

IMBALANCE OF INFORMATION POWER BETWEEN THE STATE AND THE RESOURCE OWNERS IN THE DEVELOPMENT OF NATURAL RESOURCES

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PART I: INTRODUCTION

There is a famous saying that “knowledge is power”. This saying is very true today as we are all familiar with the power of knowledge. Without knowledge a person stands to lose at the hands of his opponent. And knowledge comes through accessing information that is available to the user. In Papua New Guinea (PNG) the power of knowledge is easily identifiable as we see the exercise of this power almost everyday in the markets, shops, meeting places, villages and towns. This is imperative as PNG has one of the lowest literacy rates in the South Pacific.¹ In PNG, those with access to information that is not readily available to the majority of the people, have been able to utilise their knowledge to their own advantage.² This situation is very common in the natural resources sector. This is very apparent in the forestry and to some extent in the mineral resources sector.³

This paper looks at the participation of natural resources owners (resources owners) in natural resources development projects, and examines the ways in which the resource owners have been able to utilise information channelling methods provided by law to engage in development projects within their areas. The paper begins with a discussion of the Constitutional provisions relating to participation in development and examines the relationship between the State policy and the different Government policies dealing with communication and natural resources development. The paper then looks at the laws relating to participation in natural resources development by the different interest groups and ends with a conclusion. In the discussions that follow emphasis will be focused on the ways in which information is accessed and distributed between the different players in the chain of events that lead up to the development of a natural resource.

Natural Resources and the Economy

¹ In 1993 it was estimated that about half of the total population in PNG was illiterate. See AIDAB *Australia and Papua New Guinea : A Developing Partnership* (1993) AIDAB 11

² In 1974 this problem was highlighted by the Constitutional Planning Committee (CPC) when it said: “well educated Papua New Guineans are tending to lose touch with their relatives in the villages, and gaining substantially greater opportunities to advance themselves than their village counterparts.”, *CPC Final Report Part 1* (1974) Konedobu, Government Printer p.2/5.

³ Examples of this are shown below.

The natural resources⁴ sector plays a very important role in the economy of the country. The minerals sector alone contributes a significant percentage of revenue to the national wealth. For instance, in 1990 the mining sector alone accounted for around 69 percent of total exports.⁵ In 1996 the minerals sector accounted for about 67 percent of total exports.⁶ The forestry sector contributes about 15 percent revenue to the national purse.⁷ The natural resources sector in whole contributes about 82 percent revenue to the national wealth. The importance of the natural resources sector to the national economy is therefore, very vital.

One would think that with the vast amount of natural resources in the country and the important role the sector plays in the economy, the Government would introduce an umbrella natural resources policy and law to provide direction to the Government, the investors and resource owners in dealing with these important resources. However, such has not been the case. Past and present governments have opted to take a piecemeal approach towards the sector.

In 1976 the the post Independence Somare Government introduced two important policies dealing with two specific areas. The first was the environmental policy which deals with environmental planning and the second was the petroleum policy⁸. The petroleum policy aims at the maximum utilisation of the petroleum resources. In 1995 the government introduced a liquified natural gas (LNG) policy after it was realised by both the government and the industry that there was a huge economic potential for this resource. This policy also encourages the full utilisation of the resource for the maximum benefit of Papua New Guineans. As for mining there is no comprehensive mining policy. Since the dawn of Independence successive governments have operated on an ad hoc basis in relation to this industry.

For forestry and fisheries, government activity in these two sectors were more encouraging. In 1991 the government introduced a very comprehensive policy to cover the forestry sector. Three years later the government also introduced another comprehensive policy covering a wide range of areas relating to the fisheries and marine industry.

A close examination of the existing policies show that most of them are people related and emphasise the importance of resource owners participation in the development of these natural resources. It is imperative to note that the forestry

⁴ According to the Bank of Papua New Guinea this sector includes forest products, marine products and minerals: that is; gold, copper and oil. See Bank of Papua New Guinea, *Quarterly Economic Bulletin* (June 1996 Issue) (Vol. XXIV NO 2) (1996) Port Moresby, p.S33

⁵ John Fallon, *The Papuan New Guinean Economy : Prospects for Recovery, Reform and Sustained Growth* (1992) Canberra, Australian Government Publishing Service, 32

⁶ Bank of Papua New Guinea, *Quarterly Economic Bulletin* (March 1997 Issue) (Vol. XXV NO 1) (1997) Port Moresby, p.S33

⁷ *Ibid*

⁸ To give effect to this policy the *Petroleum Act* of 1977 was enacted.

and fisheries policies specifically recognise the customary rights of the resource owners over these resources.

The emphasis that the environmental policy and the current resource policies place on resource owners participation highlight the vital role they play in the success of a natural resource development project. The full participation of resource owners ensures that a natural resource development project is successful from the initial stages of the project to the cessation of the project. The active participation of resource owners in the utilisation of natural resources is thus, important to the economy of the country.

PART II: CONSTITUTION

Any discussion involving the people of PNG must start with their *Constitution* as it is the *mama lo*⁹ of the land. The *Constitution* is the supreme law of the land.¹⁰ It begins with a preamble, then the substantive provisions which are commonly found in a constitution and ends with some schedules. The preamble sets out the National Goals and Directives Principles (NGDPs) which act as sign posts for the direction that PNG as a State should follow. The NGDPs are in essence the State policy of the Independent State of Papua New Guinea. There are five NGDPs. For our purpose only the Second Goal is relevant.

The Second Goal of PNG is:

for all citizens to have an equal opportunity to participate in, and benefit from, development of our country;

Directive Principle (1) of Goal Two stipulates that:

We accordingly call for an equal opportunity for every citizen to take part in the political, economic, social, religious and cultural life of the country.

And Directive Principle (9) of the same goal states that:

We accordingly call for every citizen to be able to participate, either directly or through a representative, in the consideration of a matter affecting his interests or the interests of his community.

The Second Goal therefore, sets the foundation for equal participation of citizens in all forms of political, economic, social, religious and cultural activity in the country. This Goal does not discriminate against any citizen of PNG. Resource owners would easily qualify under Goal Two as they are citizens of PNG. So for

⁹ This is a Pidgin term which when translated in English means “mother law”.

¹⁰ S.11 of the *Constitution*

our purposes we can substitute the word 'citizen' with the term 'resource owners' and recite Directive Principles (1) and (9) as follows:

We accordingly call for an equal opportunity for every resource owner to take part in the political, economic, social, religious and cultural life of the country; and

We accordingly call for every resource owner to be able to participate, either directly or through a representative, in the consideration of a matter affecting his interests or the interests of his community.

We can thus, safely conclude that the *Constitution* does recognise and encourages the active participation of resource owners in the political, economic, social, religious and cultural activities of the country. Their participation in the development of natural resources located on, under, and within their land involves political, economic, social, religious and cultural considerations which affect their interests or the interests of their community. Their participation is entrenched in the substantive provisions of the Constitution as is shown below. The discussion of the existing resource policies indicate that the principles of Goal Two have been adopted by these policies. And this is very explicit with the forestry and fisheries policies.

Communication Policy

An examination of the current resource policies show that they adequately allow for resource owners participation in the exploitation of specific natural resources located on, under, or within their land.¹¹ But how can resource owners participate if they have no information and knowledge about their resources. To this end, the Constitutional Planning Committee (CPC)¹² recommended that all citizens should have access to information and especially official information.¹³ The CPC was mindful of the problems associated with the citizens' inability to access information. It pointed out that:

Without information as to governmental activity a person cannot make a meaningful contribution to discussion of issues involved in government policies and programmes.

To enable citizens access to information which would affect them, the CPC recommended that there should be freedom of information and communication. This freedom must be guaranteed by the *Constitution*. This right is found under s.51 of the *Constitution*.¹⁴ No policy mechanism was introduced by the Government to supplement the *Constitution* in terms of information and

¹¹ The scope of this paper is limited to the discussion of the law, as such I have not made any attempt to discuss the policies in any detail here except summarise my views on these policies.

¹² The CPC was largely responsible for the formulation of the PNG *Constitution*.

¹³ CPC Final Report, *supra*, at p.5/1/13

¹⁴ This provision is discussed in some detail below.

communication. This vacuum was filled in 1995 when the Government through the Department of Communication introduced a very comprehensive information and communication policy.¹⁵

In introducing the policy Mr. Martin Thompson, the then Minister for the Department echoing the concerns of the CPC stressed that:

Information and communication is part and parcel of this whole process of development and needs its own infrastructure. It is the thread which binds a nation and its people together.¹⁶

The Information and Communication Policy (Policy) thus recognises the importance of information and communication in national development. The goal of the Policy is “to provide a co-ordinated umbrella policy directions in information and communication to enhance developmental process in the country.”¹⁷ To achieve this goal the Policy sets out very detailed directions for the provision of information and communication services to the people of PNG.

The Policy spells out a number of strategies for achieving the goal of the Policy. One of the strategies for communication services is to establish and support more efficient systems for the storage and dissemination of information. As to access to information the Government seeks to improve transportation systems throughout the country and promote radio programmes in local languages. The underpinning of this strategy is to facilitate access to information to all parts of PNG.¹⁸

An examination of the Policy reveals that it is very innovative and optimistic. The issue then is; how has the Government’s innovative and optimistic Policy been effected in the utilisation of natural resources in the country? The answer to this question lies in the examination of the information channelling systems espoused by the policies and laws relating to natural resources utilisation.

PART III: PARTICIPATION UNDER LAW

Under this heading I will only deal the *Constitution*, mining and petroleum and the forestry law. The specific policies relating to the same have already been discussed above.

Constitution

¹⁵ Department of Information and Communication, *National Policy on Information and Communication of Papua New Guinea* (1993) Waigani, Government Printing Office

¹⁶ *Id.*, at p.v

¹⁷ *Id.*, at p.3

¹⁸ *Id.*, at p.32

The Constitutional provision relating to citizen participation is enshrined under Goal 2. Specific provisions of the *Constitution* reinforce this goal. These provisions include; the freedom of expression¹⁹, the right to vote and stand for public office,²⁰the electoral process²¹, and the decentralisation process.²² The overall framework of the *Constitution* encourages citizen participation.

The *Constitution* collaborates access to information and participation under s.46 and s. 51. Section 46 guarantees the freedom of expression and s.51 guarantees citizens the right to freedom of information. These two sections also operates as the link between on the one hand, information, communication and participation and, on the other hand, development. The spirit of s.51 and s.46 is that citizens must be allowed to have reasonable access to official information and to freely express themselves. Restriction on access to official information, freedom of expression and denial can only be permitted in limited circumstances.²³

The application of s. and 51 s.46 becomes a major issue in resource utilisation in two distinct situations. The first is the application of the s.51 right where a developer undertakes a feasibility study (for forestry) or exploration (for minerals) and has to submit its findings and proposals to the government and this information is not readily accessible by resource owners. What is the nature of these information? Are they official or private documents? It is submitted that these documents are official documents and therefore, can be accessed by citizens. This proposition is based on the fact that these documents find their origin from the legislation which require developers to conduct studies and prepare such documents. If developers are required by law to prepare these documents for submission and consideration by the relevant government agencies or the government then they are official documents and fall within the ambit of s.51.

If these documents are official, then the next issue is whether they fall within any of the limitations set out by s.51. There are two limitations which are relevant for our discussion.²⁴ They are listed in paragraph (b) and (j). They are in the following terms;

- (c) trade secrets, and privileged or confidential, commercial or financial information obtained from a person or body; or
- (j) geological or geophysical information and data concerning wells and ore bodies.

¹⁹ s.46 of the *Constitution*

²⁰ s.50 of the *Constitution*

²¹ Part VI, Subdivision G of the *Constitution*

²² Part VIA of the *Constitution*

²³ For a detailed discussion on the restrictions under s.51 and s.46 see the paper by Yoli Tom'tavala on *Information an Human Rights* (1997) presented at the same seminar.

²⁴ See the paper by Yoli Tom'tavala, *above*.

The application of the above provisions are obvious. If an official document is a trade secret, privileged, confidential, commercial or financial it cannot be accessed by the citizens. And if a document contains geological or geophysical information or data about mineral deposits it also cannot be accessed by the citizens. It is interesting to note that these two restrictions were never a part of the CPC recommendations.²⁵ A possible explanation for their inclusion is for the protection of commercial enterprises. This view was affirmed in a recent National Court ruling in a forestry project case involving the Turama Forest Industries Pty, Ltd and Soi & Associates and Sarea Soi.²⁶

The case revolved around the question of whether the project agreement between the State (through its agent the National Forest Authority) and Turama Forest Industries Pty, Ltd was a confidential document. The Defendants had argued that it was a public (official) document and as they were acting for the landowners they had access to the project agreement. The Plaintiff however, argued that the document was concluded between itself and the National Forest Authority and was sensitive and therefore, confidential.

In her ruling Justice Doherty took into account the provisions of s.46 and 51 and held that although the landowners had the right to be informed by virtue of s.51:

[T]he evidence clearly shows that the landowners have not been a party to the negotiations between the developer and the State, and therefore, they cannot have access to the document as it was a private contract of a commercial nature and as such was confidential.

Her Honour relied on the “ordinary laws” to reach her decision. The “ordinary laws” would presumably be the law of contract.²⁷ According to the doctrine of privity of contract “only the contracting parties are benefited and burdened in law by the making of the contract”.²⁸ The consequence of this Court decision as it stands is very discouraging for the resource owners. Their rights under s.46 and 51 are restricted as their access to information and communication have now been limited further by this decision.

It is respectfully submitted that, the approach taken by the Court in arriving at its decision was not correct. There are three reasons for this proposition. Firstly, the Court was not the appropriate forum to deal with the matter. If the Plaintiff had brought the action for a breach of its right to information, it would have been appropriate for the court to deal with the matter as it would be invoking the provisions of s.57 of the *Constitution*. As it was, this was not the case. The case

²⁵ CPC *Final Report*, *supra*, p.5/1/13-5/1/14 and p.5/1/29

²⁶ O.S 411 of 1995. The summary of the case was reported in one of the daily newspapers, *The National* 8th August, 1996.

²⁷. This is the implication from her decision.

²⁸ J.W. Carter and D.J. Harland, *Cases and Materials on Contract Law in Australia* (Second Edition) (1993) Butterworths, Sydney 359

required constitutional interpretation and therefore, it should have been referred to the Supreme Court for determination.²⁹

Secondly, according to Schedule 2 of the *Constitution* the judiciary is required to develop an underlying law appropriate to the circumstances of the country where there is no existing law on the subject matter.³⁰ In this case the court found that there was no law on confidentiality in PNG under its law nor common law. The court was then required to formulate an appropriate underlying law. However, the judge took a fleeting glance at the requirements of Schedule 2, and went in a round about way to reach her decision.

Thirdly, the Forestry Policy of 1990 and the *Forestry Act* of 1991 both encourage resource owner participation and transparency of government and developer activity within the forestry sector. This change of direction was a result of the Barnett Inquiry which uncovered a lot of secret deals and corrupt practices within the industry. This transparency is evident by the participation of resource owners at the different stages of the development project, and the scrutiny by Provincial Forest Management Committees (PFMC), the Department of Environment and Conservation and other relevant government instrumentalities. The decision of the court then is contrary to the philosophy of the forestry sector.

It is submitted that the restrictions under paragraph (c) and (j) of s.51 have a limited application. They apply to situations where a citizen has an ulterior motive for the use of the information. For instance where the user intends to use it to compete against or damage the character or reputation of another person. It is suggested that where resource owners require the information to help them participate meaningfully in the resource development project the restrictions need not apply to them.

The second situation is the application of the right to freedom of expression under s.46. If feasibility studies, development proposals, geological or geophysical information and data concerning wells and ore bodies and project agreements are trade secrets, privileged or confidential, commercial or financial information which cannot be accessed by the resource owners and as such they cannot fully express themselves, is there a breach of their right to the freedom of expression? Or in other words, is their active participation in the utilisation of their natural resources limited by the restrictions imposed by ss.51(c) and (j) and therefore, a violation of s.46?

This issue becomes complicated when we apply the definition of “freedom of expression and publication” under Sub-section (2)(a) of s.46 which reads:

²⁹ s.18 of the *Constitution*.

³⁰ Schedule 2.

- (a) freedom to hold opinions, to receive ideas and information and to communicate ideas and information, whether to the public generally or to a person or class of persons.

If the approach taken by the Court in the *Soi & Associates* case is correct it would be quite obvious that it would be in violation with s.46(2)(a). The definition of freedom of expression and publication is that citizens have a freedom to receive ideas and information and to communicate ideas and information. Resource owners therefore, have the freedom to receive information on matters which will affect them and also the same right to communicate their ideas to others based on the information that they had accessed. This freedom when exercised in full will result in meaningful participation by resource owners and will consequently lead to the success of a development project.

Organic Law on Provincial Governments and Local-level Governments (OLPLLG)

This Organic Law was passed in 1995 to replace the provincial government as adopted in 1976.³¹ The OLPLLG is aimed at enabling the quick and efficient delivery of goods and services to the rural areas, a problem prevalent under the old system.

The OLPLLG is very ambitious and envisages the rapid modernisation of the rural sector. One of the innovative aims of the OLPLLG is to encourage full and active participation by resource owners in the utilisation of their natural resources and the equitable distribution of the wealth derived from the exploitation of the natural resources. Sections 115 and 116 of the OLPLLG protect the resource owners from exploitation by unscrupulous investors, the government and elites from the locality of the natural resource. Section 115 provides that the resource owners must be consulted before a natural resource located within their area can be exploited. The manner of consultation will be provided by an Act of the Parliament.³²

Section 98 of the OLPLLG stipulates that the royalties and other incomes derived from the exploitation of the natural resources shall be distributed equitably amongst the relevant parties as provided by an Act of the Parliament.

The underpinning of these provisions is that resource owners must fully and actively participate in the development of their natural resources and must benefit equally from their efforts. Resource owners cannot be by-standers and losers in the development of natural resources located on, below or within their land.

Mining and Petroleum Law

³¹ The provincial government system was adopted by the Constitution under the *Constitutional (Amendment No.1)* of 1976.

³² s.116

The participation of resource owners in the development of a mineral deposit found on their land is expressly required by the *Mining Act* of 1992. Several provisions of the Act impose certain mandatory requirements on the government to ensure adequate participation by resource owners. For our purposes only sections 3, 17, 18, 19, 105, 106, 107, 119, and 163 of the Act will be examined and discussed.

The first of these provisions is s.3 which requires that before a special mining lease is issued by the Minister he or she must invite the persons or class of persons to be affected by the grant of the special mining lease to a development forum.

The purpose of the forum is to allow all the relevant parties to come together and discuss ways of developing the mineral deposits. It is at this conference that members are supposed to exchange or share information and communicate with each other as equal partners at the negotiating table. After a number of forums a special mining lease is granted and agreements relating to the project are concluded.

Sections 17, 18 and 19 provide the mechanism for the Government to enter into agreements between the State and the different interest groups involved in the development of the mineral. These three sections must be read together with s.3 of the Act. When read together it becomes apparent that after negotiations at the forum separate contractual agreements are concluded between the various players in the project. For example for the Lihir Gold Project about five different agreements³³ were concluded. These were:

1. Mining Development Contract Between the State and Kennecott Explorations (Australia) Ltd and Niugini Mining Limited and Mineral Resources Lihir Pty Ltd;
2. Mining Development Contract between the State and Lihir Gold Limited;
3. Memorandum of Agreement between the State and the Lihir Mining Area Landowners Association and the Nimamar Development Authority;
4. Memorandum of Agreement between the State and New Ireland Provincial Government; and
5. Memorandum of Agreement between the New Ireland Provincial Government and the Lihir Mining Area Landowners Association and the Nimamar Development Authority.

These agreements contain the various terms and conditions that were ironed out during the negotiation periods or the development forums. All these contracts

³³ I could only manage to obtain these 5 agreements.

are enforceable according to the laws of PNG³⁴. The framework of this paper does not entail the author to discuss the various terms and conditions of the agreements.

Another situation where resource owners are required to participate is during the period when an application is received for the grant or extension of a mining tenement. Under Part VI of the Act an application can be made by an applicant for the grant or extension of a mining tenement. Sections 105, 106 and 107 which are located in this part of the Act set out the procedure and time frame within which an objection can be made and heard.

The Registrar is required to fix a date for the hearing of the application for a mining tenement within 7 days after the receipt of the application.³⁵ The date for the hearing shall be within days after the receipt of the application. The application plus the date and place of hearing must be published in the *National Gazette* and the daily newspapers. Copies of the application must also be sent to the relevant provincial government, the District or Sub-District Office and a copy must be posted at the headquarters of the Department.³⁶ What the Act envisages is that through this mode of communication the resource owners can easily receive information about what the government plans to do with an application made under this part.

Parties wishing to object to the grant or extension of a mining tenement are given only 23 days to file an objection with the Registrar of Tenements. Given the mode of communication envisaged by the Act and the practical application of this system of communication in the country one wonders whether resource owners can make a real and meaning contribution in this matter.

Under the same part of the Act a tenement can also be transferred and instruments creating legal or equitable interests in a tenement can be made upon approval by the Minister.³⁷ The transfer and instrument proceedings alienate the participation of resource owners. This process is supervised by the Mining Advisory Board and the Minister alone. Resource owners are not informed of the proceedings and cannot make a representation to the Board nor Minister in these proceedings.

There are several disturbing observations that can be made about the procedures for participation as set out in the Act.

Firstly, a development forum is usually called after the developer had gathered enough information on the project after intensive scientific studies. Being

³⁴ For instance under Clause 23 of the agreement between Kennecott Explorations, Niugini Mining Limited and the Mineral Resources Lihir Pty Ltd all parties have agreed that the laws of PNG and principles of international law apply to the contract.

³⁵ s.105(1).

³⁶ s.106

³⁷ ss.118-119

satisfied that the project is viable it then makes a proposal (the mining tenement) to the Government. In terms of information the developer is very well equipped to meet the other negotiators at the forum as it has in its possession raw materials on the project.

Secondly, the Government obtains a modified version of the information collated by the developer (secondary material). It goes to the forum prepared to meet the other negotiators. Thirdly, the resource owners are required to attend the forum with no scientific materials or commercial information, except their traditional knowledge of their area documented in their minds.

Fourthly, resource owners are not permitted to participate before and during an exploration stage.

Fifthly, the mode of communicating the information about the forum to the resource owners is not specified by the Act. The usual practice is to put out a notice in the *National Gazette*, the official Government newspaper. The irony of this medium of information transmission is that resource owners hardly have access to the *National Gazette*.

In terms of making representations to the Minister in relation to a mining tenement, the mode of communication encouraged by the Act is inappropriate to the circumstances of the country. In practical terms, how many resource owners have access to the *National Gazette*, or a daily newspaper, or are close to the provincial headquarters or the District Office? The answer is obvious. There are two real problems associated with this mode of communication. Firstly, the communication by the government is usually in English, and given the fact that most of our people are illiterate, most resource owners would not access this information. Secondly, if they do access this information they would not understand it as it is in a foreign language.

To compound the problem resource owners are required to respond to an application within 23 days. This time limitation is in the author's view very restrictive on the resource owners. Resource owners function as a communal organisation and as such require lot more time to reach a consensus regarding an important matter such as this. They also require professional advice from experts who are usually in the cities and towns.

The consequence of all these factors is that resource owners are disadvantaged at development forums and in other proceedings as they are either ill-informed and unprepared for the negotiations or alienated from the proceedings.

An important provision of the Act which requires special attention is s.163. This particular section prevents the disclosure of information obtained under the Act. Discloser of information obtained under the Act without lawful authorisation

carries a penalty of K10,000.00 fine. The amount of fine reflects the gravity of weight placed on the documents by the Government.

The application of s.163 is very limited. The confidentiality clause only covers employees of the Department of Mines. It prevents the officers of the Department from disclosing information to the public without authorisation. The grounds for which an authorisation can be exercised are very wide and not restrictive.

As to whether s.163 is inconsistent with s.46 and 51 of the *Constitution*, the author's view is that there is no inconsistency. It is submitted that the underpinning of s.163 is that information obtained under the Act are official documents and can be accessed by citizens. The only requirements are that the citizen must be a person recognised under the *Mining Act* 1992 and that the purpose the person wants the information for is a purpose recognised by the Act. A person who meets these two requirements, once in possession of the document, can disseminate the information contained therein to other people without being penalised under s.163.

The mechanisms for participation of resource owners in petroleum development projects is similar to the mining sector. The main distinction is that the mining legislation is recent and as such reflects to some degree the changing attitudes and aspirations of the contemporary PNG society. The mode of communication by the Government is similar to the one used by the mining sector. The main provisions of the *Petroleum Act*³⁸ which concern us are; ss.18, 19, 30,33,108.

Sections 18 and 19 of the Act deal with applications for petroleum prospecting licences. A person who is affected by the application may make a representation to the Minister for Petroleum within one month after the date of publication.

When petroleum is discovered in an area the Minister is required under s.30 to declare the area as a "discovery block" in the *National Gazette*. After an area has been declared as a discovery block the process for utilisation begins. The Act does not permit any person who may be affected by the declaration to make representations to the Minister. The Act therefore, shuts out the resource owners during these initial stages up until the negotiations for development stage.

After a discovery the developer can apply for a petroleum development licence under s.33 and can be granted the same. Unlike its sister legislation, the *Petroleum Act* does not allow for resource owners participation at this stage as well.

All information obtained under the Act are deemed confidential information by s.108. Unlike the secrecy provision of the *Mining Act* s.108 is far more restrictive. Information deemed confidential under the Act may be disclosed in only one of six situations. Information can be disclosed:

³⁸ Chapter 198 of the Revised Laws of Papua New Guinea.

1. with the written consent of the licensee;
2. to an officer authorised to access that information;
3. about a block that was previously the subject of a licence under the Act and is not the subject of a current licence;
4. in respect of a block the subject of a current licence under the Act not earlier than 5 years after that information became available to the Department;
5. in respect of a block the subject of a current petroleum development licence, after one year after the information became available to the Department; and
6. by the Minister any time when preparing and publishing reports.

The underlying reasons for the above situations whereby information can be disclosed under the Act are quite obvious. Interestingly a former employee or consultant of the Department is barred by the Act from disclosing to ordinary citizens information which he or she acquired as an employee of the Department.³⁹ No time limit is prescribed by the Act nor the penalty for the breach.

The observations made for the *Mining Act* 1992 are also applicable to the *Petroleum Act*. Maybe the main point to highlight here is that, the *Petroleum Act* is concerned with economic aspects of the projects more than protecting resource owners' interest. This view is supported by the aim of the petroleum policy which is focused on economic maximisation of the petroleum resource.

Forestry Law

The findings of the Barnett Forest Inquiry and the pressure from international organisations resulted in the introduction of a new Forestry Policy in 1990 and the forestry legislation in 1991. The *Forestry Act* of 1991 is very detailed and covers most aspects of the forestry industry. The aim of the legislation is to ensure a sustainable logging industry. It fosters consultation between all interested parties and encourages proper management practices within the sector.

The Act ensures the direct participation of resource owners at the initial stages of the project and then through indirect representation from the conclusion of the Forest Management Agreement (FMA)⁴⁰ to the cessation of the same. Resource owners initial contact with a forestry project begins with the negotiations and conclusion of a FMA.

³⁹ s.108(6)

⁴⁰ ss.56-58. The FMA is an agreement between the Stat and the resource owners for the sale and purchase of timber rights to a forest located within the traditional lands of the resource owners.

After the completion of a FMA, the forest area is advertised for utilisation.⁴¹ A feasibility study can then be conducted and a report compiled by a prospective developer (usually a registered forest industry participant⁴²). If the developer is satisfied with the viability of the project the developer is then required to submit a project proposal to the Managing Director of the National Forest Authority who then refers the proposal to the Provincial Forest Management Committee (PFMC) for consideration.⁴³ A number of other steps are also to be complied with by the developer.⁴⁴ Where a project proposal is approved by the National Forest Board, the developer and the PFMC are required to enter into negotiations with the developer. At the completion of the negotiations a project agreement is then approved by the National Forest Board.⁴⁵ The Minister for Forests is then required to grant a timber permit to the developer.⁴⁶

Throughout the above process the resource owners are indirectly represented in the process through their membership to the PFMC. After a timber permit is issued to the developer, the developer then negotiates a Logging and Marketing Agreement with the resource owners through their landowner companies.⁴⁷

It is at these and the FMA stages that the problems of information dissemination as experienced by resource owners in the minerals sector become visible. There are various forms that the problems of information flow are experienced by the resource owners in this sector. These are discussed below.

Firstly, during the FMA stages the Government goes to the resource owners to strike the deal after collating all the relevant information about the forest on the resource owners land. This information includes; tree species, volume of the resource, forest area, estimates of economic value from the utilisation of the resource and the number of years the project will last. The resource owners on the other hand know nothing about the potential nor value of their forests in monetary and scientific terms.

To encourage resource owners to sign the TRP agreements and now the FMA, Government officials induce them with promises of great wealth, infrastructural

⁴¹ s.64

⁴² Any person who wishes to participate in the forestry industry has to register with the National Forest Authority (s.105). A person who does not register with the National Forest Authority is liable to a fine of K1000.00 or imprisonment for a term not exceeding one year (s.114).

⁴³ s.67

⁴⁴ For example other government Departments can be involved in the assessment of the project proposal as provided under s.67(3).

⁴⁵ s.72

⁴⁶ s.73

⁴⁷ The formation of landowner companies is not required under the *Forestry Act* 1991 nor was it required under the former statutes. This is a practice which has become entrenched in the industry.

development and other spin off benefits.⁴⁸ Without any independent expert advice resource owners are swayed by these promises and conclude these agreements.⁴⁹

A disturbing aspect of this process is that the FMAs are not original in the sense of the word. The National Forest Authority has drawn up a pro-forma of the FMA with blank spaces to be filled by the relevant resource owners.⁵⁰ The blank spaces relate to matters such as the area of the FMA, names of resource owners, description of the area of the FMA, the purchase amount to be paid by the State to the resource owners, and the duration of the FMA. The main terms of the FMA are pre-determined by the State before the actual negotiations. The resource owners cannot therefore, add or reject any new terms or conditions that they wish to be included in the FMA or remove those terms or conditions that they do not want from it.

The provisions of the Act⁵¹ make it mandatory for the State to negotiate through the National Forest Authority with the resource owners for the purchase of their timber rights. It can be argued that these provisions envisage fair and genuine discussions between the State and the resource owners before a contract is formalised. For instance, s.56(1) reads in part that “in the form of a Forest Management Agreement that complies with this Act and contains such terms as are agreed between the customary owners and the Authority...”. The practice as described above may be contrary to the spirit and vision of these provisions and therefore, null and void.

Secondly, when the screening and negotiations are going on between the PFMC and the developer, and the National Forest Board and the developer, the resource owners are hardly involved in this process. Even though they are represented in the PFMC, they are hardly informed by the PFMC of its deliberations regarding the proposed project within their area. This scenario amounts to a deliberate breach by the PFMC of one of its functions which is:

to provide a forum for consultation and co-ordination on forest management between national and provincial governments, forest resource owners and special interest groups.⁵²

Thirdly, after a timber permit has been granted to the developer, the developer then makes contact with the resource owners. Resource owners are required to

⁴⁸ See note 42, *supra*. The FMA is the predecessor to the TRP and in many ways no different to it. See E.L. Kwa, *The Environmental Law Aspects of Forestry Resource Development in Papua New Guinea: A Critique* (LLM (Hon) Thesis, Wollongong Uni, 1994) 82

⁴⁹ As an example see the report by the National Research Institute regarding the Ningera people's experience with the colonial Administration relating to the TRP agreement that they signed with the Administration in 1969 which they claim was based on trickery and force. J. Simet and J.Ketan, *Trans-Pual Study: Vanimo Local Group Structures and Territorial Claims* (1992) National Research Institute, Port Moresby

⁵⁰ This pro-forma FMA is available at the National Forest Service.

⁵¹ ss.46,56, 58 and 59

⁵² s.30(1)(a). Section 30 spells out the functions of the PFMC.

negotiate with the developer through the officers of their landowner company. These landowner company officials are usually educated elites who are either unemployed and living in the villages or have resigned from their jobs to take up management responsibilities of the landowner companies. In almost a great majority of the cases these official do not have any management experience or skills. They then appoint their kinsman (who in the main are either illiterate or semi-literate) who do not posses any office management experience and skills.

These company officials are then required to negotiate with the developer. The developer goes to the negotiating table with a vast volume of information relating to the project. The developer also goes to the resource owners prepared after having received advice from lawyers, accountants, scientists and other expert people or organisations. The landowner company officials, on the other hand, go to the same with either nil information or a disarray of materials and documents relating to the project and without any or little expert advice.⁵³ The communication between the developer and the resource owners representatives are therefore not based on the same plain. The Logging and Marketing Agreements that are concluded between the developer and the resource owners are invariably one-sided against the resource owners.

To add to the woes of the resource owners the terms and conditions of the Logging and Marketing Agreements are usually in formal contractual terms and written in English which are at times very difficult to comprehend by the resource owners representatives. The main follow on effect is that the resource owners are misinformed about the types of benefits that will be derived from the development of their timber resources and the obligations they have towards the project.

The final result of these information imbalances is that the contracts concluded between the resource owners and the Government, and the resource owners and the developer are unfair or unconscionable and as such may be null and void. As to what makes a contract unconscionable Carter, J and Harland, D give examples such as:

1. the parties may have bargained on unequal terms and one party may have taken advantage, unfairly, of his or her superior position;
2. bargains with persons disadvantaged by characteristics such as poverty, age, youth, inexperience, illiteracy and intoxication.⁵⁴

In the Australian jurisdiction the High Court has held that an unconscionable contract can be set aside where the aggrieved party can prove that the contract

⁵³ Personal encounters and communication with resource owners on Umboi (Umboi TRP), at Bulolo (Watut West TRP), Marshall Lagoon, and Hisiu (Iva-Inika TRP) in 1996.

⁵⁴ Carter, W.J and Harland, J.D, *Cases and Materials on Contract Law in Australia* (Second Edition), Butterworths, Sydney, 1993, 521 and 526

was based on a party taking advantage of another party because of his superior position, or bargains with persons disadvantaged by characteristics such as poverty, age, youth, inexperience, illiteracy and intoxication.⁵⁵ There is no relevant PNG judicial precedent on this subject. However, this vacuum has been filled by legislation in the form of the *Fairness of Transaction Act* 1993.⁵⁶ The aim of the Act is to ensure that the effect of certain transactions:

operate fairly without causing harm to, or imposing too great a burden on, any person, and in such a way that no person suffers unduly because he is economically weaker than, or is otherwise disadvantaged in relation to another person.⁵⁷

The impact of the Act is that, if it were to come into force it will enable all contracts entered into after 1990 which in the opinion of the resource owners are unconscionable subject to review by the courts. In relation to FMAs, they would be subjected to the provisions of the *Fairness of Transactions Act* (when it comes into force) and according to the author's proposition, most of the FMAs can be challenged by resource owners on the basis of unconscionability of contract.

CONCLUSION

Freedom of information and communication is well entrenched in PNG. The citizen's right to information and communication enables him or her to actively participate in the development of the country. The laws of the country acknowledge and encourage the participation of the people on the basis of their accessibility to information.

The analysis of the modes of information sharing and communication in the natural resources sector shows that the existing modes of communication and information sharing are to a large extent inappropriate to the circumstances of PNG. PNG needs to improve or replace the existing modes of communication and information sharing as incorporated in the natural resources laws, and the practices inherent in the sector, to capture the vision of the National Information and Communication Policy to encourage the full and active participation of resource owners in the utilisation of their resources. The existing modes of communication and information sharing in the natural resources sector as identified above are contrary to the *Constitution* and the contracts concluded under the existing arrangements may be deemed unconscionable.

⁵⁵ *Blomley v. Ryan* (1956) 99 CLR 362, *Commercial Bank of Australia Ltd v. Amadio* (1983) 151 CLR 447

⁵⁶ No. 28 of 1993. The Act has not been brought into force as yet. The Act is similar to the *Contracts Review Act* 1980 of New South Wales, Australia.

⁵⁷ Preamble to the Act.