



Promoting Government Transparency in PNG: Freedom of Information and the Seabed Mining Case

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On 29 November 2023, the Papua New Guinea (PNG) Supreme Court made a landmark ruling on Section 51 of the Constitution of the Independent State of PNG, which guarantees ‘freedom of information’. The case concerned the now defunct Solwara 1 project, the world’s first licensed commercial seabed mining project, which sought to extract high-grade mineral deposits from the seafloor. The court’s ruling not only added to the controversies surrounding the Solwara 1 project but importantly provided a better understanding of the operations of Section 51 in enabling access to official information and the potential for improved transparency and accountability of government decisions.

This In Brief discusses the issues in the Supreme Court’s judgment and its wider implications for governance and law reform in PNG.

Case background

In 2012, the PNG government granted the Canadian company Nautilus Minerals a license to operate the world’s first seabed mine in the Bismarck Sea, New Ireland Province. The government supported the project despite the lack of either an internationally accepted code regulating seabed mining and its environmental impacts, or relevant domestic legislation and regulatory systems.

However, Nautilus Minerals went into administration in 2019, and the project was abandoned. Concerned about potentially significant environmental harm, coastal villagers along the proposed project site and environmental advocates (the Applicants) requested the government disclose certain information pertaining to the statutory permits issued. Those requests were either ignored or denied.

In 2017, PNG’s only not-for-profit public interest law firm, the Centre for Environmental Law and Community Rights Incorporated, assisted the advocates in their request against the responsible government agencies — the Conservation and Environment Protection Authority and the Mineral Resources Authority (Respondents) — beginning with written requests, followed by a legal proceeding under Section 51 of the constitution.

Section 51 states that ‘[e]very citizen has the right of reasonable access to official documents, subject only to the need for such secrecy as is reasonably justifiable in a democratic society’ and lists 10 categories of documents that may be exempted, such

as cabinet meeting records, defence matters and trade secrets.

Although Nautilus Minerals had gone into administration in 2019, court proceedings against it under Section 51 were pursued partly for the significant public interest value in ensuring government transparency in dealings with natural resources and strengthening the country’s constitutionally enshrined human rights framework.

Court rulings: National Court and Supreme Court

The Applicants’ request under Section 51 was denied in the first instance by the PNG National Court in May 2022 (*Mesulam v Joku* (2022)) on the broad basis that the documents requested fell into the exempted categories, without justification for how the court had reached that conclusion on each of the documents.

The Applicants appealed the judgment to the higher court, the PNG Supreme Court, on the basis that the primary judge misconstrued both the interpretation and application of Section 51 of the constitution.

On 29 November 2023, the Supreme Court overturned the National Court judgment (SCA No 84 2022). The Supreme Court declared the case ‘the first of its kind’ to seek a direct interpretation of Section 51. It went on to establish a two-pronged test that must be satisfied by a responding agency when assessing a request for access to information under Section 51. First, an agency claiming restriction on an ‘official document’ must demonstrate how the document falls under the prescribed categories of exemption and, second, the agency must justify whether there is a need for ‘secrecy in connection with those documents’ that is reasonably justifiable in a democratic society (*ibid.*).

The judgment means that it is not sufficient to merely deem a document ‘official’ and in one of the prescribed categories without providing a reasoned and considered assessment in line with these tests.

Implications for governance and law reform

The Supreme Court’s decision sets a high standard for government agencies in dealing with public requests for access to official information under Section 51. The court warned against government officials and courts taking a ‘very broad-brushed approach’ (*ibid.*). There are two significant implications arising from the decision

that transcend the immediate court parties to address issues of human rights, law reform and transparency.

Law reform: Legislation on freedom of information

Despite the constitutional guarantee, PNG does not have a statutory mechanism enabling its citizens to access official documents such as the *Freedom of Information Act 1982* (Cth) in Australia. Section 51 applications are seldom used. There is also a lack of public awareness of this human right, and those who do have some awareness are limited by the onerous bureaucratic and legal costs of pursuing the right.

In natural resource dealings, for instance, PNG's obligation to ensure free, prior and informed consent for its indigenous peoples under international law carries with it an important parallel responsibility to establish mechanisms for its people to readily access relevant information to inform their decisions. The Supreme Court's decision thus affirms the urgent need for law reform.

Improved transparency on government dealings

In the absence of a robust freedom of information regime, the court's decision sets an important precedent for transparency and accountability in government decision-making. This precedent can be used to benefit a range of institutions, including the media, researchers and those concerned with public affairs.

At present, access to official documents is largely a matter of bureaucratic discretion. This has often promoted unscrupulous ways of accessing records, undermining the constitutional guarantee. The National Court made a passing statement on this issue in 1998:

There is an increasing call within the community for a greater 'transparency' and it seems clear that there has been a failure by the State officials and the Parliament to fully appreciate the responsibility placed on them in Section 51 of the Constitution. (*Sealark Shipping Pty Ltd and Bismark Maritime Pty Ltd v Secretary for Treasury and Corporate Affairs* (1998))

This situation has also contradicted the intentions of the drafters of the constitution, who, when creating the provision, reasoned that '[f]or our citizens to be able to participate effectively in the public affairs of the country, it is essential that they have access to official information' (Constitutional Planning Committee 1974).

The drafters of the constitution went on to reject an issue that persists in modern PNG where access to official information has become a privilege afforded

only to some, disadvantaging the majority, especially the landowners of natural resources who are often pressured to make important decisions without adequate information:

In developing countries such as Papua New Guinea, it is an unfortunate fact that often foreign businessmen know far more about the actions and policies of the government than do all but a select few of its own citizens. Thus, these business interests are in a position to exercise influence on the government without any reaction from nationalist groups being felt by the Government until it is too late for it to take any positive action in response to such reaction. (Constitutional Planning Committee 1974)

With its ruling, the PNG Supreme Court has signalled for this to change.

Conclusion

This landmark Supreme Court decision on the constitutional right of freedom of information is an important step forward in the collective struggle for improved accountability and transparency in PNG. While the case arose from the grievances of resource landowners and environmental activists, whose rights are some of the most often denied, the lack of access to official information has wider implications for the state of democracy in the country.

Author notes

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