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Abstract

This paper will present the preliminary findings of a research project into the impact of legislative legitimization of environmental damage on corporate governance in multinational companies and on public governance in the nation state. The environmental devastation of the Ok Tedi mine in Papua New Guinea (PNG) will be the focus of the paper.

Keywords

Blurring, lines, environmental, responsibility, corporate, public, governance, was, circumvented, Tedi, Mining, Limited, disaster

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**BLURRING THE LINES OF ENVIRONMENTAL
RESPONSIBILITY:
HOW CORPORATE AND PUBLIC GOVERNANCE WAS
CIRCUMVENTED IN THE OK TEDI MINING LIMITED
DISASTER**

JUDITH MARYCHURCH* & NATALIE STOIANOFF**

This paper will present the preliminary findings of a research project into the impact of legislative legitimization of environmental damage on corporate governance in multinational companies and on public governance in the nation state. The environmental devastation of the Ok Tedi mine in Papua New Guinea (PNG) will be the focus of the paper.

The responsibility for pollution resulting from mining, according to the OECD's Polluter Pays Principle (PPP) rests with the owners of the mining entity. This principle relies on a number of legislative instruments and often a mix of command and control mechanisms are advocated. The case of the Ok Tedi mine in PNG has demonstrated that this mix raises conflicts and paradoxes for the shareholders and the regulator. BHP Billiton and the PNG Government have utilized the long-standing legal principles pertaining to the separate legal entity status of a company to separate ownership and responsibility for on-going environmental damage. A series of specific legislative instruments, in addition to these long-standing legal principles, were used to establish the mine, permit on-going damage and allow the mine to continue.

This paper will focus on the legal aspects of the transfer of responsibility for the environmental disaster, including a comprehensive history of the Ok Tedi Mine as

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protected by legislative and other government action. This chronology of governmental action, taken with the actions of BHP at the equivalent time, will give rise to issues related to corporate governance and accountability to shareholders, as well as issues of public governance and responsibility to the welfare of the citizenry. In an era of enhanced focus on corporate governance, this analysis is pertinent to an understanding of how the principles of responsible corporate governance may be circumvented by legislative action.

I INTRODUCTION

Few would argue that those who cause environmental damage should be responsible for it, either through restoration of the environment as near as possible to its original state, or compensating those detrimentally affected by the damage done where it cannot be rectified. Difficulties arise, however, where the impact of the damage will be felt well beyond the current generation, and to two or more generations into the future. This is the case with the Ok Tedi mine in Papua New Guinea (PNG). In the corporate setting, there is the issue of precisely identifying the polluter: is it the corporation conducting the operation? What, if any, liability can be ascribed to the shareholders of the mining company? The separate legal entity doctrine, applied strictly, would lay sole responsibility on the mining company, and protect the shareholders, and directors or managers from liability. However, this fundamental principle is complicated today by the concepts of corporate governance, corporate social responsibility, and, specifically in the case of the Ok Tedi mine, by change in the identity of the corporate shareholders as liability for the environmental damage has been negotiated and transferred. The issues at stake take on a higher degree of pertinence when one of the shareholders is the government of a nation state. Public governance and responsibility to the citizenry of the nation and the communities of the areas most affected by the environmental damage comes to the fore.

According to the OECD's polluter pays principle,¹ responsibility for mining pollution rests with the mining entity, the polluter. In corporate terms, the payment by the polluting company ultimately affects the consumers of the ore, where the cost of pollution is passed on to the consumer, otherwise the cost is borne by the shareholders, through the reduction of profits from which dividends may be paid. It has been noted that parties who pollute may in fact receive a reward through tax expenditure.² In the case of the Ok Tedi mine, the polluter pays principle relies on a

¹ See OECD, *Environmentally related taxes in OECD Countries Issues and Strategies*, OECD Publications Service, Paris 2001, 9.

² Natalie Stoianoff, Mary Kaidonis and Lindel House, 'Do Tax Concessions for Mining Site Rehabilitation Work? Evaluating 10 Years of Reform' in Alberto Cavaliere et al (eds) *Critical Issues in Environmental Taxation* (2006) 513.

number of legislative instruments, including a series of nine statutory agreements specific to the Ok Tedi mine.³ Both command and control mechanisms are advocated to achieve enforcement of the polluter pays principle. As has been demonstrated,⁴ the case of the Ok Tedi mine raises conflicts and paradoxes for shareholders and regulators as a result of the mix of these command and control mechanisms. The Australian company, BHP Billiton, and the PNG Government used '[t]he discourse of 'future economic benefits' whilst responsibility and liabilities were shifted between them'.⁵ The mechanisms used to facilitate these shifts included fundamental legal principles permitting the separation of ownership and responsibility within a corporation, and the transfer of share ownership.⁶ The PNG government also passed a series of specific legislative instruments initially to establish the mine, and then to facilitate environmental damage, and, ultimately, to allow the mine to continue to the present.⁷

This article will present the initial findings of a longer-term project considering the impact of legislative intervention on the legitimization of environmental damage in relation to corporate governance in multinational companies. The role of the legislature of a nation state in facilitating such legislative action will come under a spotlight. A comprehensive history of the mine will be presented in order to set the scene for this discussion. This will be followed by an analysis of governmental action taken alongside the actions of the Broken Hill Proprietary Company (BHP) at the equivalent time. This analysis will give rise to issues of corporate governance, specifically corporate responsibility and accountability to stakeholders, as well as to issues of public governance and the responsibility for the welfare of the citizenry. By

³ Relevant legislative instruments will be identified throughout the paper.

⁴ Mary Kaidonis and Natalie Stoianoff, 'The Polluter Pays Principle and Rehabilitation of Mining Sites: Facing Responsibilities or transferring the cost?' (Paper presented at the Fourth Annual Global Conference on Environmental Taxation Issues, Experience and Potential, Sydney, 5-7 June 2003).

⁵ Mary Kaidonis and Natalie Stoianoff, 'Corporate and State Mining Legitimated: Transferring Future Economic Benefits or "Passing the Buck"?' (Paper presented at the School of Accounting and Finance Seminar Series, Victoria University, Melbourne, 2004) 2.

⁶ Ibid 9. See also Mary Kaidonis and Natalie Stoianoff, 'Regulator or Shareholder of a Mining Company: Transferring Financial Economic Benefits or Passing the Buck?' (Paper presented at the Fourth Asian Pacific Interdisciplinary Research in Accounting Conference, Singapore, 4-6 July 2004).

⁷ Ibid.

identifying the legal mechanisms of the transfer of responsibility for the environmental disaster, this article will also demonstrate how the principles of responsible corporate governance may be circumvented by legislative action.

II CORPORATE GOVERNANCE, CORPORATE SOCIAL RESPONSIBILITY AND CORPORATE RESPONSIBILITY

Corporate governance at its essence 'refers to control of corporations and to systems of accountability by those in control'.⁸ In terms of accountability, we must identify the stakeholders to whom those in control are accountable. While accountable to the company as a whole, that is the shareholders as a body, the case of a mining company so clearly affecting the environment and the way of life of the local population, raises the issue of accountability to the current, and future, population of the region. What does the concept of corporate social responsibility require in these circumstances? Closure of the mine, or would continuation be acceptable in some circumstances?

For the present, the decision has been made to continue the mine. So the question of what is required by corporate social responsibility in this situation is a very real one. An understanding of the requirements in relation to corporate responsibility, the term ultimately adopted by the Commonwealth Parliamentary Joint Committee on Corporations and Financial Services but essentially interchangeable with corporate social responsibility, can be gleaned from this body's (hereafter the 'Committee') recent report, titled *Corporate Responsibility: Managing Risk and Creating Value*.⁹ Within this report, corporate responsibility is recognized as a subset of corporate governance, the Committee pointing out that:

The terms corporate responsibility and corporate governance are sometimes confused with each other. Corporate governance refers to broader issues of company

⁸ John Farrar, *Corporate Governance Theories, Principles and Practice* (2nd ed, 2005) 3.

⁹ Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Corporate Responsibility: Managing Risk and Creating Value* (2006) <http://www.aph.gov.au/Senate/Committee/corporations_ctte/corporate_responsibility/report/index.htm> at 2 April 2007, specifically 4-5 on the discussion of the terms 'corporate responsibility' and 'corporate social responsibility'.

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management practices. It concerns the conduct of the board of directors and the relationships between the board, management and shareholders. At the core of corporate governance is the transparency of major corporate decisions, and accountability to shareholders.

Corporate responsibility is only an aspect of an organisation's governance and risk management processes.¹⁰

So what is corporate responsibility? The Committee makes no attempt to come to a specific conclusion, instead it recognizes that the concept is 'multi-faceted' and '[b]ecause of the sheer diversity of modern corporations ... can have a range of different meaning to different people and different organisations'.¹¹ However, it is

...usually described in terms of a company considering, managing and balancing the economic, social and environmental impact of its activities. It is about companies assessing and managing risks, pursuing opportunities and creating corporate value, in areas beyond what would traditionally be regarded as a company's core business. It is also about companies taking an 'enlightened self-interest' approach to considering the legitimate interests of a company's stakeholders.¹²

Taking into account these factors, it would be fair to say that a company engaged in mining, for example, should be taking into account, in decision-making by the board of directors, interests beyond legitimate risk-taking ventures aimed at increasing profit for the company's shareholders. However, a range of views on the duties of directors complicates this. Pointing to the prominent case concerning James Hardie Industries, the Committee considered the view at one end of the spectrum 'that a director would be failing in his or her duties if consideration was given to any factors other than maximizing profit'.¹³ This reflects the 'directors' restrictive interpretation' where 'directors claim that they are unable to undertake activities based on corporate responsibility, because such activities may not be directly "in the best interests of the

¹⁰ Ibid 6–7.

¹¹ Ibid 5.

¹² Ibid 4.

¹³ Ibid xiii–xiv.

corporation”¹⁴ There is also the shareholders restrictive interpretation that reaches a similar position via a different route.¹⁵ This ‘view is that money invested in or generated by a company is in fact the property of shareholders’.¹⁶ As a result, the company has no right to expend the company’s money on philanthropic initiatives, but ‘should distribute its funds to shareholders and allow them to choose whether to reinvest the money, use it for consumption, or apply it to philanthropic causes’.¹⁷

Further along the spectrum is the classification of ‘short term interests interpretation’, which recognizes that exercise of corporate responsibility may be appropriate if ‘it can be justified on the basis of annual return on investment’.¹⁸ Finally, there is the enlightened self-interest interpretation’, such that ‘careful and appropriate corporate responsibility is almost always in the interests of the corporation, and thus falls well within the behaviour permitted to directors under current duties’.¹⁹ This final interpretation is most consistent with the description of the term ‘corporate responsibility’ referred to above. As a result, the ‘stakeholders’ to whose interests the company should have regard, must be identified.

Simply put, ‘stakeholders’ ‘include company shareholders, but also include some non-shareholder interests groups [such as] ... employees, the community and the environment’.²⁰ In its submission to the Committee, the Business Council of Australia pointed out that ‘[w]hile some stakeholders, such as employees, will be common to all corporations, many others will vary significantly. A mining company for example is likely to place a higher priority on environmental issues than an accounting firm’.²¹ In the context of the Ok Tedi mine, stakeholders clearly extend to local indigenous communities and to the environment on which they depend, particularly when one considers that basic tort law and the action for nuisance by

¹⁴ Ibid 46.

¹⁵ Ibid 49.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid 46.

¹⁹ Ibid.

²⁰ Ibid 5.

²¹ Ibid 6.

neighbours to the mine can give rise to significant liability that the directors of the mining company must take into consideration.²²

III HISTORY OF THE OK TEDI MINE AND ENVIRONMENTAL DAMAGE TO THE FLY RIVER SYSTEM

The Ok Tedi mine in Papua New Guinea (PNG) has had a vexed history, illustrated by the substantial media coverage over, particularly during the late 1980s and early 1990s, concerning the pollution caused by the dumping of tailings into the Fly River. While the first general compensation payments were made in 1996, mining and the dumping of tailings has continued to the present, facilitated by legislation passed by the PNG parliament and the transfer of ownership of the mine from BHP to PNG Sustainable Development Program Ltd.

The history of the Ok Tedi Mine dates back to 1963, when a government patrol making contact with the Min people of the Star Mountains identified signs of copper mineralisation and collected samples for analysis.²³ Five years later, the Mt Fubilan copper-gold deposit was discovered.²⁴ The Broken Hill Proprietary Company Limited (BHP) began negotiations with the PNG government in 1976, with the government passing the *Mining (Ok Tedi Agreement) Act 1976* (PNG).²⁵ Development of the mining project did not begin until 1981, following a ten volume feasibility study produced in 1979 for consideration by the PNG government, and the formation of Ok Tedi Mining Ltd (OTML) also in 1981.²⁶ Development itself took eight years and US\$1 400 million.²⁷ The area in which the mine is situated is remote, and prior to the establishment of the mine, difficult to access.²⁸ In addition, the terrain was unstable,

²² See cases such as *St Helens Smelting Co v Tipping* (1865) 11 HLC 642; *Halsey v Esso Petroleum* [1961] 2 All ER 145; *L'Estrange v Brisbane Gas Co* [1928] St R Qd 180.

²³ Ok Tedi Mining Limited, *History of Development* <<http://www.oktedi.com/aboutus/history.php>> at 2 April 2007.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ Roger Higgins, *Ok Tedi: Creating Community Partnerships for Sustainable Development* (2002), <http://www.oktedi.com/reports/news/26/CIM_paper_Higgins.pdf> at 2 April 2007, 2.

resulting in the destruction of foundations of the Ok Ma tailing dam by landslides in 1984, with the effect that tailings were no longer able to be stored.²⁹ It was at this point that the environmental challenges of tailings disposal became most apparent. With the original tailings storage facility in the adjacent valley no longer able to be used and the waste disposal site abandoned, alternative methods of tailings disposal had to be found, with riverine disposal selected as the best method.³⁰ It is interesting that tailings 'storage' so easily translated into 'disposal'.³¹ Riverine disposal of tailings began soon after the commencement of operations at the mine,³² approximately May 1984, with the commencement of gold production, and copper production following in 1987.³³ By this time, the Sixth Supplemental Agreement had been enacted, and environmental studies carried out to begin looking at the effect of sediment caused by the tailings on the Fly River.³⁴ It was the same year that BHP agreed to provide management services to OTML.³⁵ In 1989, following cessation of gold mining and the mine becoming a sole copper mine, the PNG government set a maximum sediment level for the Fly River, with OTML required to monitor sediment effects.³⁶

The dieback phenomenon resulting from the dumping of tailings was first noted in 1991,³⁷ the same year that OTML first paid a preference dividend.³⁸ While initially evident in very limited areas, this effect had spread to 1,300 square kilometers by 2002, and was estimated at that time to potentially affect 2 040 square kilometers.³⁹ In 2005, the dieback area affected 1 588 square kilometers, and was estimated to

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid. This occurs even within one sentence: 'An interim tailings storage facility was built close to the mine to allow gold production to begin while alternative tailings disposal was investigated.'

³² Ibid.

³³ See Ok Tedi Mining Limited, above n 23.

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid.

³⁷ See Higgins, above n 28, 2.

³⁸ See Ok Tedi Mining Limited, above n 23.

³⁹ Higgins, above n 28, 2.

ultimately affect 2 500 square kilometers.⁴⁰ The mine waste has caused a sedimentary build-up that has caused extensive flooding over previously productive land used for subsistence farming, rendering the land useless for traditional pursuits, and resulting in more difficult travel and reductions in fish populations,⁴¹ further impacting on the local inhabitants ability to support themselves. There are conflicting reports on the impact of the waste on the water itself and the food caught or grown in the affected areas. OTML representatives have stated that the water is not poisoned by mine waste.⁴² However, OTML has recently reported evidence of acid rock drainage along levy banks of the Fly River in the form of sulphides.⁴³ While OTML has specifically addressed this in its Annual Review of 2005, the problem is not likely to be easily addressed, and the leeching of sulphides and dissolved metals is likely to continue after closure of the mine. Concern has been expressed that the impact of mining will be felt sixty years beyond closure of the mine.⁴⁴ Realistically, one wonders if the effect may well last beyond this time frame given the nature and extent of the damage.

IV THE IMPORTANCE OF OK TEDI TO PNG

In order to understand the complicated history of the mine, and the complex issues surrounding its operation and continuation into the future, it is necessary to appreciate some of the key statistics pertaining to the Ok Tedi Mine. According to Keith Faulkner, Managing Director of OTML, Ok Tedi contributes approximately 25 per cent of export earnings, 15 per cent of GDP, and 20 per cent of tax receipts.⁴⁵ In 2002, it was PNG's largest corporate employer, with, according to Roger J. Higgins, Managing Director of OTML at the time, over 90 per cent of the company's staff

⁴⁰ Ok Tedi Mining Limited, *2005 Annual Review* (2005), 15
<http://www.oktedi.com/reports/news/64/OTML_Annual_Review_2005_Website_Spreads.pdf> at 2 April 2007.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid 5.

⁴⁴ NGO Environmental Watch Group, PNG, *BHP's Ok Tedi Mine: What Future?* (2000)
<<http://users.nlc.net.au/mpi/oktedi/intropl.html>> at 20 November 2005.

⁴⁵ Keith Faulkner, 'The Ok Tedi Dilemma' (Speech delivered at the 2005 *Mine Closure Planning Workshop*, Tabubil Golf Club, PNG, Friday 28 October 2005), 4.
<<http://www.oktedi.com/reports/reports/134/OkTediManagingDirectorSpeechOct2005.pdf>> at 2 April 2007.

being PNG citizens.⁴⁶ This is current to 2005, with OTML reporting that 96 per cent of its employees are PNG citizens, and 47 per cent of these from the Western Province, in which Ok Tedi is located.⁴⁷ In light of these figures, it is little wonder that the PNG government wants the mine to continue: without the mine, governmental services would be severely affected. However, this must be weighed against the future cost of reclaiming the land around the mine, and supporting citizens unable to sustain themselves, either through traditional subsistence farming or due to illness. Hence, the contribution of the Ok Tedi mine to the PNG economy may ultimately be in the negative.

There appear to be two opposing groups of PNG citizens in relation to the mine and its continuation: one officially supporting continuation of the mine as a means to ensure current employment, income and sustainability of supporting businesses and services;⁴⁸ and another voicing dissension.⁴⁹ The latter group is periodically heard, though has significantly less presence, understandably, than the voices heard through OTML and its supporters. The concerning thing is the suggestions of possible misrepresentation⁵⁰ or potentially even intimidation, in relation to the 'agreement' of the local population to the continuation of the mine.⁵¹ Kisch has conducted a study into process of obtaining the Community Mine Continuation Agreements (CMCAs) that were an integral part of the withdrawal of BHP from OTML,⁵² and whether or not 'OTML, in its drafting of the environmental predictions for the Community Mine Continuation Agreements, abided by traditional standards of informed consent.'⁵³ Kisch hypothesized that the communities who signed CMCAs 'did not fully

⁴⁶ Higgins, above n 28, 1.

⁴⁷ David Masani, General Manager, Community and Business Support, OTML, *Ok Tedi Mining Limited* (2006) <http://www.wanbelistap.com/Downloads/WG1_BusinessOverview.pdf> at 2 April 2007.

⁴⁸ See OTML's website <<http://www.oktedi.com/aboutus>> at 2 April 2007.

⁴⁹ See, eg, NGO Environmental Watch Group, above n 44.

⁵⁰ Geza Theodore Kisch, *Environment versus Development: Assessing Environmental Predictions and Economic Goals in the Community Mine Continuation Agreements for Western Province, Papua New Guinea* (2006), 10–14: pointing to evidence of areas of the CMCAs that appear to underestimate or misstate the likely impact <<http://ist-socrates.berkeley.edu/~es196/projects/2006final/kisch.pdf>> at 2 April 2007.

⁵¹ See, eg, statements made by local indigenous people, on the basis of anonymity due to fear for safety <http://www.mpi.org.au/campaigns/waste/kiunga_summit> at 2 April 2007.

⁵² Kisch, above n 50. The CMCAs will be discussed further below.

⁵³ *Ibid* 7.

understand the implications of the CMCA, and that their motivations to sign the agreement were based largely on misinformation'.⁵⁴ While ultimately suggesting further investigation and study, Kisch identifies sufficient evidence to call into question the legal validity of the CMCA as binding contracts with the communities that signed them, and to query the integrity of the CMCA process that was critical to BHP withdrawal. This would suggest that the exercise of corporate responsibility of BHP and OTML has been severely lacking in relation to the local population and environment in the Fly region of PNG.

V TRACING GOVERNMENTAL ACTION IN RESPONSE TO ENVIRONMENTAL DAMAGE

The role of the PNG government in Ok Tedi dates from the beginning of the mine to the present. The government has passed several legislative instruments specific to the Ok Tedi mine, that have assisted OTML in continuing the mine, and in fact has a share in OTML. Ownership of OTML has changed over time, most notably with the exit of BHP Billiton in 2002. The company was originally wholly owned by the Independent State of PNG, and the *Mining (Ok Tedi Agreement) Act 1976* (PNG) permitted Dampier Mining Co Ltd ('Damco'), a wholly-owned subsidiary of BHP, to take over the company, with the State to retain up to a 20 per cent shareholding, with rights to elect directors. The supplemental agreement acts passed by the PNG parliament reveal the changing ownership structure over time, with change occurring frequently over the period 1980 to 1986 inclusive. In addition, these instruments also reveal mechanisms implemented to affect the responsibility for environmental damage to the area surrounding the mine.

<i>Mining (Ok Tedi Agreement) Act 1976</i> PNG	Original agreement representing outcome of negotiations between PNG government and BHP via wholly-owned subsidiary Dampier Mining Co Ltd or 'Damco', to share in Ok Tedi Development Company Pty Limited. ⁵⁵
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⁵⁴ Ibid 8.

⁵⁵ Sole beneficial ownership of the Ok Tedi Development Company Pty Limited was to remain with the State during the investigations and studies stage, with Damco subsequently having the opportunity to acquire the company.

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<i>Mining (Ok Tedi Supplemental Agreement) Act 1980 PNG</i>	Agreement to amend ownership of Damco's share to a consortium of Damco, Mt Fubilan Development Co Pty Ltd, and German company Kupferexplorationsgesellschaft mbh
<i>Mining (Ok Tedi Second Supplemental Agreement) Act 1981 PNG</i>	Damco assigns rights to BHP Minerals Holdings Proprietary Limited and Mt Fubilan Development to Amoco Minerals Company. Ok Tedi Mining Limited formed to operate the mine.
<i>Mining (Ok Tedi Third Supplemental Agreement) Act 1983 PNG</i>	An agreement to resolve the issue of environmental liability between them in respect of any environmental damage that may be caused to the Fly River and its environs in the territory of the Republic of Indonesia.
<i>Mining (Ok Tedi Fourth Supplemental Agreement) Act 1985 PNG</i>	Addresses financing issues, including loans and responsibility for the obligations thereunder.
<i>Mining (Ok Tedi Fifth Supplemental Agreement) Act 1985 PNG</i>	Requires the State to acquire 20 per cent of the shares in OTML and to contribute to financing.
<i>Mining (Ok Tedi Sixth Supplemental Agreement) Act 1986 PNG</i>	Amendments made to the original agreement to recognize an increase in the expected output of the mine, and to implement favourable taxation and other cost arrangements for OTML.
<i>Mining (Ok Tedi Seventh Supplemental Agreement) Act 1986 PNG</i>	Further amendments to financial arrangements.
<i>Mining (Ok Tedi Restated Eighth Supplemental Agreement) Act 1995 PNG</i>	An act to, essentially, allow the mine to continue and to compensate those detrimentally affected by its operations.
<i>Mining (Ok Tedi Ninth Supplemental Agreement) Act 2001 PNG</i>	An act to allow BHP to exit OTML via transfer of its shareholding to the newly formed PNG Sustainable Development Company (SDPC).

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Apart from the third supplemental agreement, these acts are lengthy and extensive. Further study is necessary to ascertain precisely the mechanisms utilised to address environmental issues, the transfer of share ownership and management responsibilities, compensation for PNG citizens affected by the dumping of tailings and the issue of mine continuation and ultimate closure. Some observations that can be raised based on other sources of information, particularly concerning the exit of BHP from OTML, include potential constitutional issues surrounding the *Mining (Ok Tedi Ninth Supplemental Agreement) Act 2001* PNG. This Act was the subject of constitutional challenge by the then Opposition leader of PNG, but was subsequently dropped.⁵⁶ Negotiations surrounding BHP's exit from the mine were under way, with the approval of the National Executive Council of PNG, by February 2001.⁵⁷ Documentation issued by OTML shortly thereafter demonstrates an awareness of the need to consult with, inform and work with local communities affected by the mine, and to put in place structures to assist the community in developing long-term initiatives in regard to food security and infrastructure.⁵⁸ This was given more formal effect in the Mine Continuation Agreement process, which ultimately translated into mine continuation agreements with all of the communities affected by the mine. These agreements purported to 'release[d] Ok Tedi and its shareholders from all demands and claims associated with future environmental impacts'.⁵⁹ At the same time, OTML and BHP were defending legal actions in the Victorian Supreme Court in respect of alleged breaches of the 1996 agreements to compensate local communities

⁵⁶ Renate Foster Mas, 'Unless Court Intervenes, BHP Exits Ok Tedi Dec. 31', *American Metal Market* (United States), 14 December 2001

<http://www.findarticles.com/p/articles/mi_m3MKT/is_242_109/ai_81018260> at 2 April 2007; Former PNG Prime Minister Michael Somare submitted the constitutional challenge: Danielle Knight, 'BHP Billiton Leaves the Scene of the Crime', *Asia Times Online* (Hong Kong), 5 January 2002 <<http://www.atimes.com/oceania/DA05Ah01.html>> at 2 April 2007. A further constitutional challenge was made by former South Fly PNG MP Gabia Gagarimabu in the PNG Supreme Court: OTML, 'Class Action Proceedings Against Ok Tedi Dismissed' (Press Release, 16 January 2004) <http://www.oktedi.com/reports/news/34/OkTediMedia_Release16_1_04.pdf?PHPSESSID=919475bd948193837d54d66cd0f8259f> at 2 April 2007.

⁵⁷ Office of the Prime Minister, PNG, 'NEC Endorses Ok Tedi Talks' (Press Release, Tuesday 20 February 2001)

<http://www.oktedi.com/reports/news/9/NEWS_NEC_endorseOkTeditalks.pdf?PHPSESSID=48dce1201eb5bb489bdb47c58ca0c3b> at 2 April 2007.

⁵⁸ OTML, 'Update on Ok Tedi' (Press Release, 10 March 2001)

<http://www.oktedi.com/reports/news/8/NEWS_Update_10_3_2001.pdf?PHPSESSID=987e1b836913865b90aaf0020d78a998> at 2 April 2007.

⁵⁹ Mas, above n 56, 2.

for the damage done by the dumping of tailings.⁶⁰ As noted above, Kisch has raised substantial questions about the nature of the process by which signing of the CMCA's were obtained, and the possible misinformation provided to local communities presented with OTML and BHP representatives carrying CMCA documents for signing.⁶¹ The 'pro-forma' CMCA's⁶² left compensation the only variable in the agreement on which local communities could negotiate.⁶³ Kisch has stated that '[s]ince the environmental damage was a pressing issue for these communities, this non-negotiable aspect presented two choices: sign and receive compensation, or not sign, and receive no compensation, and still suffer the environmental damage'.⁶⁴ Further more, the *Mining (Ok Tedi Ninth Supplemental Agreement) Act 2001* (PNG) in s 6 provides that:

- (1) The signature or other execution of a Community Mine Continuation Agreement by a person representing or purporting to represent a Community or clan, or that person's delegate, binds all of the members of that Community or clan to that Community Mine Continuation Agreement notwithstanding –
 - (a) that there is no express authority for that person to sign or execute the Community Mine Continuation Agreement on behalf of the members of the Community or clan concerned; or
 - (b) that not all representatives of the relevant community or clan have signed or otherwise executed the Community Mine Continuation agreement; or
 - (c) that not all members of the Community are parties to the Community Mine Continuation Agreement; or
 - (d) any requirement of the Underlying Law.

⁶⁰ Ibid.

⁶¹ Kisch, above n 50, 13-15.

⁶² Ibid 15.

⁶³ Ibid.

⁶⁴ Ibid.

- (2) The acts and deeds of a person described in Subsection 91: in respect of any matter referred to in the relevant Community Mine Continuation Agreement bind each person on behalf of whom that person purports to be acting, and where a person purports to be acting on behalf of the whole of that person's Community or clan, that person's acts and deeds bind each existing and future member of that person's Community or clan, including, without limitation children and persons who are subsequently born into or subsequently join, that Community or clan.

Clearly, this section has significant implications: a signed CMCA is *prima facie* valid, regardless of, essentially, who signs it and despite any requirement of 'Underlying Law', in perpetuity. Furthermore, in respect of any action against BHP Billiton, s 5 of the *Mining (Ok Tedi Ninth Supplemental Agreement) Act 2001* (PNG) may be pleaded 'as an absolute bar and defence to any proceedings taken by the State or a Government agency'. These legislative provisions make it clear that legislation has been utilised to absolve BHP Billiton of responsibility for the environmental damage caused by the Ok Tedi mine.

Beyond the actions of legitimation by the Independent State of Papua New Guinea, substantial questions about the role of the Fly provincial government remain unanswered. Allegations of misuse of revenue generated by OTML for the Fly provincial government were made in 2001, to the extent of Kina (K) 185 million over 18 years, most of which was paid in the form of royalties.⁶⁵ There is evidence of some softening of attitude toward OTML as opposed to the provincial government, with a local leader, previously a plaintiff in the 1996 class action against OTML, describing the provincial government as 'dead with "all the money stolen". It's OTML that is providing services like infrastructure'.⁶⁶

⁶⁵ 'Royalties Paid To Fly Government Unaccounted For', *The National* (PNG), 11 April 2001, 4 <http://www.oktedi.com/reports/news/4/NEWS_royalties_paid_to_Govt.pdf?PHPSESSID=b9022b1cef0626bbd9b56943d2c16406> at 2 April 2007.

⁶⁶ *Ibid.*

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Filer refers to misuse of mine-related revenue by the Fly provincial government as having been a matter of concern since 1984.⁶⁷ Combined with the very real questions as to whether or not the PNG government has permitted continuation of the mine for short and perhaps medium-term gains at the cost of the future of the Fly River regions, the accountability of government, both provincial and national, to the current and future citizens of PNG is an issue yet to be fully explored. No doubt, the economic benefits of the mine between the present and 2010, perhaps 2012, have been taken into account. However, the question remains as to whether or not the weight given to these economic benefits actually outweighs the ultimate cost of the project. The first company taxation paid was in 1995, ten years after production began.⁶⁸ As noted above, there are questions over the use to which the money paid by OTML to the government has been put. At this stage, the mine will close in approximately 2012 or 2013. However, this must be balanced against the claim that the environmental impact of the mine will continue for three generations.⁶⁹ In light of these factors, one wonders whether or not the economic benefits to either the Western Province or PNG as a whole will actually prove worthwhile, even in basic economic terms.

As at April 2006, OTML was owned by PNG Sustainable Development Program Ltd (52 per cent); the PNG government (30 per cent) and Inmet (18 per cent).⁷⁰ Under the *Mining (Ok Tedi Ninth Supplemental Agreement) Act 2001 PNG*, OTML must make annual payments aggregating to K175.3 million over the life of the mine to compensation trusts in favour of the landowners, Middle Fly, North Ok Tedi, Lower

⁶⁷ Colin Filer, 'Horses For Courses: Special Purpose Authorities and Local Level Governance in Papua New Guinea' (Discussion Paper 2004/6, State Society and Governance in Melanesia, Research School of Pacific and Asian Studies, Australian National University, Canberra), 10 citing F.M. Little and Anthony J. Regan, 'The Use of Mineral Royalties in Western Province: A Report Prepared for the Fly Provincial Government' (Institute for Applied Social and Economic Research, Boroko, 1987) <http://rspas.anu.edu.au/papers/melanesia/discussion_papers/04_06_dp_filer.pdf> at 2 April 2007; John Burton, 'Mining & Maladministration in Papua New Guinea', in Peter Larmour (ed), *Governance & Reform in the South Pacific* (Pacific Policy Paper 23, National Centre for Development Studies, Australian National University, Canberra, 1998) 154-82; Michael Finlayson, 'Sustainable Development Policy and Sustainability Planning Framework for the Mining Sector in Papua New Guinea' (Working Paper 2: Benefit from Stream Analysis, PNG Department of Mining, Port Moresby, 2001).

⁶⁸ Ok Tedi Mining Limited, above n 23, 3.

⁶⁹ NGO Environmental Watch Group, above n 44, 2.

⁷⁰ Masani, above, n 47.

Ok Tedi, South Fly and Highway communities.⁷¹ In addition, the arrangements put in place for BHP's exit via this agreement include the establishment of the Ok Tedi Development Foundation. However, the actual role of this body is questionable. The original intentions behind the foundation appear to be on sound grounds in terms of corporate responsibility. However, research to date does not reveal current involvement of the Ok Tedi Development Foundation in planning for the mine's closure. The Ok Tedi Development Foundation's website⁷² does not appear to have been updated since its original construction in 2001. The overview refers to the Foundation as to be in full operation by mid-2003, in the future tense. No reports are dated later than 2001, and no links have yet been added, although they are noted as becoming 'available soon'. The Foundation's current activities are unknown, although there is evidence of recent activity in relation to planning for the closure of the mine.⁷³ In 2003, the estimated date of closure of the mine was 2010; however, this was increased in 2004 to 2012 as a result of a review of mine plans and reserves.⁷⁴ There is further evidence that a re-evaluation in 2005 has seen an increase in the expected life of the mine to mid 2013,⁷⁵ although this is not evident in OTML's most recent financial report, to 31 December 2005.⁷⁶

PNG Sustainable Development Program Ltd (PNG SDP), a company incorporated in

⁷¹ As recognised in the *Ok Tedi Mining Limited and its Subsidiaries Special Purpose Financial Statements for the Year Ended 31 December 2004* (2004), 22

<http://www.oktedi.com/reports/news/37/OK_TEDI_MINING_LIMITED_2004_ANNUAL_REVIEW_SUMMARY.pdf?PHPSESSID=a1d85d5701988b86a20d8366da8f8f9> at 2 April 2007.

⁷² Ok Tedi Development Foundation <<http://www.oktedi.com/odf/index.php>> at 2 April 2007.

⁷³ The Keystone Centre, *Working Group on the 2006 Community Mine Continuation Agreements (CMCA) Review, Western Province, Papua New Guinea* <<http://www.keystone.org/spp/env-oktedi.html>> at 2 April 2007.

⁷⁴ Ok Tedi Mining Limited, *2004 Annual Review* (2004), 6 <<http://www.oktedi.com/reports/news.php>> at 2 April 2007.

⁷⁵ See <<http://www.inmetmining.com/index.cfm?PID=17265&PIDList=17205,17222,17265>> at 2 April 2007.

⁷⁶ Ok Tedi Mining Limited, above n 40, 35.

Singapore,⁷⁷ appears to have taken over the role envisaged for the Ok Tedi Development Foundation. However, its direct links to OTML require independent, objective evaluation of statements made in relation to the provision for the future of the citizens of the region affected by the environmental devastation of the mine. The board of directors of PNG SDP consists of seven members, three appointed by BHP Billiton, and three by the PNG government, and one director from Singapore.⁷⁸

Ultimately, this suggests that BHP Billiton has a continuing involvement in relation to the mine, but with an absolute coverage against any legal action in relation to it. This continued involvement indicates an assumption of responsibility even though BHP Billiton is no longer a shareholder of OTML. Furthermore, with three representatives of the PNG government, and one director from Singapore, majority voting power within PNG SDP appears to be in the hands of the PNG government, who has a clear vested interest in continuation of the mine, and another party, a former shareholder, which has outwardly declared an intention of extricating itself from involvement in the mine, but nonetheless retains a significant role in its replacement as a shareholder in OTML.

VI SHOULDERING THE BURDEN FOR ENVIRONMENTAL DEVASTATION

According to the long-standing and fundamental principle of corporate law that the company is responsible for its actions, OTML is clearly responsible for the pollution caused by the Ok Tedi mine. However, once the mine reaches the end of its finite life-span, and it eventually will, despite recent extensions to estimates of its productive life, the rationale for OTML as an entity will cease to exist. It is likely that

⁷⁷ According to PNG Sustainable Development Ltd '[t]he main reason why BHP Billiton and the Papua New Guinea Government agreed on the Singapore location is that this allows the Long Term Fund to be invested in profitable investments anywhere in the world without attracting any taxation in Singapore or anywhere else. As a result, much more money will be available to support development in the Western Province and elsewhere in Papua New Guinea after the mine closes': PNG Sustainable Development Ltd, *Company Profile* (2006).
<<http://www.pngsdp.com/companyprofile.html>> at 2 April 2007.

⁷⁸ The PNG SDP Company Profile states that '[t]hese six Directors appoint one Singapore Director. This is Mr. Lim How Teck who was appointed after an extensive search by an international executive search firm', *ibid*.

OTML will simply be wound up, with any undistributed profits passing to the shareholders at the time. Assuming that the present shareholders remain the same over the coming years prior to closure of the mine, a likely scenario for 82 per cent of the shareholdings in any case, this would see funds going to PNG SDP, the PNG government and, currently, Inmet. PNG SDP's investments, according to its website, 'will be used to maintain a substantial development effort in Papua New Guinea for at least four decades after the mine closes'.⁷⁹ However, the impact of the mine on the environment and the life of the local people is likely to continue well beyond this time period. There are also questions as to which local communities are benefiting, and will benefit, from assistance from PNG SDP.⁸⁰ Given that BHP Billiton appoints three directors to the PNG SDP board of directors, there is clearly a continued role for BHP Billiton in influencing decisions as to projects funded by PNG SDP for the benefit of local communities. Could self-interest (here, the interests of BHP Billiton) influence the decisions made by its representatives on the PNG SDP board? Kisch has suggested that 'the disadvantaged communities who had more pressing needs and more environmental damage wound up receiving fewer development projects than the communities closer to the mine'.⁸¹ This would appear to be substantiated by resolutions passed at the inaugural meeting of the 'Western Province Alliance for a Sustainable Future' in November, 2005.⁸² Seven resolutions were passed at this meeting, including a resolution

[t]hat BHP's share (now contained in the PNG Sustainable Development Program Company) be brought back to Western province to benefit our people, and that all people of the Western Province have representation in the decision-making processes, including on the board of directors of the PNG Sustainable Development Program Company.⁸³

⁷⁹ Ibid.

⁸⁰ See Kisch, above n 50, 17–19.

⁸¹ Ibid 18.

⁸² Western Province Alliance for A Sustainable Future, 'Western Province Mine Affected People Continue Their Struggle For Justice' (Press Release, 30 November 2005) <http://www.mpi.org.au/campaigns/waste/kiunga_summit> at 2 April 2007.

⁸³ Ibid.

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This alliance is made up representatives of people from the South and North Fly regions. The above resolution is stated to be based on the a series of beliefs, namely, that

...[t]he terms and conditions of BHP's exit from the Ok Tedi mine were not discussed with us before the company left. We feel that BHP is still responsible for the environmental problems in our land and must take on its share of these problems. It is a great injustice that this company has been allowed to escape without fixing the problems that it created, and without cleaning the river that is the life of our people.

It is a further injustice that the people of Western Province are not the main beneficiaries of the arrangements for BHP's exit when we have sacrificed so much already, and continue to sacrifice so much, to the benefit of the PNG nation.

We do not agree with the arrangements that have been made for the transfer of BHP's 52 per cent share to the PNG Sustainable Development Program Company. This company is born from our suffering.

The environmental problems facing us are increasing, and are making it difficult, if not impossible for many people of the province to meet basic needs for food and water, or to pay for our children's school fees or health needs. Once our environment provided us with all our needs, but this is no longer possible.

With this in mind, there is an urgent need to address the structure, location and allocation of funds held by the PNG Sustainable Development Program Company with the main goal of ensuring that the people of Western Province have a primary role in the decision making process, and are the sole beneficiaries of BHP's 52 per cent share in the mine.

The money from the BHP 52 per cent share must be allocated to priorities that have been identified by the people of Western Province. These funds will help us to meet the very big challenges facing us. These problems will face us and our children and grandchildren. We have the right to determine our own future.⁸⁴

⁸⁴ Ibid.

Such evidence puts into question the Commonwealth Parliamentary Committee's view that BHP Billiton is a leading Australian company in the area of corporate governance.⁸⁵ However, in order to provide a full exploration of these issues, it would be necessary to delve more deeply into the on-going role of BHP Billiton and to investigate the company's own discourse on the Ok Tedi mine disaster and its current role. It appears that, in concert with the PNG government, legislation has been used to legitimate OTML's, and ultimately BHP Billiton's, liability for actions or omissions that have decimated the environment on which indigenous residents of the areas affected by the dumping of tailings from the mine have relied. This brings into question the role and responsibility of the PNG government in representing its people and in striving for the goal of economic development.

VII CONCLUSIONS

The history of the ownership and management of OTML reveals extensive collaboration between the PNG government and the companies with shareholdings in OTML, particularly BHP Billiton. This itself is not necessarily negative. What must be considered are the actions of both the PNG government as a shareholder in OTML and a direct recipient of the benefits of the Ok Tedi mine, and the manner in which BHP Billiton was able to extricate itself from OTML and liability for the environmental damage, arguably against the requirements of corporate responsibility. The impact of the Ok Tedi mine at present is significant to the PNG government in terms of its contribution to PNG's economy and to the government's own budget. However, there is evidence of discord at the highest levels of the PNG government over the continuation of the mine and the withdrawal of BHP Billiton, as indicated by the abandoned constitutional challenge referred to above. Evidence currently available suggests that the principles of responsible corporate governance have been over-taken by self interest of both current and past⁸⁶ shareholders, ignoring the long term impact on the environment and the local communities. The reality now is that,

⁸⁵ Parliamentary Joint Committee on Corporations and Financial Services, above n 9, 21.

⁸⁶ Due to BHP Billiton's entitlement to elect three board members to the board of directors of PNG SDP.

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unless more significant efforts are made by the PNG government, OTML and its shareholders, the catastrophic effect of the Ok Tedi mine will continue and/or escalate. Here, the PNG government and the corporate entities involved have the opportunity to set world's best practice in relation to social responsibility. Clearly further investigation is required to comprehend the complete impact of the legislative intervention used to defray liabilities that otherwise should have fallen on corporate entities in line with corporate responsibility requirements. We are but at the beginning of the journey.