

# Methods in the madness: the 'landowner problem' in the PNG LNG project

Colin Filer

## Abstract

Papua New Guinea's Liquefied Natural Gas (LNG) project has been beset by an intractable 'landowner problem' since 2009, throughout its construction and operation. This paper begins by proposing that the problem has four different aspects or dimensions, each of which can be considered as a problem in its own right, and suggesting that would-be problem solvers in the national policy process have adopted three different approaches in their search for a solution. The roots of the problem and its possible solutions are traced back to a succession of policies and practices that have their origin in the late colonial period, and were subsequently applied to the development of major mining projects, as well as to the development of PNG's oil export industry in the 1990s. Particular attention is paid to the way that the problem came to be addressed in the *Oil and Gas Act of 1998* and to the way that this legislation framed the unsuccessful search for a solution during the negotiations that led to the agreements under which the LNG project now operates. The paper is primarily based on evidence assembled by the author during the period of his own direct engagement with the relevant policy process between 1993 and 2009.

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## **Methods in the madness: the 'landowner problem' in the PNG LNG project**

### **1. Introduction**

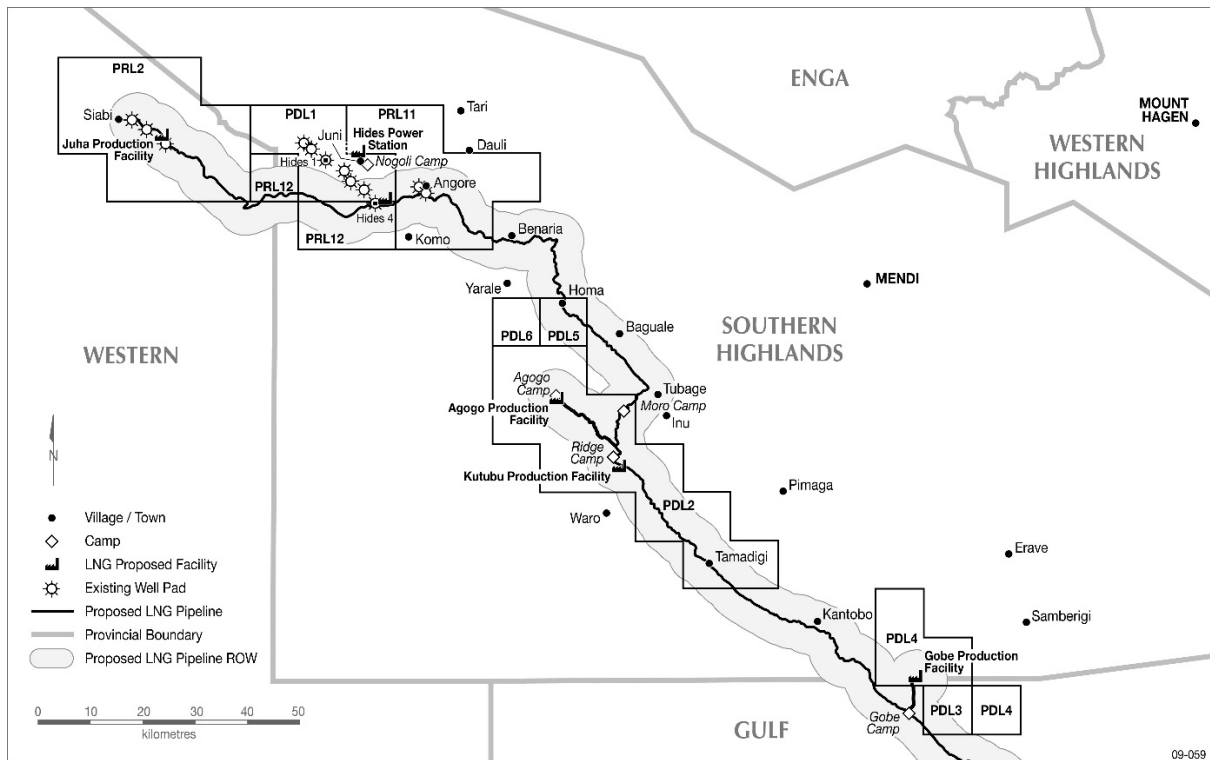
The Government of Papua New Guinea (PNG) gave its final approval for development of the PNG Liquefied Natural Gas (LNG) Project on 8 December 2009. The project's operator, ExxonMobil, spent more than four years and US \$19 billion building the infrastructure. The first shipload of liquefied natural gas departed for Japan on 25 May 2014. Throughout the period of construction and operation, the project has been beset by an intractable 'landowner problem' that appears to have no definitive solution (Main and Fletcher 2018). This paper will examine the historical background to this problem in order to show why it is so intractable. This is a long and complex story, and no single individual could pretend to know every aspect of it, so this paper will focus on those aspects with which I am most familiar because of his own engagement in different moments of the policy process through which the problem has (or has not) been dealt with.

About 3,000 square kilometres of land have been licensed to the LNG Project. Most of this is customary land that has been partially and temporarily alienated from its customary owners through the grant of petroleum development licences (PDLs) that sit on top of the gas fields. A pipeline conveys the gas to the coastline of Gulf Province, and thence across the Gulf of Papua to a liquefaction plant in Central Province, close to the capital city of Port Moresby. This plant has been constructed within a 40 km<sup>2</sup> block of land known as Portion 152, which was purchased by the colonial administration in 1906. The pipeline and plant site are known as 'dedicated project facilities' that have customary landowners attached to them by virtue of the recognition of a 5 km buffer zone around the boundary of Portion 152 and on either side of the pipeline as it traverses land outside of the development licence areas.

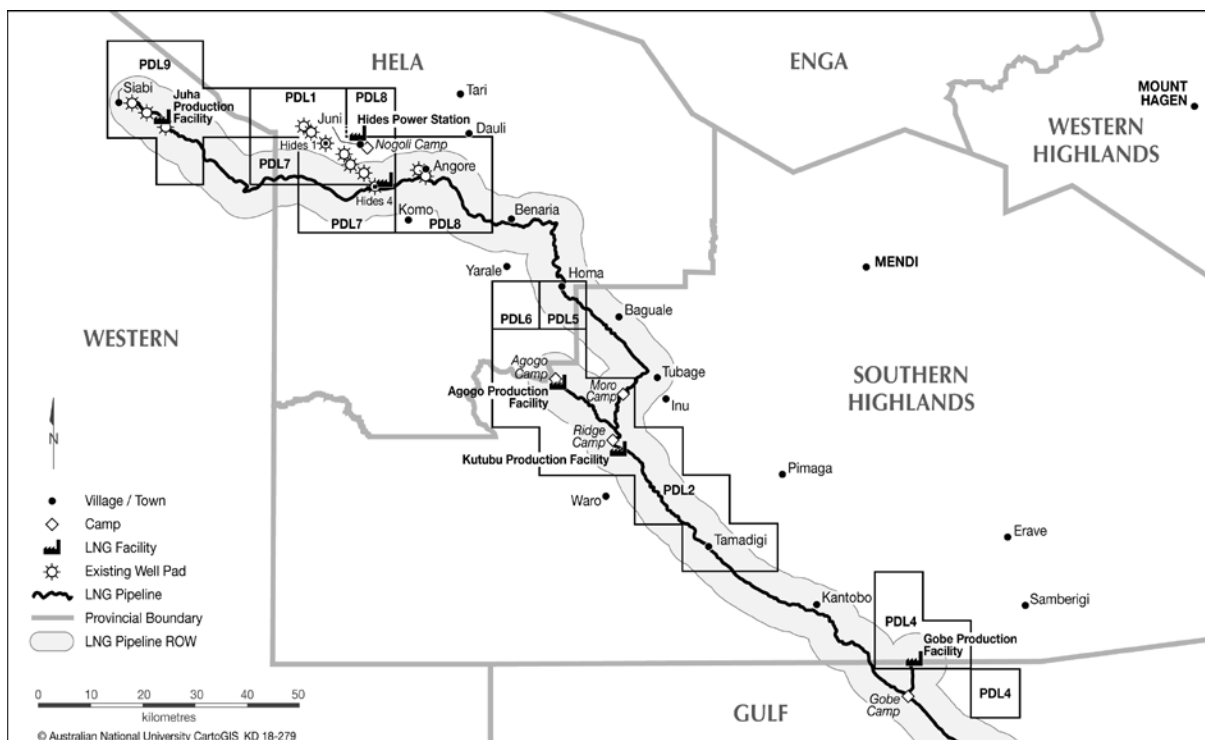
Figure 1 shows the boundaries of the petroleum development licences and petroleum retention licences (PRLs) held by the proponents of the LNG Project in 2009, which was the year in which the final development approvals were granted. Five of the areas shown on this map — PDLs 2, 3, 4, 5 and 6 — were known as 'brownfield' areas at that time because the development licences had previously been granted for the export of oil through another pipeline to the coast. All of these areas, aside from PDL 3, are now the

actual or potential sources of gas exports as well. The remaining licence areas were known as ‘greenfield’ areas because they had not previously been the source of any oil exports. The Hides area (PDL 1) was already covered by a development licence because a small portion of the gas contained within it had been turned into electricity to power the Porgera gold mine in Enga Province. Once the LNG Project had received its final development approvals at the end of 2009, the petroleum retention licences known as Hides 4, Angore and Juha became development licences in their own right: PRL 12 became PDL 7; PRL 11 became PDL 8; and PRL 2 became PDL 9. In the course of this conversion, the Angore and Juha licence areas became somewhat smaller (see Figure 2).

**Figure 1: Licence areas and pipeline buffer zone associated with the PNG LNG project before 2010**



**Figure 2: Licence areas and pipeline buffer zone associated with the PNG LNG project after 2010**



The number of customary landowners attached to the LNG Project has been a matter of conjecture for many years. The social impact assessment of the project reported that the national census counted 34,651 residents in the licence areas and buffer zones in the year 2000, but concedes that this is likely to underestimate the number of people with customary land rights in these areas at that time (Goldman 2009: 2.19–25). Since that time, the natural increase in the size of the resident population has been supplemented by the arrival of people from other areas asserting what they believe to be their customary rights to what now look like highly desirable land assets. By 2009, it was generally thought that there were as many as 60,000 people claiming to be customary owners of the licence areas and buffer zones. A more precise number should have been established by now, since these people are meant to be the recipients of the landowner benefits derived from the LNG Project, but the failure to finish counting them is one aspect of the landowner problem that continues to exist.

This problem has four aspects or dimensions, each of which can be regarded as a problem in its own right, and has been seen as such by would-be problem solvers. These are the problems of *identification*, *representation*, *distribution* and *regulation*. If framed as

questions, the first question is how the customary owners of any portion of land should be identified in the first place. The second question is how these landowners should be represented in the negotiation of agreements to exchange some of their customary land rights for some package of material benefits. The third question is how these benefits should then be distributed between the landowners entitled to a share of them. And the fourth question is how solutions to the problems of identification, representation and distribution should be turned into rules that are followed or applied by the actors involved in these transactions.

The argument I make in this paper is that the actors involved in the search for answers to these questions, once posed as questions of public policy, have adopted three kinds of approaches to their task, which I shall call *pragmatism*, *idealism* and *individualism*. I shall try to show how these three approaches have led them to propose different solutions to the landowner problem, none of which has so far made the problem go away. In doing so, I recognise that this is not just a problem for the LNG Project. However, it has proven to be a bigger problem for this than for any other project, with the possible exception of the Bougainville copper mine, *simply because it is such a big project, there are so many landowners involved, and so much is at stake in the distribution of landowner benefits.*

## **2. The colonial form of landowner identification**

In 1964, Bill McGrath, an officer in the Department of Lands, Surveys and Mines, produced a manual that was meant to help other colonial officials deal with the problem of landowner identification. This was presented as a guide to the investigation of rights to native land as a precondition for the purchase of specific land portions under the terms of the new Land Ordinance that had been passed in 1962. However, it also condensed a form of knowledge and practice with which colonial district officials (kiaps) were already quite familiar, not only because of their experience in the business of land acquisition but also because they had to deal with land disputes that were a common threat to public order.

The pragmatism in the manual has two distinct elements. One is the recognition that different people might have different kinds of rights in a particular land parcel, and that these rights might be held by individuals or by different kinds of social groups. The other

is a portrait of the process of landowner identification as one that must involve specific forms of public engagement in order to produce a valid outcome. The form of engagement highlighted in the manual is the collection of genealogies, which is said to be a “sincere and systematic thing to do” because the local people enjoy doing it and greatly appreciate the interest shown by the investigating officer (McGrath 1964: 5–6). However, this prescription is linked to the assumption that genealogies are invariably the property of a unilineal (patrilineal or matrilineal) descent group, and to the expectation that one such ‘clan’ will turn out to be the collective owner of each of the land parcels under investigation. This is the element of idealism in the manual, which almost seems to contradict the first element of pragmatism.

Preparations for the development of the Panguna copper mine on Bougainville required that the colonial form of landowner identification be applied to an area of unprecedented size — roughly 130 km<sup>2</sup> of customary land located within the prospective leases to be granted to the mining company. The kiaps duly went to work and divided this area into 829 blocks, which varied in size from 960 hectares — almost 10 km<sup>2</sup> — to less than one hectare (Regan 2017: 360). This variation in size reflected one particular aspect of the conjunction of colonial and indigenous forms of knowledge, which was that land portions tend to have names that are distinct from the names of any social groups, and that the size of the portions denominated in this way tend to be inversely related to the density of human settlement. The practical (and pragmatic) experience of the kiaps in ‘walking the boundaries’ of these land portions in the company of local (normally male) leaders had also revealed that these boundaries were generally much less contentious than the identities of the people who held customary rights over the land contained within them.

It seems that the kiaps did not have time to establish definitive lists, let alone genealogies, of all the living individuals with rights in one or other of these 829 land portions, so the number of such people is unknown. It could have been anywhere between 2,000 and 5,000 (Bedford and Mamak 1977: 71; Regan 2017: 359). Once the portions had been delineated, officials from the Land Titles Commission in Port Moresby conducted public hearings over a period of five years, between 1969 and 1974, at which the blocks were divided between 440 ‘customary heads’ (later known as ‘title holders’), some of whom were granted responsibility for more than one block. These individuals are known in the legislation as ‘agents’ who are empowered to transfer customary land rights to the state



and to distribute whatever they receive by way of payment in return. This was then the preferred solution to the problems of representation and distribution.

The colonial solutions to all three problems survived the transition to national independence, but were now applied in a very different institutional setting. Under Section 9 of the Land Act, the Land Titles Commission retained the power to appoint agents as representatives of groups of customary landowners, but this power was now shared with local land courts established under the terms of the Land Disputes Settlement Act of 1975. Section 66 of this second law excluded the Land Titles Commission from the performance of any role in the settlement of customary land disputes, while Section 36 made local land court magistrates responsible for the physical inspection of any disputed areas on which they were supposed to pass judgment. This was the only clause in any current piece of legislation making direct reference to the process of landowner identification that was the subject of Bill McGrath's manual. In their conduct of this task, the magistrates were no longer expected to work out which local leaders should be selected to 'walk the boundaries', since the legislation provided for the appointment of such individuals as 'land mediators' who should have tried to settle the dispute before it reached the court, and who then became members of the court seeking to resolve it.

A few white kiaps became provincial land court magistrates under this new regime, which meant that they were responsible for hearing appeals against decisions of the local land courts, but not for the conduct of land investigations on the ground (Allen and Giddings 1982). A larger number found employment in the private sector, where they continued to conduct this kind of inquiry on behalf of mining or petroleum companies holding exploration or development licences over customary land, but without the legal authority to resolve the problems of landowner identification or representation (Banks 1996: 229; Filer 2005: 913). There they were soon joined by some of the Papua New Guineans who had been trained to succeed them as kiaps and who actually enjoyed this kind of work. That was because the post-colonial form of district administration did not provide public servants with any such role unless they were appointed as local land court magistrates, and the exercise of this judicial function became increasingly difficult as local land mediators lost interest in the performance of their own role — especially when they did not get paid. By the time that exploitation of PNG's oil and gas resources began in earnest

in 1990, most of the government officials with formal responsibility for dealing with the problems of identification and representation did no fieldwork at all, but simply dealt in the management of forms and files (Filer et al. 2000: 23–33).

### **3. Development forum and benefit streams**

While a former kiap working as a lands officer in a mining company might know how to get a provincial or district lands officer to authenticate his findings, and might even be able to facilitate the settlement of disputes by land mediators or the land courts, the problem of representation was not so readily solved when it was linked to the problem of distribution through the institution of the ‘development forum’. This institution emerged at the end of 1988 as a pragmatic response by national government officials to demands being made by the customary owners of areas that were due to be leased for development of the Porgera gold mine in Enga Province. Although the development forum was later inscribed in Section 3 of the 1992 Mining Act as a form of consultation, it actually involved the negotiation of a set of three benefit-sharing agreements between the landowners, the provincial government and the national government (Derkley 1989; West 1992; Filer 2008). And although the existing national policy framework made provision for local landowners to receive a variety of benefits from a large-scale mining project, in addition to the compensation owed for damage to their property, they had not previously been represented in the negotiation of a benefit package with government officials.

The representation of the Porgera landowners in the development forum was also something of a novelty because of the way that it overtook the colonial form of landowner identification. About 30 km<sup>2</sup> of customary land was due to be leased for this project (Filer 1999a: 5), which was considerably less than the area required for the Panguna project, so the task should not have been so demanding. Former kiap John Reid, then working in the Department of Minerals and Energy, organised a group of Papua New Guinean kiaps to undertake a land study in 1987. They divided the area into roughly 300 blocks, each of which should then have yielded an ‘agent’ who could be recognised as the legitimate recipient of any payments to be made in respect of its acquisition. The trouble was that individual landowners were attaching their names, and those of their friends and relatives, to multiple land portions, and were doing so to an extent that contradicted the

conventional wisdom that would assign each portion to a single clan. So one of the Papua New Guinean kiaps, Kurubu Ipara, who also regarded himself as a member of the landowning community, came up with a pragmatic solution to the problem. The entire collection of landowners would be divided between seven clans and 23 subclans without any requirement for these groups to be connected to any particular set of land parcels (Golub 2007: 85). When the time came to negotiate the benefit-sharing agreements, each of the 23 subclans had one representative on the Landowner Negotiating Committee, and these 23 'super-agents' then came to be recognised as the people who would receive and redistribute the benefits earmarked for individual landowners and their families. Even compensation payments were distributed through the same channels (Banks 1996: 230).

Even if a much larger number of title holders had been recognised as the legitimate recipients of compensation and royalty payments, like their counterparts in Bougainville, government officials decided that the logistics of the development forum would not allow for dozens of landowners to participate in the agreement-making process. A pragmatic solution to this particular problem of representation enabled a smaller group of landowner representatives to make up their own solutions to the problems of identification and distribution. In effect, the super-agents were given the right to decide who would be counted as landowners and how the more soluble compensation and benefit streams would be divided amongst them. However, some benefit streams were less soluble than others. For example, one consisted of a national government guarantee of a loan of K500,000 (then worth about US\$500,000) to a 'landowner company' that would help to make it the principal local subcontractor to the mining company (Filer 2008: 125). Another consisted of funds allocated to the Porgera Development Authority, a quasi-governmental body, for the construction and maintenance of local economic infrastructure (Bonnell 1999: 76). So, while the super-agents might be well placed to function as individual patrons or gatekeepers, they were not therefore guaranteed a position of authority within one or other of the corporate bodies that also played some role in the representation of landowner interests or the distribution of landowner benefits.

#### 4. The local origins of social mapping

Social mapping is essentially a form of applied anthropology. The earliest reference to this type of activity in PNG's own legislation is to be found in Schedule II of the Mining (Ok Tedi Agreement) Act of 1976, which called for a sociographic survey of village communities likely to be affected by the future development of the Ok Tedi mine. This survey was to cover topics such as "population structure, population growth, settlement patterns, inter-clan and inter-hamlet relations, traditional movements, land use patterns, water availability, natural resource use, nutritional and health status and cultural or archaeological sites of importance to the people", and was meant to guide a broader process of social impact assessment. In this respect, it could be seen as a post-colonial version of what the kiaps used to cover in their 'situation reports', as distinct from their land investigation reports, bearing in mind that all those recruited after the Second World War were subjected to some basic training in the practice of social anthropology before they were sent out on patrol. None of the contributions that social scientists actually made to the planning of the Ok Tedi mine was designated as a sociographic survey, and the phrase has not been used in any subsequent policy document. However, the proposed contents resurfaced in the standard terms of reference for socio-economic impact studies that were set out by the Department of Minerals and Energy in 1985.

John Burton was the first anthropologist to define 'social mapping' by reference to his own fieldwork in PNG.<sup>2</sup> This was a survey of traditional and contemporary group boundaries in parts of Western Highlands Province that was undertaken in 1987 (Burton 1991). It had nothing to do with any mining or petroleum project, nor with any process of social impact assessment, but was meant to inform the provincial government's efforts to deal with the problem commonly known as tribal warfare. In this respect it was more like a form of land investigation, but one that treated the customary social landscape as a variable set of institutions that need to be properly understood before any government can make sensible decisions about the demarcation of subnational political or

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<sup>2</sup> There is no direct connection between his coinage of the term and the apparently simultaneous inclusion of 'social mapping' in the practice known as participatory rural appraisal (Chambers 1994).

administrative boundaries, let alone the subdivision of a customary group's territory into separate land parcels.

It was the Bougainville rebellion and the forced closure of the Panguna mine in 1989 that led government officials and mining company managers to wonder if social mapping might constitute a form of insurance against a repetition of that tragic sequence of events. Although there were several competing explanations for the origins of the rebellion, the one that led in this particular direction was my own suggestion that a new generation of landowners had lost faith in the capacity of the older generation, as represented by the 440 title holders, to distribute compensation payments in an equitable manner. That in turn was because the delineation of lease area boundaries through the colonial form of landowner identification had created an artificial landowning community whose customary social institutions were incapable of solving the problems of representation and distribution, and were instead disintegrating (Filer 1990). Regardless of the merits of this argument, the sudden appearance of a new market for social mapping studies was one of the reasons why the University of PNG decided to establish its own business arm (Unisearch PNG) in 1990, and one of the reasons why I was appointed to manage it one year later (Filer 1999b). This was not just a rapid move to cash in on a business opportunity; it was also part of a longer move by lecturers like Burton and myself to teach new courses that would attract more students because of the obvious market value of the knowledge they imparted, and even to involve the students themselves in the consultancies we were undertaking.<sup>3</sup>

The first social mapping study to be undertaken in this new environment was Burton's Porgera census project, which was commissioned by the Porgera Joint Venture at the beginning of 1990, half-way through the mine's construction phase. The main concern here was not to revisit the question of who owned which portions of land within the mine lease areas, but to establish the principles of local social and political organisation in a manner that might address the risk posed by the arrival of a substantial population of fortune-seeking migrants who were now intermingled with the indigenous population of

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<sup>3</sup> One of our former students is now the most senior Papua New Guinean employed by ExxonMobil to deal with the landowner problem in the LNG Project.

the Porgera Valley (Burton 1992: 1). Despite its name, this was not just a household survey, like the national census conducted in the same year, but aimed to compile a definitive set of genealogies for roughly 9,500 people then living in ten rural census units around the mine site, and to make this information legible through a purpose-built computer program called the Village Population System. However, the collection of this genealogical information made no assumption about the existence of clans or subclans. Instead, by linking local people's lines of descent with maps showing where they actually lived and worked, Burton concluded that corporate descent groups did not exist at all (ibid.: 9).

Unfortunately, Burton did not get to finish this job, apparently because company managers decided that it was taking too much time, and possibly because it was not leading to the discovery of a customary social institution that would deal with the threat posed by all those fortune-seeking migrants. Time soon proved to be one of the main enemies of social mapping. Although Unisearch delivered a number of social mapping studies to mining companies between 1991 and 1994, most of them were partial or preliminary, more like situation reports, since they did not get to the point of producing a definitive map of the local social landscape or a manageable database containing the mutual relationships of its occupants. The only one that clearly did reach this point was the one that Burton and I conducted in the island community hosting the site of the prospective Lihir gold mine in New Ireland Province between 1992 and 1994. A number of factors combined to make this completion possible. First, community leaders were especially keen to have their customs recognised and recorded in a way that would help them to keep the fortune-seeking migrants at bay. Secondly, the negotiation of agreements to develop the mine was already taking a long time, so there was time to spare. Thirdly, national government officials who were still digesting the lessons of Bougainville decided to support the exercise, so it was not cut short by the whims of corporate accountants. And finally, this was shaping up as one of the country's biggest mining projects, so the cost of social mapping would still be a tiny fraction of the cost of making it happen.

In the course of organising these various studies, Burton and I produced a set of summary guidelines to explain what we thought we were doing, in the hope that this might convince the government to make social mapping part of the regulatory framework, as

an activity that should ideally precede the conduct of detailed land investigations or the assessment of a project's future social impacts or the monitoring of impacts as they occur. Our guidelines said that the general purpose of a social mapping study is "to determine the relationship between settlement patterns, land use, land tenure, and social organisation within a particular locality" (Unisearch 1993). This relationship was then broken down into five forms of distribution: (1) the distribution of *people between groups*, i.e. the past and present division of the local population into social groups and categories, with particular reference to the principles of kinship, residence, gender and generation; (2) the distribution of *people between resources*, i.e. the physical relationship between the local population and its natural environment, including the use of land, water, and other natural resources, patterns of migration and settlement, population density and demographic trends; (3) the distribution of *resources between people*, i.e. the allocation of rights to natural and cultural resources amongst the local population, with special reference to cases in which these rights are subject to dispute; (4) the distribution of *powers between people*, i.e. the exercise of traditional and modern forms of leadership by individual members of landowning communities in various spheres of social activity; and (5) the distribution of *products between people*, i.e. the pattern of economic transactions, and especially the flow of money, which connects members of the local population with each other and with the outside world. It should be evident that the last three of these five forms of distribution are closely related to what I am now calling the problems of *identification, representation and distribution*, bearing in mind that the problem of *benefit distribution*, in the local context of any major resource project, ceases to be an empirical or analytical problem and becomes instead a practical or political problem.

## **5. Pragmatism meets idealism in the petroleum sector, 1990–1997**

Although the Petroleum Act was not amended at the same time as the Mining Act, the institution of the development forum was introduced into the petroleum sector in July 1990 (West 1992: 21), shortly before British Petroleum (BP) was awarded PNG's first petroleum development licence (PDL 1) in order to build a gas-fired power station. In the years that followed, different attempts were made to resolve the landowner problem in different licence areas, but none of them proved to be entirely satisfactory.

## 5.1 Hides gas project (PDL 1)

No attempt was initially made to identify all the customary owners of the Hides licence area. Instead, officials from the Southern Highlands Provincial Government negotiated the appointment of a group of 'clan agents' from the area that would be directly affected by construction of the power plant so that BP could make the compensation payments prescribed by the Petroleum Act. However, the first round of payments elicited a protest from representatives of the Tuguba (or Duguba) tribe who claimed that their ancestors had been the original occupants of this area, and that the current occupants, who were mostly members of the Hiwa tribe, were relative newcomers.<sup>4</sup> The dissidents took their case to the local land court, which duly ordered a halt to the compensation payments and to plans for a development forum until the dispute had been resolved. Officials in the Department of Minerals and Energy realised that this could delay their minister's capacity to issue the development licence for an indefinite period, thus threatening the operation of the mine that would depend on it, so they arranged for the licence to be granted on the basis of compulsory acquisition by the state, while the dispute was removed from the jurisdiction of the land courts and referred to the Land Titles Commission.

Justice Arnold Amet was appointed as the commissioner to hear the case. In 1991, he ruled that the current occupants should be recognised as the rightful owners, citing the principle of adverse possession that an American lawyer, Robert Cooter, thought he had already discovered in previous decisions of the land courts (Cooter 1989). This decision was somewhat controversial, because some commentators thought that this was not a customary Melanesian principle at all (Kalinoe 1993), and anyone familiar with the cultural format of Huli disputes would have to regard it as a piece of counter-intuitive logic (Ballard 1998: 3). The Tuguba plaintiffs lodged an appeal in the National Court, but before this case could be heard, the bureaucrats in Port Moresby brokered a compromise between the two sides by which compensation and benefits would be divided equally between them (Clapp 2002: 251–2). This enabled BP to resume its compensation

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<sup>4</sup> Goldman (2009: 2.74) points out that 'Duguba' is one of the Huli language terms for a foreigner or stranger. Ballard (1994: 135) has observed that Huli-speakers also applied the term to their 'downstream' trading partners in pre-colonial times, whatever language they spoke. The word 'tribe' can nowadays have any number of meanings in PNG.



payments in 1993, while the bureaucrats turned their attention to the development forum that was still outstanding. After three more years of disputation and negotiation, the forum was finally convened at the end of 1996, with what appear to be further elements of ambiguity or compromise in the identification of the landowners who were party to the benefit-sharing agreements (ibid.: 208–9).

Each of the nine recognised clans would henceforth receive an equal share of what amounted to 30 per cent of the royalties levied on the Hides gas project (Taylor and Whimp 1997: 80). If this money was shared equally between all the individual members of these groups, each one would have received a sum of less than K60 per annum (ibid.: 131). It is not clear how the money was actually distributed, since national government officials seem to have made the payments into passbook accounts nominated by the four or five individuals who were now recognised as the agents of each group, without really knowing who had access to which accounts or why the agents kept adding new ones to the list (Clapp 2002: 258–62). Meanwhile, George Clapp, the former kiap whom BP had employed to deal with the landowner problem, opted to take a different approach to the distribution of compensation payments. He just handed over wads of cash to the clan agents in front of all the clan members invited to witness the occasion, reasoning that the members of each clan would then follow their leaders around until all of them had received an amount that reflected their customary level of entitlement (Clapp 1998: 6, quoted in Filer 2007: 153). This was an even finer example of pragmatism than the various deals brokered by the government officials.

## **5.2 Kutubu oil project (PDL 2)**

The second petroleum development licence was granted at the end of 1990, shortly after the first one, but this was for an oil export project that promised a far more substantial stream of landowner benefits, and a very different approach was taken to the problems of identification, representation and distribution. By the time the licence was granted, Chevron Niugini had already employed Bill McGrath to undertake land investigations along the lines prescribed by his own manual, but had also employed Tony Power, who was not a former kiap but a former provincial planner, to be the project's business development manager. Power persuaded his employers that the Land Groups Incorporation Act of 1974 would yield the best possible solution to all three problems.

Instead of asking government officials to appoint 'clan agents' in the customary fashion, Power's plan was to incorporate each of the customary landowning groups in each of the villages in PDL 2 and along the route of the oil export pipeline. The legislation required that each such group should have its own constitution, with an executive body to represent the membership and one or more people nominated to settle disputes amongst the members. Power produced an ideal model of social organisation in which incorporated land groups (ILGs) would be represented in traditional village forums and in legally-recognised landowner associations while simultaneously owning shares in the landowner companies whose business he was meant to be developing (Power 1996: 139).

By the time that oil started to flow down the pipeline in June 1992, Bill's team had produced a set of maps showing the approximate boundaries of dozens of clan territories and a number of disputed areas across the whole of PDL 2 and parts of the surrounding area. This was no mean feat, considering that the licence area alone contained 970 km<sup>2</sup> of land, which was more than seven times the area contained in the leases for the Panguna mine. When these maps were combined into a single survey plan, it was inferred that roughly 92 per cent of the licence area was the customary land of clans whose members spoke the Fasu language, while the rest belonged to clans whose members spoke the Foi (or Foe) language.<sup>5</sup> By the end of 1992, Power's team had initiated the process through which 58 Fasu clans and 72 Foi clans were to be registered as ILGs, along with 54 clans from three other language groups along the route of the pipeline. These numbers were confirmed by notices published in the *National Gazette* during the course of the following year.

It was Tony Power who commissioned the first social mapping study to be undertaken in the petroleum sector. This was actually a review by anthropologist Tom Ernst of the work that Chevron staff had been doing to establish the identities and membership of the 58 Fasu clans. Tom found that the identification of these patrilineal descent groups had been reasonably well done, but he noted the absence of a stable relationship between

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<sup>5</sup> It was subsequently discovered that some of the landowners in the northwestern corner of PDL 2 were members of the Huli or Onabasulu language groups.

groups and localities over time, and expressed some concern about the uneven quality of the genealogies through which their membership had been established (Ernst 1993). Similar points were made by John Burton in his review of Chevron's proposal to monitor the social impacts of the project (Burton 1993). It is not clear if these observations made much difference to the way that Power managed the process of incorporation, but the *National Gazette* and the company's own records reveal that the process continued until 1998, resulting in the registration of another 285 groups in the affected area, mostly amongst the Foi population and along the route of the pipeline (Goldman 2009: 3.37).

The Kutubu project development forum had not reached any agreement on how the royalty component of the landowner benefit stream would be distributed between the customary owners of PDL 2. The Fasu delegates had even refused to sign the benefit-sharing agreement because they wanted more than the minimum 20 per cent of project royalties specified in the basic petroleum package devised by government officials (West 1992: 25). Nevertheless, the national government's project coordinator later remarked that the landowners might well have caused more disruption than they did "if it were not for the relatively mild nature of the main Fasu landowner group and the capacity for Chevron to throw money and manpower at problems as they have occurred in the field" (Ratcliff 1994). Power and his colleagues facilitated an agreement whereby:

- the landowners would collectively receive 30 per cent of the royalties collected by the government;
- 90 per cent of this money would be awarded to the Fasu and ten per cent to the Foi;
- 40 per cent of each portion would be sequestered in a 'future generations trust' controlled by the government;<sup>6</sup> and
- the remaining 60 per cent would be divided equally between the ILGs that were being incorporated in 1993, *regardless of how much land they owned within the licence area.*

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<sup>6</sup> This money was mysteriously disbursed to the current generation of landowner representatives before the end of the decade (John Brooksbank, personal communication, October 2018).

Indeed, the results of Bill's land investigations suggested that some of them owned none of it.

This arrangement certainly reduced the need to deal with boundary disputes within the licence area, since Bill's land investigations were now only relevant to the payment of compensation for damage caused to a few small parts of it. It was also made much simpler by the absence of any legal requirement for a land group to be associated with any particular area of land as a condition of its incorporation. But it would also create a new kind of economic inequality amongst the 1,657 Fasu people and 4,790 Foi people who were counted by Chevron in 1994 (Goldman 2009: 2.23–4). While the Fasu people were all granted the status of 'project area landowners', the Foi people – with whom they had close cultural affinities – were now to be divided between those who were granted the same status, but a much smaller per capita share of the benefit, and those who were completely excluded. There was no solution to the problem of distribution that would avoid a form of inequality that had already given rise to social conflict around the country's large-scale mining projects. But the solution adopted in this case also created another kind of problem.

The pragmatic decision to allocate equal shares of a benefit stream between a large number of ILGs created a perverse incentive for individuals to establish new ILGs if they felt that they were not receiving an adequate share of the benefit flowing to the one to which they already belonged (Weiner 1998, 2007). The national government had no legal power to prevent them from doing so unless there was evidence to prove that the new group was not 'customary' (Taylor and Whimp 1997: 117–8). Nor was there any provision in the Land Groups Incorporation Act to prevent people from being members of more than one ILG, let alone to prevent the creation of more than one ILG with customary claims over the same piece of real estate. The segmentation and proliferation of land groups after 1993 thus threatened to undermine the foundations of Tony Power's ideal model of social organisation, just as these foundations were increasingly detached from the upper levels of a corporate hierarchy in which local politicians competed for control of project benefit streams by creating new landowner associations or landowner companies, launching attacks on those that had already been incorporated, or replacing one group of executives with another. The idea that such bodies should somehow be accountable to customary groups gave way to a reality in which they were more like rent-

collecting vehicles of political and economic patronage (Filer 1997; Sagir 2001; Koyama 2004).

### **5.3 Gobe oil project (PDLs 3 and 4)**

While Chevron staff were busily arranging for dozens of ILGs to become the beneficiaries of the existing Kutubu project, they also began to make similar arrangements for the prospective Gobe project on the border between Southern Highlands and Gulf provinces. Eight of the groups registered in 1994 were thought to be the collective owners of some part of an area of more than 1000 km<sup>2</sup>, southeast of PDL 2, which included the area of roughly 400 km<sup>2</sup> that would later be included in PDLs 3 and 4 (see Figure 1). All eight were registered as groups of people from villages in Gulf Province containing the members of ILGs that were simultaneously being recognised as owners of some part of the oil export pipeline corridor. People from the Samberigi Valley in Southern Highlands Province instantly contested the claims implicit in this process of incorporation, and the dispute was duly referred to the Land Titles Commission.

It is not clear what form of land investigation had been carried out at this juncture. There were certainly no maps showing the approximate boundaries of group territories in the area under dispute. The trouble was that the whole of this area was virtually uninhabited, showed few signs of being used for any customary purpose, and had proven to be something of a nightmare for the patrols that struggled to find their way through it during the early colonial period (Schieffelin and Kurita 1988; Schieffelin and Crittenden 1991).<sup>7</sup> Officials in what was then the Department of Mining and Petroleum asked me to review the reports of these patrols in order to establish the identities and locations of the people whom they encountered as they entered or left the area (Filer 1994). If that counted as a land investigation report, it was not treated as relevant evidence when Justice Gibbs Salika was appointed to deal with the dispute in 1995. The judge later noted that he was required by the Land Titles Commission Act to “walk the boundaries” before deciding the merits of the claims made by the representatives of 14 different clans from around the

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<sup>7</sup> This is precisely the sort of area that appeared to the colonial authorities to be “waste and vacant” prior to the arrival of a national ‘ideology of landownership’ that refused to acknowledge such a possibility (Filer 2014: 82).

area, so he decided that most of the 'walking' would have to consist of an 'aerial inspection' from a helicopter. After six months of hearings, he made a determination based on the principle of adverse possession previously cited by Justice Amet in the Hides case (GPNG 1996). This was rather odd, since none of the claimants appeared to be in 'possession' of the land in question. Nor did his judgment settle the matter. The case has been bouncing back and forth between the Land Titles Commission, the National Court and the Supreme Court ever since, with no prospect of any final resolution.

Justice Salika did appear to make one important discovery, which was that claimants from the two provinces, unlike the two sides contesting ownership of PDL 1 (Hiwa and Tuguba) and PDL 2 (Fasu and Foi), did not share a common set of ideas about how 'land groups' should be constituted and related to each other. While both sides seem to have accepted the idea that land groups should be patrilineal descent groups, and individuals should only be members of one such group, the Samberigi claimants were inclined to combine these entities into 'super-groups' or confederations that the judge called 'stock clans'. This turned out to be a problem in its own right, since their desire to create such entities was not matched by an agreement about which group names designated a confederation, which designated the members of a confederation, and which groups were in fact members of which confederation.

The intractable nature of this dispute did not prevent the national government from granting the two development licences at the end of 1996, nor did it prevent government officials from negotiating a draft benefit-sharing agreement that was signed by representatives of the groups provisionally recognised as customary owners of the licence areas. Unlike the previous agreement over the Kutubu project, this one said that the royalties were to be divided amongst the landowning clans in proportion to the size of their holdings within the licence areas, then subdivided between the ILGs within each of these clans in proportion to the size of their membership (Taylor and Whimp 1997: 81).<sup>8</sup>

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<sup>8</sup> Chevron staff estimated a population of roughly 3,000 customary landowners in the 'Gobe catchment' at that juncture (Goldman 2009: 2.24-5).

To facilitate the implementation of this agreement, Chevron staff arranged for the incorporation of 12 more land groups to represent the Samberigi people whom Justice Salika had recognised as legitimate landowners. His judgment was also taken as the basis for a calculation that eight clans owned shares of the combined licence area that varied from as much as 39 per cent to as little as one per cent, with 15 per cent being unallocated. The draft benefit-sharing agreement implied that each of the eight primary beneficiaries should be a 'stock clan' containing two or more ILGs. If that were so, one might expect that each of these smaller groups would now have a perverse incentive to enlarge their membership lists, instead of their members having a perverse incentive to create new land groups, as was happening in the Kutubu case. But in the Gobe case, the problems of identification and representation were still awaiting their own solution, so the faults inherent in this new solution to the problem of distribution were still just faults in a model, not the actual bone of contention between the would-be landowners.

## **6. The Action Team and the Oil and Gas Act, 1998**

While different solutions to the landowner problem were being concocted in each of the existing licence areas, the companies involved in the exploration and development of PNG's oil and gas reserves were telling the government to overhaul the existing legal and policy framework in order to solve a wider range of problems in the regulation of the sector (Millett 1992). The government's response was to seek assistance from the World Bank and other members of the donor community (Mathrani 2002). The landowner problem was assigned to the Asian Development Bank, which funded a pair of lawyers, Meg Taylor and Kathy Whimp, to produce a couple of reports on its current dimensions and possible solutions for the newly-established Department of Petroleum and Energy (Taylor and Whimp 1997; Whimp and Taylor 1998). The first of these reports made 31 recommendations, the first of which was to establish a "task force to investigate issues in the management of landowner identification, organisation and representation" (Taylor and Whimp 1997: 18).

All 31 of the recommendations were discussed by a mixture of company and government representatives at a two-day seminar held in January 1998, and the first one led to the creation of a body, known as the Petroleum Project Benefits Action Team or the Landowner Benefits Action Team, which contained a similar mix of stakeholders. The

members of this body held weekly meetings over a period of four months, at which they discussed the principles that should apply to the distribution of different benefit streams between provincial governments, local-level governments and local landowners, as well as those that should apply to the different aspects of the landowner problem itself. A separate sub-committee, known as the ILG Breakout Group, discussed ways to improve the regulation or administration of the process of land group incorporation as a solution to the problem of landowner representation (Filer 2007: 153). The results of these deliberations were partially incorporated into the provisions of the Oil and Gas Act that replaced the old Petroleum Act at the end of 1998. Some of these provisions were amended in 2001 in order to reduce the risk that legal solutions to the landowner problem might be blocked or delayed by litigation against the executive decisions of the Minister for Petroleum and Energy.

Section 47 of the Oil and Gas Act deals with the problem of landowner identification by imposing an obligation on licence-holders to conduct social mapping and landowner identification studies and then submit the results to the regulator. Despite the nominal distinction drawn between the two types of study, there is no indication of how they might differ from each other, or whether one should precede the other. Instead, a separate distinction is drawn between ‘preliminary’ and ‘full-scale’ studies of both types — the first to be undertaken before the holder of a prospecting licence enters the licence area, and the second to be undertaken after the discovery of reserves that warrant an application for a development licence. In the first version of the legislation, all these studies were meant to be studies “of the customary owners and the occupants of the land comprised in the licence area”. In the amended version, the ‘occupants’ were removed. It is not entirely clear how a distinction between genuine ‘owners’ and mere ‘occupants’ could be made before the preliminary studies are conducted, but this logical problem has not become a political issue in its own right because the legislation says nothing about the purpose of these studies. Taylor and Whimp (1997: 23) argued that their aim should be “to identify the groups which are best suited to make collective decisions about the use of land, within the context of the particular social organisation of the target community”, but this point seems to have gotten lost in translation. Perhaps we should infer that the point is to ensure that the licence-holder or the regulator starts to think about such issues at an early stage in the process of exploration.



If preliminary studies do somehow help to produce a clear distinction between the genuine owners and mere occupants of a licence area, the full-scale studies are meant to extend their coverage beyond the boundaries of a proposed development licence, to include the owners of a five kilometre buffer zone around any dedicated project facility and any “other areas which would be affected by the petroleum project if developed”. This might seem to align the aim of the full-scale studies with the aim of the social impact assessment process that is required under the terms of the Environment Act. However, since the amended version of the Oil and Gas Act says that the full-scale studies are to be submitted at the same time as the application for a development licence, and this application can only be made after an environmental impact statement has already been completed and approved, this does not appear to be the case. Instead, Section 49 of the Act says that the main aim of the full-scale studies is to satisfy the Minister that “the people who would be project area landowners of the petroleum project are truly represented by the persons who are to be invited to the development forum as their representatives”. In other words, the aim is to solve the problem of representation, as well as the problem of identification. However, the problem of representation can only be partially solved by means of such studies. In the amended version of the Act, a new section (169A) says that the Minister’s invitations must also be based on a variety of other submissions and considerations, including the judgments of the courts.

Of all the issues debated by the Action Team, the most contentious was the question of whether land group incorporation should now be recognised as the only legal solution to the problem of landowner representation. This was the point of difference between Tony Power and George Clapp, both of whom were active members of the group. Clapp’s pragmatic preference for the appointment of individual clan agents could be portrayed as a sort of colonial relic, rather like the kiaps who shared this preference and recommended the appointments. It could also be argued that this form of knowledge and practice had signally failed to produce a durable solution to the problem of representation in Bougainville. On the other hand, the pragmatists thought that Power’s idealistic preference for the incorporation of customary groups as legal personalities had already failed to produce a durable solution to the same problem in Chevron’s licence areas, and that is one reason why government officials and company managers in the hard-rock mining sector had not shown much enthusiasm for this alternative (Filer

2007: 156–7). The private sector participants on both sides could argue that their own preferred solutions would be more effective and sustainable if only the post-colonial state would get its own house in order. One of the most common refrains in the deliberations of the Action Team was that “the state should act like a state”, even if no one was sure what else it was acting like.

The Oil and Gas Act dealt with this bone of contention by providing two alternative escape routes. On one hand, Sections 48 and 49 do not require the minister to consider whether the representatives of project area landowners are either members or executives of incorporated land groups when he invites them to participate in a development forum. The Minister only has to be satisfied that the landowners are truly represented by these individuals. On the other hand, Sections 169 and 176 allow for the possibility of a benefit-sharing agreement in which persons or entities other than land groups may represent the landowner beneficiaries and then receive the benefits on their behalf. Nevertheless, the legislation expresses a clear preference for land group incorporation as the default solution to the problems of representation and distribution. This in turn would seem to require that full-scale social mapping and landowner identification studies make recommendations about the way that land groups ought to be incorporated in each licence area — or at least in those licence areas where the process of incorporation has not already been completed to the satisfaction of the regulator.

But this is not the only way in which the legislation expects these studies to contribute to a resolution of the distribution problem. Section 170 says that they are also meant to help the Minister decide whether some project area landowners “have a greater or more substantial occupation or right of occupation of the land ... or are more adversely impacted by the petroleum project than other project area landowners”, and hence to decide whether landowner benefits should be distributed in a way that reflects this differential level of entitlement. This is linked to a separate requirement, under Section 49, for the Department of Petroleum and Energy to produce a proposal for the equitable distribution of landowner benefits before the Minister convenes the development forum to which the landowner representatives are to be invited. It is this document that is meant to take account of the social and economic impacts anticipated in the environmental impact statement produced by the developer, as well as the findings of the social mapping and landowner identification studies undertaken in each licence

area. Section 49 also says that a copy of this proposal must be provided to the landowner representatives before the development forum takes place. The implication is that the development forum itself is meant to produce two different solutions to the problem of distribution — the first being to decide the manner in which landowner benefits should be distributed, and the second being to decide the proportions in which they should be distributed between different groups of landowners.

## **7. The disappearing regulation, 1998–2002**

Section 47 of the Oil and Gas Act allows the Minister to “prescribe the scope and method of a social mapping study or landowner identification study” by means of a regulation. The main contribution that I made to the deliberations of the Action Team was to produce a draft regulation (Filer et al. 2000: 160–2; Power 2000: 48–52) that reflected the concerns raised by the other members of the group and many of the 31 recommendations previously made by Meg Taylor and Kathy Whimp. This document proposed that a preliminary social mapping study should have five aims and make three types of recommendation for actions to be taken by the government or the licence-holder, while a full-scale study should have eight aims and produce four types of recommendation. One of the eight aims of a full-scale study would be to produce a “descriptive account of the relationship between settlement patterns, land use, land tenure, and social organization” of the kind envisaged in the Unisearch guidelines, but some of the others were more concerned with the need for strategies to reduce the risk of conflict in the adoption of solutions to the problems of identification, representation and distribution.

This draft regulation made persistent reference to “local custom and practice”, as well as to national policy and legislation, in order to highlight the need for solutions that would be tailored to the social institutions or relationships peculiar to each licence area. It was envisaged that preliminary studies would be undertaken within 12 months of the grant of a prospecting licence, while full-scale studies would be undertaken in conjunction with project feasibility studies so that the results could inform the process of social impact assessment. Finally, it was proposed that full-scale studies should be commissioned by bodies similar to the committees that the former Department of Minerals and Energy had set up to commission socio-economic impact studies during the 1980s, with representatives from several government agencies as well as the project proponent.

The expatriate lawyer who drafted the Oil and Gas Act during the second half of 1998 did not produce another version of the regulation mentioned in Section 47. He disappeared at the end of the year because his work was funded by a World Bank technical assistance project that had now run its course (Mathrani 2003: 6).<sup>9</sup> The raw material for his work was a set of drafting instructions for a Petroleum (Project Benefits) Act that members of the Action Team produced in June that year, to which a version of the draft social mapping regulation was attached. Although the Oil and Gas Act gave effect to some of these instructions, what it had to say about the purpose and timing of both preliminary and full-scale social mapping and landowner identification studies was quite inconsistent with what had been proposed in the draft regulation and appeared to narrow their problem-solving scope. The net result was a regulatory hole that has been gaping ever since.

By 2001, the Department of Petroleum and Energy was in receipt of another round of technical assistance from the World Bank, and the officials decided to use some of the money to pay for an expert to solve what had now become their social mapping problem. The provision of advice on the development of a regulation was only one of the tasks this person was expected to perform. He or she would also undertake “social mapping research and analysis together with associated fieldwork in the concerned petroleum resource areas and amongst project area communities”, develop a “landowner information database system”, and train departmental staff to do such things themselves. John Rivers, who was then teaching development studies at the PNG University of Technology, was selected to perform this role.

After many months of consultation with various stakeholders, including local landowners, Rivers produced a social mapping issues paper that ran to 66 pages and contained no less than 215 issues that social mapping studies might need to address (GPNG 2002). These issues were partly classified by reference to the five “forms of distribution” distinguished in the Unisearch guidelines, so it appeared that some attempt

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<sup>9</sup> According to Main and Fletcher (2018: 12), the Oil and Gas Act was co-authored by “[l]awyer and former MP Alfred Kaiabe”. This is incorrect. At the time when it was drafted in 1998, Kaiabe was the Shadow Minister for Mining, Petroleum and Energy. As a member of the parliamentary opposition, he would not have been in any position to draft national legislation. He was a member of the government, and Chair of a body called the Gas and Energy Development Committee when the Act was amended in 2001, and might therefore have had some influence over the content of the amendments.

was being made to build on the deliberations of the Action Team, even though Rivers himself had not been a member of it. Yet one of the more interesting features of this document was the inclusion of a number of statements suggesting that departmental officials did not think they could trust the results of studies commissioned by the companies whose behaviour they were meant to regulate, which is possibly one of the reasons why their consultant was expected to build their own capacity to undertake these studies themselves.

There was of course no way that 215 issues could be incorporated into a single regulation, but the draft regulation that emerged in November 2002 was nevertheless a good deal more detailed than the one I had begun to formulate in 1998. While preliminary social mapping and landowner identification studies would now have four aims, full-scale studies would have 16 of them — double the number that I had proposed. But another draft that emerged one year later went even further: preliminary studies would now have seven aims, while full-scale studies would have 22. This proliferation of aims and objectives was largely due to the fact that each successive draft had more to say about the nature of the social things that were to be described, rather than the nature of the actions to be taken to reduce the risk of social conflict. And for this work of thicker description, both drafts specified a list of methodologies to be used in the collection of relevant information, ranging from rapid rural appraisal to participant observation, and even went on to specify the number of ‘expert days’ that should be spent on the collection of information about populations of different sizes. Even so, two things were notably absent from both of these draft regulations. First, they said nothing at all about the institutional arrangements through which the studies would be commissioned, their findings disseminated, or their recommendations implemented. Second, the list of methodologies made no reference to the well-worn practice of land investigation or the collection of genealogies.

The second of these omissions reveals a fault that was already present in the deliberations of the Action Team. Several of the members — especially the former kiaps and the anthropologists — assumed that licence-holders would continue to pay for these things to be done because Chevron staff had already been doing them in the areas where development licences had already been granted. It thus appeared that a certain form of landowner identification had already been institutionalised in the petroleum sector, just

as it was in the hard-rock mining sector, and social mapping was an additional activity that would need to be regulated because it had not yet been institutionalised. The point that got lost in the thinking of the would-be regulators — myself included — is that a regulation applied to the combination of full-scale social mapping and landowner identification studies would need to specify the way in which the two kinds of activity would henceforth be combined to produce better records of local custom and practice in each licence area, and hence to produce better local solutions to the problems of identification, representation and distribution.

The draft regulations that emerged from the Department of Petroleum and Energy still recognised that these were the problems that had to be solved, as well as that solutions would need to be tailored to local circumstances, but the lengthening list of things to be described, and the list of methods to be used for this purpose, read as if they were part of a regulation that ought to be applied to the practice of social impact assessment under the terms of the Environment Act. This was somewhat ironic, because officials in the Department of Environment and Conservation had already tried and failed to produce a regulation for that purpose. In both cases, bureaucratic deliberations were creating levels of complexity that met with growing resistance from industry representatives, and that appears to be the main reason why neither of the regulations ever got to be gazetted.<sup>10</sup> So the developers of oil and gas projects are not legally obliged to do much more by way of social mapping and landowner identification than to tell the Department of Petroleum and Energy two things: first, how they think the landowners in a licence area should be divided into land groups that someone might like to incorporate, and second, which individuals the Minister might like to invite to the negotiation of a benefit-sharing agreement.

## **8. The emergence and blockage of a third way, 1999–2006**

While departmental officials were elaborating the regulation that got away from them, former kiap George Clapp and anthropologist Laurence Goldman, both of whom had been members of the Action Team, were seeking a pragmatic solution to the question of how

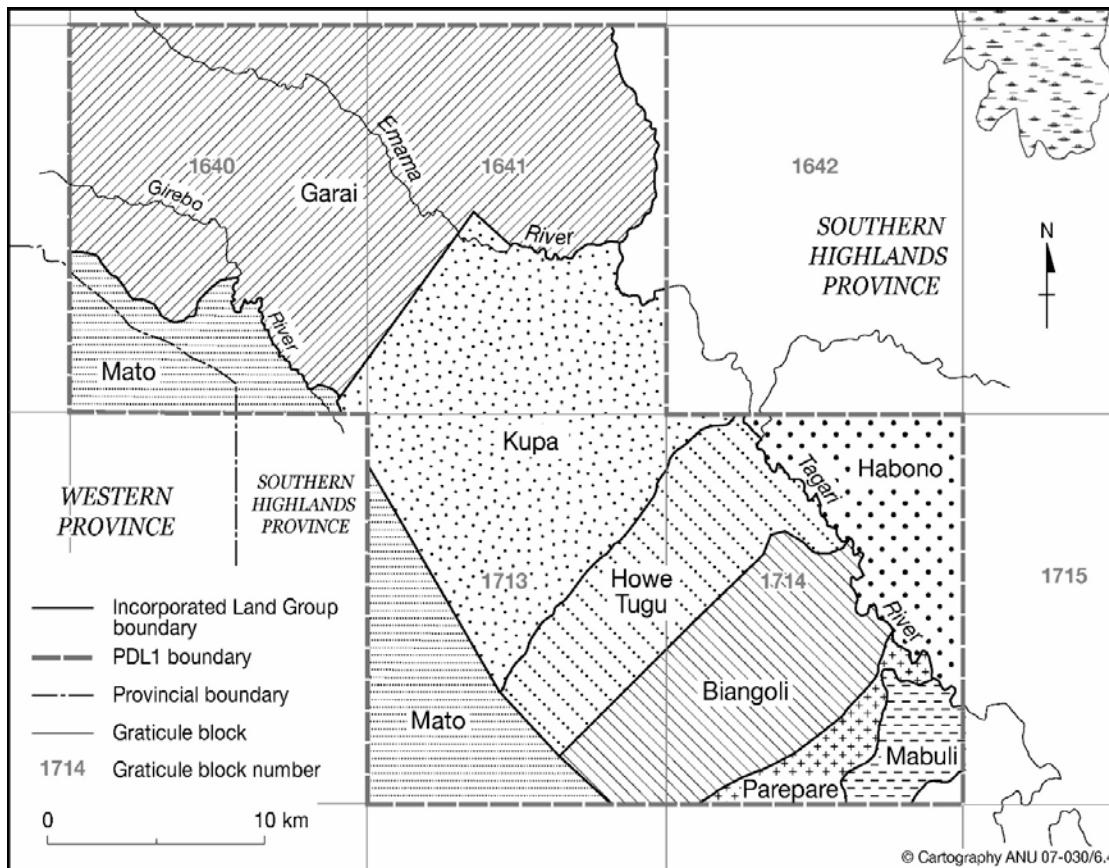
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<sup>10</sup> Sam Koyama and Laurence Goldman, personal communications, June and October 2018.

to produce a set of incorporated land groups in the Hides licence area that would simultaneously satisfy the landowners and the bureaucrats. This was no easy task because the Huli-speaking people of this and neighbouring areas have a well-deserved reputation for quarrelling about many different things, including land rights, and also like to claim rights of residence in several different places by virtue of their different personal connections (Glasse 1959; Allen 1995; Ballard 1997; Goldman 2007a). That is why Clapp did not think that land group incorporation would solve more problems than it would create. However, the bureaucrats were not inclined to countenance an exception to the preference expressed in the new legislation, so land groups would somehow have to be incorporated.

Goldman had already conducted a preliminary social mapping study of the licence area in 1999 and recommended the formation of what he called 'zone ILGs', each of which would consist of all the landowners then resident in one geographical zone, regardless of their clan affiliations (see Figure 3). The zones were distinguished from each other by virtue of the greater intensity of social interaction within them than between them. In this case, local custom and practice was taken as a reason to avoid the conduct of a more detailed form of land investigation, or the establishment of smaller land groups with exclusive rights to specific portions of land, because experience had shown that any one parcel of land could rightfully be claimed by members of more than one clan, so this would be a recipe for endless disputes (Goldman 2007b: 108–12). This proposal was initially supported by the bureaucrats in Port Moresby, but they changed their minds in response to demands from landowner representatives from the neighbouring Hides 4 licence area who were also based in the national capital. At the same time, the Hiwa Tuguba Hides Association, which claimed to represent all the landowners in the Hides licence area, was demanding a substantial share of the World Bank's technical assistance funds in order to cover the cost of incorporating their own land groups in a manner of their own choosing (Clapp 2002: 318–20).

**Figure 3: Zone ILGs proposed for the Hides licence area (PDL 1)**



Source: Goldman 2007: 109.

The work of social mapping was then disrupted in another way, as Chevron decided to sell its interest in the future development of PNG’s gas reserves to ExxonMobil in 2001, and then, in 2003, to sell its interest in the existing oil export operations to its joint venture partner, Oil Search, which had previously purchased BP’s interest in the Hides gas power plant in 1999, and which retained a stake in the further development of the gas reserves. Some of the resources that might have been devoted to a new round of full-scale social mapping studies after 2001, even in the absence of a government regulation, was diverted to the task of updating the social impact assessment of what was then still conceived as a proposal to pipe the gas to Australia (Simpson et al. 1998; Goldman 2005).

At the beginning of 2005, Joe Gabut, who had been Secretary of the Department of Petroleum and Energy since it was first established in 1997, was still making public complaints about the refusal of landowner representatives in the Hides licence area to accept that they could not be given responsibility for the conduct of social mapping



studies, since the Oil and Gas Act clearly assigned this responsibility to the licence-holder. He also observed that “[t]he recent serious assault by the Hiwa Koma landowners on a senior [project] co-ordinator is a criminal act and cannot be entertained by this country as the way to solve landowner problems” (Gabut 2005). Shortly afterwards, he was appointed to a new position as the government’s Gas Project Coordinator, which initially seemed to relieve him of the need to deal with these problems on a daily basis so that he could focus on the negotiation of a development agreement with ExxonMobil and its partners. However, it was Gabut who led a delegation of government officials that went to meet with ExxonMobil representatives in their Brisbane office in June 2006 to discuss a new solution to these problems. The nub of their argument was that the problem of representation had become intractable because the individuals acknowledged as landowner representatives thought they had a right to decide who else should be counted as landowners and, more importantly, how landowner benefits should be distributed between them. To break this impasse, it was proposed that landowner identification studies should produce lists of the individual members of each clan in each licence area, and that each member, whether male or female, should receive an equal share of the cash benefits earmarked for that group. This would take the heat out of the question of who should be invited to represent the landowning clans in the development forum, since their only role would be to discuss the overall size and composition of the landowner benefit stream.

This resort to individualism was not an entirely new solution to the problem of distribution. Something similar had been proposed by one of the industry representatives in the Action Team in 1998 and was already implicit in the approach that John Burton and I had recommended in the Unisearch guidelines of 1993. Yet this was the first time that government officials had openly conceded their inability to deal with the conflicting claims being made by executives of the representative bodies contained in Tony Power’s ideal model of landowner organisation. Now the bureaucrats were prepared to take the escape route offered by the Oil and Gas Act and decide that the process of land group incorporation might be more trouble than it was worth. But the other trouble was that the four full-scale social mapping studies that had so far been undertaken — all along the

route of the proposed gas export pipeline<sup>11</sup> — had not come up with the sort of ‘telephone directory’ that the officials were now demanding, and there was nothing in the Oil and Gas Act, nor any associated regulation, to say that this is what they should produce.

In August 2006, Laurence Goldman, John Burton and I met with three officials from the Department of Petroleum and Energy to design a method of producing and maintaining a version of Burton’s Village Population System — now known as Community Express — that would contain the genealogies of all the customary owners of the proposed licence areas and buffer zones associated with the existing proposal to export gas from PNG. We worked out that the database could probably be assembled within two years, despite the size of the target population, if enough people were properly trained and supervised in the collection of the genealogies. But we reckoned the cost of such an exercise to be about a million US dollars. By that time, the World Bank’s technical assistance money had been used up, government regulators were unable or unwilling to impose the cost on the developers, and ExxonMobil’s executives had already convinced themselves that the landowner problem was the government’s problem, not their own. So this window of opportunity closed within a few months of being opened.

## **9. The benefit-sharing shemozzle, 2008–2009**

By the end of January 2007, ExxonMobil and its partners had decided that it would make more economic sense to build a liquefaction plant in PNG and ship the liquefied gas to customers in northeast Asia than to proceed with the previous plan to pipe the gas to Australia. This decision marked the birth of what was henceforth to be known as the PNG LNG Project. It entailed a further revision of the social impact studies that had already been completed and the production of full-scale social mapping and landowner identification studies for all of the proposed licence areas and buffer zones, including the zone around the liquefaction plant, in advance of the development forum that was initially expected to take place before the end of 2008. The project proponents persuaded the PNG Government to sign a development agreement in May that year, but the umbrella

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<sup>11</sup> The routes of the oil and gas export pipelines are not identical, but there is a substantial overlap between the groups of people claiming customary ownership of the land within their respective buffer zones.

benefit-sharing agreement was not signed until May 2009, and that was followed by a succession of more specific benefit-sharing agreements for each of the licence areas and buffer zones.

### **9.1 Another task force**

There is a sequence of 15 PowerPoint presentations, containing a total of 140 slides, that testifies to the formation of a task force or working group in July 2008 to consider possible solutions to the various aspects of the landowner problem in advance of the umbrella development forum that was still expected to take place in October that year, but was eventually convened in Kokopo, the capital of East New Britain Province, in April 2009. One of these presentations contains a proposal for the appointment of an independent observer to attend this meeting in order to observe “the manner in which the principles of integrity, independence and transparency are observed in the entire process” and “the manner in which the rights and responsibilities of our project area communities are respected”. I have copies of the whole set of presentations as I was asked to perform this role myself, although I was later ejected from the meeting at the behest of the head of the Department of Petroleum and Energy, whose Minister was notionally responsible for organising it.<sup>12</sup> This appears to confirm a suspicion that the task force itself was not exactly representative of the government whose crest appears on each of the presentations, but included some former government officials who were now employed by the project proponents to manage community (or landowner) affairs.<sup>13</sup>

My point here is not to suggest that ExxonMobil and Oil Search had somehow misappropriated the functions of the government, since a measure of collaboration between government and industry had been evident since the formation of the Action Team in 1998. The question is how they now proposed to deal with the landowner problem, given the wording of the Oil and Gas Act, the continued absence of a regulation on the conduct of social mapping and landowner identification studies, and the

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<sup>12</sup> According to Main and Fletcher (2018: 12), representatives of Transparency International suffered the same fate. This is incorrect. That organisation was asked to nominate one of the three independent observers, but wanted to nominate all three, so the invitation was withdrawn.

<sup>13</sup> Sam Koyama, personal communication, June 2018.

government's failure to persuade ExxonMobil to pay for the production of a 'telephone directory'.

Full-scale social mapping studies of the proposed development licence areas, including the 'brownfield' areas from which oil was already being exported, did not begin to reach the Department of Petroleum and Energy until September 2008, but the task force assembled in July that year was already aware that these studies would only serve to identify the clans with land rights in each area. Departmental officials were still wedded to the idea that it would be necessary to undertake some sort of census to identify the individual beneficiaries in each of these clans in order to avoid what they called "interference by middlemen or organisations acting as agents" in the distribution of landowner benefits. However, even if this version of the telephone directory only involved a list of people's names, with the sex, age and place of residence of each person on the list, there would not be time to get the job done before it would be time to invite their representatives to attend the development forum. This meant that some solution would have to be found to the problems of representation and distribution before a definitive solution had been found to the problem of identification, and the process of landowner identification would have to take place after the benefit-sharing agreements had been signed and the development licences granted.

The task force came up with nine alternative solutions to the problem of representation, the last of which was described as "the extreme option where every landowner gets to represent him or herself which is really unrealistic". Each alternative was subjected to a conventional SWOT analysis to determine the strengths, weaknesses, opportunities and threats that it contained, and was then assessed for its level of compliance with eight principles or criteria. Would it be transparent, equitable, manageable and realistic? Would it reflect the mandate of the landowners? Would it contribute to the security of the project? Would it deal with the problems that already existed in the brownfield licence areas, and would it be sufficiently flexible to produce a different kind of solution to the same problems in the greenfield licence areas now being added to the project?

It is not clear how the participants went about the business of assigning numerical scores to each of the alternatives, but the one that came out with the top marks was the one in which the landowners would be represented by the 58 ward councillors who were

elected to represent them in their respective local-level governments. The second most popular option was to hold separate elections in each of the census units or villages containing the landowners, recognising that this would produce a larger number of representatives because some council wards contain more than one census unit. Both of these forms of representation scored almost twice as many votes as the two alternatives ranked next on the scorecard. One of these was to have land group chairpersons represent the brownfield landowners and clan agents represent the greenfield (mostly Huli) landowners to the north. The other was to hold elections in which these individuals, of whom there would be more than a thousand, would themselves elect a smaller, and hence more manageable, number of representatives. The least popular option was for landowners to be represented by the unelected executives of landowner associations, which surely indicates the extent to which government officials had grown sick and tired of being pestered by such people, and no longer thought that they represented anything much beyond their own personal interests. This option was even less popular than the 'really unrealistic' option of not having any landowner representatives at all, which would effectively make it impossible to hold a development forum.

## **9.2 The invitation list**

The thinking of government officials seems to have changed by January 2009, when 19 of them attended a workshop to decide who should be invited to represent the landowners at what was now being called the Umbrella BSA (Benefit Sharing Agreement) Forum. According to the minutes of this meeting, the executives of 'recognised' landowner associations should now be eligible to attend, as should the chairpersons of land groups incorporated after the completion of 'proper' social mapping and landowner identification studies and prominent leaders of project area clans from the greenfield licence areas. In addition, it was thought that invitations should be extended to women's representatives and church representatives nominated by project-impacted communities, and possibly to ward councillors as well, if local people insisted. Yet this last option was now considered to be the least appealing one because the councillors "are part of the state", and the councils to which they belonged would have their own representatives at the forum in any case.

In the event, 525 landowner representatives were invited to the umbrella forum. Most of them fell into the first three categories identified in the January workshop. Less than ten per cent were women. There was a smattering of church representatives and ward councillors, and even some former members of parliament who had now been recognised as prominent leaders of the landowning communities. This latter group included Sir Moi Avei, who had been the Minister for Petroleum and Energy between 2002 and 2006, was dismissed from parliament in 2007, and had now reinvented himself as a representative of the landowners attached to Portion 152. It also included Hami Yawari, a leader of the Foi people who had *not* been counted as customary owners of PDL 2 in 1994. He had been the Governor of Southern Highlands Province between 2003 and 2007, when he lost his seat to a prominent Huli leader, Anderson Agiru, who was able to attend the forum in his official capacity without having to make any claim to be a project area landowner.

ExxonMobil assumed responsibility for organising transport and accommodation for the people on the invitation list, while the government agreed to pay them a daily allowance once they arrived in Kokopo. It is not clear how many of the people on the list took advantage of this opportunity, though most of them seem to have done so. The start of proceedings was delayed for a week or so while a body called the Digimu Landowners Association sought and obtained a national court order for another 53 people to be invited to the forum on the grounds that the original invitation list had not been based on full-scale social mapping and landowner identification studies, as required by Section 49 of the Oil and Gas Act. Section 169A required the Minister to take account of this judgment, so the government chartered a plane to fly the extra 53 people to Kokopo on the very next day. This prompted another group of would-be landowner representatives to lay siege to the ExxonMobil office in Port Moresby to protest against the court decision and demand that they be granted free passage as well. Company staff rejected this demand, but some other landowner representatives had clearly made their own way to Kokopo before the proceedings got under way and others may have turned up later. According to one estimate, there were as many as 2,000 of them present at some stage in the negotiations (Korugl 2009).

### **9.3 The deal on the screen**

On the opening day of the proceedings, hundreds of these more-or-less-officially recognised landowners crowded into a meeting hall owned by the Catholic Church and managed to arrange themselves into groups attached to the different licence areas and buffer zones. There they were entertained with speeches from the government ministers and other dignitaries parked on a stage at the front of the hall, including one by Governor Agiru that got the Huli representatives very excited because it was delivered in their own language and promised them a much better deal than the one that was officially on offer. The official offer took the form of a Powerpoint presentation projected onto a giant screen facing the crowd, which included a number of slides that were evidently meant to satisfy Section 49 of the Oil and Gas Act by proposing an equitable distribution of landowner benefits as a prelude to further discussion with the beneficiaries.

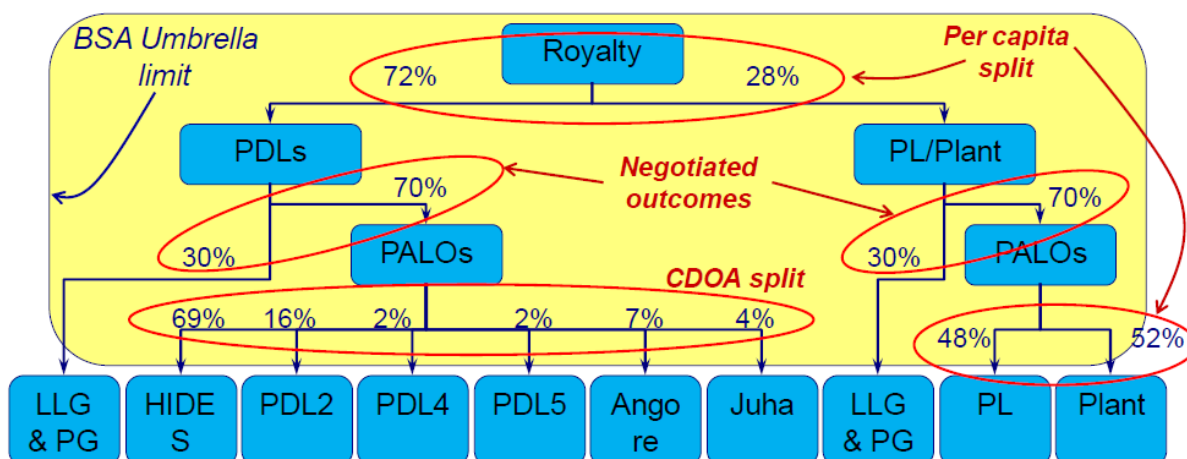
There were two slides showing the proposed distribution of the royalty benefit and the equity benefit in the form of flow charts (see Figure 4). These two slides assumed that the royalty benefit would be worth about US \$1.78 billion over the life of the project, while the equity benefit provided at government expense would be worth about US \$1.72 billion. Both slides began with an initial division of the relevant benefit stream between the development licence areas and the buffer zones around the pipeline and the plant site, supposedly based on the relative size of their landowning populations. The development licence areas would thus get 72 per cent of the royalty benefit and 67 per cent of the equity benefit. The reason for this discrepancy is that none of the equity benefit would be allocated to the brownfield licence areas because their entitlement to 'free equity' had already flowed through the benefit-sharing agreements for the existing oil export projects.

Figure 4: The government's proposal for distribution of the royalty benefit, April 2009

## Benefits Proposal - Royalties



### Royalty - PALO, LLGs, PGs (K5.39 billion)



The above final split has to be paid in accordance with s176 of the O&GA. 40% cash, 30% Future Generations Trust, 30% Community Investments Trust

The two benefit streams emanating from the LNG Project would then be divided between the landowners and their respective provincial and local-level governments in fixed proportions. The landowners in both categories would thus receive 70 per cent of the royalty benefit and 90 per cent of the equity benefit. Finally, the benefit streams allocated to landowners in the development licence areas would be divided between those areas in accordance with the volume of gas that they were thought to contain, while the benefit streams allocated to the rest of the landowners would be divided between the pipeline corridor and the plant site buffer zone in accordance with the size of their respective landowning populations. Since the Hides (PDL 1) and Hides 4 (PRL 12) licence areas were thought to contain most of the gas, the result of this arrangement was that their landowners would get 69 per cent of the royalty benefit, and 71 per cent of the equity benefit, allocated to all of the licence areas. Landowners in the pipeline corridor would get 48 per cent of both benefit streams allocated to the buffer zone landowners, while



those around the plant site would get 52 per cent because they were thought to have a slightly larger population.

These were not the only two benefit streams directed towards the landowners. Their landowner companies would be eligible for business development grants; they were also meant to benefit from development levies and infrastructure development grants allocated to their provincial and local-level governments; and they would be given preference in the allocation of jobs during the four years it would take for the project's own infrastructure to be built. However, the proposed division of these benefit streams between different geographical zones was not spelt out in any detail in the PowerPoint presentation.

Although this benefit-sharing proposal had clearly been the subject of protracted discussion between the regulators and the developers over a period of several months, it is not clear how many of the landowner representatives crowded into the church meeting hall were able to make sense of the slides projected onto the screen in front of them. The reader of this article might guess that many of them would have been a bit confused. However, some of them clearly knew the details of the offer in advance of the meeting, and one group, comprising a 21-person 'working committee' from PDL 1, had already assembled a counter-proposal in the form of another PowerPoint presentation with almost as many slides as the one compiled by the government officials.

In any case, hard copies of the government's presentation were printed and distributed to the assembled landowners, and those from each licence area and buffer zone were dispatched to different venues to contemplate their responses. This activity was meant to last for a day or two, but actually lasted for six days. The delay might have been partly due to a form of mental indigestion amongst some of the landowners, but was largely due to the fact that the size of each group had now been swollen by the arrival of uninvited guests, and each group was now required to nominate just ten of their number, including one woman, to attend the 'real' development forum at which the negotiations would proceed, since there would not be enough space for more than 150 people in the room allocated for this purpose. It was at this juncture, as police cordoned off the space around the meeting room, and a mob of disgruntled landowner representatives protested at their

exclusion, that I made my own exit from the fray.<sup>14</sup> Eighteen days later, an agreement was finally signed after a good deal of argumentation, both inside and outside the meeting room, that was mentioned in contemporary newspaper articles but not properly documented in any subsequent report.

#### **9.4 The deal half done**

Most of the concessions made by the national government related to the value of the business development grants and infrastructure development grants, and they were open to negotiation from the outset. The government agreed that local landowner companies would receive business development grants with a combined value of K120 million (US \$48 million) during the construction phase of the project, and these would be divided between the development licence areas and the buffer zones in the same proportions as the royalty benefit (GPNG 2009: 28–29). The landowner companies would then have an opportunity to bid for a share of the construction work to be funded through infrastructure development grants with a combined value of K1.2 billion during the course of the next decade. In addition, the national government committed a sum of K460 million to nine ‘high-impact’ infrastructure projects in and around the greenfield licence areas in what was then part of Southern Highlands Province but would soon become the new (Huli-dominated) Hela Province. Landowners were given the option of purchasing additional equity in the project, but this would not be ‘freely carried’ by the state (ibid.: 22). From the government’s point of view, the best thing about the agreement is that it did not require any further amendments to the Oil and Gas Act.

Despite the number of landowner representatives who were present during the course of the negotiations, only 267 of them signed the benefit-sharing agreement. Of these signatories, 172 were clearly assigned to one of the licence areas or buffer zones, while the other 95 appeared in two separate lists where their geographical affiliation was generally not specified. This second group included most of the beneficiaries of the national court order made at the end of April. Even amongst the first group, only 98 appeared on the list of 525 representatives who were officially invited to the forum,

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<sup>14</sup> My final task as an independent observer was to assist in the production of nametags for uninvited landowner representatives.

which meant that the gatecrashers accounted for almost two thirds of the signatories. A similar proportion of the signatories who were clearly assigned to one of the licence areas or buffer zones were assigned to the two Hides licence areas (PDL 1 and PRL 12), which suggests that the number of signatories was partly correlated with the volume of gas contained in the areas they claimed to represent. But there were no signatories at all from the adjacent Angore licence area (PRL 11) since the landowners present at the forum were all flown home at an early stage in the proceedings because of a renewed outbreak of tribal fighting in the area.

The legal status of this agreement was questionable — and several people did question it — because Section 48 of the Oil and Gas Act says that a development forum must be held “at a place close to the proposed licence area to provide ease of access”. Kokopo was clearly nowhere near any of the licence areas, but the text of the agreement foreshadowed the conduct of separate forums in each of the licence areas and buffer zones. It also stated that invitations previously made to landowner representatives had been made in accordance with the Act (GPNG 2009: 19), regardless of the fact that most of the landowner representatives who now agreed with this statement had not actually been invited to participate in the forum, and that “the authorisation for these representatives to attend the UBSA Forum does not mean recognition by the State for them to perform other roles as representatives of their Licence Areas” (ibid.: 21).

## **10. The state of intractability since 2010**

Although the local development forums were all concluded by the end of 2009, with no substantial amendment to the terms of the umbrella agreement signed in Kokopo, a collection of dissenters continued to challenge the legal validity of the results, partly on the grounds that the problem of landowner identification had not yet been solved (Nicholas 2009; GPNG 2015). The loudest of the dissenters were Hami Yawari, the former Governor of Southern Highlands Province, and Simon Ekanda, an especially litigious tribal leader who wanted everyone else to tell him how he could be “an undisputed Tuguba Tribe Chairman if [he] was not a legitimate landowner and tribal leader and son of Tuguba who owns four gas fields supplying gas to the PNG LNG projects?” (Anon.

2014a).<sup>15</sup> The judges of the National Court responded to this wave of litigation by ordering or proposing that the cases be subject to a form of judicial mediation known as alternative dispute resolution (Nicholas 2009; Talu 2010a, 2010b). One of them, Justice Ambeng Kandakasi, ordered a halt to the distribution of any landowner benefits until this form of mediation had been conducted in all of the licence areas and buffer zones (Raitano 2011; Raitano and Talu 2011). Since Kandakasi was already chairing the judicial committee responsible for such activities, the Chief Justice then appointed him to be the mediator (Anon. 2011a). ExxonMobil, Oil Search and the Department of Petroleum and Energy sought leave to appeal against this sequence of decisions in the Supreme Court, but the Chief Justice denied their request on the grounds that only four out of 34 cases had so far been subject to specific mediation orders, and the parties to each case still had the option of returning to court if the mediation was unsuccessful (GPNG 2011).

The bureaucrats were unhappy with this form of judicial intervention because they had already engaged a private company called Heritage Consultants to facilitate the incorporation of land groups in the greenfield licence areas and the plant site buffer zone. The assumption here was that the problem of identification had already been resolved to the satisfaction of all stakeholders except those taking cases to the National Court, and it was now time to address the problems of representation and distribution. But the consultants were chased out of the Hides licence area in May 2011 (Anon. 2011b), and the whole exercise was suspended two months later, either because there were too many landowners who did not share the bureaucratic assumption, or else because the bureaucrats could not find the money to pay for its continuation (Alphonse 2011; Anon. 2011c, 2014b). Nevertheless, officials in the Department of Petroleum and Energy were still able to pursue their own bureaucratic solution to the landowner problem by means of a form of inquiry that came to be known as ‘clan vetting’, which only sought to identify the names of the customary groups holding different degrees of entitlement to each of the designated areas, and which formed the basis of a sequence of ministerial determinations published in the *National Gazette*.

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<sup>15</sup> Members of the Tuguba ‘tribe’ were now claiming partial ownership of all four greenfield licence areas.

The first appearance of clan vetting in the pages of the national newspapers implied that some landowner representatives thought it should inform the distribution of the K120 million in business development grants or 'seed capital' that was part of the umbrella benefit package agreed in Kokopo (Tapakau 2010). This might have been true if Tony Power's ideal model of social organisation had been incorporated into the benefit-sharing agreements and the landowner companies in each licence area or buffer zone had therefore been obliged to prove that they were owned by officially-recognised clans before they could access the money. But while vestiges of this model could still be detected in the brownfield licence areas, the agreements left the National Executive Council with the ultimate power to decide which landowner companies should be recognised as the representative companies in each area (GPNG 2016: 23). The business development grants were thus distributed in fits and starts through a process of political negotiation, and occasional litigation, amongst a large assortment of landowner company directors and a smaller group of national government ministers, provincial governors and other members of parliament, nearly all of which took place in the national capital.

In theory, the seed capital should have been spent on the backhoes, bulldozers and other items of equipment that would have enabled the landowner companies to bid for some of the building contracts funded through the infrastructure development grants that were meant to be disbursed at the rate of K120 million per annum over a period of ten years. However, much of it was apparently used to cover the expenses or debts incurred by the directors in their struggle to obtain a share of it (Alphonse 2015a). The same process of negotiation and litigation was then extended to the infrastructure funds themselves, prompting government ministers and officials to declare, from time to time, that these were not to be treated as cash handouts to 'paper landowners' camping in Port Moresby (Anon. 2012a, 2012b; Eroro 2012). In theory, this money should have been allocated to projects endorsed by the relevant provincial and local-level governments and then approved by the senior government officials who were members of the Expenditure Implementation Committee established under Section 178 of the Oil and Gas Act or the Economic Corridor Implementation Agency that was supposed to assume this function at some point in the future (GPNG 2009: 41–2). The first of these bodies seems to have spent two years producing guidelines for the assessment of project proposals (Anon. 2011d), in which time the total cost of the proposals being assessed had grown to K5 billion

(Mabone 2012). The money then proceeded to flow, also in fits and starts, from the national capital towards each of the licence areas and buffer zones where it should have been spent, prompting all manner of speculation about the amounts that had been misappropriated along the way (Anon. 2012c, 2012d, 2014d, 2015a, 2016a; Kelola 2013). But as it did so, the task of vetting the project proposals was removed from the Expenditure Implementation Committee without being transferred to the Economic Corridor Implementation Agency, which was never formally established or funded to perform this task.<sup>16</sup>

It would take a commission of inquiry, accompanied by a major exercise in forensic accountancy, to figure out what actually became of all this money, but it appears that all of the funds earmarked for high-impact infrastructure projects, and nearly all of the seed capital for landowner companies, had been disbursed before the first shipload of gas set sail for Japan in 2014 (Anon. 2013; Nalu 2013). And yet the unseemly scramble for access to these benefit streams served as a distraction from the problem of deciding who would receive the royalty and equity benefits that would only be available for distribution once the LNG Project had entered its operational phase. This meant, in effect, that the state had four and a half years in which to find a solution to the landowner problem that could have ignored the competing demands of different groups of landowner company directors and their friends (or enemies) in the national parliament. But when the time was up, the Minister for Petroleum and Energy announced that the clan vetting process had only reached the end of its first phase, through which a set of genuine customary groups had supposedly been identified. The results of that exercise would now have to be verified by an independent issues committee chaired by former secretary Joe Gabut, and the second phase would then proceed to deal with the problem of how the money should be distributed between the beneficiaries (Mauludu 2014; Wrakuale 2014; Kolma 2015).

Simon Ekanda (the litigious tribal leader) thought this was totally outrageous because Justice Kandakasi had barely begun the process of alternative dispute resolution in the greenfield licence areas (Anon. 2015b), and the judge seems to have agreed with him, so Gabut's committee wound itself up (Elapa 2015). Kandakasi and his team of mediators

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<sup>16</sup> John Brooksbank, personal communication, January 2019.

did manage a visit to the Angore licence area and one segment of the pipeline buffer zone in 2015 (Alphonse 2015b; Pok 2015), but their budget dried up before they could settle anything in those areas, let alone proceed to another one (Anon. 2016b, 2017a; Moi 2016). Meanwhile, dissenting landowners were still seeking court orders to prevent government officials from proceeding with the second phase of their clan vetting exercise once they found the money to pay for their excursions from Port Moresby (Anon. 2014c; GPNG 2015; Pakawa 2016). The contest between the judicial and bureaucratic approaches to the landowner problem even persisted after landowners in the Hides licence areas threatened to turn off the gas taps in August 2016 (Main and Fletcher 2018: 21). They had to be placated with a cheque for K35 million that was said to represent the annual sum of the infrastructure development grants to owing to their local authority, but the cheque then bounced because of a national court injunction (Anon. 2016b; Pakawa 2016; Yafoi 2017). It was only in 2017 that the contest between these two approaches was seemingly resolved by an agreement that alternative dispute resolution and clan vetting were really just different ways of achieving the goal of landowner beneficiary identification, and while Justice Kandakasi would confine his version to the Angore licence area, where the disputes were most intractable,<sup>17</sup> the bureaucrats would be free to persist with their own version in all the other licence areas and buffer zones, and then the beneficiaries would begin to get their benefits (Anon. 2017b; Nicholas 2018).

## **11. Conclusion**

Eight years after the umbrella agreement had been signed, and three years after the first shipload of gas had set sail for Japan, the royalty and equity benefits that should have been allocated to the project area landowners were still locked up in government trust accounts (if they had not been misappropriated) because the problem of landowner identification had not yet been solved. The first royalty payments were made to the bank accounts of 83 clans associated with the plant site buffer zone in September 2017 (Sii

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<sup>17</sup> This was the only licence area in which disputes about the legitimacy of different landowner companies had prevented the release of business development grants during the project's construction phase (Anon. 2013; Kana 2014).

2017).<sup>18</sup> Needless to say, this news was not well-received by landowner representatives from other areas. Most of them were still waiting for their money one year later (Teme 2018).

It is easy enough to argue that the PNG government should have found some way to solve the landowner identification problem before dealing with the problems of representation and distribution. Some have also argued that the fault ultimately lies with the project's developers and financiers, not only because they leant on the government to speed up the approval process, but also because they fooled the government into thinking that it would receive a much bigger revenue stream than has since materialised, and thus reduced the government's capacity to honour the promises made to the landowners in the benefit-sharing agreements (Flanagan and Fletcher 2018; Main and Fletcher 2018).

This paper has shown how the corporate players could also be accused of blocking the government's efforts to regulate solutions to the landowner identification problem in 2003, and then to avoid making a substantial financial contribution to the solution that government officials were proposing in 2006. However, it has also revealed the many inconsistencies and contradictions in the approaches that different stakeholders have taken to different aspects of the landowner problem in the oil and gas sector over the course of the past 30 years. These differences cannot be reduced to a contest between developers and regulators. Company staff and government officials have argued amongst themselves, and these arguments have drawn other stakeholders into the fray — including lawyers, anthropologists, and landowner representatives.

It took government officials a long time to realise that the idealistic approach advocated by Tony Power was not going to solve the landowner problem in the Huli-dominated greenfield licence areas. The slow dawn of this realisation can hardly be blamed on the licence-holders, especially once Chevron had sold its interest in these areas in 2001. Yet the preference for this approach that was already expressed in the Oil and Gas Act received additional reinforcement with the passage of amendments to the Land Groups

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<sup>18</sup> In accordance with Section 176 of the Oil and Gas Act, 40 per cent of a benefit stream then worth K15.6 million was paid out in cash, while the balance was invested in trust funds for community development projects and the benefit of future generations.



Incorporation Act in March 2009, shortly before the Kokopo development forum. These amendments required all existing land groups to reincorporate themselves under stricter terms and conditions in order to take advantage of a new legal opportunity to register titles over their customary land (GPNG 2008). Since Chevron staff had managed to arrange the incorporation of 480 land groups in the brownfield licence areas between 1992 and 2003 (Goldman 2009: 3.37), one might have thought that the landowner problem in these areas could be addressed by reconstituting these groups in accordance with the new legislation.

This could not be done immediately, since the legislation did not come into effect until 2012, but notices published in the *National Gazette* showed no sign of any such activity during the five-year grace period that was allowed before these groups would be divested of their legal personalities. In 2017, the Lands Minister announced that the grace period would be extended for another five years, citing the government's need to accommodate the interests of big resource companies. ExxonMobil's managers considered this to be the government's problem, not their own, since the government was responsible for the distribution of landowner benefits. However, the process of clan vetting was clearly not leading towards a solution, so Oil Search reluctantly accepted that this was part of the legacy inherited from Chevron, and commissioned a team of consultants to sort out the mess.<sup>19</sup>

In May 2014, a few days before the first shipload of gas set sail for Japan, the *National Gazette* carried an interim ministerial determination of the identity of the landowner beneficiaries in all of the licence areas and buffer zones except for the Kutubu, Gobe and Juha licence areas. This determination was based on the first phase of the clan vetting exercise that had already been undertaken by government officials, and even covered the Angore licence area (PDL 8) where Justice Kandakasi was still in search of an alternative solution to the problem. A total of 1,156 clans listed in this notice were variously assigned to different villages, ethnic groups, tribal regions, graticular blocks or segments of the pipeline corridor. However, to judge by notices published in the *National Gazette*, there were barely two dozen clans from all these areas that applied to be registered as

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<sup>19</sup> John Brooksbank, personal communication, October 2018.

incorporated land groups in the five years from 2013 to 2017. Whatever becomes of current efforts to reincorporate the land groups already present in the brownfield licence areas, agents of the post-colonial state appear to have reinvented the colonial practice of appointing clan agents along the pragmatic lines that were pioneered in the development of the Panguna copper mine, putting aside the idealistic preferences of the Oil and Gas Act, ignoring the legal role of the Land Titles Commission in the appointment of such individuals, and forsaking the tiresome requirement to ‘walk the boundaries’ of their separate fiefdoms.<sup>20</sup>

The individualistic approach that was favoured by the regulators between 2006 and 2009 also seems to have fallen by the wayside. The construction of a list of individual beneficiaries by means of a census would have taken less time and money than the construction of a genealogical database, and could probably have been accomplished in at least some of the licence areas or buffer zones before the development forum was convened. This would not have provided an ideal solution to the problem of landowner identification, since the application of this method in the Porgera Valley produced a sequence of lists with an ever-increasing number of ‘phantom’ landowners on them (Burton 2014: 44), and this would also be likely to happen in the Huli-dominated greenfield licence areas, where local people have a similar cultural disposition to identify themselves with several different places of residence and therefore be counted more than once. But even the application of this method seems to have required more time and money than the regulators and developers were willing or able to invest in it. In any case, an individualistic solution to the problem of distribution did not appeal to the more idealistic national stakeholders, especially members of the legal fraternity, who thought it would undermine the integrity of customary social groups, and was equally unappealing to those ‘prominent leaders’ who wanted to control the distribution of landowner benefits in order to line their own pockets, reinforce their own authority, or simply pay off the debts they had accumulated while they waited for the state to keep its promises.

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<sup>20</sup> This does not mean that all talk of land group incorporation has ceased in the greenfield licence areas; it only means that the talk has no definitive or practical outcome (Minnegal et al. 2015).

Nevertheless, the pragmatic approach embodied in the colonial form of landowner identification, or even in the Land Disputes Settlement Act, is unlikely to come up with a better solution unless everyone agrees that landowner benefits should be distributed between customary groups in accordance with the relative size of their landholdings in each licence area or buffer zone, and unless the developers or regulators are then prepared to invest an even greater amount of time and money in walking the boundaries and making the maps. This approach did not yield a satisfactory outcome in the Gobe licence areas and it was largely abandoned before the passage of the Oil and Gas Act. Indeed, this constitutes another reason for the failure to reconstitute the land groups already established in the brownfield licence areas, since the amended legislation requires each group to provide a sketch map of its land boundaries before it can be granted a certificate of recognition. There is no point in engineering an interminable series of disputes over the location of such boundaries in each area when there is no proposal to use them as the basis for deciding which customary groups should receive how much of a landowner benefit stream.

The other pragmatic approach embodied in George Clapp's distribution of cash to clan agents in public gatherings might have worked reasonably well with payments of a few thousand kina (in small denomination notes), but would it work on a much larger scale, with payments of several million? We do not know the answer, since the experiment has not been undertaken. Instead, the Department of Petroleum and Energy has opted for another version of the same approach, by letting the clan agents decide how they will distribute the money paid into clan bank accounts. The element of accountability that was present in the public gathering has therefore been sacrificed on the altar of expediency. But even this approach has not yielded a simple solution to the problem. Government officials already had the names of customary groups provided to them in the full-scale social mapping studies of each licence area and buffer zone, and all they have done since then is to convene meetings of prominent (and normally male) leaders from each area and get them to verify or amend the names on the list and then seek some agreement about the division of the spoils between the groups thus named. But the anthropologists who did the original work would not be at all surprised to learn that this kind of public gathering does not lend itself to a consensus. What it does is encourage a form of competition or conflict in which the number of would-be clan leaders claiming different

shares of a landowner benefit stream, and the number of arguments about which of them is genuine and which of them is not, both tend to grow in proportion to the size of the prize that they have yet to receive. The leaders of the plant site landowners might have found a way to call a temporary halt to this kind of disputation in order to let the stream flow in their direction, but once it flows the arguments are likely to resume, as leaders are accused of stealing money from the clan accounts that they control. That is what happened on Bougainville.

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