

# Legal Framework

Overview of regulations that impact foreign enterprise  
Agricultural and business leases for customary land  
Residency status determines income tax rates  
State retains ownership of oil and other key minerals





PNG has comprehensive and effective companies legislation

# Principles of legislation

## Laws on the books promote investment and ensure regulation

**GOVERNMENTS & THEIR POWERS:** There are three levels of government in Papua New Guinea, the national, provincial and local governments.

The Constitution and the Organic Law on Provincial Government and Local Level Government (Organic Law) regulate the lawmaking powers of the national, provincial and local-level governments. Each level has its own distinct lawmaking powers. The lawmaking powers of the national Parliament are covered in section 41 of the Organic Law; the lawmaking powers of the provincial legislatures are covered in section 42; and the local governments are covered in section 44.

The division of lawmaking powers between the three levels is based on the following principles:

- The national, provincial and local-level governments, respectively, have specific powers;
- The powers that are not specified are assumed to remain with the national government;
- Where for any reason a level of government cannot exercise any of its powers effectively, then such powers may be delegated to either of the other levels of government to exercise on behalf of the first government;
- Both provincial and local-level government powers are subject to the National Law, but only to the extent that the national interest so requires, otherwise they have relative autonomy to operate;
- The powers of local-level governments are subject to the powers of provincial governments, but only to the extent that the provincial interest requires them to be made subject to the provincial laws.

The general principles above are non-justiciable, but may be used in the interpretation and implementation of the Organic Law (section 40).

Provincial and local-level government laws deal with such things as the sale, purchase and consumption of alcohol, cemeteries, community sport, use of local roads, pornography, driving of motor vehicles, sale and purchase of local foodstuffs, prostitution, practising of witchcraft, and so on. Locating up-to-date copies of

provincial and local government legislation is notoriously time-consuming and difficult to do.

**THE LAWS OF PAPUA NEW GUINEA:** The laws of PNG consist of:

- The Constitution;
- The Organic Laws;
- The Acts of the Parliament;
- Emergency Regulations;
- The provincial laws;
- Laws made under or adopted by or under the Constitution or any of those laws, including subordinate legislative enactments made under the Constitution or any of those laws;
- The underlying law (customary law and English common law and equity), and none other.

All written laws, other than what is found in the Constitution, must be read and construed, subject to:

- In any case: the Constitution;
- In the case of Acts of the Parliament: any relevant Organic Laws;
- In the case of adopted laws or subordinate legislative enactments, the Organic Laws and the laws by or under which they were enacted or made;
- So as not to exceed the authority to make them properly given, to the intent that where any such law would have been in excess of the authority so given it is nevertheless treated as a valid law to the extent to which it is not in excess of that authority.

The Constitution and the Organic Laws are the supreme law of PNG and, subject to section 10 (construction of written laws) of the Constitution, all acts, whether legislative, executive or judicial, that are inconsistent with these documents are, to the extent of the inconsistency, invalid and ineffective.

An organic law may be altered only by another organic law, or by an alteration to the Constitution.

**COMMON LAW:** Importantly, PNG adopted the Common Law of England as in force on Independence Date (September 18, 1975) as part of the law of PNG. The principles and rules that formed, immediately before

independence, the principles and rules of common law and equity in England have been adopted, and are applied and enforced, except if, and to the extent that:

- They are inconsistent with a Constitutional Law or a statute;
- They are inapplicable or inappropriate to the circumstances of the country from time to time;
- In their application to any matter they are inconsistent with custom, as adopted by the Constitution.

The principles and rules of common law and equity have been adopted notwithstanding any revision of them by any statute of England that does not apply in PNG by virtue of section 5, Chapter 2.6 (adoption of pre-independence laws) of the Constitution.

Concerning any particular question before a court, the applicability or appropriateness of a particular rule of English common law or equity is determined by reference, among other things, to the individual circumstances of the case, including the time and place of any relevant transaction, act or event.

**FOREIGN COMPANIES DOING BUSINESS IN PNG:**

There are a variety of PNG laws that may impact a foreign enterprise in its business dealings in PNG.

As noted above, PNG has, subject to certain qualifications, adopted principles and rules of common law and equity from England that applied immediately prior to Independence Day in PNG.

English common law dealing with issues such as the law of penalties, rights of subrogation, estoppels, privity of contract and guarantees and indemnities may be relevant to a foreign enterprise doing business in PNG.

The courts will enforce financing and other documents governed by the laws of a country other than PNG. In international financing transactions involving a PNG party, it is common for the loan agreement, the security documents and other related instruments to be governed by English law or the laws of another foreign country. The PNG courts are familiar with this.

**PROMOTION OF INVESTMENT:** The Investment Promotion Act (IPA) 1992 provides for the promotion of investment in PNG in the interests of national, social and economic development. For that purpose, IPA establishes a body known as the Investment Promotion Authority and defines its powers and functions.

A foreign enterprise (including a PNG company owned or controlled by non-citizens) must be certified under the IPA to do business in the country.

As a general rule, an isolated transaction (broadly, one completed within 30 days) will not of itself amount to carrying on business in PNG and, accordingly, there is no need for a foreign enterprise carrying out an isolated transaction to be certified under the IPA. However, if a particular transaction is the first in a series of transactions, this may amount to doing business.

Subject to certain exceptions, if there is a change in the ownership, shareholding or beneficial ownership or control of a foreign enterprise doing business in PNG, the company must, within 14 days of the change, apply for a fresh certification under the IPA.

A foreign enterprise having been granted a certificate under the IPA to conduct business in PNG may apply



The Investment Promotion Act encourages FDI in the interests of social and economic development

to the Investment Promotion Authority in the prescribed form and on payment of the prescribed fee for:

- Its activity;
- Its location of doing business in an activity;
- Any other prescribed term or condition of a certificate (IPA section 33).

Where a contract, agreement or understanding is entered into between a foreign enterprise (being a foreign enterprise) and another enterprise, the court may, on the application of the other enterprise or the Investment Promotion Authority, declare the contract unlawful and void if:

- The foreign enterprise had not been issued a certificate at the time at which the contract, agreement or understanding was entered into;
- The subject matter of the contract relates to business activities outside of the nature of the activities for which the foreign enterprise is certified to conduct business.

**REGULATION OF COMPANIES:** PNG has comprehensive companies legislation. The Companies Act 1997 (Companies Act) is based on New Zealand legislation and adopts a simple and fairly effective system for dealing with companies.

A company that is incorporated in PNG under the Companies Act and owned or controlled by foreign interests operates in PNG subject to that act.

Similarly, a company incorporated outside PNG that is registered to do business in PNG operates subject to the Companies Act. The Companies Act deals with registration of charges, insolvency, as well as a host of other company-related matters.

A foreign enterprise doing business in PNG may, on occasion, want to grant to a third-party security over some or all of the assets of the foreign enterprise, it is appropriate to consider those provisions in the Companies Act dealing with registration of charges.

For the purposes of the Companies Act, the term “charge” is defined to include a right or interest in relation to property owned by a company, by virtue of which

a creditor of the company is entitled to claim payment in priority to creditors entitled to be paid under Section 361, but does not include a charge under a charging order issued by a court in favour of a creditor.

Where a PNG company creates a charge to which Part XIII of the Companies Act applies, the company must submit the following to the registrar for registration within two months after the creation of the charge:

- A notice for registration of the charge in the prescribed form; and
- A certified copy of the document creating or evidencing the charge.

Where this requirement is not complied with, the charge is, so far as it confers any security on the company's property or undertaking, void against:

- The liquidator of the company; and
- Any creditor of the company.

This does not prejudice any contract or obligation for repayment of the money secured by a charge, and when a charge becomes void under section 222(2), the money it secures becomes immediately payable. The charges to which Part XIII applies are:

- Charges (other than charges solely on land) to secure any issue of debentures;
- Charges on uncalled share capital of a company;
- Charges or assignments created or evidenced by instruments (including instruments creating or evidencing absolute bills of sale or absolute assignments or transfers of book debts) that, if executed by an individual, would be invalid or of limited effect if not registered under the Instruments Act;
- Floating charges on the undertaking or property of a company;
- Charges on calls made but not paid; and
- Charges on a ship or aircraft, or on a share in a ship or aircraft;
- Charges on goodwill, on a patent or licence under a patent, on a trademark, or on a copyright or a licence under a copyright; and
- Charges on the book debts of a company (Companies Act section 222(4)).

Where a charge created in PNG affects property outside the country an application for registration of the charge in the prescribed form and a certified copy of the document creating or evidencing the charge may be submitted for registration under and in accordance with the procedures outlined above, notwithstanding that further proceedings may also be necessary to make the charge valid or effectual according to the law of the place in which the property is situated (Companies Act section 222(5)).

**TAXATION:** The principles of taxation in PNG are similar to those which apply in Australia and a number of other countries in the region. A variety of taxes, imposts and duties are imposed on individuals and business organisations in PNG, including income tax, a form of value-added tax (referred to as goods and services tax, GST), land tax, payroll tax, withholding tax, Customs duties and excises, mining and petroleum royalties, stamp duty and training levies. The tax year is a calendar year running from January 1 to December 31. How-

ever, a substituted tax year can be adopted, subject to the approval of the Taxation Office. Income tax returns, where required, should be lodged by February 28 the following year. Losses may be carried forward up to 20 years for most businesses and indefinitely for businesses in the primary industry sector.

Companies incorporated in PNG and companies that do business in PNG and whose central management is located in PNG are resident companies. The worldwide income of resident companies and the PNG-sourced income of non-resident companies are taxed.

**INCOME TAX:** Income tax is administered under the Income Tax Act 1959. Its provisions apply to income derived by individuals, corporations, trusts and partnerships. A liability to pay tax arises for "taxable income", which is defined by the Income Tax Act 1959 to mean the amount remaining after deducting all allowable deductions from assessable income. The term "assessable income" includes not only salary and wages, business profits, rent and dividends, but also a number of other items which are set out in the act.

Details of "allowable deductions" are outlined in the Income Tax Act 1959. In general, all losses and outgoings, to the extent they are incurred in gaining or producing assessable income, or are necessarily incurred in doing business for the purpose of gaining or producing that income, are allowable deductions except to the extent they are losses or outgoings of capital, or of a capital, private or domestic nature, or are incurred in relation to the gaining or production of exempt income. However, taxpayers involved in mining or petroleum projects may be able to deduct from their assessable income certain items of capital expenditure, such as allowable exploration expenditure.

**COMPANIES:** Different rates apply depending on whether the taxpayer is a resident, non-resident, resident or non-resident mining or petroleum company. A company that conducts business in PNG must appoint a public officer to represent the company in all dealings with the PNG Taxation Office.

**PARTNERSHIPS & JOINT VENTURES:** Partnerships are required to lodge a tax return, but partnership income is not taxed separately. Rather, it is included in the assessable income of each partner. Joint ventures do not have to lodge a separate return, though each participant is taxed on income from the joint venture.

**TAX CREDITS:** Some tax credits are given for foreign tax paid on overseas income. PNG has entered into a number of double tax treaties with nations including Australia, Canada, China, Germany, Malaysia, Singapore, the UK, South Korea and Fiji.

**GST:** A GST of 10% is levied on the following in accordance with the Goods and Services Tax Act 2003:

- Supplies of goods and services by a registered person in the course or furtherance of a taxable activity (but not including an exempt supply); and
- Imports into PNG (except certain goods).

Export tax is 0%, providing for input tax credits.

The transfer of land is deemed not to be a supply. However the transfer of improvements and structures on the land, whether transferred with or without the

transfer of ownership of land are not defined as land. Exempt supplies under the GST Act 2003 include:

- Financial services;
- Fine metal;
- Medical and related services;
- Educational services by an educational institution;
- Public road transport to passengers by a registered public motor vehicle or taxi;
- Newspapers;
- Betting, lotteries and games of chance;
- Postage stamps; and
- Housing and motor vehicle to an employee by his employer in the course of employment.

**PERSONAL CHATTELS:** The Instruments Act (Chapter 254 of the Revised Laws), is an act relating to bills of sale of personal chattels and to liens on crops and wool and stock mortgages, and for related purposes.

In particular circumstances, it may be desirable for a foreign lender to register as a bill of sale under the Instruments Act, a security granted to the foreign lender by a PNG company. This is likely to be the case if the security is not able to be registered under the Companies Act. Registration is important in terms of obtaining priority and generally serves to put third parties on notice about the particular dealing.

Certain securities may constitute a charge registrable under the Companies Act and a bill of sale registrable under the Instruments Act. A charge to which section 222 of the Companies Act applies:

- Does not need to be registered under the Instruments Act (Chapter 254);
- Is not subject to avoidance under the Instruments Act; and
- On registration under Part XIII of the Companies Act has effect and is as valid, for all purposes, as if it had been duly registered under the Instruments Act (Companies Act section 222(1)).

It is also important to note that the national Parliament has passed the Personal Property Security Act. This new legislation became operational as of December 2012 and has replaced all other legislation dealing with securities over personal property (that is, any property other than land).

Securities over real property (that is, land) will continue to be regulated by the Land Act 1996 and the Land Registration Act.

**OTHER COMMERCIAL ISSUES:** The Mercantile Act (Chapter 260 of the Revised Laws) contains various provisions that lenders in PNG need to be aware of. The Mercantile Act is a compendium of useful and sometimes odd provisions that have not been included in other legislation. All too often the provisions of the Mercantile Act are ignored.

**ASSIGNMENT OF DEBT:** In PNG a written absolute assignment under the hand of the assignor (not purporting to be by way of charge only) of a debt or other legal thing in action, of which express written notice has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim the debt or thing in action is, and is deemed always to have been, effectual in law (subject to all



The Insurance Act, rolled out in 1995, regulates the insurance of all risks, with limited exceptions

equities having priority over the right of the assignee) to pass and transfer from the date of the notice:

- The legal right to the debt or thing in action;
- All legal and other remedies for the debt or thing in action;
- The power to give a good discharge for the debt or thing in action without the concurrence of the assignor (Instruments Act section 3(1)).

If the debtor, trustee or other person liable for a debt or thing in action that is being assigned has notice:

- That the assignment is disputed by the assignor or a person claiming under him;
- Of any other opposing or conflicting claims to the debt or thing in action, he may, if he thinks fit;
- Call on the persons making claim to the debt or thing in action to interplead concerning it; or
- Pay the debt or other thing in action into court under the provisions of any Act for the relief of trustees. (Instruments Act section 3(2)).

**POWERS OF ATTORNEY:** Subject to any stipulation to the contrary in the instrument creating the power, a power of attorney concerning an act or thing done or suffered in good faith, continues in force until notice:

- Of the death of the donor of the power; or
- Of some other revocation of the power,

**CONVEYANCES:** A conveyance of property made with intent to defraud creditors is voidable, at the instance of any person prejudiced by it. This provision does not affect the operation of the law of insolvency. (Instruments Act section 7(2)). Nor does this provision apply to an estate or interest in property conveyed:

- For valuable consideration; or
- On good consideration to a person not having, at the time of the conveyance, notice of the intent to defraud creditors (Instruments Act section 7(3)).

A voluntary disposition of land made with intent to defraud a subsequent purchaser is voidable at the instance of that purchase.

In PNG, there is no voluntary disposition with intent to defraud by reason only that a subsequent conveyance



Approximately 97% of land is held by its traditional owners under customary principles of land ownership

for valuable consideration was made, if the subsequent conveyance was made after the commencement date (Instruments Act section 8(2)).

A “disposition” includes every mode of disposition referred to in the Land Registration Act (Chapter 191). **CUSTOMARY LAND:** Approximately 97% of land in PNG is held by its traditional owners under customary principles of land ownership. The specific elements of rules of the system of customary land tenure vary from place to place. However, customary land ownership generally recognises the traditional users of land and their personal and clan arrangements for land use.

A foreign investor cannot purchase or lease customary land from its traditional owners. If a foreign investor requires access to customary land, it is possible for the government to acquire the land from its traditional owners and lease it to the foreign investor.

Previously, in order to enable customary land to be assigned or mortgaged, the PNG government issued special agricultural and business leases (SABLS) backed by a lease from the customary owners to the government. In a number of cases, under the label of agricultural development, some developers utilised SABLS as a guise to harvest native forests for the purpose of selling round logs on the export market.

As a result of those practices, the government set up a special commission of enquiry which has made various recommendations in relation to the grant of a number of SABLS, including a recommendation that several SABLS be revoked. To resolve this problem, in 2009 the government amended the Land Groups Incorporation Act and the Land Registration Act to improve the method of incorporation of incorporated land groups and to include appropriate accountability and management processes for transparent and effective governance of incorporated land groups.

The primary objective of the amended legislation is to empower customary landowners to utilise their land for development in a fair, equitable and convenient manner. The purpose of amending the legislation was

to ensure that customary landowners do not divorce themselves from ownership of their land. They continue to have control of their land through the registration of incorporated land groups, without alienating the “parent” title from ownership by the incorporated land group, so that future generations of landowners will have a voice in how their customary land is used.

**ALIENATED LAND:** The balance of the land is known as alienated land. Alienated land is land that has been acquired from customary owners by the government either for its own use or for private development. However, some alienated land is held as freehold other than by the government. Most enterprises in which foreign investors are involved are located on alienated land.

Alienated land can be held either as freehold or leasehold from the state. However, freehold land makes up a small proportion of alienated land in PNG.

Both freehold land and leasehold land are registered by the Registrar of Titles under a Torrens-type system of land registration. Under this system, an original certificate of title (for freehold land) or state lease (for leasehold land) is kept on a register maintained at the country’s Titles Office. Land dealings are carried out by means of instruments which are perfected upon registration. A certificate of title or state lease kept on the register maintained by the Titles Office should reveal at any time the exact location of the land in question, as dimensions, the present owner or lessee and may also reveal sub-leases and mortgages to which the title may be subject. Certain dealings in land may also require the approval of the Minister for Lands.

**FREEHOLD LAND:** Under the Land (Ownership of Freeholds) Act, a non-citizen is precluded from owning freehold land. However, freehold land can be converted to leasehold land so that it may be used by a non-citizen.

Leasehold land can be more freely dealt with than freehold land. Leasehold land is land that the government has acquired from its customary owners and leased to a person or company for a term of up to 99 years for a specific purpose. The Land Act provides for:

- Agricultural leases;
- Pastoral leases;
- Business and residence leases;
- Mission leases;
- Leases of government owned buildings;
- Special purpose leases; and
- Town subdivision leases.

The act also deals with the granting of licences, transfer of customary land and compensation payments, and specifies which dealings require ministerial approval.

**PATENTS & INDUSTRIAL DESIGN:** The Patents and Industrial Design Act 2002 came into effect on July 1, 2002, introducing legislation for the protection of patents and industrial design in PNG for the first time.

A patent for an invention under the act expires 20 years after the filing date of application for the patent. Annual renewal fees are payable commencing one year after the filing date of the application. The act recognises the rights of priority under the Paris Convention. An invention is patentable if it is new, involves an inventive step and is industrially applicable.

**RESOURCE OWNERSHIP:** Relevant legislation in PNG vests ownership of oil, petroleum, natural gas, gold, silver, copper and other minerals in the state. In 1990 and 1991, there was a constitutional challenge to the predecessor of the current Mining Act 1992 on the ground that the state's ownership of minerals under privately owned land was an unjust deprivation of property. The court determined that the reference had been made prematurely and dismissed it without making a decision as to its merits.

The litigation was subsequently settled without a further reference being made. The point, therefore, has not been settled beyond doubt.

**MINING:** The Mining Act 1992 sets out a detailed regime dealing with types of mining tenements which may be granted by the state, including:

- Exploration licences;
- Special mining leases;
- Mining leases;
- Alluvial mining leases;
- Leases for mining purposes; and
- Mining easements;
- The terms and conditions of licences;
- Making mining development contracts;
- Paying rents, fees and royalties;
- Registering interests and dealings in tenements; and
- Compensating landowners.

**REGISTER OF TENEMENTS:** The register of tenements at the Department of Mining and Petroleum contains details of all applications, details of their grant or refusal and certain other information. Any dealing in a legal or equitable interest in a tenement must first be approved by the Minister for Mining and Petroleum and registered before becomes effective.

**COMPENSATION:** A tenement holder is liable to compensate the owners of that land, any adjoining land or improvements and land or improvements in the vicinity, for its entry on to or occupation of the land. The holder is also responsible for loss and damage caused or foreseen to be caused by exploration, mining or related activities. Compensation arrangements must be finalised before entry on to or occupation of the land.

**HYDROCARBONS:** The exploration and development of oil, petroleum and gas are regulated under the Oil and Gas Act 1998. Like the Mining Act 1992, it vests ownership of petroleum, natural gas and helium at or below the surface of land in the state.

The Oil and Gas Act 1998 sets out a comprehensive regime that deals with the types of petroleum licences that may be granted by the state, including:

- Petroleum prospecting licences;
- Petroleum retention licences;
- Petroleum development licences;
- Pipeline licences,
- Petroleum processing facilities licences and the terms and conditions of their issue;
- Registering interests and dealings in tenements;
- Compensating landowners; and
- Paying fees and royalties.

**FORESTRY:** The Forestry Act 1991 regulates the forestry industry. The purposes of the Forestry Act include:

- Managing, developing and protecting the country's forest resources and environment so as to conserve and renew them;
- Maximising citizens' participation in the use and development of forest resources;
- Using the country's forest resources to achieve economic benefits and create employment; and
- Encouraging study and research into forest resources so as to contribute to ecological balance.

The act deals with the establishment of a forestry authority and certain other entities, forest management and development (including the development of national and provincial forest plans), the approval of forest project proposals, the issue of timber permits, authorities and licences, customary ownership of forest resources, and the payment of royalties and levies.

A timber permit authorises the holder to carry out the operations specified in the permit within a specified area, for a specified term and subject to the conditions specified, including compliance with project statements, five-year plans and annual logging plans.

**FISHING:** The Fisheries Management Act 1998 regulates the fishing industry and its aquatic resources and environment. The purposes of the act include:

- To manage, develop and protect the country's fisheries resources and marine, coastal and aquatic environments so as to conserve and replenish them;
- To maximise citizens' participation in the use and development of fisheries resources;
- To use the country's fisheries resources to achieve economic benefits and ecological balance and to create employment; and
- To pursue effective strategies for managing fisheries resources and national, provincial and local interests in them.

The Fisheries Management Act deals with the establishment of the National Fisheries Authority and certain other bodies, the management, development and regulation of fishing, conservation of fisheries, customary resource ownership and the issue of fishing licences. The act also details prohibitions in relation to certain fishing and associated activities. The act extends to all persons and boats in PNG waters.

**EMPLOYMENT CONDITIONS:** The Employment Act regulates the conditions under which citizens can be employed. Subject to certain exceptions, the act contains provisions relating to maximum daily hours and rest periods, overtime and overtime rates, recreation and sick leave and payment and protection of wages. Care should be taken in contracting with non-citizens, as these minimum conditions may apply.

Examples of common conditions of employment are: a 40-hour week with overtime; three weeks' annual leave; six-month-long service leave after 15 years' of continuous service; and after three months' continuous service, a requirement of one week's notice of termination of employment by either party, or, if the employer terminates the employment, one week's wages in lieu of notice.

These and other conditions of employment may be negotiated and varied in the contract between the

employer and the employee, but some minimum entitlements are set by law. The act contains detailed provisions relating to contracts of employment.

Minimum wage levels are set by a government-appointed Minimum Wages Board. The board, which includes representatives of unions, employers and government, meets every three years and fixes a minimum wage after holding public hearings and making adjustments for changes in the cost of living.

Some workers in major regional centres and at major natural resource projects belong to a trade union and all workers have the right to belong to a union.

Other than the acts mentioned above, the key regulations relating to employment in PNG are:

- The Industrial Organisations Act, which provides for registration and control of industrial organisations;
- The Industrial Relations Act, which provides for the establishment and operation of the Minimum Wages Board, settlement of disputes and common rules;
- The Industrial Safety, Health and Welfare Act; and
- The Workers' Compensation Act.

**INSURANCE ACT:** A new Insurance Act came into force in PNG in October 1995. With limited exceptions, the act regulates the insurance of all risks. The act is administered by the Insurance Commissioner, who is appointed by the Minister for Finance and Planning.

A corporation intending to conduct general insurance business, or business as a broker, loss adjuster or agent must first apply to the Insurance Commissioner for a licence. The Insurance Commissioner will grant a licence subject to such terms and conditions as he or she considers to be appropriate. Licences are issued for one year at a time only and can be renewed. All risks that are situated in PNG for which insurance (including reinsurance) is required must be insured with properly licensed insurers.

A person who insures, or as agent, broker or insurer, arranges insurance of a risk situated in PNG with a person other than a licensed insurer is guilty of an offence. The act contains an exemption to this prohibition where the Insurance Commissioner is satisfied the existing facilities and available capacity of licensed insurers are fully used.

An application for exemption must comply with certain formalities and provide certain information, including details of arrangements for the payment of income tax by non-resident insurers as well as for approvals required under the Central Banking (Foreign Exchange and Gold) Regulation.

**STAMP DUTY:** The Stamp Duties Act (SDA) imposes stamp duty (a form of indirect taxation) on a variety of documents (instruments) and transactions of the type and at the rates detailed in Schedule 1 to the SDA.

The duty is imposed as ad valorem duty (that is, the amount of the duty varies depending on the value of the transaction) or as fixed duty (the duty remains the same irrespective of the value of the transaction).

Stamp duty chargeable on an instrument is payable:

- In the case of an instrument that is first executed outside PNG before January 1, 1995—when the instrument comes into the country; and

- In all other cases, when it is first executed.

An instrument executed before July 1, 1953 (the date of commencement of the pre-Independence Stamp Duties Act 1952) is not chargeable with stamp duty under the SDA (section 5(2)).

Duty is chargeable in respect of an instrument that is outside PNG if the instrument (irrespective of whether it was executed in PNG or otherwise) relates to property situated, or any matter or thing done – or to be done – in PNG (SDA section 5A).

An instrument containing or relating to several distinct matters is chargeable with stamp duty in respect of each of those matters, as if each matter were expressed in a separate instrument (SDA section 11).

The consequences of not paying the correct amount of duty when due are severe. In addition to the actual duty itself, interest, fines and other penalties are payable in respect of unstamped instruments liable to duty.

The most important consequence, however, of not paying the correct duty is that, subject to certain exceptions and qualifications, an instrument must not be pleaded or given in evidence, except in criminal proceedings or admitted to be good, useful or available in law, unless it is duly stamped in accordance with the law in force at the time when it was first executed or came into the country, whichever is the latter.

Effectively, this makes an unstamped document that is otherwise liable to duty unenforceable until such time as the duty is paid. Stamp duty has been abolished in relation to loan agreements and loan securities (including mortgages) executed after January 1, 2008.

There is currently no stamp duty levied on guarantees whether executed under hand or under seal.

**FOREIGN EXCHANGE CONTROL:** The key legislation is the Central Banking (Foreign Exchange and Gold) Regulation. Until December 2004 PNG maintained a comprehensive regulated foreign exchange control regime with a variety of transactions requiring the approval of the Bank of PNG (the central bank).

Since December 2004, foreign exchange control has been progressively liberalised in PNG. However, the central bank still retains control over:

- The opening of offshore foreign currency accounts, including offshore kina accounts;
- Licensing of gold exporters;
- Licensing of foreign-exchange dealers;
- Removal from PNG of physical cash in excess of PGK20,000 (\$9540) or foreign currency equivalent.

Approval from the central bank is still required for residents (broadly, any enterprise of whatever legal structure having an economic presence in the country) to give a guarantee or grant security over assets in PNG in favour of a non-resident (or enter into a transaction having a similar effect) where such guarantee or security is part of a transaction that is not for the direct benefit of a person resident in PNG.

Additionally, only “authorised dealers” (banks authorised by the central bank) may conduct foreign currency transactions. Residents still require central bank approval to enter into or perform an agreement with another resident in a currency other than kina.



There is a vacuum in the law in terms of geothermal exploitation

# Regulating climate change

## A new authority to keep tabs on the energy sector

Papua New Guinea has taken on a global role in developing policies on climate change, most notably through the successful lobbying to gain recognition for avoided deforestation credits through the UN initiative on Reducing Emissions from Deforestation and forest Degradation (REDD), specifically REDD+ arrangements and via active participation in the Coalition of Rainforest Nations. Most recently, in February 2013, the Office of Climate Change and Development released a draft climate change policy for comment, which envisages:

- Establishment of a climate change authority;
- Introduction of a carbon tax to be imposed on four main areas, namely: on a consumption tax on the use of fossil fuels; flaring and venting of gas from oil and gas wells; clearance of native vegetation for commercial purposes; and harvesting of logs (with a reduced tax on processed timber);
- Establishment of a climate-change fund from funds pre-appropriated from the carbon tax and to be spent on: subsidising investments in measures to reduce emissions; conservation activities, including providing a mechanism for communities to be paid for preserving carbon (e.g. that contained in forests) on their traditional lands as well as the “provision and maintenance of ecosystem services”; and assistance to communities in adapting to climate change;

This policy requires substantial further consultation.

**GEOTHERMAL ENERGY:** There is at present a vacuum in the law in relation to regulating the commercial exploitation of geothermal energy. As such, there is little by way of exploration for geothermal energy sources that could potentially be utilised for power generation and other uses. One issue has been that the Mineral Resources Authority and the Energy Division of the Department of Petroleum and Energy are both showing an interest in regulating this area. It is thus a key issue that warrants more attention by the government.

**PERSONAL PROPERTY SECURITY:** The new Personal Property Security Act (PPSA) was passed into law by Parliament on December 9, 2011. When implemented,

the act will reform the law relating to security over almost all personal property, and will establish a single register for security interests that will cover mortgages and charges and also other transactions that have economically similar effects. The main purpose of this PPSA is to promote business through facilitating credit. It is aimed at making loan schemes cheaper and more accessible to a wide range of people, giving them further opportunities to participate in the economy, thus promoting economic growth. The act makes provisions for the creation, perfection, prioritisation and enforcement of security interests in certain property. It also provides for related transactions and other interests necessary in giving notice of property status to buyers and prospective creditors. The four general policies of PPSA are as follows:

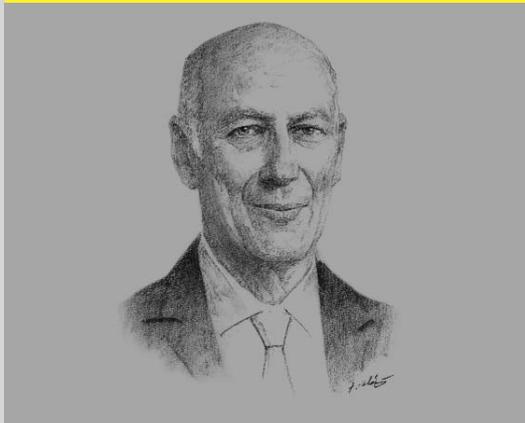
- i. To make lending cheaper/more convenient;
- ii. To provide rules for distinguishing conflicting interests in personal property;
- iii. To provide transparent information to those who need it with respect to collateral agreements; and
- iv. To reduce the time and cost and improve the reliability of enforcement tools.

The PPSA covers two kinds of security interests.:

- In substance security interests, which cover secure payment or performance of obligations; and
- Deemed security interests, which cover transactions that are treated as security interests, even if they do not secure payment or performance of obligations.

While the new act is not yet in force, it is expected to commence operation once the new registry has been established. In the meantime, the government is embarking on an implementation phase, which will include procurement and establishment of the registry system along with a public information-processing phase.

OBG would like to thank *Leahy Lewin Nutley Sullivan Lawyers* for their contribution to **THE REPORT** Papua New Guinea 2014



Stephen Lewin

## Protecting landowners

Stephen Lewin, Partner, Leahy Lewin Lowing Sullivan Lawyers, on the law relating to customary land

Approximately 95% of land in Papua New Guinea is known as customary land. Section 132 of the Land Act 1996 (Act) provides that, subject to Sections 10 and 11, a customary landowner has no power to sell, lease, charge or otherwise dispose of customary land or customary rights other than to citizens in accordance with custom. A contract or agreement made by a customary landowner that is not in accordance with custom is void. Section 10 of the Act allows the Minister for Land and Physical Planning to acquire customary land on terms agreed between the minister and the customary landowners. However, the minister cannot acquire customary land unless he or she is satisfied, after reasonable enquiry, that the land is not required or likely to be required by the customary landowners or by persons to whom the land will or may devolve by custom.

Section 11 of the Act provides that the minister may lease customary land from the customary owner for the purpose of granting a special agricultural and business lease (SABL). Section 11 (2) provides that where the minister leases customary land under Section 11 (1), an instrument of lease in the approved form, executed by or on behalf of customary landowners, is conclusive evidence that the state has good title to the lease and that all customary rights in the land, except those which are specifically reserved in the lease, are suspended for the period of the lease to the state. No rent or other compensation is payable by the state for a lease of customary land under Section 11(1).

The Act generally provides for the grant of various types of leases. These include state, agricultural, pastoral, business and residence, mission, special purpose and urban development leases, and SABLs.

Division 9 of the Act specifies that the minister may grant a lease for special agricultural and business purposes of land acquired under Section 11. A SABL must only be granted to a person or to a land group, business group or other incorporated body to whom the customary landowners have agreed that such a lease shall be granted. The main purpose of the inclusion of

Division 9 was to allow customary landowners to mobilise their land and overcome the limitations referred to in Section 132 specified above. However, there has been significant public controversy as to the granting of SABLs. There have been allegations of misuse of SABLs to allow destructive logging of virgin natural forest under the guise of agricultural development.

As a result, in 2013 the government established a special Commission of Enquiry (Commission) comprising three lawyers to examine the circumstances of the granting of about 95 SABLs and to make recommendations to the government. Although those reports have not been publicly released and one of the reports has not yet been completed, we understand that recommendations have been made by the Commission to revoke and terminate a large number of previously granted SABLs as an abuse of process. The government is considering this issue and has established a task force to review the Commission's recommendations.

Prior to that date, and due to the need or desire of landowners to mobilise their land, the Constitutional Law Reform Commission has reviewed the Land Groups Incorporation Act and the Land Registration Act and recommended the passing of the Land Registration (Amendment) Act 2009 and the Land Groups Incorporation (Amendment) Act 2009.

The amendments, which went into effect in 2012, were designed to improve the methods of incorporation of land groups, and to include accountability mechanisms and more streamlined processes for dealing with disputes between customary landowners as to whether they are entitled to become members of incorporated land groups, which is the chosen vehicle for dealing with mobilisation and ownership of customary land. The primary objective of the acts is to empower customary landowners to utilise their customary land for development in a fair, equitable and convenient manner. They are designed to ensure that customary landowners continue to have control of their land through the registration of the incorporated land group.