

Legitimate Recipients of Development Levies under the Organic Law on Provincial Governments and Local-level Government and the Oil and Gas Act 1998

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Introduction

In Papua New Guinea (PNG), the *Organic Law on Provincial Governments and Local-level Governments* 1995 (OLPGLLG) and the *Oil and Gas Act* 1998 (OGA) are two important pieces of legislation designed to promote sustainable development, equitable distribution of resources, and the empowerment of local communities within provinces impacted by oil and gas development projects. At the core of the implementation of these two laws is the concept of development levies which serve as a mechanism to ensure communities affected by the oil and gas projects benefit from the economic activities taking place on their customary land.

This paper discusses the law on development levies (derived from oil and gas projects) and sheds light on the entity that is entitled by law to receive and disburse these funds. The aim of the paper is to clarify the functions of the Local-level Government and Local-level Government Special Purpose Authority (SPA)¹ and explain why a SPA cannot receive and disburse development levies on behalf of its Local-level Government.²

Provincial Governments

The provincial government system is established under Section 187A of the *Constitution*.³ In 1995, the provincial government system was reformed to include a third layer of government - local-level governments.⁴ The provincial government for a province is provided for under Section 10 of the OLPGLLG.⁵ Section 10 (1) and (2) of the OLPGLLG stipulate that:

10. Provincial Government and Provincial Legislature.
 - (1) A Provincial Government is hereby established for each province.
 - (2) A provincial legislature, to be known as the Provincial Assembly or by whatever local name is considered appropriate, is hereby established for each Provincial Government.

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¹ For a discussion on Special Purpose Authorities see Filer, C, 'Horses for Courses: Special Purpose Authorities and Local-level Governance in Papua New Guinea' (Discussion Paper 2004/6) (Canberra: ANU Research School of Pacific and Asian Studies: State, Society and Governance in Melanesia, 2004) (See discussions, stats, and author profiles for this publication at: <https://www.researchgate.net/publication/258567462>).

² As an example of a SPA see Minnala, M, 'Corporate Governance Framework of the Porgera Development Authority as a Semi-Government body in Papua New Guinea – a reflective review' (Balcony Perspectives, 2013) (<https://mcminnala.wordpress.com/2023/10/06/corporate-governance-framework-of-the-porgera-development-authority-as-a-semi-government-body-in-papua-new-guinea-a-reflective-review/>)

³ See the discussion on the provincial government system prior to 1995 in Ghai, Y and Regan, A., *Decentralisation and Intergovernmental Relations in Papua New Guinea* (Boroko: IASER, 1989).

⁴ See Howes, S, Pillai, LN (ed); *Papua New Guinea: Government, Economy and Society* (Canberra: ANU Press, 2022); Kwa, EL, Lois, S, Kesenga, D, Fairio, M, Winnia, X and Kwa, V (ed), *Decentralisation for an Integrated, Strong and Prosperous Papua New Guinea* (Port Moresby: CLRC, 2016); Gelu, A and Axline A., *Options for the Restructure of Decentralised Government in Papua New Guinea* (Special Publication No50) (Port Moresby: National Research Institute, 2008); Kwa, E., *Constitutional Law of Papua New Guinea* (Sydney: Law Book Co, 2001).

⁵ *Supreme Court Reference by the Western Highlands Provincial Executive* (1995) SC486. See also *Christian v Namaliu* (1996) SC1583 and *In Matter of Constitutional Validity of Constitutional Amendment (Provincial Governments and Local-level Governments) and Organic Law on Provincial Governments and Local-level Governments; Isidore Kaseng v Rabbie Namaliu, Speaker of the National Parliament* [1995] PNGLR 481.

The primary function of the Provincial Government is the administration of the State machinery for effective service delivery. The administrative functions of provincial governments is provided under Section 43 of the OLPGLLG as follows:

43. Principal Administrative Functions, and Service Delivery Functions and Responsibilities.
 - (1) Subject to the *Constitution* and this Organic Law, an Act of the Parliament shall provide for-
 - (a) the principal administrative functions of Provincial Governments; and
 - (b) the assigned service delivery functions and responsibilities of Provincial Governments.
 - (2) An Act of the Parliament may provide for all or any of the following-
 - (a) the determination of, or the means of determining, the service delivery functions and responsibilities of Provincial Governments;
 - (b) the assignment of, or the means of assigning, service delivery functions and responsibilities to-
 - (i) a Provincial Government or a class of Provincial Governments; or
 - (ii) a person or body, or a class of persons or bodies;
 - (c) the alteration of, or the means of altering, service delivery functions and responsibilities of-
 - (i) a Provincial Government or a class of Provincial Governments; or
 - (ii) a person or body, or a class of persons or bodies;
 - (d) the reassignment of, or the means of reassigning, service delivery functions and responsibilities to or from-
 - (i) a Provincial Government or a class of Provincial Governments; or
 - (ii) a person or body, or a class of persons or bodies.

The service delivery functions of a Provincial Government includes the enactment of provincial laws⁶ and the imposition of levies, fees and charges⁷ on development activities taking place within the province. For large scale oil and gas projects, the participation of the provincial governments is captured in Section 98 of the OLPGLLG and Section 168 of the OGA. This is supplemented by relevant Umbrella Benefit Sharing Agreements (UBSA) and License-based Benefit Sharing Agreements (LBSA) for specific projects.

Local-level Governments

Local-level Governments (LLG) are established under Section 187A of the *Constitution*. Section 187A of the *Constitution* provides that:

- 187A. Provincial Governments and Local-level Governments system.

There shall be a system of Provincial Governments and Local-level Governments for Papua New Guinea in accordance with this Part.

Sections 26 and 27 of the OLPGLLG give effect to Section 187B of the *Constitution*. Apart from the law-making function of the LLG⁸, its principal function is to ensure effective delivery of services to people within the local government area. The administrative functions of the LLG is provided under Section 45 of the OLPLG. It states:

45. Principal administrative functions, and service delivery functions and responsibilities of Local-level Governments.
 - (1) Subject to the *Constitution* and this Organic Law, an Act of the Parliament shall provide for-
 - (a) the principal administrative functions of Local-level Governments; and
 - (b) the assigned service delivery functions and responsibilities of Local-level Governments.
 - (2) An Act of the Parliament may provide for all or any of the following-
 - (a) the determination of, or the means of determining, the service delivery functions and responsibilities of Local-level Governments;
 - (b) the assignment of, or the means of assigning, service delivery functions and responsibilities to-
 - (i) a Local-level Government or a class of Local-level Governments; or

⁶ Section 42 of the OLPGLLG.

⁷ Sections 86 and 98 of the OLPGLLG.

⁸ Section 44 of the OLPGLLG.

- (ii) a person or body, or a class of persons or bodies;
- (c) the alteration of, or the means of altering, service delivery functions and responsibilities of—
 - (i) a Local-level Government or a class of Local-level Governments; or
 - (ii) a person or body, or a class of persons or bodies;
- (d) the reassignment of, or the means of reassigning, service delivery functions and responsibilities to or from—
 - (i) a Local-level Government or a class of Local-level Governments; or
 - (ii) a person or body, or a class of persons or bodies.

The LLG, like the provincial governments, can also impose levies, fees and charges on economic and development activities within the local government area. Given the geography of the country and the limited capacities that LLG have⁹, they require more support from the provincial and national governments to deliver services at the local levels.

The government recognising the inability of LLG to effectively deliver services within their jurisdictions, envisioned the creation of a development agency to support some of these LLG, particularly those which host natural resources projects. This unique agency is called the Special Purpose Authority (SPA) which is provided for under the *Local-level Governments Administration Act 1997* (LLGAA).

Special Purpose Authorities

Section 3(1) of the *Interpretation Act 1975* defines “Area Authority” as a Local-level Government Authority established under Section 42(1) of the LLGAA. The same provision defines Local-level Government Authority as a Local-level Government Special Purpose Authority.

A SPA is established through a proclamation made by Head of State acting on advice. A proclamation establishing an authority specifies the purpose for which the SPA is created and outlines its functions. The relevant provision of the law is Section 42 of the LLGAA which provides:

42. Establishment of Authorities.
- (1) The Head of State, acting on advice, may, by proclamation, establish a Local-level Government Special Purposes Authority in and for an area of one or more Local-level Governments.
 - (2) A proclamation under Subsection (1) shall specify the purposes for which the Authority is established and such other matters as may be necessary.

A proclamation creating a SPA is thus made subject to the LLGAA. The proclamation creating the SPA is subject to the *Constitution*, the OLPGLLG and the LLGAA. In contrast a LLG is an elective government established by the *Constitution* and the OLPGLLG, the provisions of which are supreme and self-executing.¹⁰ Section 44 of the LLGAA provides for the legal personality of a SPA. The provision is set out below.

44. Incorporation of Authorities.
- An authority-
- (a) is a corporation; and
 - (b) has perpetual succession; and

⁹ See Kwa, E, “Strengthening Local-level Governments for Sustainable Rural Development” (2001-2002) 28 *Melanesian Law Journal* 37.

¹⁰ The following judicial pronouncements on the term ‘self-executing’ are instructive: *In re Constitution Section 19(1) - Special reference by Allan Marat*; *In re Constitution Section 19(1) and 3(a) - Special reference by the National Parliament* (2012) SC1187; *Haiveta, Leader of the Opposition v Wingti, Prime Minister; and Attorney-General*; and *National Parliament* [1994] PNGLR 197; *SCR No 1 of 1992*; *Re Constitutional Amendment No 15 Elections and Organic Law on National Elections (Amendment No 1) Law 1991* [1992] PNGLR 73; and *State v Independent Leadership Tribunal; Ex Parte Sasakila* [1976] PNGLR 491.

- (c) shall have a seal; and
- (d) has power-
 - (i) to acquire, hold, dispose of, mortgage or pledge property; and
 - (ii) to enter into contracts; and
 - (iii) to borrow money; and
 - (iv) to invest funds; and
 - (v) to institute and defend actions, suits and other legal proceedings; and
 - (vi) to do all things necessary for the effective exercise and performance of its powers and functions.

The management and operations of a SPA are set out under Section 45. Basically, a SPA must be conducted by a management body, whose membership must not include members of the LLG. The SPA must operate at arm's length from the LLG and its manual of operations will be as prescribed by a proclamation.

From the above provisions, a number of distinct characteristics of the SPA can be deduced. These are quite distinct from a LLG established under Sections 26 and 27 of the OLPGLLG. These include:

1. Incorporation as companies with separate legal personality.¹¹
2. Managed through separated governing body.¹²
3. Members of the governing body are not be members of the Local-level Government.¹³
4. Operation is at arm's length from the Local-level Government.¹⁴

Section 48 of the LLGAA further provides for the powers of the SPA, which stems from the proclamation by the Head of State.¹⁵ It also sets the limits on these powers. Section 48 is set out below.

48. Powers and Functions of Authorities.

- (1) Subject to this section, the Head of State, acting on advice, may by proclamation vest in an Authority any of-
 - (a) the powers, other than-
 - (i) the power to make Local-level laws; or
 - (ii) the power to impose or levy rates, taxes, charges or fees; or
 - (iii) executive powers; or
 - (iv) a power, which any other law may forbid an Authority from exercising, of a Local-level Government; and
 - (b) the duties and responsibilities of a Local-level Government.
- (2) The powers which may be vested under Subsection (1) shall not exceed the powers of a Local-level Government.
- (3) No power may be vested in an Authority so as to have the effect of divesting a Local-level Government of that power.

In exercising a power vested under this provision, a SPA is prohibited from performing the functions listed in paragraphs (i), (ii), (iii), (iv) of Section 48 (1) (a) of the LLGAA. This provision also makes it clear that a SPA must not exceed the power conferred in a LLG or remove any power from a LLG.¹⁶

Legal basis for Development Levy

The legal basis for the payment of development levies by developers to affected landowners from which natural resources are harvested is established by Section 98 of the OLPGLLG.

¹¹ Section 44 of LLGAA.

¹² Section 45(1) of LLGAA.

¹³ Section 45(2) of LLGAA

¹⁴ Section 45(3) of LLGAA

¹⁵ Section 42 and 48(1) of LLGAA

¹⁶ See the case of the Porgera SPA by Filer and Minnala, n1 and 2, above.

Natural resources as per Section 98(1) of the OLPGLLG include “*minerals, petroleum, gas, marine products, water, timber (including forest products), fauna, flora and any other product determined by law to be a natural resource*”¹⁷. For this discussion, the focus is on petroleum resources and the disbursement of development levies derived from it.

The manner of disbursement and the beneficiaries of development levies is spelt out in Section 98(2) and (3) of the OLPGLLG. This provision clearly states that Provincial Governments and LLG are the only legitimate organs of the State to receive development levies. The provisions are set out below:

- (2) Subject to Subsection (7), for each fiscal year, a developer of a natural resource, shall pay out of its own cost-
 - (a) to the Provincial Governments and the Local-level Governments of the province or area in which the development is situated, development levies in the form of -
 - (i) infrastructural development levies; and
 - (ii) economic development and land use follow-up levies; and
 - (iii) community and social development levies; and
 - (iv) any other levies as are from time to time determined by national law or by agreement; and
 - (b) to the National Government, Provincial Governments or Local-level Governments, land owners benefits in respect of natural resources obtained, for payment to the owners of the land from which the natural resources were obtained.

To give effect to Section 98 of the OLPGLLG, the respective natural resources laws specify the percentage of development levies which must be paid to provincial and local-level governments affected by the development projects. For oil and gas projects, Section 160(1) of the OGA specifies the percentage of development levy payable to affected provincial governments and LLG. It reads:

- (1) Subject to this section, a petroleum development licensee shall pay in accordance with Section 98 of the *Organic Law on Provincial Governments and Local-level Governments* to the affected Provincial or Local-level Governments of a petroleum project development levies at a rate of 2.00% of the wellhead value of all petroleum product from the licence area, calculated in the same manner as provided for in Section 159.

The OGA not only specifies the rate of development levy, but goes further to clarify that, it must be paid to the affected provincial or local-level governments of the petroleum project area. As such provincial governments and LLG are the only entities recognised by law to receive development levies. A developer operating a petroleum project in a particular province must pay the agreed value of the wellhead to the relevant provincial government and LLG. This issue was considered in the case of *Andaman v Samuel*¹⁸ (Andaman case).

In the Andaman case, the SPA, (Juha Hela SPA) of North Koroba LLG sought declarations that would enable it to receive, manage and account for Infrastructure Development Grants (IDG) funds for the Juha Petroleum Development License (PDL) 9 Area. The plaintiffs claimed that their right to receive and disburse the IDG funds from the National Government was captured in the PNG Liquefied Natural Gas (LNG) Development Project Agreement and therefore they were entitled to receive development levies for PDL 9.

The issue in the Andaman case was whether a SPA was entitled to receive IDG funds. The National Court considered the issue in light of Section 89(2) of the OLPGLLG and Section 160

¹⁷ See *Ekanda v Rimua* (2015) N6174 where the National Court considered these provisions. See generally Kwa, E (ed), *Natural Resources Law of Papua New Guinea* (Sydney: Law Book Co, 2001); See also the short discussion on the application of this provision to forestry in *Rimbunan Hijau (PNG) Ltd v Enei* (2017) SC1605. In this case the Supreme Court found that the landowners were abused by the forestry developer (RH); for nickel mining see *Ramu Nico Management (MCC) Ltd v Tarsie* (2010) SC1075.

¹⁸ (2023) N10164.

of the OGA and found that SPA was not named in the law¹⁹ as recipient of the IDG funds. The court further found that Juha Hela SPA was not a party to the agreement and therefore could not seek enforcements of rights under the relevant laws. In refusing the declaration sought, Justice Makail stated that:

... according to this provision, the recipients of IDG funds are “affected Local-level Governments” and “affected Provincial Governments”. Thus, it is not clear if a Special Purpose Authority is one of the recipients of the IDG funds.

In a related case, between the SPA for PDL 7 and Hela Provincial Administration styled, *Hides PDL 7 Special Purposes Authority v Hon. Philip Undialu, MP-Governor for Hela and ors*²⁰ (PLD 7 case), the National Court adopted and applied the principle in the Andaman case and found that a SPA established by the Head of State on advice through a proclamation under the LLGAA was not entitled to development levy. In the PDL 7 case, the plaintiff also sought declarations to be recognised as a legitimate recipient of development levy. In refusing the relief sought, Justice Kuvi stated that:

...only a provincial government and local-level government of affected resources areas are entitled to development levies. See section 98(2) (a) of the Organic Law on Provincial Governments and Local-Level Governments and Section 160 (1) of the *Oil and Gas Act* 1998. The rights of Provincial Governments and Local-level Governments to receive development levies are prescribed by an Organic Law and Acts of Parliament. Since there is no statutory assignment of those rights, it follows that a proclamation cannot remove those rights. Any construction of law that provides that the proclamation removes a Local-level Government's rights to receive and manage development levies has no foundation in law.

The court in the PLD 7 case further ruled that given that the Hides PDL 7 SPA was not a signatory to the UBSA and the LBSA, it was not a privy to the agreement and could not seek enforcement of the agreements.

Given the above discussion, and recognizing that a SPA is established by a proclamation under the LLGAA, it cannot assume the functions of a LLG as outlined in the OLPGLLG, nor can it receive and disburse benefits from associated development projects. These functions are vested in an elective government, which is directly accountable to the people affected by petroleum projects. Therefore, provincial governments and LLG remain the legitimate recipients of development levies for oil and gas projects.

Conclusion

The Provincial and Local-level Governments are established under the *Constitution* and the OLPGLLG to implement the National Government’s plans and programs, primarily by delivering services through effective resource management. Due to the remoteness of many communities, the LLGAA allows the Head of State, on advice, to establish SPA to assist LLG in service delivery. However, SPA operate under the LLGAA and cannot assume or override the powers and functions of LLG as provided for by the OLPGLLG or an Act of Parliament. Regarding development levies for oil and gas projects, the National Government determines benefit distribution through the OLPGLLG and the OGA. In all cases, the host Provincial and Local-level Governments remain the legitimate recipients of these levies.

¹⁹ Section 98 of the OLPGLLG and Section 160 of OGA.

²⁰ OS 12 of 2022.