

# *Bougainville Mining (Transitional Arrangements) Bill 2013:* Analysis

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## 1. Introduction

This memo gives an overview of the second (March 2013) draft of the *Bougainville Mining (Transitional Arrangements) Bill 2013* ('*BMTA Bill*') with a particular focus on the extent to which this proposed law upholds the rights of indigenous people including their rights over customarily owned land as well as the right of prior, free and informed consent.

### 1. Executive summary

The *BMTA Bill* gives joint ownership of customarily owned mineral resources to customary landowners and the Autonomous Bougainville Government (ABG). This provision may be invalid as it appears to breach the Constitution of the Autonomous Region of Bougainville which mandates that the laws of Bougainville must be directed to achieving ownership of mineral resources by the people of Bougainville *in accordance with custom*.

The rights which mineral resource ownership gives to customary landowners under the *BMTA Bill* are vastly inferior to those given to the ABG. Relevantly, customary ownership of resources gives these landowners the right to:

- be consulted about and refuse the grant of an exploration licence over their land; and
- be consulted about the grant of a mining lease by the ABG (but NOT the right to refuse consent to that licence).

In contrast, the *BMTA Bill* gives the ABG the power to:

- control all mining revenue flowing from resource development; and
- grant exploration licences over non-customary and customarily owned land (subject to landowner approval) and mining leases and all other tenements (irrespective of landowner consent).

Finally, consultation provisions within the *BMTA Bill* fail to fulfill the principle of prior, free and informed consent because:

- the *BMTA Bill* fails to prescribe what kind of information must be communicated to people affected by a potential mining development;

- at the point in time that information about the impact of a proposed mining lease is communicated to concerned landowners (during a Bougainville Mineral Resources Forum) these landowners no longer have a right to veto the project.

## 2. Ownership of the land

Under the *Papua New Guinea Mining Act 1992*, all minerals on, in or below the surface of land are the property of the State of Papua New Guinea.<sup>1</sup> Section 10 of the *BMTA Bill* states that all minerals existing on, in or below the surface of any customary land in the Bougainville are the *joint* property of the owners of the customary land and the Autonomous Bougainville Government.<sup>2</sup>

### 2.1 Inconsistency with the UN Declaration on the Rights of Indigenous Peoples

The *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), adopted by the United Nations General Assembly in 2007, recognises that “Indigenous peoples have the right to the lands, territories and resources which they have owned, occupied or otherwise used or acquired.”<sup>3</sup> Again, the vesting of ownership of minerals on customary land in the ABG coupled with the ABG’s monopoly over the power to grant mining leases and control mining revenue flows (discussed below) clearly breaches this UNDRIP principle.

### 2.2 Potential conflict with the Constitution of Bougainville

Bougainvilleans’ indigenous right to customary lands is reflected in the Constitution of the Autonomous Region of Bougainville. Relevantly, section 23 provides of the provides that:

- the laws and policies of Bougainville *shall* be directed to achieving ownership of the ground and sea and natural mineral and oil resources of Bougainville by the people of Bougainville *in accordance with custom*; and
- this should be taken into account in any law about the development of those resources.

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<sup>1</sup> Section 5.

<sup>2</sup> Section 10.

<sup>3</sup> Article 26.

Traditionally, custom within PNG and Bougainville does not recognise state ownership of resources.<sup>4</sup> Therefore, a law which gives the ABG part ownership of minerals on customary land is not a law which is directed to – or can be characterised as – achieving ownership of mineral resources “in accordance with custom.” This is especially the case when the inferior customary rights of ownership over mineral resources under the *BMTA Bill* are compared to the extensive rights given to the ABG (discussed below). Unless section 23 of the Bougainville Constitution is deemed by a court as non-justiciable (meaning that it cannot be enforced to strike down a law or policy passed by the ABG), there is a high likelihood that a court examining section 10 of the *BMTA Bill* would declare it unconstitutional and therefore illegal.

According to a letter published in the Post Courier by Mathias Salaas (former ABG Minister for Finance, Mining, Lands and Planning)<sup>5</sup> on 11 June 2012, the BEC voted for the section 23 of the Bougainville Constitution to be embedded within the *BMTAB*. The third draft of the *BMTA Bill* remains incomplete and/or unavailable.

### **3. Rights flowing from customary ownership of minerals**

The *BMTA Bill* allocates different rights over jointly owned mineral resources located on customary land to customary owners and to the ABG respectively. Overall, if the *BMTA Bill* is passed, the ABG will have much greater financial and decision-making power over land and mineral resource development than customary owners.

This memo will consider in turn the respective rights of the ABG and customary landowners over jointly owned mineral resources:

- control of mining revenue flows;
- the grant of exploration licences; and
- the grant of mining leases.

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<sup>4</sup> Custom is law which exists between indigenous people rather than between the state and the people: M Demain ‘Custom in the Court Room, law in the village: legal transformations in Papua New Guinea’ (2003) 9 *Journal of the Royal Anthropological Institute* 97, 100.

<sup>5</sup> Post Courier, 13 August 2013.

### 3.1 Mining revenue flows

The *BMTA Bill* provides that the ABG “has exclusive power to determine the amount, and the allocation, of revenue from the development of minerals.”<sup>6</sup> So while customary land is to be owned jointly by customary landowners and the state, the ABG will have complete control over profits and royalties flowing from mining development.

### 3.2 The grant of exploration licences

The Bougainville Executive Council has the right to grant exploration licences.<sup>7</sup> An exploration licence gives the licence holder “the right to enter and occupy the land which comprises the exploration licence for the purpose of carrying out exploration for minerals on the land.”<sup>8</sup>

However, customary land owners have the right to:

- be consulted about the grant of an exploration licence over the land; and
- withhold consent to any such grant.

### 3.3 The grant of mining leases

Under the *BMTA Bill*, only the holder of an exploration licence has the right to apply for a mining lease. When the BEC is considering the grant of a mining lease, affected customary owners only have the right to be consulted at a Bougainville Mineral Resources Forum (BMRF).

The purpose of a BMRF is amongst other things to:

- obtain the views of the approved landowner organisations, the applicant, the Autonomous Bougainville Government, and other persons who will be, or are likely to be, affected by the grant of the application;
- “share information about the proposed mining development”;
- obtain the consent of affected landowners (including but not limited to landowner organisations); and
- reach agreement on benefit sharing arrangements, monitoring and evaluation requirements of the development.

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<sup>6</sup> Section 16.

<sup>7</sup> Section 45.

<sup>8</sup> Section 48(1)a

Where agreement is not reached at the forum, customary land owners have the right to participate in a mediation which will usually be conducted by a mediator agreeable to all parties involved. However, where the consent of affected landowners is not obtained through the mediation, the BEC retains the right to grant a mining lease over customary land contrary to the wishes of the landowners. This power is contrary to the right of Indigenous peoples “to the lands... and resources which they have owned, occupied or otherwise used or acquired”.<sup>9</sup>

## **4. Does the *BMTAB* fulfill the principle of Free, Prior and Informed Consent?**

### **4.1 What is the Principle of Free, Prior and Informed Consent?**

UNDRIP promotes the right of indigenous peoples to give or deny their free, prior and informed consent (PFIC) for projects that affect them, their land and their natural resources.

Relevantly, Article 19 of UNDRIP provides that:

“States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resources.”

The requirement of “informed consent” implies that indigenous peoples have been provided all information relating to the activity and that the information is objective, accurate and presented in a manner and form understandable to indigenous peoples.<sup>10</sup> Overall, a commitment to FPIC necessarily entails a commitment to a process of educating and informing people about the worst-case scenarios and the likelihood that these will occur.<sup>11</sup> This means undertaking thorough environmental and social risk assessments and communicating the findings to local people in ways that are understandable to them.

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<sup>9</sup> UNDRIP Article 26.

<sup>10</sup> Oxfam, *The right to decide: Company Commitments and Community Consent* (2013), 7.

<sup>11</sup>

#### 4.2 Customary landowner right of refusal over the grant of mining leases

Once landowners have consented to the grant of an exploration licence, they do not have the right to refuse the grant of mining lease over their land. So once an exploration licence has been granted, customary landowners will likely have very limited legally-backed bargaining power during a BMRF. As such the current draft of the *BMTA Bill* significantly limits the right of indigenous customary landowners to withhold consent to any proposed resource development project on their land once an exploration licence has been granted.

#### 4.3 To what extent does the BMTAB provide for *informed consent*?

The *BMTA Bill* gives landowners the right “to be consulted about the grant of an exploration licence.”<sup>12</sup> Given that exploration on its own is unlikely to have a significant social or environmental impact, this provision is sufficient to uphold the requirement of FPIC prior to the grant of an exploration licence.

As discussed above, before the ABG can grant a mining lease, the ABG must “share information about the proposed mining development” within a BMRF.<sup>13</sup> This requirement is clearly not robust enough to meet the standard required by FPIC as it does not include a requirement that indigenous people potentially affected by the development be made aware of:

- the likely social and environmental impacts of the proposed development; and
- the worst-case scenarios for negative impacts resulting from the development and the likelihood of their occurrence.

More importantly though, even if the requirements of FPIC were met during a *BMTA Bill*, this information cannot be used by landowners to make an informed choice about whether to consent to the grant of a mining lease or not. This is because at this point landowners no longer have a right to refuse the proposed development. As discussed above, this right is lost once landowner permission is granted for an exploration licence.

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<sup>12</sup> Section 12(a).

<sup>13</sup> Section 23(4)a.