended the transfer of ownership to leaseholders following extraction, on the basis that mining companies will not expend money if they do not have the right to sell the minerals once they are dug up.¹⁷⁴

The Mining Act leaves open the possibility that land will be compulsorily acquired, with mineral ownership rights vesting in the ABG, if landowner permission for a mine cannot be obtained. Under the Mining Act, the ABG can compulsorily acquire land for a ‘public purpose’, which is defined as ‘namely mining, exploration for minerals, and other activities ancillary to mining’.¹⁷⁵ If land is no longer ‘customary land’, by virtue of being compulsorily acquired, then the minerals on, in or below the surface of the land automatically belong to the ABG.¹⁷⁶ Although compulsory acquisition is a

¹⁶⁹ *Bougainville Mining Act 2015* s 8.

¹⁷⁰ ABC Radio, ‘Bougainville landowners to share mining rights with govt’ (Jemima Garret, 7 March 2013) at <http://www.abc.net.au/pm/content/2013/s3710525.htm>; Radio New Zealand International, ‘Public will see benefits of mining law, says Bougainville Admin’ (15 August 2014) at ‘<http://www.radionz.co.nz/international/pacific-news/252260/public-will-see-benefits-of-mining-law-says-bougainville-admin>’.

¹⁷¹ See President John Momis, Speech to the House of Representatives, *The Draft Bougainville Mining Act 2013* (Buka, Autonomous Region of Bougainville, 13 January 2013), p 6 where he notes that the BEC supported the joint ownership option.

¹⁷² *Bougainville Mining Act 2015* s 8.

¹⁷³ *Bougainville Mining Act 2015* s 165(2)-(3) for artisanal licences, s 129(2)-(3) for mining leases, s 152(2)-(3) for quarry leases.

¹⁷⁴ ‘If the landowners agree to exploration and mining going ahead, they then also agree to sell the minerals they own, once they are dug up,’ President John Momis, *Second Reading Speech: Bougainville Mining (Transitional Arrangements) Bill 2014* (8 August 2014) p 8.

¹⁷⁵ *Bougainville Mining Act 2015* s 2(2).

¹⁷⁶ *Bougainville Mining Act 2015* s 9.

long and arduous process, it may be simpler than the protracted steps to obtain landowner permission set out in the Mining Act (set out at **1.3** above).

The types of tenements generally available to customary landowners limit their power to exercise customary mineral ownership. Community mining licences restrict the depth that they can mine¹⁷⁷ and the tools they can use¹⁷⁸, which curtails their rights to extract the minerals they legally own and reserves the more lucrative mineral deposits for large companies.

As noted by President Momis, ‘Bougainvillean owners of the minerals do not have the technology, the skills, experience or the funds’ to do large-scale mining.¹⁷⁹ If customary landowners wish to exercise their ownership rights to minerals at a greater depth, then they have to rely on their other landowner rights, such as refusing entry onto land and demanding compensation for access. These options are far from a true realisation of the principle of ownership.

3.5 COMMUNITY DEVELOPMENT AGREEMENTS

Claims

*...we have our own mining law now, which is the final long-term mining law which is probably the most liberating legislation in Bougainville so far. It liberates the landowners, liberates the people of Bougainville and creates a level playground for a collaborative effort between the developers, the government and the landowners.*¹⁸⁰

*Also, to requirements for plans approved by the ABG after involvement of the landowners, for such matters as employment preference, business preference, resettlement, mine closure and rehabilitation, and so on. And also requirements for rent and compensation agreements, quite different from those that apply in PNG. Much fairer. And of course, none of these things are going to be agreed to by the landowners unless they’re satisfied. The landowners aren’t going to agree to a mining licence being granted, unless all of these things are satisfied, as far as they’re concerned. So there’s a dramatic shift in power.*¹⁸¹

¹⁷⁷ *Bougainville Mining Act 2015* s 75(3)(vi) – not mine deeper than 5 metres below the natural surface of the ground.

¹⁷⁸ *Bougainville Mining Act 2015* s 75(3)(b)(iii) – can only use non-mechanised mining methods.

¹⁷⁹ President John Momis, *Second Reading Speech: Bougainville Mining (Transitional Arrangements) Bill 2014* (8 August 2014), p 8.

¹⁸⁰ Radio New Zealand International, ‘Bougainville’s Momis eyes second term’ (Dateline Pacific, 15 April 2015) at <http://www.radionz.co.nz/international/programmes/datelinepacific/audio/20174729/bougainville-s-momis-eyes-second-term>.

¹⁸¹ Anthony Regan, *The Bougainville Mining Act 2015: Process, Substance and Controversies* (Presentation given at the Coral Bell School of Asia Pacific Affairs, ANU College of Asia & the Pacific) at < <http://ips.cap.anu.edu.au/news-events/podcasts/bougainville-mining-act-2015-process-substance-and-controversies#.VeWXAntC3-Y>.

Analysis

Licence holders can be granted an exemption from the requirement to have a Community Development Agreement if a community is 'unwilling or unable' to enter into the one proposed by the licence holder. This means communities may accept substandard agreements to get any assistance at all.

This inequality is compounded by the fact that the CDA is negotiated between customary landowners and proponents. There is no involvement of the ABG or any other third party, which could assure quality control.

A licence holder is only required to 'substantially comply with its obligations' under an approved CDA, which does not provide a strong regulatory incentive for compliance.

Recommendations

- a. That an independent advisory service be set up by the ABG to work with affected communities to level the playing field when negotiating community development agreements.
- b. That the Mining Act require companies to fully comply with the terms of their agreed Community Development Agreements.

A Community Development Agreement (**CDA**) between mining companies and communities is considered a key instrument for defining the relationship and obligations between these parties, including the roles of local and national governments and NGOs.¹⁸²

The Mining Act has adopted the CDA as the main legal vehicle by which holders of large-scale mining leases fulfil their obligations to communities affected by their operations.¹⁸³ CDAs are both a mandatory condition of large-scale mining leases¹⁸⁴ and a precondition to mining development in large-scale lease areas.¹⁸⁵ Under the Mining Act, leaseholders are required to expend at least 1.25% of mineral value on community development, which is guided by the CDA.¹⁸⁶

¹⁸² The World Bank, *Mining Community Development Agreements Source Book* (March 2012) at http://siteresources.worldbank.org/INTOGMC/Resources/mining_community.pdf, p ix.

¹⁸³ *Bougainville Mining Act 2015* s 138(1) provides: (1) The holder of a large-scale mining lease must—(a) assist qualified communities affected by its operations, by—(i) promoting their sustainable development; and (ii) enhancing the general welfare and the quality of life of their inhabitants; and (b) recognise and respect the rights, customs and traditions of qualified communities and their inhabitants. Note that a template CDA is included in the Regulations but is not yet in force.

¹⁸⁴ *Bougainville Mining Act 2015* s 138(2)(a).

¹⁸⁵ *Bougainville Mining Act 2015* s 138(3).

¹⁸⁶ *Bougainville Mining Act 2015* s 138(7)(a).

Yet despite the appearance of fostering social responsibility, the Mining Act allows companies to sidestep the requirement to have a CDA, and makes compliance with its terms almost voluntary.

If a mining company can argue that a community is ‘unwilling or unable’ to enter into a CDA, then the Minister can exempt them from having to enter into a CDA.¹⁸⁷ The mining company is also excluded from having to give development assistance to that community.¹⁸⁸ What is meant by ‘unwilling’ or ‘unable’ is unclear – it is possible that a community has simply rejected an unreasonable draft CDA, or the negotiating process is taking longer than expected.

The threat of missing out on financial assistance may force communities to accept a substandard agreement in order to obtain any developmental assistance at all. Communities are particularly vulnerable as services delivered pursuant to a CDA will be the main way in which they will receive human resources development, economic benefits, social infrastructure and health services as a result of the mining project. This dependence does not create the ‘level playground’ envisaged.

This inequality is compounded by the fact that the CDA is negotiated between customary landowners and proponents. There is no involvement of the ABG or any independent third party, that would ensure the CDA meets the interests of landowning communities.¹⁸⁹ Given that proponents will likely have the commercial expertise and commercial motivation to produce a CDA that strongly reflects the company’s best interest, it is critical that an independent advisory service is set up by the ABG to work with affected communities to level the playing field. The Secretary can strengthen a community’s negotiating position by requiring the proponent to provide funds for capacity-building and preparation, which is a positive step.¹⁹⁰

Finally, a licence holder is only required to ‘substantially comply with its obligations’ under an approved CDA.¹⁹¹ The fact that a portion of a company’s obligations can be disregarded without consequence does not provide a strong regulatory incentive for compliance.

¹⁸⁷ *Bougainville Mining Act 2015* s 139 (1).

¹⁸⁸ *Bougainville Mining Act 2015* s 139(3). The proponent is not relieved of their general obligations to the qualified community under s 138(1): s 139(4).

¹⁸⁹ *Bougainville Mining Act 2015* s 138(4) notes that a community development agreement enters force on the date it is ‘approved in the prescribed manner’, which suggests that an assessment/approval process may be set out in the Regulations, which are not yet in force.

¹⁹⁰ *Bougainville Mining Act 2015* s 138(6).

¹⁹¹ *Bougainville Mining Act 2015* s 138(2)(b).

4 OFFENCES AND CONDITIONS

Claims

*The petition complains about a criminal offence about withdrawing survey pegs. But that should not be a problem for landowners under our law, because they have an absolute right to refuse permission for exploration or mining licenses. If they refuse, there will be no survey pegs. If they agree to licenses, most will want to see the survey pegs, because it will be those pegs that will define the areas that receive rents, equity, compensation, royalties, and so on.*¹⁹²

But what's mainly forgotten in all this stuff about penalties, is that these are mainly penalties in an act designed to protect Bougainville's interests, and there's only going to be mining and exploration if the landowners agree. And so most of the penalties are there to protect things that landowners have agreed to. In addition, I think it's also forgotten that a very large of the proportion of the penalties and offences are directed against holders of licences and tenements, not against other people. They're designed to keep the holders of licences and tenements in check, and to make sure they obey the law...

*...there's going to be penalties, quite high penalties, for people who interfere with mining in all sorts of ways including taking out survey pegs. But the only bloody survey pegs that are going to go in, will go in if the landowners of the area have agreed.*¹⁹³

Analysis

'Offences' under the Mining Act can be used to suppress the legitimate right of protest enshrined in international human rights law such as the International Covenant on Civil and Political Rights.

The penalties for offences most likely to affect landowners have dramatically increased between the Bougainville Mining Bill and the final Mining Act. There was no change to the penalties affecting mining companies during this time.

Unless explicitly provided, it is not necessary to prove that a person intended to commit an offence before convicting them. In addition to being punished with harsh penalties, a convicted offender can also be ordered to pay compensation and prosecution costs as well as serve a lengthy prison sentence.

¹⁹² President John Momis, *Second Reading Speech: Bougainville Mining Bill 2015*, cited at Bougainville News, 'Press Release and Full Speech : NEW MINING LAW A REJECTION OF THE PAST: MOMIS' at <http://bougainvilleneews.com/2015/03/26/bougainville-news-press-release-and-full-speech-new-mining-law-a-rejection-of-the-past-momis>.

¹⁹³ Anthony Regan, *The Bougainville Mining Act 2015: Process, Substance and Controversies* (Presentation given at the Coral Bell School of Asia Pacific Affairs, ANU College of Asia & the Pacific) at <http://ips.cap.anu.edu.au/news-events/podcasts/bougainville-mining-act-2015-process-substance-and-controversies#.VeWXAntC3-Y>.

Authorised officers have the power of police officers, including the right to arrest and detain. This is particularly concerning given the lack of qualification or training required by people appointed to enforce these laws, which may result in further infringement of rights. They also have immunity from prosecution.

In regards to companies, a breach of a condition is not an offence under the Mining Act, which means that there is a weak incentive for compliance.

Recommendations

- a. That the offences are amended so that they are not as harsh and draconian, do not suppress the legitimate right of protest, do not unduly punish offenders, and require a court to have found that an accused had the intention to commit an offence before finding them guilty.
- b. That authorised officers are not given police powers.
- c. That minimum standards of training are required for authorised officers.
- d. That the regulatory regime that applies to breaches of the Mining Act when waste is being handled in a way that poses a hazard, or if the tenement holder uses hydraulic mining methods and fails to control the water discharge to protect natural waterways, be extended to every breach of condition or term of the Mining Act.

Considerable public disquiet has surrounded the offences stipulated in the Mining Act. Severe penalties for criminal offences, which happen to occur around or against resource extraction works, are said to be justified as necessary for a conducive operating environment and to attract investors. Criminalising protest and imposing harsh punishment, regardless of intention to commit a crime, as well as granting public servants police powers, however, calls into question basic human as well as constitutional rights. These provisions are in stark contrast to provisions that allow mining companies to breach the Mining Act without significant consequences.

4.1 THE RIGHT TO PROTEST

A primary concern is how offences set out in the Mining Act suppress the freedom of protest. A number of enforcement provisions in the Mining Act arguably contravene international human rights law¹⁹⁴ and the Bougainville Constitution¹⁹⁵, to the extent that they restrict or suppress the right of protest or opposition by communities. Even though governments may lawfully impose limitations on those rights for reasons of public order, landowners have the right by international human rights conventions and the Bougainville Constitution to oppose and actively express opposition to

¹⁹⁴ See also Article 19, Universal Declaration of Human Rights.

¹⁹⁵ Bougainville Constitution s 178 (adopting the Basic Rights of the PNG National Constitution, including the right of freedom of conscience, of expression, of information and of assembly and association).

extractive projects. The importance of this right to protest is heightened by the weakness of the ABG's enforcement provisions against misconduct of companies.

The ABG and key advisors repeatedly rely on the problematic argument, detailed above, that that offences will not arise because mining will only occur if landowners agree. However, as is well known in Bougainville, the complexity of land ownership and interests, combined with the shortcomings noted with the approved landowner organisation model (see discussion at **2.2** above) and the problematic concept of landowner permission (see **2.1** above) makes opposition to a mining development, in one form or another, very likely. This position also discounts the legitimate right of protest when developers do not fulfil their obligations.

4.2 SEVERE PENALTIES

The penalties for offences most likely to affect landowners have dramatically increased between the Bougainville Mining Bill (purported to have been subjected to community consultation¹⁹⁶) and the final Mining Act now in force:

- The fines have increased up to 10 times in severity (in the case of interfering with operations authorised by the Mining Act, the penalty has risen from K25,000 to K250,000);
- The stipulated penalty for offences is now mandatory, removing the discretion of the judge to reduce the penalty due to mitigating circumstances; and
- The penalty is now both a fine and a term of imprisonment, whereas previously it was either one or the other, or both.

Conversely, the offences most likely to affect mining companies have not been altered between the Bill and the final Mining Act. This is a striking difference.

The penalties that now apply to Bougainvillean customary landowners are much more severe than those that apply to Papua New Guinean customary landowners, or that applied in Bougainville before the Mining Act came into force. For instance, a Bougainvillean would receive a fine of K250,000 and five years' imprisonment for interfering with mining operations, whereas Papua New Guinean would receive a fine not exceeding K10,000 or imprisonment not exceeding four years, or both. No justification has been provided as to why Bougainvilleans will be more harshly punished under this new law than citizens in other regions of PNG.

Appendix A demonstrates the above in greater detail.

¹⁹⁶ See *Bougainville Mining Legislation and Regulations Development: A Presentation to the People of Bougainville* (12 November 2014) at <https://bougainvilleneews.files.wordpress.com/2014/12/bougainville-policy-act-and-regulations-presentation-to-landowners.pdf>.

4.3 STRICT LIABILITY AND DOUBLE PUNISHMENT

Under the Mining Act, a person can be found guilty even if they did not mean to commit an offence.¹⁹⁷ ‘Strict liability’ offences mean that even if a landowner mistakenly removes a boundary marker, not knowing what it is, or interferes with mining operations by growing a garden in a place they did not know was going to be mined, they could be found guilty and punished, even where they did not intend to obstruct mining operations.¹⁹⁸

If a court finds a person guilty, then on top of a penalty, the person can be ordered to pay the ABG its court costs, and compensation to another person who ‘suffered loss of income, loss or damage to property or incurred costs.’¹⁹⁹ This double punishment does not reflect international standards and seems disproportionate; it serves only to cripple defendants who are already punished through a conviction and harsh penalty.

4.4 POWERS OF AUTHORISED OFFICERS

‘Authorised officers’ are given broad-ranging powers which are usually only exercised by police officers. Most egregious is the power of an authorised officer to arrest a person without a warrant on minor grounds. For example, if a person refuses to give a name and address, or if the officer ‘suspects’ they have committed an offence, this act is punishable with imprisonment for one month or more.²⁰⁰ The Mining Act moderates this power by requiring the detained person to be escorted to a police station, but this must occur only ‘without unnecessary delay’, an entirely subjective standard which does not protect citizens against abuse of this detention power.²⁰¹

The Mining Act allows authorised officers to exercise the powers of police officers, without requiring the equivalent high standard of training and skills. The only requirement on the recruitment of an authorised officer is that they have the ‘necessary expertise or experience to carry out the duties that will be required of the person’.²⁰² Requiring a minimum level of skill, qualification or education would help ensure that the Mining Act was being enforced appropriately. This is particularly

¹⁹⁷ *Bougainville Mining Act 2015* s 355.

¹⁹⁸ The following are examples of offences of strict liability: s 346 (interfering with operations authorized by the act), s 348 (interference with boundary marks), s 347 (extortion), s 348 (interference with boundary marks); s 349 (offences in relation to authorized officers).

¹⁹⁹ *Bougainville Mining Act 2015* s 357.

²⁰⁰ *Bougainville Mining Act 2015* s 334(1). Most offences in the Mining Act are punishable by imprisonment for more than one month.

²⁰¹ *Bougainville Mining Act 2015* s 334(2).

²⁰² *Bougainville Mining Act 2015* s 330(3).

important when authorised officers are immune from prosecution for their actions while performing their job.²⁰³

The power to arrest a person, effectively removing their right to liberty through detaining them against their will, is a tool of ‘last resort’ for modern law enforcement professionals, which should only be used once other options have been tried.²⁰⁴ The readiness of the Mining Act to give powers of arrest to authorised officers, and the ability for arrest to be occasioned as the first step to enforce the law, is concerning.

4.5 WEAK ENFORCEMENT OF CONDITIONS

‘Conditions’ are restrictions on mining activities. They are generally to control mining development activities for the benefit and protection of customary landowners, the environment, or the government and community at large. However despite their protective importance, a breach of a condition is not an offence under the Mining Act, which means that there is weak incentive for compliance.

‘Suspension orders’, or ‘stop work orders’, are issued when a licence holder fails to comply with a condition or contravenes the Mining Act.²⁰⁵ This is the main way that the ABG enforces conditions. However, suspension orders are of questionable effectiveness. In most cases, suspension orders are not mandatory, are only valid for a limited time period²⁰⁶, and can be cancelled even if the condition is not complied with or the breach not rectified.²⁰⁷ It is only when a company does not heed the suspension order that it becomes an offence.²⁰⁸

A different regulatory regime applies if waste is being handled in a way that poses a hazard, or if the tenement holder uses hydraulic mining methods and fails to control the water discharge to protect natural waterways.²⁰⁹ In these cases, the Secretary is compelled to suspend operations.²¹⁰ Ongoing failure to comply triggers the process for cancellation of the lease or licence.²¹¹ These two ‘environmental’ breaches are the only exceptions to the otherwise lax rule described above. Given the extensive and in many cases irreversible environmental damage that can occur at all stages of

²⁰³ *Bougainville Mining Act 2015* s 360. Authorised officers are protected from prosecution from any act they do or fail to do during the discharge, or purported discharge, of their duty.

²⁰⁴ For instance, s 99 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) gives police the power to arrest without a warrant, however it demands that police exhaust their alternative powers (e.g. obtain identity/address, and issue move-on directions) before issuing the arrest for the purpose of bringing a person to court.

²⁰⁵ *Bougainville Mining Act 2015* s 338.

²⁰⁶ *Bougainville Mining Act 2015* s 338(1)(a).

²⁰⁷ *Bougainville Mining Act 2015* s 338(2) allows the Secretary to cancel a suspension order without any preconditions.

²⁰⁸ *Bougainville Mining Act 2015* s 338(7).

²⁰⁹ *Bougainville Mining Act 2015* s 207(1), s 208(1).

²¹⁰ *Bougainville Mining Act 2015* s 207(3), s 208(3).

²¹¹ *Bougainville Mining Act 2015* s 207(4), s 208(4).

the mining process, it would be appropriate to extend this process to all conditions under the Mining Act.

5 PROTECTION OF LANDOWNERS

Analysis

Contrary to some public statements, the rights of BCL had lapsed and were subsequently resurrected by the new Mining Laws.

There are insufficient checks and balances in the new law. Key bodies that are meant to provide independent opinions are not independent, most decisions cannot be challenged, and the ABG has immunity from prosecution for offences under the Mining Act.

There is no independent dispute resolution or grievance mechanism. This effectively removes the landowner's right to engage with an independent third party to resolve their disputes.

Recommendations

- a. That independent bodies be established to oversee implementation of the Act, with landowners and communities having recourse to challenge decisions perceived to be inappropriate or unjust made under the Act.
- b. That international best practice in regards to dispute resolution, including mechanisms that are legitimate, accessible, predictable, equitable, rights-compatible and transparent, be incorporated into the Mining Act.

5.1 THE RIGHTS OF BOUGAINVILLE COPPER LIMITED

Claims

The draft Act does not grant any minerals to BCL. It does no more than give BCL a right to negotiate with both the ABG and Landowners for a mining licence, and only for the area previously covered by the SML. If we cannot negotiate conditions that are satisfactory to the ABG and landowners, then BCL will not receive a mining licence. They will leave. Then the ABG and the landowners will decide what to do next.²¹²

...That exploration licence is intended to put BCL in the same position as any exploration licence holder that has completed exploration, and wants to apply for an

²¹² President John Momis, *Second Reading Speech: Bougainville Mining (Transitional Arrangements) Bill 2014* (8 August 2014), p 13.

*negotiate about possible grant of a mining licence. It gives BCL a right to negotiate the conditions on which it might be allowed to resume mining, but only if it gets permission from both customary landowners and the ABG.*²¹³

Despite reports that the Transitional Act stripped BCL of its seven exploration licences and its special mining lease over Panguna²¹⁴, the mining laws actually made special provision for BCL and resurrected BCL's exclusive right to the Panguna lease area, which had expired in April 2011.²¹⁵ While the Mining Act provides that a lease or licence in force before the Transitional Mining Act is of no effect,²¹⁶ this diminution of rights does not affect the Panguna Special Mining Lease, because it was not in force.

Instead, the Mining Act confirmed that the holder of a special mining lease in force on 1 January 2011 (the only one being the Panguna lease) was taken to have been granted an exploration licence over the Panguna lease area on 8 September 2014, the day the transitional law came into force.²¹⁷ The ABG has placed BCL in a privileged position by converting its expired mining lease into an active exploration licence.

5.2 LEGISLATIVE CHECKS AND BALANCES

The Advisory Council, which plays a central role in the mining regulation regime²¹⁸, would be an independent and representative body, providing it issued balanced recommendations drawn from a diverse range of views. However, the Advisory Council is not independent. The permanent members of the Council are all Bougainvillean public service employees²¹⁹, appointed by the BEC or the Secretary.²²⁰ This leaves open the possibility of a hand-picked Advisory Council providing pre-determined recommendations.

Judicial review of a decision of a government body is a well-accepted check on executive power. Notably absent from the Mining Act, however, is the right of review of the decisions of the BEC or the Advisory Council. Furthermore, it is unclear

²¹³ Bougainville News, 'Momis: "NO" To PNG buying RIO TINTO shares in Bougainville Copper Ltd' (15 April 2015) at <http://news.pngfacts.com/2015/04/momis-no-to-png-buying-rio-tinto-shares.html>.

²¹⁴ ABC Radio, 'Bougainville Government strips Rio Tinto subsidiary of all exploration and mining licences' (Jemima Garrett, 11 August 2014) at <http://www.radioaustralia.net.au/international/radio/program/pacific-beat/new-legislation-strips-rights-from-rio-tintos-subsidiary-bougainville-copper/1355338>.

²¹⁵ Bougainville Copper Limited, *Annual Report 2013* at <http://www.bcl.com.pg/wp-content/uploads/2014/05/Annual-Report-Release-March-14.pdf> p 1. 'The company's special mining lease lapsed through effluxion of time on 10 April 2011 and in accordance with the applicable legislation the company is entitled to a 21 year extension which has been applied for but not as yet granted'. At the time the Mining Act was passed, this extension had not been granted.

²¹⁶ *Bougainville Mining Act 2015* s 366.

²¹⁷ *Bougainville Mining Act 2015* s 367(1)-(3).

²¹⁸ The functions of the Advisory Council are set out in *Bougainville Mining Act 2015* s 23.

²¹⁹ *Bougainville Mining Act 2015* s 20. Note that if the matter before the Board (sic) relates to an area of land, a representative of the Council of Elders for the land in which that area is situated can also be appointed: s 20(1)(f).

²²⁰ *Bougainville Mining Act 2015* s 20(3).

how others affected by the impact of the Act are able to challenge the ABG or mining companies for unlawful acts or damages suffered.

The ABG is given immunity from prosecution under the Mining Act²²¹, severely restricting the right of Bougainvilleans to have unfair or illegal decisions reviewed. It also makes it virtually impossible for the ABG to be brought to justice in the event that crimes are perpetrated against landowners or if the government fails to comply with the Mining Act.

5.3 DISPUTE RESOLUTION

The Mining Act provides no independent grievance or accountability mechanism. While dispute resolution mechanisms arise from various agreements between landowners and proponents²²² the Mining Act does not require third-party involvement, contains no detail about how human rights are protected during these dispute processes, and in most cases provides no option for an impartial adjudication. This is in notable contrast to the provisions of the *Land Dispute Settlement Act*, which gives parties recourse to the courts to adjudicate their disputes.²²³ There is no independent body in charge of community engagement or development plans to act as the medium between the landowners and mining companies.

By putting the onus on mining companies to implement the plans and mechanisms, the Mining Act effectively removes landowners' freedom to engage with an independent party in the resolution of disputes.²²⁴ The consequence of this system may be power imbalances becoming entrenched and long-standing disputes going unreconciled, both factors that contributed to the closure of the Panguna mine. This is especially problematic in post-conflict environments such as Bougainville, where culturally appropriate and trustworthy grievance mechanisms are an essential part of the transitional process.

To ensure an appropriate independent grievance process, it is critical to incorporate international best practice in regards to dispute resolution, including mechanisms that are legitimate, accessible, predictable, equitable, rights-compatible and transparent, into the Mining Act.²²⁵

²²¹ *Bougainville Mining Act 2015* s 4(2).

²²² For instance, dispute resolution mechanisms are referred to in the sections in the Mining Act or draft Regulations governing community engagement plans, the ELLACA, the approved landowner organisation agreement and community development agreement.

²²³ The *Land Dispute Settlement Act (PNG)* is recognised and applied to land ownership disputes – see *Bougainville Mining Act 2015* s 13.

²²⁴ United Nations Declaration on the Rights of Indigenous Peoples, Article 27.

²²⁵ International Council on Mining and Minerals, *Good Practice Guide: Indigenous Peoples and Mining* at <http://www.icmm.com/document/1221>, p 100.

5.4 RESETTLEMENT MANAGEMENT PLANS

Analysis

Resettlement management plans are only mandatory if people are displaced due to a large-scale lease. This provision is discriminatory as the protection afforded depends on the legal characterisation of the tenement and not on the impact on the affected people.

The obligation to have a resettlement management plan can be avoided if it is considered that it is 'not necessary or imposes an unjustified burden'. This 'escape clause' means resettlement management plans can be avoided.

Recommendation

- a. That resettlement management plan are mandatory in relation to displacement caused by all types of resettlement leases, and the current exemption in the Mining Act be removed or qualified.

A resettlement management plan is how the holder of a mining lease manages displacement of people caused by its operations, through either resettlement (if there is physical displacement) or compensation (if economic, but not physical displacement).²²⁶ Landowners who must be resettled because of a mining lease operation have the right to participate in a resettlement process in accordance with a resettlement management plan.²²⁷

The protection offered by the law is potentially discriminatory, as it differs depending on the classification of the tenement and not the impact on the person or their livelihood. A resettlement management plan is only mandatory for communities affected by a 'mining lease operation'.²²⁸ If the displacement occurs due to any other type of tenement (e.g. a mining easement) the mining company must notify the Minister before they resettle people, who can then decide whether or not a resettlement management plan is required.²²⁹

Despite the severe and far-reaching consequences of displacement, a mining company can be exempted from needing to have a resettlement management plan if they successfully argue that 'the scale of the applicant's proposed mining operation or other circumstances' mean that a resettlement plan 'is not necessary or imposes

²²⁶ *Bougainville Mining Act 2015* s 124(3).

²²⁷ *Bougainville Mining Act 2015* s 10(n).

²²⁸ A 'mining lease' is defined in Schedule 1 as a lease granted under s 126. Section 126 governs small-scale mining leases and large-scale mining leases.

²²⁹ *Bougainville Mining Act 2015* s 298.

an unjustified burden on the applicant'.²³⁰ The terms 'not necessary' or 'unjustified burden' are not defined and could be interpreted broadly to the detriment of the rights of displaced people.

In lieu of a resettlement management plan, the BEC can impose other conditions that are 'appropriate in the circumstances', but this is not mandatory and offers no guaranteed protection, unlike resettlement management plans.²³¹ Without guidance, the possible negative consequences of displacement cannot be appropriately planned for and managed.

6 ENVIRONMENTAL CONCERNS

Analysis

The continued application of the PNG Environment Act does not sufficiently allay environmental concerns justifiably raised from the impact of the Panguna mine on land, communities and the Jaba River system.

It furthermore introduces deep seabed mining without broad protections and creates a lax regime for rehabilitation and mine closure which cannot be independently enforced.

The restriction on the number of large-scale mines does not guarantee the avoidance of catastrophic environmental consequences.

Recommendations

- a. Control over the environmental and social consequences of mining would be better achieved through strengthening enforcement and environmental protection conditions, rather than limiting the number of mines.
- b. That strict environmental laws and regulations for enforcement be established that protect the land, communities and waters, minimise degradation and the impact from the establishment and ongoing operation of mining.
- c. Detailed consultations regarding deep seabed mining should occur prior to applications for deep seabed mining being granted, given the possibility of serious impacts of this new technology on Bougainville's marine ecosystems.
- d. That mining companies not be exempted from a rehabilitation and closure plan and from responsibility for remediation of land and waters.
- e. That the Mining Act give the ABG the power to compel additional security for remediation later in the project cycle if this is reasonably required.
- f. That a mechanism for monitoring and enforcing rehabilitation plans be introduced.

²³⁰ *Bougainville Mining Act 2015* s 125(2)-(3).

²³¹ *Bougainville Mining Act 2015* s 125(4).

6.1 TWO LARGE-SCALE MINES ONLY

Claims

*We must control mining in ways that manage those impacts. Because all of our people feel such impacts, it is vitally important that it is the ABG that manages the overall system for permitting exploration for and development of minerals. It can make sure that what benefits mineral landowners does not have excessive negative impacts on others. One of the ways in which the Bill seeks to deal with such issues is imposing a strict limit on the number of large-scale mines that can operate in Bougainville at any one time. There can be no more than two. Any more than this would cause unmanageable impacts.*²³²

*...Section 5 says there can be no more than two [mines] at any one time. This is to protect present-day Bougainville from the cultural and environmental impacts of many mines. Section 5 is also intended to ensure that the interests of future generations of Bougainvilleans are looked after, by making sure some mineral wealth is maintained for them.*²³³

*To reduce social impacts of mining, and ensure the rate of resource development leaves some wealth for future generations, the draft law sets a limit of no more than two 'major' mines in Bougainville at any time.*²³⁴

The Mining Act provides that no more than two large-scale mining leases are to be in force at any one time.²³⁵ The logic that limiting the number of large-scale mines will protect Bougainville's environment can be challenged. This restriction by itself does not ensure that destructive environmental and cultural impacts of mining will be adequately controlled.

A presentation by the Department of Mineral and Energy Resources illustrates how little bearing the size of the lease has on the mine's impacts. The presentation distinguished between pre-existing mines in PNG that required large-scale mining leases (Panguna and Ok Tedi, Lihir, Porgera types) and those that required small-scale mining leases (Tolokuma, Simberi, Wild Dog, Eddie Creek Wau).²³⁶

²³² President John Momis, *Second Reading Speech: Bougainville Mining Bill 2015*, cited at Bougainville News, 'Press Release and Full Speech : NEW MINING LAW A REJECTION OF THE PAST: MOMIS' at <http://bougainvillenews.com/2015/03/26/bougainville-news-press-release-and-full-speech-new-mining-law-a-rejection-of-the-past-momis>.

²³³ President John Momis, *Second Reading Speech: Bougainville Mining (Transitional Arrangements) Bill 2014* (8 August 2014), p 6.

²³⁴ Hon. Michael Oni, ABG Minister for Natural Resources, *Speech to the Opening Session: Panguna Negotiating Forum Meeting* (Buka, 5th-6th August 2014), p 3.

²³⁵ *Bougainville Mining Act 2015* s 115.

²³⁶ ABG Department of Mineral and Energy Resources, *Bougainville Mining Legislation and Regulations Development: A Presentation to the People of Bougainville* (12 November 2014) at <https://bougainvillenews.files.wordpress.com/2014/12/bougainville-policy-act-and-regulations-presentation-to-landowners.pdf>, slide 54.

From this list, it is clear that lease size is not a definitive indicator of environmental impact. ‘Small-scale’ mining leases such as Simberi are notorious polluters and have been dogged by environmental concerns, dumping more than one million tonnes of tailings and waste rock every year²³⁷ and spilling cyanide causing the deaths of fish, turtles, dugongs, whales and other marine life.²³⁸ Control over the consequences of mining would be better achieved through strengthening enforcement and environmental protection conditions.

6.2 THE PNG ENVIRONMENT ACT

The PNG *Environment Act 2000 (Environment Act)* will continue to govern the regulation of the environmental impacts of mining in Bougainville until the ABG enact their own Environment Act, likely to be sometime in 2016.²³⁹ The delays in devolving this power to date may continue, thus affecting the predicted timeframe.²⁴⁰

Obtaining environmental permits under the Environment Act is a precondition for obtaining mining leases and licences.²⁴¹ However, the fact that the PNG Environment Act applies gives no significant reassurance that the disastrous environmental impacts of mining can be appropriately managed or avoided. The PNG Environment Act is an outdated law, which allows the proponent itself to determine the scope and contents of the Environmental Impact Statement and therefore the discretion to decide what information to exclude.²⁴² The Environment Act is also administered by the PNG Department of Environment and Conservation, which has limited technical capacity to assess detailed scientific reports required for environmental impact assessments.

6.3 DEEP SEABED MINING

The Mining Act includes novel provisions to facilitate ‘offshore exploration and mining’, a first for Bougainville.²⁴³ Deep seabed mining, as it is also known, is a highly controversial and speculative mining technique that is untested, yet has been

²³⁷ Earthworks and Mining Watch Canada, *Troubled Waters: How mine waste dumping is poisoning our oceans, rivers, and lakes* (February 2012) at https://www.earthworksaction.org/files/publications/Troubled-Waters_FINAL.pdf, p 8.

²³⁸ PNG Post Courier, ‘Cyanide spill shuts Simberi mine’ (Harlyne Joku, 9 March 2011) cited at <http://www.minesandcommunities.org/article.php?a=10769>.

²³⁹ ABG Department of Mineral and Energy Resources, *Bougainville Mining Legislation and Regulations Development: A Presentation to the People of Bougainville* (12 November 2014) at <https://bougainvilleneews.files.wordpress.com/2014/12/bougainville-policy-act-and-regulations-presentation-to-landowners.pdf>, slide 66.

²⁴⁰ See comments of President John Momis, ‘We are currently experiencing difficulties in the process of drawdowns with the following departments and agencies...Environment and Conservation’, Bougainville News, ‘Speech by ABG President Chief Dr John Momis at JSB meeting, Arawa’ (15 March 2015) at <http://bougainvilleneews.com/2015/03/15/bougainville-political-news-speech-by-abg-president-chief-dr-john-momis-at-jsb-meeting-arawa>.

²⁴¹ See *Bougainville Mining Act 2015* s 119(1)(xi)(a) which requires proof that all required permits and approvals for proposed activities have been issued under the Environment Act to accompany an application for a mining lease.

²⁴² *Environment Act 2000* (Papua New Guinea) sections 51-53.

²⁴³ *Bougainville Mining Act 2015* Part 8, sections 209-218.

foisted upon South Pacific nations in part due to their relative lack of regulation. The Solwara 1 deep sea mining project off the coast of New Ireland Province has been strongly opposed by landowners²⁴⁴, the provincial government²⁴⁵ and civil society organisations alike.²⁴⁶ Given the possibility of serious impacts of this new technology on Bougainville's marine ecosystems, it would be critical to have detailed consultations regarding this extension of the legislation prior to applications for deep seabed mining being granted.

6.4 REHABILITATION AND CLOSURE PLANS

The Mining Act does not give landowners the right to have customary land rehabilitated following mine closure. This is in contrast with the right to be resettled (discussed at 5.4 above) and to receive compensation (discussed at 3.2 above).

Mining companies can obtain an exemption from the requirement to have a rehabilitation and closure plan on the grounds it 'is not necessary or imposes an unjustified burden on the applicant'.²⁴⁷ If an exemption is obtained, the proponent has no obligation to submit a bond for the environmental rehabilitation, and can walk away from the mine without rehabilitating it, or providing security for the remediation of the destroyed land.²⁴⁸ Exempting mining companies from responsibility for remediation of land and waters is a substantial failure of the Act, particularly given the legal vacuum surrounding the responsibility for remediation of the current Panguna mine site.

Exemptions aside, the ABG can require the payment of security to cover rehabilitation costs before mining or ancillary operations can commence.²⁴⁹ However, given that this is required so early in the project cycle, it is possible that it will be insufficient to meet the full costs of rehabilitation, which can balloon out in ways that are not foreseeable at the commencement of mining operations. The Mining Act could give the ABG the power to compel additional security should this be reasonably required.

There is no mechanism for monitoring or enforcing rehabilitation plans. While the Mining Act notes that the holder of an expired lease remains liable to implement its

²⁴⁴ Post Courier, 'Landowners threaten to close Nautilus Mine', (6 August 2014) cited at

<http://www.deepseaminingoutofourdepth.org/landowners-threaten-to-close-nautilus-mine>.

²⁴⁵ Subsea World News, 'PNG Province Governor Opposes Solwara 1 Project' (10 September 2012)

<http://subseaworldnews.com/2012/09/10/png-province-governor-opposes-solwara-1-project>.

²⁴⁶ Helen Rosenbaum, *Out of Our Depth: Mining the Ocean Floor in Papua New Guinea* (November 2011)

<http://www.deepseaminingoutofourdepth.org/wp-content/uploads/Out-Of-Our-Depth-low-res.pdf>. This report was produced in partnership with the PNG organisation Centre for Environmental Law and Community Rights Inc (CELCOR).

²⁴⁷ *Bougainville Mining Act 2015* s 125.

²⁴⁸ *Bougainville Mining Act 2015* s 233(1), see also s 234(1) regarding the exclusion from the requirement for finalisation of rehabilitation and closure plan.

²⁴⁹ *Bougainville Mining Act 2015* s 233(3).

approved financial rehabilitation and closure plan²⁵⁰, the ABG cannot compel performance of the plan, nor prosecute a failure to act.²⁵¹ Sections of the Mining Act which attempt to enforce this requirement via conditions do not make up for this absence of power to enforce the law, particularly given how weak the condition enforcement process is (see discussion at 4.5 above).²⁵² The consequence could be that mining companies simply refuse to clean up their mess, and the ABG is powerless to make them.

7 RESTRICTIONS ON CONSTITUTIONAL RIGHTS

Analysis

The Mining Act regulates and restricts a number of constitutional and human rights.

Recommendations

That the Mining Act be carefully reviewed to ensure that constitutional and human rights are not unjustifiably interfered with, limited or restricted by the Act.

A primary concern is that the Mining Act may unjustifiably restrict the constitutional and human rights of Bougainville individuals and communities.²⁵³ Section 2 of the Mining Act regulates or restricts the following rights:

- the freedom from arbitrary search and entry (s 44 of the PNG Constitution)
- the freedom of employment (s 48)
- the right to privacy (s 49) and
- the right to freedom of information (s 51).

The Mining Act provides that these restrictions are necessary to give effect to the public interest in public safety, public order and public welfare.²⁵⁴ According to the Bougainville constitution, these restrictions are lawful ‘...to the extent that the law is

²⁵⁰ *Bougainville Mining Act 2015* s 234(5).

²⁵¹ It is noted that a breach of a provision of the Mining Act is grounds for the Secretary to issue a ‘show cause’ notice as to why the tenement should not be cancelled: s 284. However, this is a lesser regulatory control than enforcement proceedings.

²⁵² For instance, that a condition of the mining lease is that the holder ‘substantially complies’ with the plan (s 231(2)), that the holder of a large-scale mining lease must ‘take into account’ the rehabilitation and closure provisions in a community development agreement (s 231(3)) and requiring the holder to implement the plan (s 231(6)).

²⁵³ Those Constitutional rights can be found in s 180(3) of the Constitution of Bougainville and s 303(2) of the National Constitution. The ‘human rights’ in the Bougainville Constitution means the rights and freedoms referred to in Section 178 (basic rights) and Section 179 (additional rights).

²⁵⁴ *Bougainville Mining Act 2015* s 2(1)(b).

reasonably justifiable in a democratic society having regard for the rights and dignity of mankind.²⁵⁵

Whether a law is ‘reasonably justifiable in a democratic society’ can be challenged in the Bougainville High Court, the Supreme Court, or the National Court, which must have regard to international principles and conventions for its determination.²⁵⁶ This is an option open to the people of Bougainville, if they are of the opinion that human rights infringements authorised by the Mining Act are not justified.

²⁵⁵ *Bougainville Constitution* s 180(2).

²⁵⁶ *Bougainville Constitution*, s 181. This includes the established doctrine of international human rights law which provides that any such limitation must comply with certain standards of necessity and proportionality with regard to a valid public purpose, defined within an overall framework of respect for human rights: the United Nations Declaration on the Rights of Indigenous Peoples, article 46, paragraph 2. It should be noted that laws that purport to restrict rights must be made by an absolute majority vote, and certified by the Speaker. It is unclear whether this has been done.

CONCLUSION

Following the enactment of the Mining Act, the ABG appears to be taking steps to reassure people that if there are any problems with the Mining Act, it can be amended. In his second reading speech for the Mining Act, President Momis said:

Mr. Speaker, Before I finish my comments, I must emphasise that we are only just beginning in the process of taking full control of mining powers in Bougainville. There is still much to be done. As the Minister rightly says, *yumi brukim bus*²⁵⁷. As we implement the new law, we will find things that need improving. I am sure that there will be a need to make amendments, and regulations under the Bill. That is one of the best things about autonomy – we are now in control of mining, and can make the changes we think are necessary.²⁵⁸

In an interview in April 2015, Patrick Nisira, the caretaker vice President, said:

We made it clear when we passed the piece of legislation, we said 'this law was made by man, so any government that comes up in future can come up with amendments according to the way they think it would be best for people.' Through its implementation we will see where there will be flaws and then we will fine-tune it as we implement the bill. This has been our government's approach.²⁵⁹

This readiness to change the law was also repeated by Amanda Masono, legal officer with ABG, at a forum in Canberra:

...But what we are open about is that we are encouraged about, is that it's not written on stones. We can amend the law as we go along, and as we experience and see whether it's working in Bougainville or not, we can change it as we go along.²⁶⁰

The ABG should seize upon this appetite for ensuring that the Mining Act is adapted and appropriate to Bougainville without delay. This report highlights dimensions of

²⁵⁷ This expression translated into English means 'We will do whatever it takes and sort it as we go along'.

²⁵⁸ President John Momis, *Second Reading Speech: Bougainville Mining Bill 2015*, cited at Bougainville News, 'Press Release and Full Speech : NEW MINING LAW A REJECTION OF THE PAST: MOMIS' at <http://bougainvillemnews.com/2015/03/26/bougainville-news-press-release-and-full-speech-new-mining-law-a-rejection-of-the-past-momis>.

²⁵⁹ Radio New Zealand International, 'Bougainville's ABG happy with mining measure input (Don Wiseman, 8 April 2015) at <http://www.radionz.co.nz/international/programmes/datelinepacific/audio/20173960/bougainville%27s-abg-happy-with-mining-measure-input>.

²⁶⁰ Amanda Masono, *The Bougainville Mining Act 2015: Process, Substance and Controversies* (Presentation given at the Coral Bell School of Asia Pacific Affairs, ANU College of Asia & the Pacific, 14 May 2015) at <http://jps.cap.anu.edu.au/news-events/podcasts/bougainville-mining-act-2015-process-substance-and-controversies#VeWXAntC3-Y>.

the Mining Act that are prospective candidates for reform. The ABG Mining Department can accept applications for tenements from 1 October 2015. The Mining Department is currently setting up its administration, and finalising the regulations and forms associated with this. Parliament has reconvened, and the next five years are critical to the future of Bougainville as the window for a referendum on independence has opened.

As it stands, the Mining Act suffers from a range of serious defects centring on the questions of 'free, prior and informed consent' (**FPIC**), landowner representation, developer responsibilities and the criminal liability of those engaged in legitimate forms of protest in defence of customary rights. In the current iteration, the Mining Act is designed in such a way as to make landowner approval a highly likely outcome – regardless of popular sentiment in mine-affected areas – owing both to the way in which consent is organised and measured, and the considerable powers given both the ABG and mining concerns.

Compounding matters, landowners have to negotiate with prospective mining interests – i.e. companies which command considerable resources – without having assured access to technical expertise, or independent oversight bodies. There are few incentives built into the Act that ensure compliance from mine operators; on the other hand, landowners face a range of punitive laws restricting their constitutional rights that violate essential human rights and sentencing principles.

Given that the traumatic social, cultural and environmental impacts of mining were a central trigger in Bougainville's decade long war, it is essential that the Mining Act is at the forefront of international best practice with respect to FPIC and Indigenous rights. Serious reforms are required if the Mining Act is to be brought into conformance with international best practice.

While such a reform process will be demanding, it is vital if the contradictory effects of mining on landowning communities are to be mitigated.

Appendix A

Table 1: Offences that are more likely to affect landowners

Offence in Mining Bill ²⁶¹	Penalty	Offence in Mining Act	Penalty	Penalty PNG law
Interfering with operations authorized by this act – s 334	Penalty: A fine not exceeding K25,000 or imprisonment for a term not exceeding thirty (30) calendar days, or both.	Interfering with operations authorized under the Act – s 346	K250,000 and 5 years' imprisonment	S167(4)(h) - Penalty: A fine not exceeding K10,000.00 or imprisonment for a term not exceeding four years, or both such fine and imprisonment; Default penalty: A fine not exceeding K1,000.00.
Injury to boundary marks – s 336	Penalty: A fine not exceeding K25,000 or imprisonment for a term not exceeding thirty (30) calendar days, or both.	Interference with boundary marks – s 348	K25,000 and 30 days' imprisonment	S 168 (no specific offence) - (2) A person who commits an offence against this Act for which no penalty is provided elsewhere in this Act is liable to a penalty of a fine not exceeding K3,000.00 or to imprisonment for a term not exceeding three months, or to both such fine and imprisonment, and where the offence is a continuing one, is further liable to a default penalty of a fine not exceeding K300.00 for every day during which the offence was committed after conviction.
Offences in relation to authorized officers – s 330	A fine not exceeding K50,000 or imprisonment for a term not exceeding two (2) years, or both.	Offences in relation to authorized officers – s 349	K50,000 and 2 years' imprisonment	S 167(4)(d) - Penalty: A fine not exceeding K10,000.00 or imprisonment for a term not exceeding four years, or both such fine and imprisonment; Default penalty: A fine not exceeding K1,000.00.
Offences (general) - carries on	Penalty: A fine not exceeding K100,000 or imprisonment for a term not exceeding four (4) years, or both	Unauthorised exploration or mining – s 343	K1,000,000 and 10 years' imprisonment	167(4)(a) Penalty: s A fine not exceeding K10,000.00 or imprisonment for a term not exceeding four years, or both such fine and imprisonment;

²⁶¹ This refers to the final version that Adam Smith International submitted in November 2014.

exploration or mining on any land without being duly authorised under this Act – s 327	such fine and imprisonment; Default penalty: A fine not exceeding K50,000.			Default penalty: A fine not exceeding K1,000.00.
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Table 2: Offences that are likely to affect mining companies

Offence in Mining Bill	Penalty	Offence in Mining Act	Penalty
338. PENAL PROVISIONS RELATING TO ANNUAL RENT, ROYALTY OR PRODUCTION LEVY FRAUD, ETC.	Penalty: in addition to any penalty that may be assessed under Section 278, a fine not exceeding K250,000 and treble the amount of annual rent, royalty or production levy which has been undercharged in consequence of each such offence, or would have been undercharged if any such return, statement, accounts or information had been accepted as correct, or would have been undercharged if such fraud, art or contrivance had not been detected, and imprisonment not exceeding three (3) years.	Evasion of annual rent, royalty, production levy, etc – s 353	Penalty: In addition to a penalty that may be imposed under Section 293— (a) K250,000; and (b) an amount equal to 3 times the amount sought to be evaded; and (c) 3 years’ imprisonment.
331. OFFENCE OF FAILING TO COMPLY WITH SUSPENSION ORDER.	Penalty: If the person convicted of an offence is: (a) a Corporation - a fine not exceeding K1,000,000; and the additional penalty of K10,000 for each day on which the act continues. (b) other than a Corporation - a fine not exceeding K50,000 and the additional penalty of K1,000 for each day on which the act continues, or imprisonment for a term not exceeding two (2) years, or both. Default penalty: A fine not exceeding K50,000.	S 338(7) - Secretary may suspend operations	Penalty: In the case of— (a) an individual— (i) K50,000; and (ii) a further K1000 for each day the offence continues; and (iii) 2 years’ imprisonment; or (b) a corporate body— (i) K1,000,000; and (ii) a further K10,000 for each day the offence continues. Default penalty: K50,000.